

# DRUG TESTING IN THE WORKPLACE

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Most employers need not concern themselves about testing employees for drugs (including alcohol). While no one would condone the illegal use of drugs, only a few industries have either the safety or honesty issues that would require testing on a random and regular basis. In industries, such as transportation (trucking, airlines, etc.) where safety issues predominate, often employers will have some form of drug testing policy in place to cover off those concerns.

The Courts and Human Rights Tribunals have recently had to deal with this issue, particularly as it relates to the issue of disability. Most human rights legislation prohibits discrimination in employment matters on the basis of disability, either physical or mental. Jurisprudence in this area has generally accepted that alcoholism is an addiction like drug addictions and as such, is a disability. When an employer wants to do such testing, normally two issues will arise.

First there is the issue of the person's right to privacy. Most drug testing involves the taking of bodily fluids (urine or blood), and as such, can be an invasive procedure or raise issues regarding a person's right to privacy. While a breathalyzer is not as invasive, it can only detect if a person has a quantity of alcohol present in their system. Testing for illegal drugs (such as cocaine, marijuana, heroin, etc.) or even legal ones that might affect performance (tranquilizers, depressants, etc.) usually involves having to give a specimen of blood or urine. Courts have traditionally frowned upon forcing people to give such specimens, unless there is a clearly defined right or need. This has been strengthened by the latest Human Rights jurisprudence.

One of the recent cases involved Exxon. As a result of the Exxon Valdez oil spill and the billions of dollars in damages

Exxon had to pay because the captain of the ship was drunk at the time, Exxon developed a policy of testing employees in what were termed safety sensitive positions.

Employees in such positions were required to disclose if they had experienced a problem with alcohol or drug abuse presently or in the past. If they answered yes, an assessment would be made and if the problem was confirmed, the employee would not be permitted to enter or remain in that position.

The employee concerned, Entrop, disclosed he previously had an alcohol problem, but had been dry for 7 1/2 years. He was then assigned to a less desirable position (with no loss of pay), and required to undergo a rigorous assessment. The assessment concluded he was "alcohol dependent in remission", and there was no psychological or psychiatric reason to prevent him from resuming his full duties. As a result he was reinstated, but required to undergo significant testing, etc. No testing disclosed any relapse.

He complained of discrimination under the Ontario Human Rights Legislation. The experts agreed that he was a former alcoholic with a very low risk of relapse. The human rights tribunal agreed with the complaint of discrimination. Without going into the legal reasoning in detail, the tribunal seemed to be influenced by the heavy handed approach of Exxon, and this may have affected the result.

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The other case involved the Toronto Dominion Bank and their policy of requiring all applicants for employment to accept a drug screening and testing procedure as a condition of employment. Originally, the policy was upheld by the human rights tribunal, an apparent opposite result to the Exxon decision. The decision was appealed by the Civil Liberties Association, who had filed the complaint.

The Federal Court on appeal remitted the decision back to the tribunal for reconsideration. The Court held that the tribunal erred when it found the policy non-discriminatory. It was held to be adverse discrimination, which means that a rule is neutral on its face, but has the effect of discriminating against a particular group of individuals suffering from the disability of drug dependency (addiction).

The Court directed the tribunal to consider whether there was a rational connection between the policy and job performance. At this point in time, it is not known whether the Bank has appealed the court decision, or will be going back before the tribunal to deal with that issue.

As a consequence of these two decisions, about the only safe conclusion that can be drawn today, is that this law is in a state of flux. Any employer that feels that alcohol or drug use is a problem in his workplace should proceed carefully, with proper legal advice, given the detailed comments that are made in these latest two cases.

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