

Court Dismisses ADA Claims Alleging “Excessive” Drug and Alcohol Testing

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A federal court in New York dismissed a disability discrimination claim asserted under the Americans with Disabilities Act (ADA) based on allegedly “excessive” drug and alcohol testing of employees after they failed drug or alcohol tests required under the U.S. Department of Transportation (DOT)’s regulations. *Vuono, et al. v. Consolidated Edison of New York, Inc.*, Case No. 1:18-cv-016365-VEC (S.D.N.Y. June 11, 2019).

The employer required the group of plaintiff-employees to submit to random drug and alcohol testing pursuant to DOT regulations. In addition, employees who tested positive were put in the employer’s “On Call” program, which required additional drug and alcohol testing, without advance notice of the tests. (Although the Court’s opinion does not make it clear, it appears that these “On Call” tests were follow-up drug and alcohol tests required under DOT regulations after a violation of a DOT drug and alcohol rule).

Seven current and former employees filed suit alleging disability discrimination. In their third amended complaint, they claimed were regarded as disabled under the ADA, and subjected to excessive drug and alcohol testing as a result. Significantly, the employees did not specify how frequently they were subjected to the On Call testing. They also alleged the tests were unlawful disability-related inquiries under the ADA. The employer moved to dismiss.

The Court held that the employees failed to state a claim because they were not subjected to an adverse employment action. In general, drug and alcohol testing by an employer is “not an adverse action” for purposes of a disability discrimination claim. Moreover, the complaint was devoid of facts alleging that the On Call testing was “so frequent and so invasive” that it was comparable to a demotion, pay cut, or other standard adverse employment action. Rather, it was a “mere inconvenience,” which is not actionable. The Court also rejected the employees’ argument that the embarrassment associated with the testing was sufficient to establish an adverse action. Because the employees failed to assert a viable claim after three attempts, the Court dismissed the claim with prejudice.

With respect to the employees’ unlawful disability-related inquiry claim, the Court concluded the allegations were insufficient to show the claim was timely filed (*e.g.*, within 300 days of the administrative charge). However, the Court allowed six of the seven employees to amend the complaint to try to demonstrate that such allegations were not time-barred. But the Court also expressed skepticism that a drug or alcohol test constitutes a medical examination or inquiry under the ADA, primarily because a drug or alcohol test result does not “tend to reveal a disability.” Moreover, these employees are subject to DOT drug and alcohol testing regulations and the ADA expressly provides that drug and alcohol testing of DOT-regulated employees is permissible.

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