

IN PRACTICE

EMPLOYMENT LAW

A Sobering Reality When Terminating an Alcoholic Employee

Reasonableness is not the standard when there is direct evidence of discrimination

By Vincent A. Antonello

We employment lawyers, of course, know that alcoholism is considered a disability, both under the federal Americans with Disabilities Act and the New Jersey Law Against Discrimination. Employers have become more educated about the issue and have imposed workplace policies to address the addictions of their employees. The substance abuse issue typically arises in the context of determining an employer's obligation to "reasonably accommodate" an alcoholic/addict, or determining whether an employer has a right to conduct drug/alcohol testing of its employees.

Generally, under the law, employers are not expected to tolerate inappropriate behavior or poor performance on the part of alcoholics/addicts, and they may perform "reasonable suspicion"

Antonello is senior counsel at Resnick Law Group in Roseland. The practice is dedicated to all aspects of employment law.

testing of employees who appear to be intoxicated in the workplace. But, while *reasonableness* is the guidepost for so many of these and other questions under the law, the recent New Jersey Appellate Division decision in *A.D.P. v. ExxonMobil Research and Engineering Co.*, 428 N.J. Super. 518 (App. Div. Oct. 26, 2012), makes it crystal clear that, when evaluating the termination of employment of an alcoholic employee with no documented performance issues, based on a policy that expressly treats alcoholics differently than others, *reasonableness* is simply not the standard.

Background and Procedural History

The plaintiff had worked for ExxonMobil for 29 years when she was required to sign an aftercare contract that required her to totally abstain from alcohol and submit to at least two years of random alcohol testing as a condition of her continued employment. Such requirements originated from a voluntary admission by the plaintiff to an ExxonMobil nurse that she was an alcoholic and intended to

check in to a rehabilitation center to receive treatment. The admission was not the result of an inquiry or pressure from ExxonMobil based on poor job performance. In fact, the plaintiff was performing quite well, and there was no evidence that she was drinking at work.

The aftercare contract was an express requirement under ExxonMobil's Drug and Alcohol Use Policy, which stated, in part:

Any employee returning from rehabilitation will be required to participate in a company-approved aftercare program. If an employee violates provisions of the employee Alcohol and Drug Use Policy, appropriate disciplinary action will be taken.... If an employee suffering from alcohol or drug dependency refuses rehabilitation or fails to respond to treatment or fails to meet satisfactory standards of effective work performance, appropriate disciplinary action, up to and including termination, will be taken.

...

[ExxonMobil] may also require employees to submit to ... alcohol and drug testing where cause exists to suspect alcohol or drug use, including workplace incidents. Unannounced periodic or random testing will be conducted when an employee meets any one of the

following conditions: has had a substance abuse problem, or is working in a designated position identified by management, a position where testing is required by law, or a specified executive position. A positive test result or refusal to submit to a drug or alcohol test is grounds for disciplinary action, including termination.

Here, the only condition for testing that applied to the plaintiff was her admitted alcoholism. When she, in turn, failed a random breathalyzer test, ExxonMobil fired her. The plaintiff sued ExxonMobil in Superior Court, Law Division, Essex County, asserting disability discrimination in violation of the New Jersey Law Against Discrimination (LAD), among other claims.

Trial Court Decision

After the close of discovery, both parties moved for summary judgment. The trial court denied the plaintiff's motion, but granted summary judgment in favor of the defendant, dismissing the plaintiff's claims. It did so by focusing its analysis on the reasonableness of ExxonMobil's Alcohol and Drug Use Policy, and not on whether the defendant would have made the same employment decision absent the plaintiff's status as an alcoholic.

The plaintiff appealed the trial court's decision granting summary judgment to the defendant, but did not appeal the decision denying her own motion for summary judgment.

Appellate Decision

The Appellate Division defined the issue on appeal as follows: whether summary judgment was properly granted to an employer that required a long-term employee whose job performance was satisfactory to submit to random alcohol testing, and terminated her employment when a test showed she had used alcohol. The core of the plaintiff's argument was that ExxonMobil subjected her to additional terms and conditions of employment because she is an alcoholic, in violation of the LAD, and that no legally

justifiable basis was provided for such disparate treatment.

The court began its analysis by pointing out that the plaintiff's claim (and similar discrimination claims) may be proven by either direct or circumstantial evidence. It set forth the respective "burden-shifting" methodologies that apply in each instance. Under the *McDonnell Douglas* framework, for cases involving only *circumstantial* evidence, the court explained that the burden of *persuasion* always remains with the plaintiff, and the employer's sole obligation, after the plaintiff sets forth a prima facie case, is to carry a minimal burden of *production* to present a legitimate, nondiscriminatory reason for its actions. By contrast, the court emphasized, in cases where *direct* evidence of discrimination exists, under the applicable *Price Waterhouse* framework, the employer has a far more meaningful task once a plaintiff sets forth a prima facie case — the burden of *persuasion* shifts to the employer to prove that it would have made the same employment decision absent the plaintiff's membership in a protected class (in this case, absent the plaintiff's disabled status as an alcoholic).

Here, the court noted that the plaintiff relied, in part, upon the plain language of ExxonMobil's Alcohol and Drug Use Policy, which contained requirements of total abstinence and a minimum of two years of random testing that were imposed *only* upon employees who were identified as alcoholics. That language, the court reasoned, was "facially discriminatory" and constituted *direct* evidence of a hostility toward alcoholics. Moreover, proof that there was a *direct* causal connection between that hostility and termination of the plaintiff's employment was provided by testimony, on the part of a human resources representative, that the plaintiff's employment was terminated solely because she violated the policy and not because of any performance issue whatsoever. Indeed, there was testimony that the plaintiff would have been fired "even if she were performing in the top one percent of all employees."

Given this direct evidence of discrimination, the court ruled that the

Price Waterhouse framework applied, and since there was no dispute that the plaintiff presented a prima facie case of discrimination, the burden of *persuasion* should have shifted to ExxonMobil to prove that it would have subjected the plaintiff to random testing and terminated her employment even if she were not an alcoholic. On the record before the court, it was clear that ExxonMobil did not even attempt to make that showing, instead basing its defense on the "reasonableness" of the policy, including arguments that it had a "legitimate business reason" to impose such a policy and that the policy constitutes a "reasonable accommodation" of the plaintiff's alcoholism. In the words of the court, "[i]n advancing this argument, ExxonMobil fails to acknowledge the burden of persuasion it carries."

Viewing the evidence in the light most favorable to the plaintiff, the Appellate Division held that the trial court erred by granting summary judgment in favor of ExxonMobil on the plaintiff's disability discrimination claim, and remanded the case to the trial court for further proceedings. The appellate court underscored the fact that the plaintiff was not subject to a "last chance agreement," which might have been extended to an employee on shaky ground stemming from poor performance due to alcoholism, and that the plaintiff was not the subject of any pending disciplinary action or internal investigation.

Impact of the Decision

The decision in *A.D.P. v. ExxonMobil* speaks loudly and clearly to employers who have drug and alcohol policies that impose upon alcoholics and addicts additional terms and conditions of employment because of their disability. Based on the precedent now set by the Appellate Division, the language of such policies, alone, may very well dramatically change the landscape of a disability discrimination case. It may buy the employer the duty to prove that it would have made the very same employment decision even absent the employee's status as an alcoholic/addict — a showing that is not an easy one when the employee is a top performer. Just ask ExxonMobil. ■