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New Jersey's Appellate Division Limits Parameters of Workplace Drug and Alcohol Policy

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In *A.D.P. v. ExxonMobil Research & Engineering Co.*, 2012 WL 5273469 (App. Div. Oct. 26, 2012), the Superior Court of New Jersey, Appellate Division reversed in part the lower court's ruling granting summary judgment by holding that Defendant ExxonMobil Research and Engineering Company ("ExxonMobil") applied a "facially discriminatory" drug and alcohol policy against its employee, Plaintiff A.D.P., based on her disability of alcoholism. This alert discusses the ramifications of this decision for employer alcohol and drug policies.

Background

Like many employers, ExxonMobil implemented a comprehensive Alcohol and Drug Use Policy ("Policy") to foster "a safe, healthy, and productive workplace for all employees." Concerned that the substance abuse of employees would "impair their ability to perform properly" and "have serious adverse effects on . . . other employees and the Corporation as a whole," the use of drugs or alcohol in the workplace was "strictly prohibited" and "grounds for termination of employment."

The Policy was not solely prohibitive, as it "recognize[d] alcohol or drug dependency as a treatable condition" and "encouraged [employees] to seek advice and to follow appropriate treatment promptly before it results in job performance problems." Accordingly, as a matter of company policy, "[n]o employee with alcohol or drug dependency [was to] be terminated due to the request for help" or "because of involvement in a rehabilitation effort."

On August 17, 2007, A.D.P. voluntarily disclosed to a nurse at ExxonMobil that she was an alcoholic and intended to check herself into a rehabilitation program to address her alcohol dependency and depression. A.D.P. was hospitalized from August 20, 2007 to September 8, 2007, and participated in outpatient treatment thereafter. Following treatment, A.D.P. met with ExxonMobil representatives and, on October 29, 2007, signed an "after-care contract" pursuant to the Policy, which required any employee returning to work from rehabilitation to participate in a company-approved aftercare program.

Pursuant to the after-care contract, A.D.P. agreed to "maintain total abstinence from alcohol" and "actively participate" in: (i) treatment for chemical dependency for the duration of the Primary Treatment Program; (ii) After–care including clinical substance testing for a minimum of two (2) years after completion of the Primary Treatment Program; and, (iii) monitoring for an additional three years. The contract also provided that A.D.P. would "maintain acceptable work performance" and "be subject to periodic and unannounced alcohol and drug testing." The noncompliance of "[a] positive alcohol or drug test result or refusal to submit to periodic testing [wa]s grounds for discipline which [wa]s most likely to be termination of employment."

As a matter of company policy, employees not identified as alcoholics were not required to sign the after-care contract and were subject to alcohol and drug testing only "where cause exists" under one of the following conditions: "has had a substance abuse problem"; "working in a designated position identified by management"; "a position where testing is required by law"; or "a specified executive position." Notwithstanding her admitted alcoholism, none of these conditions applied to A.D.P.

Between October 29, 2007 and August 20, 2008, ExxonMobil administered nine random breathalyzer tests to A.D.P., all of which she passed. Two days after she passed the last of these tests, A.D.P. was required to take additional breathalyzer tests. The laboratory report described the tests as "random," indicating that they were administered pursuant to the after-care contract. There was no evidence that A.D.P. was intoxicated or that her behavior that day gave ExxonMobil reasonable cause to believe that she had been drinking alcohol at work. The breathalyzer tests administered on August 22, 2008 produced blood alcohol concentration (BAC) readings of .047 and .043. As a result, A.D.P.'s employment was terminated on August 26, 2008.

A.D.P. filed a complaint in state court, alleging that: (1) ExxonMobil violated the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5–1 to –49, by discriminating against her because of her disability; and (2) that her termination violated public policy (*Pierce v. Ortho Pharm. Corp.*, 84 N.J. 58 (1980)). The lower court granted summary judgment and dismissed A.D.P.'s complaint. The Appellate Division held that summary judgment was erroneously granted as to A.D.P.'s LAD claim, but was appropriate to dismiss her *Pierce* claim.

Holding

The LAD declares that it is an unlawful employment practice or an unlawful discrimination "[f]or an employer, because of the ... disability ... of any individual, ... to discharge ... or to discriminate against such individual ... in terms, conditions or privileges of employment" (N.J.S.A. 10:5–12(a)), "unless the nature and extent of the disability reasonably precludes the performance of the particular employment." (N.J.S.A. 10:5–4.1). The LAD, however, does not "prevent the termination or change of the employment of any person who in the opinion of the employer, reasonably arrived at, is unable to perform adequately the duties of employment." (N.J.S.A. 10:5–2.1).

The Appellate Division held that ExxonMobil's Policy was "facially discriminatory" under the LAD, determining that the Policy's requirements of "total abstinence" and "a minimum of two years of random testing" for only those employees who were "identified as alcoholics" demonstrated "hostility toward members of the employee's class." The Appellate Division accordingly concluded that A.D.P.'s employment was terminated not because of her job performance but "solely" because of her disability.

In making this determination, the Appellate Division stressed that A.D.P. was not the subject of any pending or threatened employment or disciplinary action. It also highlighted testimony from one ExxonMobil manager that the "imposition of these conditions was unrelated to her job performance" and testimony from a Human Resources Advisor that A.D.P. would have been discharged upon failing the breathalyzer test "even if she had been performing in the top one-percent of her group."

The Appellate Division rejected the two justifications for the Policy advanced by ExxonMobil: (1) "it ha[d] a legitimate business reason – the health, safety and effective functioning of its employees"; and (2) the Policy constituted a reasonable accommodation of A.D.P.'s alcoholism.

As for the first justification, the Appellate Division noted that ExxonMobil "conflate[d]" two defenses: the "business necessity" defense (which was inapplicable to the instant case of disparate treatment) and the "safety" defense (which ExxonMobil failed to prove). "When asserting the safety defense, the employer must establish with a reasonable degree of certainty that it reasonably arrived at the opinion that the employee's handicap presented a materially enhanced risk of substantial harm in the workplace." *Jansen v. Food Circus Supermarkets, Inc.*, 110 N.J. 363, 383 (1988) (emphasis added). Moreover, the employer must conclude "that the handicap will probably cause such an injury." *Id.* at 374 (emphasis added).

According to the Appellate Division, although the ExxonMobil's Policy contained the general observation "that alcohol, drug, or other substance abuse by employees will impair their ability to perform properly," the "safety" defense requires the employer to "make an individualized assessment of the safety risk, which must include objective medical evidence as well as relevant records such as the employee's work and medical histories." *Barbera v. DiMartino*, 305 N.J. Super. 617, 632 n.5 (App. Div. 1997) (internal citation omitted).

In evaluating whether an "individualized assessment" existed, the Appellate Division also looked to guidance from the Equal Employment Opportunity Commission ("EEOC"), EEOC, No. 915–002, *Enforcement Guidance: Disability–Related Inquiries and Medical Examination of Employees under the Americans with Disabilities Act (ADA)* (2000), available at http://www.eeoc.gov/policy/docs/guidance-inquiries.html. The EEOC guidance identified factors an employer should consider in determining whether to subject an employee to periodic alcohol testing, such as (1) "the safety risks associated with the position the employee holds," (2) "the consequences of the employee's inability or impaired ability to perform his/her job functions," and (3) "how recently the event(s) occurred that cause the employer to believe that the employee will pose a direct threat (e.g., how long the individual has been an employee, when s/he completed rehabilitation, whether s/he previously has relapsed)." In addition, (4) "the duration and frequency of the testing must be designed to address particular safety concerns." The Court found no such individualized assessment here, as "ExxonMobil defend[ed] its actions as requirements it uniformly imposed as a matter of policy upon any identified alcoholic."

Furthermore, the Court found that the Policy was not a "reasonable accommodation," as (1) A.D.P. did not allege a cause of action based upon a failure to accommodate her disability and (2) other than initially allowing A.D.P. to enter rehabilitation, ExxonMobil did not enter into the required "interactive process" but "dictated the purported accommodation, the terms of the after-care contract, and required [A.D.P.] to agree to its terms if she wanted to keep her job."

Thus, the Appellate Division determined that the trial court's decision granting summary judgment in favor of ExxonMobil with respect to A.D.P.'s LAD claim was erroneous. The Court accordingly reversed and remanded.

Takeaway

The Appellate Division's decision underscores the imperative that employers must carefully draft and consistently apply workplace alcohol and drug policies. Although employers are permitted under the law to maintain an alcohol- and drug-free workplace, employers cannot adopt a one-size-fits-all policy. Rather, discipline for employee behavior which stems from alcoholism or other addiction must include an individualized assessment of the employee's work performance and/or the risks posed to the safety of the workplace. Given the broad definition of disability under federal and state law, employers should expect such issues to persist regarding the implementation of their alcohol and drug policies. To avoid liability, employers must remember to perform individual assessments, reasonably accommodate their alcohol- or drug-disabled employees who are otherwise qualified, and refrain from adverse actions unless they are based on legitimate, nondiscriminatory reasons.

The Appellate Division's decision also is significant, as it comes at a time when employers across the country are paying closer attention to their alcohol and drug policies. Indeed, the recent initiatives passed by Colorado and Washington to legalize, regulate, and tax the sale of small amounts of marijuana to adults who are age 21 or older (which join the medical marijuana laws in at least 17 states and D.C.) portend more challenges on the horizon. As the law continues to evolve, employers must remain vigilant and should confer with counsel to determine if it is necessary to adjust their alcohol and drug policies.

If you have any questions or concerns regarding the Appellate Division's decision or your workplace alcohol and drug policy, please contact your Proskauer lawyer.

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