THE
NATIONAL LAW REVIEW

After Nearly 25 Years, New Jersey Appellate Court Provides 'Sobering' Guidance to Employers Respecting Workplace Alcoholism

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Wednesday, November 28, 2012

It has been almost 25 years since a New Jersey appellate court published a decision providing any meaningful analysis of the treatment of alcoholism in the workplace under the State's Law Against Discrimination (LAD), the last time being the Supreme Court's 1988 decision in *Clowes v. Terminix International, Inc.*

That has now changed.

On October 26, 2012, the Appellate Division held in ***A.D.P. v. ExxonMobil Research & Engineering Co.*** that a private-sector, non-union employer's blanket policy requiring any employee returning from an alcohol rehabilitation program to submit to random alcohol testing, applicable only to those identified as being "alcoholic" and divorced from any individualized assessment of the employee's performance, was facially discriminatory under the LAD — a conclusion that would likely be the same under the federal **Americans with Disabilities Act (ADA)** as well. Although the Court reversed summary judgment initially entered in favor of the employer, *A.D.P.* provides valuable guidance to employers as they develop their

policies concerning how best to deal with alcohol (and substance) abuse in the workplace. Equally important, *A.D.P.* illustrates the utility of so-called "last chance agreements" to address these issues when they arise.

Plaintiff in *A.D.P.* had been employed as a research technician, and later Senior Research Associate, for approximately 30 years. Unlike the plaintiff in the Supreme Court's 1992 decision in *Hennessey v. Coastal Eagle Point Oil Co.*, hers was not a "safety-sensitive" position. In 2007, plaintiff voluntarily disclosed to her employer that she suffered from alcoholism, and entered a rehabilitation program. At the time, she was not subject to any pending or threatened disciplinary action, and she had built a good performance record over the years. The company's policy nonetheless required that, upon her return from rehabilitation, plaintiff sign a contract agreeing to participate in a company-approved "aftercare program" obligating her to "maintain total abstinence from alcohol" and submit to "clinical substance testing for a minimum of two (2) years." A positive test result or refusal to submit to a test would be deemed grounds for discipline, "which is most likely to be termination of employment." Although plaintiff passed nine breathalyzer tests over a period of just 10 months, she subsequently failed a pair of tests on August 22, 2008, and accordingly was terminated under the company's policy.

Reversing summary judgment, the Appellate Division held that the employer's blanket policy was facially discriminatory because it was unrelated to any performance concerns and was based solely on the fact that an employee was identified (in plaintiff's case, self-identified) as an alcoholic (i.e., the employer, according to the court, exhibited "hostility toward members of the employee's class"). Unlike the Supreme Court in *Hennessey*, which considered whether an employer's termination of an employee who failed a mandatory random drug test violated a clear mandate of "public policy" thereby creating a common law cause of action for wrongful discharge, the *A.D.P.* Court grounded its analysis of the defendant's alcohol policy on LAD.

Notably, the *A.D.P.* Court looked to the EEOC's 2000 policy guidance under the ADA, even though the EEOC had not yet considered the potential impact of the 2008 ADA Amendments Act upon that guidance. The EEOC explains that, absent a "last chance" agreement, an employer can subject employees returning from alcohol rehabilitation to random alcohol testing, a breathalyzer for example, only if the employer has a reasonable belief, based on objective evidence, that the employee will pose a "direct threat" (for example, to safety or job performance) absent such testing. Any such "reasonable belief" must be based on an individualized assessment of the employee and his/her position, including "safety risks associated with the position," and not on generalized assumptions. The A.D.P. Court looked to this guidance statement for "assistance in interpreting the LAD" because the ADA's prohibition against disability discrimination is "similar" to its LAD counterpart, and alcoholism may qualify as a disability under either statute.

In *A.D.P.*, plaintiff did not have a last chance agreement, a fact the court "emphasize[d]" at the outset. The court also stressed that the employer had made no individualized assessment, but rather "defend[ed] its actions as requirements it uniformly imposed as a matter of policy upon any identified alcoholic." Interestingly, the *A.D.P.* Court did not mention the Third Circuit's unpublished 2009 decision in

Byrd v. Federal Express Corp. Byrd upheld an employer's termination of a self-reported alcoholic employee for failing a random alcohol test mandated under a "Statement of Understanding" (SOU) — a contract the Third Circuit described as "in effect, a 'last chance' agreement" — that the employer required all employees identified as alcoholics to sign. *Byrd* did not, however, consider plaintiff's claim that requiring the SOU was itself a violation of LAD "because it treats employees with alcohol or substance abuse problems differently," as plaintiff had failed to challenge the SOU within LAD's statutory limitations period.

Although *A.D.P.* invalidated the particular policy before it, in its opinion, the Court nonetheless provides employers with valuable guidance in developing their own policies concerning alcohol and substance abuse in the workplace. It seems clear under *A.D.P.* that private, non-union employers can require employees returning from rehabilitation programs for alcoholism to submit to random alcohol or drug testing (subject to the limits imposed by the Supreme Court in *Hennessey*) provided that either (i) they articulate a reasonable belief, based on careful assessment of objective evidence concerning both the employee and the position, that the employee will pose a direct threat absent such testing, or (ii) the employee has entered into a last chance agreement providing for random testing.

Key Takeaways

- Employers should strongly consider entering into last chance agreements with any employee who points to alcohol or substance dependency as a cause for workplace problems (for example, poor performance or persistent tardiness), and include in the agreement requirements that, as a condition of continued employment, the employee will enter a rehabilitation program and submit to periodic testing.
- Absent a last chance agreement, employers should not compel an employee to submit to periodic alcohol testing unless the employer can articulate a reasonable belief, based on a careful assessment of objective evidence concerning both the employee and the nature of his/her position, that the subject employee will pose a direct threat without testing.
- Employers are cautioned against instituting blanket workplace alcohol (or substance) policies that specifically target employees returning from rehabilitation without regard to safety or performance issues.