

March 13,
2013



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Alcoholism in the Workplace: Why Employers Need to Be Careful When Making Employment Decisions Involving Alcoholic Employees

By Ola A. Nunez

As alcoholism is recognized as a disability under the Americans with Disabilities Act ("ADA"), employers must be mindful, as with all other disabilities, when making employment decisions involving employees suffering from alcoholism. Certainly, under the ADA, an employer may discipline, terminate, or deny employment to any employee or applicant, even an alcoholic one, whose current alcohol use impairs his or her ability to perform job duties or results in inappropriate workplace conduct. However, an employer may not discriminate against an alcoholic who is not currently under the influence of alcohol and whose job performance and workplace conduct is satisfactory.

This issue was discussed recently in the New Jersey case, *A.D.P. v. ExxonMobil Research and Engineering Company*, 428 N.J. Super. 518, 54 A.3d 813 (October 26, 2012), where the New Jersey Appellate Division considered whether an employer may require a self-reported alcoholic employee whose job performance was satisfactory to submit to random alcohol testing and whether the employee may then be terminated solely for failing the alcohol test.

The plaintiff, who was a long-time employee, had voluntarily disclosed her alcoholism to a company nurse and had informed the nurse that she planned to check in to a rehabilitation program. At that time, the employee was not the subject of any pending or threatened discipline, and there was no evidence that she consumed alcohol at work or came to work intoxicated. After completing the rehabilitation program, the employee signed an

agreement that required her to totally abstain from consuming alcohol and to submit to random breathalyzer tests for a two-year period as a condition of her continued employment. Other employees who were not identified as alcoholics were not required to sign such an agreement and were not subject to alcohol testing, except for cause as set forth in the employer's policy. The New Jersey Appellate Division pointed out that the plaintiff was not subject to testing and termination pursuant to a "last chance agreement," which is an agreement between an employer and employee that permits the employee to undergo a probationary period following an incident calling for discipline so that the employee has an opportunity to improve his or her performance and permits the employer to impose the contemplated disciplinary action or any other appropriate discipline if the employee violates the terms of the agreement.

The plaintiff passed nine breathalyzer tests that were randomly administered over the course of ten months, but failed a tenth test that was administered two days after the ninth test. The New Jersey Appellate Division noted that there was no evidence presented that the plaintiff was intoxicated or that her behavior on the day of the tenth test gave her employer reasonable cause to believe she had been drinking at work. A few days later, the plaintiff was terminated for failing the test in violation of the company's alcohol and drug policy.

The plaintiff filed a lawsuit, alleging disability discrimination and wrongful termination under New Jersey's Law Against Discrimination ("NJLAD"). The plaintiff argued that her employer had subjected her to additional terms and conditions of employment due to her alcoholism in violation of the NJLAD without any legally justifiable basis. The trial court dismissed the case. However, the New Jersey Appellate Division reversed, finding that the employer's policy requiring total abstinence from alcohol and two years of random alcohol testing was discriminatory because it was only applied to alcoholic employees. The appellate court noted that, under the policy, an employee's status as an alcoholic was the "lone trigger" for the requirements of total abstinence and random testing without cause, and while an alcoholic employee could be terminated after one "slip" even if their job performance did not suffer, the use of alcohol alone would not be grounds for terminating other employees that were not identified as alcoholics.

The appellate court further explained that because the policy was discriminatory, the burden shifted to the employer to present evidence that, even if plaintiff were not an alcoholic, it would have subjected her to random testing and terminated her employment. In other words, the employer had to come forward with a legitimate, alternative basis for triggering the test and/or her termination, such as poor work performance. The New Jersey Appellate Division sent the case back to the trial court for further consideration of issues that the appellate division did not reach, *i.e.*, whether there was sufficient evidence presented that the plaintiff's performance was adversely affected prior to her termination as a result of her alcoholism.

The moral of the story appears to be that while workplace alcohol and

drug policies are certainly advisable and legal, employers considering implementing such policies should ensure that the policies are not narrowly applied to a protected class of individuals.

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