

Drug and Alcohol Testing in the Workplace

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The Ontario Court of Appeal recently made a distinction between the legality of drug testing and the legality of alcohol testing in the workplace in the *Entrop v. Imperial Oil Ltd.* decision. According to that Court, both blanket and random drug testing of employees violates human rights law and will not be allowed. On the other hand, testing employees for alcohol will be allowed in certain situations.

Largely in reaction to the Exxon Valdez incident, Imperial Oil adopted a comprehensive substance abuse policy. The policy included:

- (a) blanket drug testing of all prospective employees,
- (b) random drug testing of all current employees, and
- (c) random alcohol testing for employees in safety-sensitive positions.

The policy also required all employees to disclose any past or current substance abuse. There was a “zero tolerance” provision for substance use by employees in safety-sensitive positions.

Entrop was employed by Imperial Oil in a safety-sensitive position when the policy was introduced. Although he had not had a drink in seven years, he complied with the policy and informed Imperial Oil of a previous problem he had had with alcohol. Imperial Oil immediately reassigned Entrop to a non-safety-sensitive (and less desirable) position.

Entrop lodged a complaint with the Human Rights Commission on the basis that he had been discriminated against due to disability (ie: substance addiction). In response to that complaint Imperial Oil did reinstate Entrop to his prior job. Imperial Oil also, however, made that reinstatement subject to numerous conditions.

In deciding whether discrimination had occurred, a unanimous Ontario Court of Appeal applied the new test handed down by the Supreme Court of Canada in the *Meiorin* decision (commonly known as the B.C. Firefighters case). In *Meiorin*, a female firefighter (who had otherwise been an adequate employee for three years) was fired when she failed to pass an aerobic capacity test the employer had introduced. Meiorin claimed the test was discriminatory because females generally have a lower aerobic capacity, and could not meet the standard set even with training.

The Supreme Court of Canada stated that, when determining whether a policy or standard breaches human rights law, one must ask:

- (a) is there a sufficient “connection” between the purpose of the standard (ie: ensuring a certain level of aerobic fitness) and the requirements of the job (ie: strength and endurance);
- (b) was the standard adopted by the employer in the “honest belief” that it is needed to ensure the work-related purpose;

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(c) is the standard actually needed to ensure the purpose; and

(d) is it impossible to accommodate those who fail the standard due to a characteristic listed under human rights law (for example gender or disability) without causing the employer "undue hardship". (**note:** what represents "undue hardship" is a complicated inquiry that depends on the particular circumstances of any given employer).

If the answer is no to any of the above questions, discrimination for which an employer can be held liable has occurred. In *Meiorin*, the Supreme Court held that the employer had failed to show that the level of fitness required to pass the aerobic test actually *was* the level of fitness needed to fight forest fires. On this basis, the policy of requiring employees to pass the test was struck down.

Applying *Meiorin* to Imperial Oil's treatment of Entrop, the Ontario Court of Appeal found that the automatic reassignment upon Entrop's disclosure of his past alcohol problem and the conditions placed on his reinstatement were unnecessarily severe and not individually tailored.

In other words, random alcohol testing was considered properly "connected to" and "necessary" for the purpose of ensuring a substance free workplace, however, the Court found that Imperial Oil should have dealt with Entrop on a more individualized basis. Recognizing and treating Entrop as a *recovered* alcoholic would not have caused Imperial Oil "undue hardship".

Having dealt with the situation of *Entrop* specifically, the Court of Appeal also ruled on the legality of Imperial Oil's testing policy in general. The Court found that Imperial Oil had a proper health and safety purpose in attempting to ensure a substance free workplace. However, it also found that it was impairment *on the job*, and not elsewhere, which jeopardized the achievement of the purpose. Drug tests do not show whether employees are currently impaired, they only indicate that drugs have been used at some time prior to the test. Blanket or random drug testing, for prospective or current employees, was not sufficiently connected to the purpose of ensuring actual workplace safety. Imperial Oil's drug testing policy was struck down.

Alcohol testing was different. Breathalyzer samples *do* show current impairment. Such testing was considered justified in certain situations. Specifically, alcohol testing was found to be permissible for employees in safety-

sensitive positions. However, the employers' response to positive tests must be tailored to the needs of the particular individual and also limited to what is reasonably necessary for achieving a substance free workplace.

The *Entrop* decision was made by the Ontario Court of Appeal, a court highly regarded across Canada. The Court found that the *Meiorin* decision should apply to human rights legislation in all provinces, therefore the decision may well be adopted in Alberta. As such, blanket or random drug testing by employers is now ill-advised. On the other hand, if an employee's position is safety-sensitive, the use of alcohol testing is still available. Still, an employer must take care to ensure that any response to a positive alcohol test is formulated on an individualized basis and is not overly broad.

This is a complex and developing area of law. Employers who are considering a drug and/or alcohol testing policy should contact their legal advisors. Similarly, employers who currently have policies should have them reviewed to ensure they continue to comply with human rights law.

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