

Drug Testing and Privacy - Recent Decisions

An Alberta Federation of Labour Analysis

July 2006

Introduction

Two recent legal decisions in Alberta strengthen the limits on random drug and alcohol testing in the workplace. Both decisions overturn employer drug testing policies on the grounds they are discriminatory, and both offer useful direction for unions and workers who are arguing against random drug testing policies.

This document is an attempt to offer a summary of the two decisions and their significance. It is not intended as a full legal analysis. Anyone wishing to utilize the decisions in a formal legal setting is advised to consult legal counsel before proceeding.

Chiasson Decision (May 15, 2006)

Significance: *Court of Queen's Bench decision rules that pre-employment drug testing is discriminatory due to its universal nature. Automatic termination (or failure to hire) due to a failed test is ruled to be unreasonable. Employers must offer accommodation or other alternatives.*

Kellogg, Root and Brown (KRB), a construction company working with Syncrude upgrades, offered a job to John Chiasson. KRB had a mandatory pre-employment drug test. The policy required pre-access testing of all non-union workers with automatic termination for a positive test. Chiasson took the test and began working on the job site. Nine days later, Chiasson was informed he had failed the drug test and he was immediately terminated. Chiasson admitted to using marijuana five days before the test, and to being a recreational user, but only on personal time.

The judge ruled that the policy of testing all new workers along with automatic termination was discriminatory:

"...I find prima facie discrimination. The KBR Policy combines mandatory pre-employment testing for all covered employees, automatic termination for a positive result and no accommodation. By purpose and effect it screens individuals from the work force based on a risk assessment that a positive drug test increases the chance an individual may be impaired at work some time in the future. ... In relying on general statistics to weed out a particular person, the Policy relies upon presumed personal traits and does not take into account the capacity, needs, merits and circumstances of the individual job applicant. ... The Policy creates a class of people, those who test positive, and then treats them all the same way by denying them employment. By doing so it fails to assess each prospective employee according to her or his own personal abilities, and instead judges them against presumed group characteristics." (Paragraph 61)

To summarize, the judge argued the policy is discriminatory because it treated all workers as if they were disabled by drug addiction, and treated all positive tests in the same manner. The judge argued a recreational user of drugs should be afforded the same protection under Human Rights law as a person disabled by addiction.

The judge made two other observations which are relevant. First, he noted that drug testing does not test for impairment, and so may not be the most effective tool for preventing workplace impairment. “Pre-employment urine tests do not test for nonimpairment at work and to the extent they may provide some information about the risk of such impairment, there are other much more direct, effective, efficient and individual methods for employers to monitor impairment at work.” (para. 132)

Second, the judge rejected claims that pre-employment testing made workplaces safer. “It is even less clear what, if any safety consequences can be attributed to pre-employment drug testing”. (para. 143)

The judge ordered KRB to revised its drug policy to either eliminate pre-employment drug testing, or alternatively, to institute a process of “assessment or accommodation to individuals failing pre-employment drug testing” (para. 145).

Read the full decision:

<http://www.albertacourts.ab.ca/jdb/2003-/qb/civil/2006/2006abqb0302.cor1.pdf>

Jackknife/Collins Decision

Significance: *Alberta Human Rights Commission Panel finds that drug and alcohol testing of all workers in a workplace is discriminatory under the Human Rights Act. Testing of workers in non-safety-sensitive positions cannot be justified.*

Two administrative workers for the Elizabeth Metis Settlement were fired after refusing to submit to a drug and alcohol test being applied to all workers of the Settlement. The policy was established following a Settlement Council meeting regarding drug and alcohol problems on the settlement.

The Panel found that testing all workers, with a policy of termination for a failed test, were discriminatory under the Human Rights Act. Quoting from an earlier Court of Queen’s Bench decision on the same case, the Panel argued:

A policy which requires current employees to undergo testing for drug or alcohol use, where potential consequences for testing positive include the loss of employment, treats those employees as if they were disabled by drugs or alcohol. It is thus in prima facie violation of s. 7(1) of the Human Rights, Citizenship and Multiculturalism Act. ...Employees whose employment is terminated as a result of refusing to be tested, thereby also perceived to be disabled as a result of substance abuse, similarly fall within the protection of the Act.” (para. 13)

The panel also raised questions about the validity of testing workers not in safety-sensitive positions. However, it never fully ruled on this item, as other issues were satisfactory to overturn the testing policy.

The panel ruled the testing, and the terminations arising from it, to be invalid, and ordered remedy to the two women, including costs.

Read the full decision:

http://www.albertahumanrights.ab.ca/legislation/Panel_Decisions/panel_decisCollinsJackknifeMay06.pdf

Conclusion

The AFL has been a longstanding critic of drug and alcohol testing in the workplace. We consider testing to be an unjustified violation of workers' privacy. Courts have ruled that drug testing is discriminatory, as it unfairly singles out people with dependency disabilities, or treats other workers as if they were addicted to drugs or alcohol.

The AFL also believes testing is an ineffective method for preventing the safety hazard of impairment at the workplace. Other methods, including adequate training of management, appropriate supervision and employee assistance programs, and efforts to lower workplace stress and conflict, are more effective at improving safety by tackling root causes of impairment or addiction.

The legal status of drug and alcohol testing in Canada has been unclear. There has been confusion about what employers can and cannot do with drug testing policies.

The two recent decisions help clarify the legal situation. Each offers a clear articulation of the boundaries to drug testing in the workplace. Employers are bound to respect human rights and the privacy of their workers. Each decision has clarified some of the boundaries of what employers can require in their testing policy.

The AFL will continue to monitor the legal environment for drug testing. We will also be producing a new drug testing guide in the near future.

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