

EMPLOYMENT LAW COMMENTARY

Volume 28, Issue 1
January 2016

San Francisco

Lloyd W. Aubry, Jr., Editor
Karen J. Kubin
Linda E. Shostak
Eric A. Tate

Palo Alto

Christine E. Lyon
Tom E. Wilson

Los Angeles

Tritia Murata
Timothy F. Ryan
Janie F. Schulman

New York

Miriam H. Wugmeister

Washington, D.C./Northern Virginia

Daniel P. Westman

London

Caroline Stakim

Berlin

Hanno Timmer

Beijing

Paul D. McKenzie

Hong Kong

Stephen Birkett

Tokyo

Toshihiro So

Sidebar:

[UK: Zero hours Contracts –
New Penalties](#)



ALCOHOLISM AND DISABILITY DISCRIMINATION: LESSONS FROM THE USC COACH'S CASE

By [Tom Wilson](#)

INTRODUCTION

If you have never dealt with an employee who is an alcoholic, rest assured, you will. Alcoholism has been described as the single largest, most destructive addiction in the United States, with an estimated seventeen

Attorney Advertising

**MORRISON
FOERSTER**

continued on page 2

million Americans struggling with some form of alcohol addiction. According to a recent study by the National Institute on Alcohol Abuse and Alcoholism, nearly 7 percent of adults ages 18 and older have an “alcohol use disorder.”¹ By his own admission, one of these individuals was Steve Sarkisian, who prior to his termination on October 12, 2015, was the head coach of the University of Southern California’s football team. Less than two months after he was fired, Sarkisian filed a lawsuit against USC alleging that his termination was the result of disability-based discrimination and that, rather than attempting to reasonably accommodate his alcoholism as required by law, the University fired him and “kicked him to the curb.”² In fact, in his complaint Sarkisian alleges that USC fired him a day after placing him on an indefinite leave of absence and that he first learned of his termination while traveling to an out-of-state treatment facility. In addition, Sarkisian claims that USC did not have cause to terminate his employment contract and, consequently, owes him roughly \$15 million in severance. In response to Sarkisian’s complaint, USC filed a motion to compel arbitration earlier this month in which it denies firing the coach because he was an alcoholic and asserts that Sarkisian was let go because he could not perform basic job responsibilities, including showing up for practices and speaking events.³

While it is quite unlikely that any of us will have any involvement in a decision to terminate the employment of a potentially disabled NCAA Division 1 football head coach, the *Sarkisian* case does provide a useful framework to re-examine what obligations an employer faces in managing an employee who is an alcoholic. Before undertaking that analysis, we need to briefly review the circumstances of Coach Sarkisian’s USC employment that culminated in his termination from one of the most prestigious head coaching positions in the country.

THE RISE AND FALL OF STEVE SARKISIAN

When he was hired as head coach by USC in December 2013, USC’s Athletic Director, Pat Haden, announced: “We are delighted to welcome Steve Sarkisian back to the Trojan family. We conducted an exhaustive and thorough search. We kept

coming back to Sark.”⁴ Sarkisian’s status as part of “the Trojan family” was earned by his prior service on the USC coaching staff under head coach Pete Carroll in a variety of positions, including offensive assistant, quarterbacks coach, offensive coordinator and assistant head coach from 2001 to 2008. From 2008 until 2013, Sarkisian was the head football coach for the University of Washington, where he was credited for taking a winless Husky team to four consecutive bowl appearances. After the “exhaustive and thorough search” referenced by AD Haden, on December 3, 2013, USC and Sarkisian entered into a 5-year contract,⁵ which made the then 39-year-old Sarkisian the highest paid coach in the Pac. 12.⁶

In Sarkisian’s first season at USC, the Trojans in 2014 posted a respectable 9-4 record. However, the 2015 football season began badly for Sarkisian. At the school’s annual “Salute to Troy” pep rally in August, Sarkisian was “apparently intoxicated, slurring his words, uttering an expletive and acting so unsteady that he left the stage before his remarks were complete.”⁷ Sarkisian later apologized and based his conduct on an unexpected interaction between anti anxiety medications and two beers he had consumed prior to the pep rally. The 2015 football season had begun with high expectations—the Associated Press poll ranked USC as the 8th best team in the nation⁸—but after winning its first 3 games, USC was defeated by Stanford⁹ and on October 8, USC suffered an upset loss to the University of Washington (a game USC was favored to win by 17 points.) Three days later, on October 11, Sarkisian was too ill (supposedly, he was hungover) to attend a team practice. In telephone conversations later that day with AD Haden, Sarkisian told Haden that he needed time off because he was not well, and Haden responded by putting the coach on an indefinite leave of absence. The following day, on October 12, the Los Angeles Times published an article claiming that Sarkisian had drinking problems during his tenure as Washington’s head coach.¹⁰ The same day, USC decided to fire Sarkisian. According to Sarkisian, he learned of USC’s decision through an email he received from Haden while he was in transit to an out-of-state inpatient rehabilitation program. During the press conference in which he announced Sarkisian’s termination, Haden stated that he knew

Sarkisian “was not healthy.”¹¹ Less than two months later in December, Sarkisian filed his lawsuit against USC in a complaint containing 14 separate causes of action in which he chiefly asserted USC’s decision to terminate his employment violated his contract and was the product of disability based discrimination.¹² Among the non-contractual causes of action Sarkisian alleges in his complaint against USC are failure to engage in the interactive process, failure to accommodate, discrimination on the basis of disability and retaliation. He seeks contractual damages in excess of \$15 million.

ALCOHOLISM IS A PROTECTED DISABILITY.

Both the Americans with Disabilities Act (ADA) and California Fair Employment and Housing Act (FEHA) prohibit employment discrimination based upon a person’s disability or known disability.¹³ Alcoholism is a protected disability under federal and California law.¹⁴ The disability discrimination allegations of Sarkisian’s complaint are brought only under the FEHA—presumably, because FEHA provides a broader definition of “disability.” Under FEHA a disability must only “limit” a “major life activity” and does not have to meet the “substantial limitation” standard required under the ADA.¹⁵ “Working” is statutorily defined as a “major life activity” under the FEHA.¹⁶ If Sarkisian’s alcoholism limited his ability to perform his job as USC’s head football coach, he had a protected disability under FEHA.¹⁷

Once an employee either notifies an employer that he or she has a disability or the employer perceives that the employee is disabled, the employer has two immediate obligations under FEHA. First, the employer must engage in an “interactive process”—basically a good faith discussion with the employee—about whether the employer can accommodate the employee’s disability such that the employee can perform the job’s essential functions.¹⁸ Second, an employer has an affirmative duty to provide a “reasonable accommodation” for the disability of the employee, unless the provision of that accommodation would place an “undue hardship” on the employer.¹⁹

These obligations are the heart of Sarkisian’s claims against USC for disability discrimination. In brief, he contends that USC knew (or should have known)

UK: Zero hours Contracts – New Penalties

By [Caroline Stakim](#)

Zero hours contracts have been the subject of much press coverage in the UK over the past two years. Under these types of contracts, the worker is not guaranteed a minimum number of working hours each week and not entitled to pay or benefits in respect of a period where no work is carried out. The main criticism of their use is that, at the same time, there is often a prohibition against the worker undertaking work for any other party, meaning that the worker is unable to rely on earning a regular income.

Following a government consultation, such “exclusivity” clauses were banned in May 2015, meaning that workers could not be bound by them. However, no penalty for non-compliance was introduced at that time, and, as a result, the ban was of little value. This has now been addressed under the Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015 (the “Regulations”) which came into force on 11 January 2016.

Under the Regulations, the dismissal of a zero hours worker is automatically unfair where the principal reason for

that he had a disability, and that USC failed to engage in the required “interactive process” or offer up any reasonable accommodation for dealing with his disability. For its part, USC’s position is that Sarkisian never admitted that he had a drinking problem and never said he needed to seek treatment. However this factual dispute is decided, any employment law practitioner or HR professional would acknowledge that firing an employee, whom you acknowledge is “not healthy,” one day after placing that employee on a leave of absence, constitutes, at minimum, awkward timing.

There also appears to be a factual dispute whether Sarkisian specifically informed Haden that he needed time off to participate in an inpatient rehabilitation program. Had he done so, USC would have had to consider another statutory obligation with respect to providing a reasonable accommodation. Under California Labor Code section 1025, an employer must “reasonably accommodate any employee who wishes to voluntarily enter and participate in an alcohol or drug rehabilitation program,” as long as the “reasonable accommodation does not impose an undue hardship on the employer.”²⁰

Although alcoholism can be a protected disability requiring consideration of a potential accommodation, under both the ADA and FEHA an employer can discipline and even discharge an employee whose use of alcohol adversely affects job performance or conduct.²¹ Put another way, an employee’s inappropriate behavior or failure to perform is not excused by the employee’s alcohol dependency, especially if the employer has specific workplace policies addressing alcohol. In the same vein, if a person is unable to perform the essential functions of his or her job, and no reasonable accommodation exists that would enable the employee to perform the “essential functions” of the job, the employer’s decision to terminate that employee does not constitute disability discrimination. Obviously, USC’s defense will be that it fired Sarkisian for his misconduct and performance problems and not because he was an alcoholic. Thus far, the only reported incidents involving Sarkisian’s performance problems are his inappropriate behavior at the “Salute to Troy” event in August and the team practice he was

dismissal is that he or she breached an exclusivity clause (for example, by working for another employer contrary to the terms of their contract). This is a “day one” protection; there is no need for the worker to have two years’ service to bring this claim. In addition, zero hours workers who are subjected to detrimental treatment as a result of breaching an exclusivity clause can bring a claim for compensation against their employer at the employment tribunal. The compensation awarded will be an amount the tribunal considers just and equitable in the circumstances. In both cases, the burden of proof in showing that the reason for dismissal or detrimental treatment was unrelated to the breach of an exclusivity clause falls on the employer.

In light of this, employers engaging zero hours workers would be best advised to remove exclusivity clauses from contracts and should carefully consider, and document, the reasons behind any proposed action involving zero hours workers.

unable to attend after the USC loss to Washington in October. It would not be surprising to learn that there were other incidents of Sarkisian's alcohol-related performance problems that were kept out of the press.

PLAYING ARM CHAIR QUARTERBACK.

Hindsight, as the saying goes, is twenty-twenty. That said, it may be instructive to consider what strategy USC could have adopted in dealing with Coach Sarkisian that would have placed the University in a better position to defend against Sarkisian's disability discrimination claims.

- *USC could have acknowledged that Sarkisian had an alcohol-based disability.* In response to Sarkisian's claim that USC discriminated against him because of his alcoholism, the University asserts that it was unaware that the coach was an alcoholic, stressing that Sarkisian never admitted he had a drinking problem. "Denial" is commonly recognized as "an integral part of the disease of alcoholism,"²² and in this instance both the alcoholic and his employer appear to have been in denial. As more facts about Sarkisian's drinking are elicited in discovery, and how many university officials (particularly, administrators in the athletic department) were aware of his overuse of alcohol, USC may have a difficult time sustaining its position that it was unaware that Sarkisian was an alcoholic. By not acknowledging that it knew Sarkisian was an alcoholic, USC in effect contends that there was no need for it to comply with the disability discrimination protections required under FEHA—meaning there was no need to engage in an "interactive process" with Sarkisian about potential accommodations or to attempt any reasonable accommodation. USC's implicit position (as articulated in its motion to compel arbitration), that it did not have to treat Sarkisian as disabled because he never admitted he was an alcoholic, is contrary to court decisions which have held that the interactive process for considering a reasonable accommodation may be triggered by the employer's recognition of the need for such an accommodation, even if the employee does not specifically make the request.²³ Finally, in the absence of making any effort to reasonably accommodate Sarkisian's alcoholism, it may be

hard for the University to convincingly argue, that even if it had attempted to accommodate Sarkisian's disability, the coach still would not have been able to perform the essential functions of his job.

- *USC could have made Sarkisian's continued employment contingent upon his participation in a rehabilitation program.* At the time Haden told Sarkisian he was being placed on a leave of absence on October 11, the Athletic Director could have insisted that the coach attend an in-patient rehabilitation program. This accommodation is typically offered by employers to alcoholic employees. USC might have believed that directing its head coach into a rehabilitation program in the midst of the season would have placed an "undue hardship" on the program. Sarkisian's advocates will counter that assistant coach Clay Helton, who had previously served as "interim head coach," could have capably filled in for Sarkisian during his absence.²⁴ In fact, USC ultimately made Helton its permanent head coach six weeks after it fired Sarkisian.
- *USC could have given Sarkisian a "last chance agreement."* In addition to conditioning Sarkisian's continued employment on his successful completion of a rehabilitation program, USC could have given the coach a "last chance agreement" (LCA). An LCA is a written agreement between an employer and its employee that allows the employee to remain employed despite alcohol-related misconduct, assuming the employee meets certain conditions. (One of those conditions is often the employee's participation in a rehabilitation program.) If the employee engages in any further misconduct, (or fails to complete the rehab program) the LCA warns the employee that he or she will be fired. Admittedly, there are only a handful of decisions in California on LCAs, but the courts have enforced these agreements. For example, in 1996 a California Court of Appeal upheld the termination of an employee who had argued his employer had failed to reasonably accommodate his alcoholism by firing him after he had violated his signed LCA.²⁵ In rejecting the employee's argument that he deserved another LCA, the Court stated: "the employer's duty

to accommodate such a disabling condition (alcoholism) is not unlimited, and the employer cannot be an insurer of recovery.”²⁶ Practically speaking, an LCA operates as the final step in the employer’s demonstration of an effort to reasonably accommodate the alcoholic employee’s disability and, as such, it provides additional protection against a disability discrimination claim..

A FEW TAKEAWAYS FOR EMPLOYERS.

Mindful of the Sarkisian/USC dispute, employers should develop a “game plan” for dealing with employees who have drinking problems. The basic components of that game plan should include:

- *Workplace policies, communicated to all employees, prohibiting the use of alcohol in the workplace.* Even if alcoholism is a disability, the employer can still enforce its work rules and discipline misconduct and poor performance.
- *Training managers to recognize signs of alcoholism or substance abuse issues.* A non exhaustive list of those signs would include: smelling alcohol on breath; bloodshot eyes; slurred speech; increased absenteeism and tardiness; rapid decline in performance; and complaints from customers, clients or co-workers regarding rude or inappropriate behavior and work quality.
- *Review (or adopt) an employee assistance program (EAP).* The EAP should include the ability to refer employees who have a drinking problem to a qualified rehabilitation program. Mandating the employee’s participation in a treatment program can be used in conjunction with disciplining the employee for alcohol-related misconduct or poor job performance. And, to reiterate, it also can be cited as an example of an effort to reasonably accommodate the employee’s disability.

- *Train managers and HR officials that alcoholism is a disability subject to protection under our disability discrimination laws.* The same training should differentiate between alcoholism as a protected disability and the company’s continued ability to discipline employees for misconduct and poor performance.

CONCLUSION

It is likely that the *Sarkisian* case will be resolved in arbitration without further public disclosure other than a press release announcing its settlement or resolution. Nonetheless, based upon what has been reported to date about the lawsuit between USC and its former coach, we can draw broader lessons applicable to workplaces beyond the gridiron.

Tom Wilson is a Senior Counsel in Morrison & Foerster’s Palo Alto office and can be reached at (650) 813-5604 or twilson@mof.com.

To view prior issues of the ELC, click [here](#).

- 1 Substance Abuse and Mental Health Services Administration (SAMHSA), 2014 National Survey on Drug Use and Health, Table 5.8A. Available at: <http://www.samhsa.gov/data/sites/default/files/NSDUH-DeTabs2014.htm#5-8A>.
- 2 Complt., *Sarkisian v. University of Southern California*, No. BC603337 (Super Ct. L.A. County, Dec. 7, 2015).
- 3 Nathan Fenno, *USC says Steve Sarkisian's suit is 'full of half-truths' and 'outright lies'*, LOS ANGELES TIMES, (Jan. 9, 2016), <http://latimes.com/sports/usc/la-sp-usc-sarkisian-lawsuit/20160109.html>.
- 4 *USC hires Steve Sarkisian as coach*, ESPN (Dec.3, 2013), http://espn.go.com/los-angeles/college-football/story/_/id/10068739/usc-trojans-hire-steve-sarkisian-washington-huskies-new-football-coach.
5. Actually USC and Sarkisian entered into two contracts. The first was a head coaching contract; the second was a contract between USC and "Sark Enterprises, Inc." The latter contract covered "marketing services" provided by Sarkisian. Both contracts ran concurrently.
6. *Salaries and Contracts*, COACHES HOT SEAT, <http://www.coacheshotseat.com/SalariesContracts.htm>.
7. Bill Plaschke, *If Steve Sarkisian's issues run deeper than one night, that's an issue for USC*, LOS ANGELES TIMES (Aug. 23, 2015, 10:23 PM), <http://www.latimes.com/sports/usc/la-sp-0824-sarkisian-usc-plaschke-20150824-column.html>.
8. D. Ferguson, *Preseason College Football Rankings 2015: Winners and Losers from AP Poll*, <http://bleacherreport.com/articles/2553744-preseason-college-football-rankings-2015-winners-and-losers-from-ap-poll>.
9. Both the author and the editor of this publication are graduates of the Stanford Class of 1972.
10. Nathan Fenno & Lindsey Thiry, *Documents, former players point to Steve Sarkisian's alcohol use at Washington*, LOS ANGELES TIMES (Oct. 12, 2015, 3:00 AM), <http://www.latimes.com/sports/usc/la-sp-usc-sarkisian-washington-20151012-story.html>.
11. *Steve Sarkisian Terminated as USC Head Coach*, <http://ktla.com/2015/10/12/steve-sarkisian-terminated-as-USC-head-football-coach>.
12. The contract claims in Sarkisian's complaint will not be discussed in this article other than to note that both his head coach contract and the marketing agreement had appended arbitration agreements that both sides signed.
13. 42 U.S.C. section 12102(1); Cal. Gov't Code section 12926(m)(6).
14. U.S. Equal Employment Opportunity Comm'n and U.S. Dep't of Justice, *Americans with Disabilities Act: Questions and Answers*, <http://www.ada.gov/employmt.htm>; *Collings v. Longview Fibre Co.* (9th Cir. 1995) 63 F.3d 828; *Gosvener v. Coastal Corp.* (1st Dist. 1996) 51 Cal. App. 4th 805, overruled in part on other grounds, *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal. 4th 1019.
15. The distinction between FEHA's "limits" standard and the ADA's "substantially limits" test is explained in Cal. Gov't Code section 12926.1.
16. Cal. Gov't Code sections 12926(j)(1)(C), 12926.1(c).
17. It should be noted that "current" use of alcohol is treated differently under our disability discrimination statutes than "current" illegal drug use. For example, FEHA excludes from the definition of disability "psychoactive substance use disorders" that result from current use of illegal drugs, but does not exclude current use of alcohol. Cal. Gov't Code section 12926(j)(5).
18. Cal. Gov't Code section 12940(n).
19. Cal. Gov't Code section 12940(m).
20. Under this frequently overlooked statute, which is over 30 years old, an employee could request a reasonable accommodation to attend a substance abuse rehabilitation program even if his or her alcoholism did not meet the definition of a disability.
21. *Brown v. Lucky Stores, Inc.* (9th Cir. 2001), 246 F.3d 1182; US Equal Employment Opportunity Comm'n & U.S. Dep't of Justice, *Americans with Disabilities Act, Questions and Answers*, at 8, <http://www.ada.gov/q&aeng02.htm>.]
22. Mark Gold, *Dealing with Denial in Alcoholism*, PSYCH CENTRAL (Jan. 30, 2013) <http://psychcentral.com/lib/dealing-with-denial-in-alcoholism/>; *Breaking Through Denial is Alcoholic's First Step in Recovery*, HAZELDEN BETTY FORD FOUNDATION (Feb. 1, 2015), <http://hazeldenbettyford.org/articles/breaking-through-denial-is-first-step-in-recovery-for-alcoholic/>
23. See, e.g., *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1112 (en banc), vacated in part on other grounds by *U.S. Airways, Inc. v. Barnett* (2002) 535 U.S. 391; *Brady v. Wal-Mart* (2d Cir. 2008) 531 F.3d 127, 135-36.
24. Helton previously had been the interim head coach in 2013. After Sarkisian was fired, he again was appointed interim head coach. P. Volk, *USC Hiring Clay Helton as Full-Time Head Coach*, SBNATION, <http://www.sbnation.com/collegefootball/2015/11/30>.
25. *Gosvener v. Coastal Corp.* (1st Dist. 1996) 51 Cal. App. 4th 805, overruled in part on other grounds, *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal. 4th 1019. See also, *Fuller v. Frank* (9th Cir. 1990) 916 F.2d 558 (citing use of LCA in upholding termination of alcoholic employee under the federal Rehabilitation Act).
26. *Gosvener v. Coastal Corp.* 51 Cal. App. 4th at 861.

We are Morrison & Foerster — a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, and Fortune 100, technology, and life sciences companies. We've been included on *The American Lawyer's* A-List for 12 straight years, and the *Financial Times* named the firm number six on its 2013 list of the 40 most innovative firms in the United States. *Chambers USA* honored the firm as its sole 2014 Corporate/M&A Client Service Award winner, and recognized us as both the 2013 Intellectual Property and Bankruptcy Firm of the Year. Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger.

Because of the generality of this newsletter, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. The views expressed herein shall not be attributed to Morrison & Foerster, its attorneys, or its clients. This newsletter addresses recent employment law developments. Because of its generality, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

If you wish to change an address, add a subscriber, or comment on this newsletter, please write to:

Wende Arrollado | Morrison & Foerster LLP
 12531 High Bluff Drive, Suite 100 | San Diego, California 92130
warrollado@mof.com