

Current Workplace Issues

Drug Testing Policies: Can You Weed Out the Users?

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***This article is an excerpt from a paper entitled **SUBSTANCE ABUSE IN THE WORKPLACE**, by L. Frank Molnar and Nancy Bains (and updated by Kathryn F. Fleishaker) of Field LLP in Calgary. For more information, or a copy of the paper, please contact Nancy Bains

The prevalence of drugs, alcohol, addictions, users and abusers in the workplace and how to deal with them is a concern for employers now more than ever, especially in light of emerging case law that is placing more responsibility on employers.

The case of *Alberta (Human Rights & Citizenship Commission) v. Kellogg Brown & Root (Canada) Co.*, [2006] A.J. No. 583 (Q.B.)(QL), [KBR], is the most recent pronouncement with regard to drug and alcohol testing in the workplace by the Court of Queen’s Bench in Alberta.

John Chiasson was offered a job as a receiving inspector at the Syncrude UE-1 project in Fort McMurray, with a start date of July 8, 2002. A condition of the offer of employment was pre-employment drug testing. While the offer of employment specifically stated that the offer was extended to him “subject to the results of your pre-employment medical and drug screen”, Mr. Chiasson was permitted to start work before the results of the drug screen were received.

The test results, received on July 17, 2002, were positive for marijuana. The employer’s medical officer then interviewed Mr. Chiasson, at which point he admitted that he had used marijuana five days before the drug test. The day after the meeting with the medical officer, Mr. Chiasson’s employment was terminated (after approximately 9 days of work). The dismissal letter stated in part:

When offered the position with Kellogg Brown & Root, it was a condition of employment to successfully pass a pre-employment medical and drug screen. Kellogg Brown & Root received the results from your drug screen on July 18 and the results were positive for drugs; consequently the organization has no choice but to terminate your employment.

Mr. Chiasson filed a complaint with the Alberta Human Rights and Citizenship Commission, claiming that he had been discriminated against on the ground of disability, because of the pre-employment drug test policy. The Commission dismissed the complaint, finding that there was no evidence that Mr. Chiasson suffered a disability, either real or perceived.

Mr. Chiasson appealed the Commission’s ruling and, in his appeal, submitted that the pre-employment drug test policy was discriminatory against those who suffered a disability, real or perceived. Mr. Chiasson admitted to being a recreational user of marijuana and testified that he had never been dependent

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on any drug or alcohol.

Martin J. concluded that although Mr. Chiasson was not drug dependent, the policy assumed that a person who tested positive for drugs was likely to be impaired at work in the future and therefore would not be fit for duty. The Court further stated that "...speaking through this policy, KBR demonstrates its belief that any person testing positive on a pre-employment drug test is a substance abuser." Based on this reasoning the Court found that on its face, the policy was discriminatory.

The Court determined that the employer's policy did not differentiate between categories of drug users and simply assumed that a user, recreational or otherwise, posed a greater risk at the workplace. Interestingly, even though there was no evidence of a real disability, the Court used the concept of perceived disability to find that the policy was discriminatory.

The parties had agreed that the pre-employment drug screen was rationally connected to the performance of the job: to increase workplace safety, and that the employer had adopted the policy in good faith and with the honest belief that the testing was necessary to achieve the goal of increased workplace safety.

Therefore, if the employer could have shown that there were no other means of increasing workplace safety without imposing undue hardship on the company then the policy would be sustained as a reasonable and justifiable infringement.

However, the Court decided against the employer and held that employers are not entitled to automatically terminate, without accommodation, on the strength of a positive result from a pre-employment drug screen. The Court stated that the policy was "too severe and more stringent than necessary for a safe workplace and not sufficiently sensitive to individual capabilities."

From this case, one important point to note for employers is that to legitimize such pre-employment testing policies, it should offer accommodation to a prospective hire who has tested positive for drugs.

It is also important to note the employer did not lead any evidence as to the costs of different forms of accommodation to support an argument that accommodation would entail undue hardship.

Nonetheless, *KBR* was a positive decision for employers in two ways:

1) There was a clear acceptance by the Court that there is significant drug and alcohol abuse problems amongst oil sands workers; and

2) The Court was prepared to classify Mr. Chiasson's position as safety sensitive and that it was reasonably foreseeable that his actions could jeopardize the health and safety of himself and co-workers.

This case demonstrates that there is a duty or obligation among employers to not sidestep the issue of drugs and alcohol and to deal with it head on. Therefore, employers should have a clear and effective drug and alcohol policy and proactive strategies in place.

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