

involved the illegal use of controlled dangerous substances.  
person within the Law, and (ii) that his or her addiction has not  
establish (i) that he or she is or has been a "handicapped"  
under the statute, a person alleging addiction to drugs must  
illegal conduct. In order to establish entitlement to protection  
whose addiction has involved, or presently involves, ongoing  
that term, the statute's protection does not extend to persons  
handicap under the Law Against Discrimination's definition of  
addiction which have involved only legal conduct may constitute a  
For the reasons set forth below, while some forms of

question of first impression in New Jersey.  
Discrimination, N.J.S.A. 10:5-1 et seq. This request presents a  
handicap that is protected under the New Jersey Law Against  
dependence (hereafter "addiction") to legal or illegal drugs is a  
You have requested a legal opinion on whether addiction or

Dear Director Hawkins:

Re: Drug Addiction as a Protected Handicap  
Under the New Jersey Law Against Discrimination

Ollie H. Hawkins, Director  
Division on Civil Rights  
1100 Raymond Boulevard, Room 400  
Newark, New Jersey 07102

October 6, 1989

PETER N. PERRETTI, JR.  
ATTORNEY GENERAL

DEPARTMENT OF LAW AND PUBLIC SAFETY

STATE OF NEW JERSEY



F.O. 1, 1989

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The New Jersey Law Against Discrimination defines a handicapped person as one who is suffering from physical disability, infirmity, malformation or

distigurement which is caused by bodily injury, birth defect or illness including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impairment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. [N.J.S.A. 10:5-5(q)]

See, generally, Clowes v. Terminix International, 109 N.J. 575 (1988); Andersen v. Exxon Co., U.S.A., 89 N.J. 483 (1982); Rogers v. Campbell Foundry Co., 185 N.J. Super. 109 (App. Div.), certf. denied 91 N.J. 529 (1982).

As was recognized by the New Jersey Supreme Court in Clowes v. Terminix International, Inc., 109 N.J. at 593-594, a claim of discrimination on the basis of a handicap requires proof of two distinct elements: first, the existence of a disability or

infirmity, and second, the origin of that infirmity in a condition or etiology expressly or impliedly recognized by the Legislature, including "bodily injury, birth defect or illness" or "anatomical, psychological, physiological or neurological conditions". N.J.S.A. 10:5-5(q).

The applicability of the Law Against Discrimination to a particular claimant cannot turn on the mechanistic application of medical definitions. A condition recognized as a disability, handicap or disease for purposes of clinical research or medical

treatment is not automatically within the definition for purposes of legal standards. For example, the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R) (3d Ed. Revised 1987) recognizes "psychoactive substance dependence" as a treatable psychiatric condition, and includes within that definition dependence upon alcohol, marijuana, cocaine, and hallucinogens. However, the authors of this treatise have expressly disclaimed any application of its medical definitions, developed for purposes of research, diagnosis and treatment alone, in the legal context: The purpose of DSM-III-R is to provide clear descriptions of diagnostic categories in order to enable clinicians and investigators to diagnose, communicate about, study, and treat the various mental disorders. It is to be understood that inclusion here, for clinical and research purposes, of a diagnostic category . . . does not imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder or mental disability. The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability, determination, and competency. Id. at xxix (emphasis added). The determination that the Law Against Discrimination should apply in a particular case thus cannot be a mere function of its categorization as a condition or disorder by the medical profession. A claimant must demonstrate that he meets the two requirements of the statute, that he suffers from a disability or infirmity and that his disability or infirmity is caused by one of the conditions enumerated in the statute. See Clowes, 109 N.J. at 593-94. However, not all drug addiction which meets these two requirements triggers the protection of the Law Against

Discrimination. By its own terms, the Law distinguishes between legal and illegal conduct. It provides in part that "[n]othing contained in this act . . . shall be construed to require or authorize any act prohibited by law . . ." N.J.S.A. 10:5-2.1. The Law Against Discrimination cannot be applied to protect drug addiction which involved the illegal use of drugs. In the context of addiction involving the use of illegal drugs, the application of the Law Against Discrimination raises serious policy considerations.

In recognition of the dangers which can and do result from the use of illegal drugs, New Jersey has adopted a strong legislative policy to eliminate their use and sale. As is clearly set out in the declaration of policy and legislative finding of the Comprehensive Drug Reform Act of 1986, N.J.S.A. 2C:35-1.1, and in the Act itself, New Jersey's narcotic law is founded upon a recognition that illegal drug use can cause profound physiological and psychological changes, and that these changes typically cause severe consequences to the individual and to society. The Legislature made clear that the unlawful use of controlled substances continues to pose a serious and pervasive threat to the health, safety and welfare of the citizens of this State. N.J.S.A. 2C:35-1.1b.

Indeed, the Law's classification of controlled substances is based upon their recognized capacity to cause physical or psychological dependency. N.J.S.A. 24:21-6 to 8.1. Controlled substances are assigned to statutorily-created "schedules", which reflect a substance's medicinal or therapeutic value, if any, measured against its potential for toleration and abuse.

See N.J.S.A. 24:21-5 et seq. These schedules, in other words, reflect the inherent potential for addiction, and it is no coincidence that, as a general matter, sternest punishment under our criminal drug laws is reserved for offenders involved with Schedule I and II substances (e.g. cocaine, heroin), for which the potential for addiction is greatest.

New Jersey's narcotics legislation thus bespeaks a determination to criminalize the use of certain drugs for a fundamental reason: that society will not tolerate or accommodate the widespread addiction that is the predictable outcome of drug use. The Legislature's fundamental objective of eliminating the use of illegal drugs, and thereby preventing the significant harm that results from such drug use, precludes the application of the Law Against Discrimination in a manner that would, in effect, extend extraordinary protection to controlled dangerous substance users.

The exclusion of addiction resulting from the use of illegal drugs from the Law Against Discrimination is also supported by Law's express purpose of protecting those discriminated against on the basis of conditions beyond their control. See

N.J.S.A. 10:5-5(q). Unlike an individual whose birth defect or accidental injury gives rise to a claim of discrimination on the basis of handicap, a person who seeks the Law's protection for conditions caused by the use of illegal drugs has made a critical choice; in the face of a network of criminal laws designed to prevent the very harm which he alleges, he has chosen to engage in criminal activity and thereby to risk that harm.

As it is consistent with the prohibition of drug use in the criminal law, the exclusion of addiction involving illegal use of drugs from the protection of the Law Against Discrimination is consistent with the frequently-articulated public policy of our federal and state governments in favor of a drug-free workplace. Congress recently enacted a Drug-Free Workplace Act. 41 U.S.C. §§ 701-707. The Act conditions receipt of Federal grant funds on the grantee's adoption of a policy prohibiting illegal drug-related conduct in the workplace and sanctioning, or rehabilitating, those who are convicted of committing such an offense. *Id.* Governor Kean has adopted a Drug-Free Workplace policy that is consistent with this Federal law. Exec. Order No. 204. All private employers who receive federal grant funds must adopt similar policies.

President Reagan issued an executive order which proclaims, "Persons who use illegal drugs are not suitable for Federal employment." Exec. Order No. 12564, September 15, 1986. Governor Kean, finding that abuse of drugs and alcohol in the workplace reduces efficiency, increases absenteeism and use of sick leave and jeopardizes lives and safety, has established a Cabinet Task Force on Drug Testing in the Workplace. Exec. Order No. 191. The United States Supreme Court has recognized an employer's right to administer tests designed to detect illegal drugs and to take action based on positive test results. See *National Treasury Employees Union v. Von Raab*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989); *Skinner v. Railway Labor Executives Ass'n*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 1402, 103 L.Ed.2d 639

All of the provisions of the act to which this act is a supplement shall be construed to prohibit any unlawful discrimination against any person because such person is or has been at any time handicapped or any unlawful employment practice against such person, unless the nature and extent of the handicap reasonably precludes the performance of the particular employment. [N.J.S.A. 10:5-4.1].

Further, a construction of the Law Against Discrimination that denies protection to drug addicts involved in illegal conduct is consistent with policies expressed by the Legislature in statutes that provide for forfeiture of public office or employment upon conviction, N.J.S.A. 2C:51-2, permit exclusion of a candidate otherwise eligible for state employment on the basis of a prior conviction which relates adversely to the employment sought, N.J.S.A. 11A:4-11, and require denial of a permit to purchase or carry a firearm if the applicant is a drug dependent person or has previously been convicted of a crime, N.J.S.A. 2C:58-3(c)(1) and (2). Each of these statutes imposes adverse consequences on the basis of illegal conduct; none provides exemptions for persons who are addicted. Nothing suggests that the Legislature intended to extend the Law Against Discrimination to protect addicted persons who engage in illegal conduct.

(1989) (approving drug testing of employees performing or seeking safety sensitive jobs); see also Matter of Carberry, 114 N.J. 574, 588 (1989) (recognizing the right to test law enforcement officers for illegally using drugs and to dismiss officers who do so). Indeed, the Law Against Discrimination expressly precludes protection of a condition which prevents satisfactory job performance:

The exclusion of claimants who have engaged in illegal activity from the Law Against Discrimination is consistent with the Legislature's objective in applying the statute to the handicapped. The Law Against Discrimination is intended "to secure to handicapped individuals full and equal access to society, bounded only by the actual physical limits that they cannot surmount." Andersen v. Exxon Co., supra at 495. It was enacted to prevent discrimination against handicapped people on the basis of unfounded assumptions about their capabilities, id. at 495-496 and n. 2, not to protect persons who engage in illegal activity and incur, as a result of that activity, the very kind of adverse health effects which undergird the societal determination to designate that activity as illegal in the first instance.

As to those categories of persons to which its protection extends, the Law Against Discrimination provides a broad range of remedies, and places significant burdens on employers. See N.J.S.A. 10:5-4 et seq. /1 Employers must make reasonable accommodations for an employee who is protected by the Law Against Discrimination or establish that they cannot accommodate the employee's handicap. See N.J.S.A. 10:5-4.1; N.J.A.C. 13:13-2.5; Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363, 374-375, 380-381 (1988). It would be inconsistent with the Legislature's goal of assuring equal access to the ill and

1/Indeed, it is worthy of note that the President's National Drug Control Strategy recommends that in order to "hold drug users more accountable for their illegal behavior", the Administration "will seek to amend the appropriate statutes to ensure that drug use alone will not be grounds for protection under Federal handicapped laws." National Drug Control Strategy (September 1989) at 100.

disabled to impose this burden on employers in order to protect persons whose illnesses are the result of a persistent pattern of illegal conduct. The Law Against Discrimination is to be construed "fairly and justly with due regard to the interests of all parties." N.J.S.A. 10:5-27. While fairness may, in certain circumstances, require an employer to reasonably accommodate addictions involving legal abuse of substances, given the uncertainties of the rehabilitative process for drug addiction, see New York City Transit Authority v. Beazer, 440 U.S. 564, 593 (1979), it does not dictate identical efforts on behalf of employees whose addiction involves or involved ongoing illegal conduct. The Legislature has expressly reserved the employer's right to discriminate on the basis of an employee's conduct, insofar as that conduct may impact upon his performance of job responsibilities, N.J.S.A. 10:5-2.1, and other persons who engage in illegal conduct under the compulsion of illnesses, e.g. pedophiles and compulsive gamblers, are not protected from the consequences of their illegal acts, see, e.g., N.J.S.A. 2C:47-3(a).

Indeed, the legitimacy of restrictions which distinguish between medical conditions involving illegal conduct and those associated only with legal conduct has been recognized in a number of contexts. In Robinson v. California, 370 U.S. 660, 666 (1962), the United States Supreme Court recognized that while a criminal sanction for the status of an addict is unconstitutional, a law which would punish addicts who use illegal drugs is not. The Legislature nonetheless chose not to

make drug dependency an exemption from criminal liability. N.J.S.A. 2C:35-18. In recent attorney-ethics cases, the New Jersey Supreme Court held that addictions that led attorneys to misappropriate client funds did not mitigate their illegal conduct. See In re Romano, 104 N.J. 306 (1986); In re Monaghan, 104 N.J. 312 (1986). In Copeland v. Philadelphia Police Department, 840 F.2d 1139 (3d Cir. 1989), cert. denied \_\_\_ U.S. \_\_\_, 109 S.Ct. 1636 (1989), the Third Circuit rejected the plaintiff's equal protection challenge to an employer's policy of dismissing users of illegal drugs but retaining alcohol abusers. It accepted the employer's argument that police officers who were drug users and police officers who were alcoholics could be treated differently because "a rational distinction exists between the two categories of officers: one group commits a criminal offense merely by possessing or using illegal drugs whereas the second group engages in an activity -- the consumption of alcohol -- that is not per se unlawful." 840 F.2d at 1147.

That very distinction differentiates the condition at issue from the handicap considered by the New Jersey Supreme Court in the Clowes case. Because the consumption of alcohol is not an unlawful activity in and of itself, the Court was not compelled in Clowes to consider N.J.S.A. 10:5-4's exclusion of illegal conduct from protection. The Supreme Court's ruling in Clowes does not extend the application of the Law Against Discrimination to any condition involving activity that is illegal per se, and thus does not compel the conclusion that addiction involving illegal use of drugs is a protected handicap.

The exclusion of persons whose addiction involves or has involved the illegal use of drugs from the protection of the Law Against Discrimination does not leave such persons without appropriate societal concern for their condition. As is reflected in an evolving panoply of laws and programs, our society has determined that those who are addicted to illegal drugs comprise a distinct class that at once presents unique problems and warrants special consideration. On both the federal and state levels, for example, individuals addicted to illegal drugs are the focus of extensive programs of narcotics treatment.

The President's National Drug Control Strategy (September 1989)

articulated this priority:

Regardless of how successful we are in preventing the next generation from using drugs, and how successful our law enforcement efforts are in disrupting drug markets, there will remain millions of individuals who need help to stop using drugs. If we fail to provide that help, drug users will continue not only to destroy their own lives, but to endanger the lives of unborn children, commit crimes against others, spread the deadly AIDS virus, and siphon productive energy from the American economy. For these reasons and more, the effective treatment of drug dependent individuals must be an important element in our overall strategy for reducing drug use in America. [Id. at 35].

See also Governor's Blueprint for a Drug-Free New Jersey (October 1986) at 9-10.

This special concern for the problems of those addicted to illegal drugs is also reflected in rehabilitative legislation. In the Rehabilitated Offenders Act, N.J.S.A. 2A:168A-1 et seq., the Legislature stated that "it is in the public interest to assist the rehabilitation of convicted offenders by removing impediments and restrictions upon their ability to obtain

