

# Employment Law

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## Employee Alcohol Testing: When Does It Amount To Discrimination?

By Vito A. Gagliardi, Jr., Esq. and Suzanne E. Peters, Esq.\*

Requiring a self-disclosed alcoholic employee to submit to random breathalyzer tests and firing that employee for a positive test may result in discrimination lawsuits for New Jersey employers. On October 26, 2012, the New Jersey Appellate Division ruled in *A.D.P. v. ExxonMobil Research and Engineering Company* that Defendant ExxonMobil Research and Engineering Company ("Defendant") was not entitled to summary judgment dismissing a suit alleging discrimination based on a disability under the New Jersey Law Against Discrimination ("LAD"). *A.D.P. v. ExxonMobil Research & Eng'g Co.*, 2012 N.J. Super. LEXIS 171 (App. Div. Oct. 26, 2012). The court found that Defendant's Alcohol and Drug Abuse Policy was facially discriminatory because it treated alcoholic employees differently than non-alcoholic employees by imposing additional conditions on them. Absent any evidence of Plaintiff A.D.P.'s poor performance, Defendant failed to meet its burden of demonstrating that it would have terminated Plaintiff even if it had not considered her alcoholism.

**The Facts**

Plaintiff A.D.P. ("Plaintiff") worked for Defendant for 29 years. Throughout her early career, Plaintiff was consistently ranked as a top performer. In April 2005, she was promoted to the position of Senior Research Associate. Her ranking in this new position dropped, but she remained in the top third of employees. She never dropped to the bottom-tenth percentile of employees, a ranking that requires the underperforming employee to follow a "performance improvement plan."

Defendant's Alcohol and Drug Abuse Policy (the "Policy") stated that "[b]eing unfit for work because of use of drugs or alcohol is strictly prohibited and is grounds for termination of employment." *ExxonMobil* at \*6. Additionally, the Policy stated that: "[T]he Corporation recognizes alcohol or drug dependency as a treatable condition. Employees who suspect that they have an alcohol or drug dependency are encouraged to seek advice and to follow appropriate treatment promptly before it results in job performance problems." *Id.* The Policy also ensured that no employees with alcohol or drug dependencies would be terminated due to their request for help or because of involvement in a rehabilitation effort.

In 2007, Plaintiff voluntarily disclosed to a nurse at ExxonMobil that she was an alcoholic and subsequently enrolled in an inpatient rehabilitation program. At no time was Plaintiff the subject of any pending or threatened disciplinary action, nor was there any evidence that she had

either consumed alcohol at work or was ever deemed unfit for work. Additionally, Plaintiff was never advised that her job performance had fallen below an acceptable level.

After completing her rehabilitation program, Plaintiff met with Defendant's representatives. At this meeting, the representatives forced Plaintiff to sign an "after-care contract" that required her to abstain from alcohol and submit to random breathalyzer tests as a condition of her continued employment. Plaintiff testified that she signed the contract because she believed that, if she failed to sign it, she would have been terminated. Notably, Plaintiff was not subject to testing pursuant to a "last chance agreement," an agreement that suspends disciplinary action pending a probationary period in which the employee is afforded a chance to improve her performance. Indeed, testimony from Defendant's representatives demonstrated that the imposition of the conditions of the contract was unrelated to Plaintiff's job performance and that Plaintiff would have been terminated when she failed a breathalyzer test, regardless of her performance. Employees not identified as alcoholics were neither required to sign such a contract nor subject to alcohol testing except for cause.

Between October 29, 2007 and August 20, 2008, Plaintiff passed nine random breathalyzer tests. Two days after she passed the last of these tests, Plaintiff took two random breathalyzer tests. Her blood alcohol concentration was .047 and .043. Defendant terminated Plaintiff's employment solely due to the results of the breathalyzer tests.

#### Trial Court

Plaintiff filed a complaint alleging that (1) Defendant violated the LAD by discriminating against her because of her disability, and (2) her termination violated public policy. Both Plaintiff and Defendant filed motions for summary judgment. Defendant argued that Plaintiff's admission of her alcoholism triggered its Policy, which although facially discriminatory, was reasonable. The trial judge agreed, granting Defendant summary judgment. Plaintiff appealed.

#### Appellate Division

On appeal, the Appellate Division noted that the Policy's requirements of total abstinence and two years of random testing "were only imposed upon employees identified as alcoholics, demonstrating hostility towards members of the employee's class." *ExxonMobil* at \*19. Thus, the court noted that an employee's status as an alcoholic automatically triggered the requirement of total abstinence and random testing, regardless of the employee's performance. One failed breathalyzer test would terminate an alcoholic employee's position, whereas the use of alcohol alone would not be grounds for terminating the employment of other employees. Because Plaintiff presented direct evidence of hostility towards her protected class, Defendant bore the burden of demonstrating that the termination of Plaintiff's employment would have occurred regardless of her breathalyzer test results. However, Defendant failed to present any evidence suggesting that there were any issues with Plaintiff's job performance.

Instead of arguing that Plaintiff was unable to perform her job, Defendant relied on its Policy to argue that the conditions imposed were both reasonable and well-intentioned. The court disagreed and held that even if a policy is well-intentioned and rational, its "reasonableness must be measured within the context of the specific employee's job performance." *Id.* at \*23. Additionally, even if the Policy had a reasonable purpose, it "plainly imposed additional conditions upon Plaintiff's employment that were not imposed upon other employees who were not alcoholics." *Id.* Defendant also could not rely on a "safety

defense" -- arguing that the employee cannot do her work without posing a serious threat of injury to health and safety of herself and other employees -- because it failed to identify any substantial injury to Plaintiff or others in the workplace as a result of Plaintiff's alcoholism.

Because the burden shifted to Defendant, and Defendant failed to show that the termination of Plaintiff's employment would have occurred even if it had not considered Plaintiff's alcoholism, summary judgment dismissing Plaintiff's disability discrimination claim was inappropriate.

#### Lessons from *ExxonMobil*

In this case, Defendant admittedly terminated Plaintiff for "failing" a breathalyzer test (with a blood alcohol reading of about half of the concentration which would deem her too intoxicated to operate a car).

That standard was applied to her because she was an alcoholic, and was not applied to non-alcoholics -- Defendant's first problem. Also, there was no documented performance issue which would otherwise justify termination -- problem number two.

As a result of this decision, New Jersey employers should consult legal counsel and review their drug and alcohol use policies. Employers must recognize that careful adherence to a policy that provides for disparate treatment of a protected class -- those with disabilities, such as alcoholism -- will prove to be of little value as a defense in a discrimination suit.

*\*Ms. Peters has passed the bar in New Jersey and will be sworn in next month.*

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