involved the illegal use or controlled dangerous substance.

person within the law, and (ii) that the or her addiction has not
established (i) that he or she is or has been a "handicapped"
under the statute, a person abstaining addiction to drugs must
illegal conduct. In order to establish entrenchment 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 as a
you have requested a legal opinion on whether addiction or

Dear Director Hawkins:

Under the New Jersey Law Against Discrimination

Newark, New Jersey 07102
1100 Raymond Boulevard, Room 400
Division of Civil Rights
OLITE H. HAWKINS, DIRECTOR

October 6, 1989

ATTORNEY GENERAL
Peterson, Peter, Jr.

STATE OF NEW JERSEY

00:52:00

F:O:1, 1989
handicap or disease for purposes of clinical research or medical
determination, as is recognized as a disability, a condition recognized as a disability, a condition estimated cannot turn on the mechanical application of

The applicability of the law agenant discrimination to a

condition "... (b)...

or "...condition, "...including...birth defect or illness.

condition or etiology expressed or imported recognized by the

infertility, and second, the origin of that infertility in a

discrimination...condition or disability or

discrimination on the basis of a handicap...a claim of


person as one who is suffering from

The New Jersey Law Against Discrimination defines a handicapped
requirements triggers the protection of the law against

However, not all drug addiction which meets these two

statute. See C.D.M., 197 N.J. at 593-94.

integrity is caused by one of the conditions enumerated in the

suffices from a disability or integrity and that the disability or

that he meets the two requirements of the statute, that he
disorder by the medical profession. A claimant must demonstrate
cannot be a mere function of the categorization as a condition or

American
discrimination should apply in a particular case thus

12. At this (emphatically added), the determination that the law

Responsibility, disability determination, and competency.

that take into account such issues as individual

may not be wholly relevant to legal judgments, for example.

that these conditions as mental disorders

categorization of these conditions as mental disorders

discorder, mental disease, mental disorder or mental disability. The

meets legal or other nondrug criteria for what constitutes

a diagnostic category. ... does not imply that the condition

treat the various mental disorders. It is to be understood

injury attributable to drug use, communicable diseases, etc.

of diagnostic categories in order to make the distinctions and

The purpose of DSM-III-R is to provide clear descriptions

Research, diagnosis, and treatment alone, in the legal context:

application of the medical definitions, developed for purposes of

authors of this treatise have expressly disclaimed any

account, and hallucinations. However, the

condition, and includes within that definition dependence upon

psychosomatic substance dependence as a treatable psychiatric

Disorders (DSM-III-R) (3rd ed. Revised 1987) recognizes

association's Diagnostic and Statistical Manual of Mental

of legal standards. For example, the American Psychiatric

treatment is not automatically within the definition for purposes
measured against its potential for tournament and abuse.

'Any substance, medication or therapeutic value, if not any substance is classified as Schedule I under the Federal Controlled Substance Act, shall be subject to controls, based upon their recognized capacity to cause physical or psychological dependence.'

Indeed, the law's classification of controlled substances is

\[
\text{State. N.J.S.A. 2C:35-1.1p.}
\]

thrust to the health, safety and welfare of the citizens of this

controlled substance continues to pose a serious and pervasive

to society. The Legislature made clear that the unlawful use of

changes typically cause severe consequences to the individual and

profound psychological and physiological changes, and that these

foundations upon a recognition that illegal drug use can cause

2C:35-1.1, and in the Act first, New Jersey's Narcotic Law is

finding of the Comprehensive Drug Reform Act of 1986, N.J.S.A.

clearly set out in the declaration of policy and legislative

legislative policy to eliminate their use and sale. As is

the use of illegal drugs, New Jersey has adopted a strong

In recognition of the dangers which can and do result from

policy considerations.

applicability of the law against discrimination raised serious

context of addiction involving the use of illegal drugs, the

addiction which involved the illegal use of drugs. In the

The law against discrimination cannot be applied to protect drug

authorizes any act prohibited by law...

contaminated by this act...

illegal conduct. It provides in part that...

abuse, and illegal conduct. By its own terms, the law distinguishes between
In criminal activity and thereby to risk that harm. Prevent the very harm which he alleged, he has chosen to engage in the face of a network of criminal laws designed to choose; in the face of a network of criminal laws has made a critical condition caused by the use of illegal drugs has made a critical condition. A person who seeks the law's protection on the basis of hardship, a person who seeks the law's protection on the basis of hardship, gives rise to a claim of discrimination on the basis of hardship whose birth defect or N.J.S.A. 10:5-5(b), unlike an indigent whose birth defect or see on the basis of conditions beyond their control. See law's express purpose of protecting those discriminated against drugs from the law against discrimination is also supported by the exclusion of addiction resulting from the use of illegal drug users. Extend extraordinary protection to controlled dangerous substances. Law against discrimination in a manner that would, in effect, that results from such drug use, precludes the application of the use of illegal drugs, and thereby preventing the significant harm use. The Legislature's fundamental objective of eliminating the widespread addiction that is the predictable outcome of drug fundamental reason that society will not tolerate or accommodate determination to criminalize the use of certain drugs for a New Jersey's narcotics legislation thus bespeaks a the potential for addiction is greatest. Schedule I and II substances (e.g., cocaine, heroin), for which our criminal drug laws are reserved for offenders involved with conduct less than that, as a general matter, severe punishment under conduce to the inherent potential for addiction, and it is no See N.J.S.A. 24:21-5.6 et seq. These schedules, in other words,
Executive Order

No. 12564, September 15, 1986, "Executive Order No. 12564, September 15, 1986, "Persons who use illegal drugs are not suitable for Federal posts."

Order of President Reagan issued an executive order which proclaims, "Executive Order No. 12564, September 15, 1986, "Persons who use illegal drugs are not suitable for Federal posts."

adopt similar policies.

All private employers who receive Federal grant funds must policy that is consistent with this Federal law. Executive Order No. 12564, September 15, 1986, "Persons who use illegal drugs are not suitable for Federal posts."

on the grantee's adoption of a policy prohibiting illegal drugs on the grantee's property.


congressional and state governments in favor of a drug-free workplace.

consistent with the frequency-attenuated public policy of our criminal law, the exception of addiction involving illegal use of drugs is consistent with the prohibition of drug use in the workplace.
To protect addressed persons who engage in illegal conduct, the legislation intended to extend the law against discrimination exemptions for persons who are addressed; nothing suggests that

consequences on the basis of illegit conduct; none provides 2C:58-3(c)(1) and (2), each of these statutes imposes adverse

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

purchase or carry a firearm if the applicant is a drug dependent

sought, N.J.S.A. 11:4-11, and require denial of a permit to

purchase or carry a firearm if the applicant is a drug dependent

of a prior conviction which relates adversely to the employment

of a prion conviction which relates adversely to the employment

on the basis

employment upon conviction, N.J.S.A. 2C:58-7, permit excision of

In statutes that provide for corroboration of public office or

conduct as consistent with policies expressed by the legislature

that denies protection to drug addicts involved in illegit

Further, a construction of the law against discrimination

particle or employment, N.J.S.A. 10:5-4.1.

construction which precludes satisfactory job

performance: so, indeed, the law against discrimination expressly

proceeds 2C:58-7, 588 (1989) (recognizing the right to test law

officers for illegit activity without drugs and to dismiss officers who do

safety sensitive jobs); see also Matter of Carberry, 114 N.J. 24

(approving drug testing of employees performing or seeking

performance:
In the Senate. I agree that the President's National Drug

and Legislation's goal of assuring equal access to the III and

363, 374-375, 380-381 (1988). It would be in consonance with the


The employee's handicap. See N.J.S.A. 10:5-4.1; N.J.A.C.

against discrimination or establish that they cannot accommodate

accommodations for an employee who is protected by the law

N.J.S.A. 10:5-4 et seq. I employers must make reasonable

remedies, and places significant burdens on employers. See

extends, the law against discrimination provides a broad range of

as to those categories of persons to which the protection

instance, discrimination to designate that activity as illegal in the first

do adverse health effects which undergird the societal

activity and though, as a result of that activity, the very kind

at 495-496 and n. 2, not to protect persons who engage in illegal

the basis of ungrounded assumptions about their capabilities, id.

cannot surmount. Anderson v. Exxon Co., supra at 495. It was

society, bounded only by the actual physical limits that they

secure to handicapped individuals full and equal access to

handicapped. The law against discrimination is intended to

the Legislature's objective in applying the statute to the

activity from the law against discrimination is consistent with

The exclusion of categories who have engaged in illegal
illegal drugs is not. Therefore, nontheless choose not to unconstitutiona a law which would punish addresses who use criminal sanction for the status of an addict to 1962), the United States Supreme Court recognized that while a number of contexts, in Robinson v. California, 370 U.S. 660, 669 associated only with legal conduct has been recognized in a association between medical conduct involving illegal conduct and those indeed, the legitimacy of restrictions which distinguish

20:47-3(a).

Consequences of these illegal acts, see, e.g., N.Y. J.S.A. 10:5-2.1, and other persons who engage in illegal conduct under the constitution of illegality, e.g., N.Y.S. L. 519, 529, 539 right to discriminate on the basis of an employer’s conduct, the employer’s employees whose addiction involves or involves ongoing illegal conduct. The employer’s conduct has expressly reserved the employer’s discretion in these situations. See New York City Transit Authority v. Beazer, 440 U.S. 564, 569 uncertainties of the probabili situation process for drug addiction, and addiction involving illegal abuse of substances, given the circumstances, require an employer to reasonably accommodate all parties. N.Y.S. L. 10:5-27. While fairness may, in certain conducted "fairly and justly with due regard to the interests of persons whose illnesses are the result of a persistent pattern of disturbed to impose this burden on employees in order to protect


Illega! use of drugs is a protected handicap. Thus does not comport the conclusion that addiction involving conduct from protection. The Supreme Court's ruling in Cloves to consider N.J.S.A. 10:5-4,1's exclusion of illegal unlawful activity in and of itself, the court was not compelled from the handbook considered by the New Jersey Supreme Court in the Cloves case, because the consumption of alcohol is not an issue at issue.

At 1147,
See also Governor's Blueprint for a Drug-Free New Jersey (October 1986) at 9-10.

[13. at 35.]

[14. at 35.]

The President's National Drug Control Strategy (September 1989) stresses the importance of comprehensive drug control programs. The strategy identifies drugs as a significant threat to national security, and advocates a multi-faceted approach to drug control. The strategy calls for a comprehensive drug control strategy that includes enforcement of drug laws, treatment of drug addicts, and prevention of drug use. The strategy also emphasizes the importance of international cooperation in addressing the drug problem.

Regardless of how successful we are in preventing the next generation from using drugs, and how successful we are in treating those who are addicted to drugs, we cannot afford to ignore the problem of drug addiction. The problem of drug addiction is a complex one, and requires a coordinated effort from all levels of government and society. It is clear that drug addiction is a serious problem that must be addressed in order to protect our society from its harmful effects.

The exclusion of persons whose addiction involves or has
The law against discrimination, express terms and legislative
condition, do not deprive them of the special treatment that is warranted by their
depressed condition of the law against discrimination does not
from the protection of the law against discrimination. By the law, their exclusion
be employed. In short, those who have become addicted to illegal
interfere with the occupation or profession in which he seeks to
rehabilitated and that his history of narcotics use does not
contrasted narcotics offender who can demonstrate that he has been
instances, this statute provides a statutory remedy to a
license or certificate is sought. N.J.S.A. 2A:168A-1. In many
occupation, trade, vocation, profession or business for which the
crime ... unless the conviction relates adversely to the
discrimination against persons "because of any conviction for a
record,. The act provides licensing authorities from
employment ... based on the existence of a criminal

a medical condition enumerated in the New Jersey law against
discrimination under the statute. For the reasons stated above,
Illegal use of drugs cannot be the basis for a claim of
complet the conclusion that part of present addiction involving
purpose, as well as other expressions of legislative policy,

Discrimination, N.J.S.A. 10:5-1 et seq., may be a handicap with

it is our conclusion that while addiction to drugs resulting from

"...
Very truly yours,

ATTORNEY GENERAL

PETER N. PERRETT, JN.

conduct.

whose addiction has involved, or presently involves, illegal
discrimination do not apply to current or former drug addicts
the meaning of the law, the protections of the law against