Drug testing standoff

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Both Alberta and Ontario have released leading cases on drug testing but each has reached a different conclusion.

Pre-employment drug testing is a critical issue for employers in safety-sensitive industries. But an employer's ability to conduct such testing continues to be the subject of litigation. And as the court rulings continue, the legal waters grow murkier.

A recent Alberta Court of Appeal decision, *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company,* upheld an employer's pre-employment drug testing program relating to a casual drug user who tested positive and was dismissed. The issue for employers? The case conflicts with a much earlier Ontario Court of Appeal decision that reached the opposite conclusion.

Ontario's stand on drug testing: Entrop decision

In its 2000 decision in *Entrop v. Imperial Oil Limited*, the Ontario Court of Appeal rejected pre-employment (and random) drug testing for employees on the basis that the technology used did not measure current impairment, only whether the drug was present in the body.

The Court determined that an employer who administers a drug test cannot tell whether that person is impaired at the moment or will ever likely be impaired while on the job. For this reason, the Court held that an employer could not justify pre-employment testing for employees in safety-sensitive positions as reasonably necessary to accomplish the goal of a safe workplace that was free from impairment.

Alberta decision supports employer

The Alberta Court of Appeal released its decision in *Kellogg* in December 2007. The case involved a casual marijuana user who claimed to be discriminated against on the basis of perceived disability.

Kellogg Brown & Root (KBR) was a construction company helping Syncrude Canada in its plant expansion near Fort McMurray. KBR agreed to hire the plaintiff as a receiving inspector in 2002, pending successful completion of the company's pre-employment medical and drug screening.

The plaintiff started work, but was told several days later that he had failed the drug screen. He admitted to using marijuana five days before the test and had assumed it would be out of his system. He admitted to being a casual marijuana user but was not drug dependent.

The Alberta Human Rights Panel upheld the KBR drug testing policy, ruling that it was not discriminatory on the basis of perceived disability. However, on appeal, the chambers judge overturned this finding and found discrimination, stating that the policy "not only treats all prospective employees who test positive for drugs the same, it treats them as if they were drug dependent and further assumes that they are likely to report to work impaired."

The Alberta Court of Appeal disagreed and upheld the employer's drug testing policy, noting the lingering effect of cannabis in an employee's system.

"The evidence disclosed that the effects of casual use of cannabis sometimes linger for several days after its use. Some of the lingering effects raise concerns regarding the user's ability to function in a safety challenged environment. The purpose of the policy is to reduce workplace accidents by prohibiting workplace impairment. There is a clear connection between the policy, as it applies to recreational users of cannabis, and its purpose. The policy is directed at actual effects suffered by recreational cannabis users, not perceived effects suffered by cannabis addicts. Although there is no doubt overlap between effects of casual use and use by addicts, that does not mean there is a mistaken perception that the casual user is an addict."

The Alberta Court expressly declined to follow the reasoning in the *Entrop* decision, and held that pre-employment drug testing in safety sensitive positions was not discriminatory under the *Human Rights Act*, at least in respect of casual users.

Supreme Court of Canada may rule

In April 2008, the Alberta Human Rights and Citizenship Commission sought leave to appeal the Kellogg decision to the Supreme Court of Canada. If the leave application is successful, the Supreme Court will be in a position to bring clarity to an area of law that has long been uncertain for employers.

In the meantime, employers who are considering the implementation of a drug-testing policy, or changing an existing policy, should be sure to get legal advice before introducing any testing procedures.

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