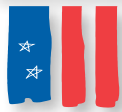


UPDATE

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Partnership for a Drug-Free New Jersey

In Cooperation with the Governor's Council on Alcoholism & Drug Abuse and the New Jersey Department of Human Services

Update No. 71

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Does Your Employee Assistance Program Comply with New Jersey Law?

Mandatory Follow-Up Alcohol Testing Violates Rights of Alcoholic Employees, New Jersey Appeals Court Concludes

By Nancy N. Delogu

Many employers encourage workers with substance abuse issues to seek assistance voluntarily, often offering their workers to self-refer without fear of adverse employment action. In such a case, the employer often provides its employees with time off while they pursue treatment and are able to come to work without unauthorized drugs or alcohol in their systems. Once released as able to work, the employee resumes his or her job duties, often while completing follow-on counseling. Concerned about relapse, the employer requires the employee to pass a return to work drug and/or alcohol test, and to submit to unannounced follow up tests. As long as the employee remains drug and alcohol free, all is well. Right? Well, maybe not.

A workplace policy requiring all employees who self-identify as in need of substance abuse treatment to submit to unannounced alcohol testing following their return to work discriminates against alcoholics, according to a recent decision from New Jersey's appellate court. The court found that the employer's demand that its employees who self-identify as in need of treatment agree to submit to unannounced follow-up alcohol tests could not be justified as either a reasonable safety measure or compelled by "business necessity," as applied to an office worker who had no safety-sensitive duties. Repudiating the employer's arguments in favor of the policy, the Court allowed the employee's claim of disability discrimination (brought under the New Jersey Law Against Discrimination (LAD)) to move forward. The case is A.D.P. v. ExxonMobil Research and Engineering Co.

The facts of the case were straightforward. "A.D.P.," an ExxonMobil employee, voluntarily informed her employer that she needed assistance with alcohol abuse, and took a leave of absence to pursue treatment. As part of its standard employee rehabilitation program, ExxonMobil required her to sign an aftercare agreement agreeing that once she returned to work, she would abstain from alcohol use completely, and to submit

to unannounced breath tests. Significantly, A.D.P., who had worked for ExxonMobil for 29 years and had a history of good to excellent performance, had not violated the ExxonMobil rules on drug and alcohol use, was not subject to discipline for any other reason, and did not work in a safety-sensitive role. Nevertheless, ExxonMobil's representative testified that ExxonMobil's policy applied to all employees equally, and it required A.D.P. to sign the abstinence and follow-up testing agreement simply because she had self-identified as an alcoholic.

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After A.D.P. completed alcohol treatment and return to work, she did submit to unannounced random breath-alcohol tests. Over the next eleven months, she took and passed nine unannounced alcohol tests. Two days after her ninth test, she was again selected for testing, and this time she tested positive, with a breath-alcohol level of between 0.04 and 0.05 percent. ExxonMobil discharged her on the basis of those test results.

Examining these facts, and the fact that only those individuals who self-disclosed alcohol dependence were required to submit to tests, the court concluded that the policy discriminated against employees simply based on their status as alcoholics, and was therefore direct evidence of discrimination. ExxonMobil

could defend its policy by showing that the policy was justified as applied to A.D.P. For example, the court concluded that ExxonMobil's application of its policy would have been justified either because the nature and extent of A.D.P.'s disability reasonably precluded her from performing her job. It also posited that ExxonMobil would have been justified in requiring her to participate in the tests in lieu of termination, if she had given them a reason to discharge her, such as by engaging in misconduct or otherwise failing to meet legitimate performance expectations.

In defense of its policy, ExxonMobil argued that its rule reflected only a legitimate desire to provide for the health, safety, and effective functioning of its employees, as permitted by the LAD's provisions on disability discrimination. The company also argued that the alcohol testing program was part of an employee wellness program, and that the policy was employed to accommodate A.D.P.'s alcoholism. Ultimately, ExxonMobil's arguments were rejected, at least with respect to its application of the policy to A.D.P.

Safety concerns could not justify the policy as applied, the court held, because ExxonMobil had no reason to believe A.D.P.'s condition would pose a serious threat to the health and safety of herself or other employees. The LAD's "safety" defense requires an employer to demonstrate that it "reasonably arrived at the conclusion that the employee's handicap presented a materially enhanced risk of substantial harm in the workplace." To be considered reasonable, however, an employer must have made an individualized assessment of the safety risk posed by the individual employee based on objective medical evidence, work duties, and medical history. Because no individualized assessment of any kind was conducted in A.D.P.'s case, the court reasoned that ExxonMobil had no reason to believe that A.D.P. might pose a threat to workplace safety because of her status as an alcoholic. In fact, the court concluded that ExxonMobil's stated policy of imposing uniform follow-up testing requirements on any identified alcoholic served only to confirm the facially discriminatory nature of the policy.

The court also rejected ExxonMobil's assertion that its policy served as a reasonable accommodation, as A.D.P. had not asked for an accommodation other than leave to attend an

in-patient program. The court flatly rejected the assertion that ExxonMobil's unannounced alcohol testing policy qualified as a voluntary employee wellness program.

The LAD's provisions protecting individuals with disabilities are very similar to the protections offered under the Americans with Disabilities Act (ADA), a fact the court acknowledged, although New Jersey courts have in the past recognized that the LAD may be more protective of alcoholics than is the ADA. Although most of the time, treating employees and applicants exactly alike is the standard for employee relations, that is not true when evaluating accommodations for individuals with disabilities. Under both state and federal disability discrimination laws, New Jersey employers must conduct an individualized determination of the employee's circumstances and offer accommodations accordingly. The court noted that employers cannot require employees to submit to random, unannounced alcohol testing absent an individualized determination that testing is necessary to ensure that the employee poses no risk to himself or others in the workplace. Because A.D.P. had not violated ExxonMobil's rules on drug or alcohol use prior to identifying as an alcoholic, and because she did not perform any safety-sensitive duties, the court concluded ExxonMobil could not defend its actions as a reasonable condition of a last-chance agreement as New Jersey law might permit.

So, must employers refrain from requiring follow-up alcohol tests? No. Employers may be able to require such tests of employees who have self-identified as alcoholics and who hold safety-sensitive roles. Employees who have been permitted to seek assistance in lieu of termination are also presumably free to agree to submit to such tests as a condition of continued employment.

What A.D.P. does teach us is that alcoholics, like other employees with disabilities, cannot be treated exactly alike as a matter of policy. Employers should moreover be cautious of overreaching by requiring employees to submit to medical examinations, which include alcohol tests, absent some significant business reason. Had A.D.P. worked in a safety-sensitive job, the court's analysis likely would have led to a different result.

About the Author

Nancy N. Delogu is the managing shareholder in Littler Mendelson, P.C.'s Washington, D.C. office. In addition to counseling employers on substance abuse prevention and disability discrimination laws, she helps them with strategic counsel and defense of employment law disputes.

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THE PARTNERSHIP FOR A DRUG-FREE NEW JERSEY
DRUGS DON'T WORK IN NJ!

16th Annual Legal Issues of a Drug-Free Workplace

MEMBER SEMINAR

Thursday
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Eatontown Hotel

6 Industrial Way East
Eatontown, New Jersey 07724

Seminar 8:30 am - 12 pm.
Continental Breakfast will be served.

Parking available on site.

FEATURED SPEAKER: Nancy N. Delogu, Esq.

Biography

Ms. Delogu is a recognized authority on federal and state drug-free workplace and drug-testing issues and has drafted dozens of substance-abuse prevention policies, including, Department of Transportation (DOT) mandated programs. She also assists DOT regulated employers to comply with regulations addressing workplace safety compliance and medical certification requirements.

Lectures & Presentations

Ms. Delogu is a frequent presenter and trainer on harassment avoidance, conducting lawful investigations and issues relating to drug and alcohol testing. She has testified before the United States Commission of Civil Rights regarding the Americans with Disabilities Act (ADA) and substance abuse. For several years, she has co-taught an introductory course on traditional labor law as an Adjunct Professor at the College of William & Mary's Marshall-Wythe School of Law.



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