

Insight

IN-DEPTH DISCUSSION

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EEOC Increases Scrutiny of Employer Actions Taken Against Prescription Drug Users

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Prescription drug abuse has made national news in the last few years. In March 2016, President Obama noted that “prescription opioid abuse and [the] heroin epidemic claims the lives of tens of thousands of Americans each year,” and that he was taking more steps to address the epidemic. He stated on Twitter that the “epidemic is harming too many Americans and their families,” but that “treatment works and recovery is possible.”¹

This does not mean, however, that employers must not be mindful of federal and state disability laws that protect those taking prescription drugs for valid medical conditions. Two recent lawsuits brought by the Equal Employment Opportunity Commission (EEOC) alleging disability discrimination claims in violation of the Americans with Disabilities Act (ADA) underscore the importance of engaging in an interactive process with job applicants and employees and providing reasonable accommodations to those taking prescription drugs for medical conditions.

Failed Drug Test Due to Valid Prescription Drug Use

On September 14, 2016, the EEOC filed a lawsuit in a South Dakota federal court against a casino on behalf of a job applicant after her pre-employment drug test revealed a positive drug test result. According to the EEOC, the applicant suffered from a back and neck impairment, which limited her ability to perform certain tasks, such as lifting and bending. After receiving the positive test result, the casino withdrew her job offer. The EEOC alleges that when the applicant tried to explain to the casino that the positive drug test was due to legally prescribed pain medication, even offering to provide documents to support this, the casino still refused to hire her.

¹ Melanie Garunay, White House Blog, [President Obama Is Taking More Steps to Address the Prescription Drug Abuse and Heroin Epidemic](#) (Mar. 29, 2016).

The crux of the EEOC's lawsuit is that the casino's refusal to hire an applicant taking lawful prescription drugs due to a disability violated the ADA. The lawsuit also challenges the casino's blanket policy requiring all employees, regardless of whether they work in safety-sensitive positions, to disclose their prescription or non-prescription drug use.

Doctor's Note Stated Treatment Included Pain Medication

Two weeks later, on September 28, 2016, the EEOC filed a complaint against a regional medical center alleging it terminated a physician after learning about his use of narcotic drugs to treat his chronic pain. According to the lawsuit, which was filed in Georgia federal court, the physician provided the medical center with a letter from his doctor, which stated that he was undergoing treatment for a chronic pain condition that limited the functioning of his musculoskeletal and neurological systems. The letter also stated that the physician's treatment plan required him to take prescribed pain medication and receive spinal injections.

According to the lawsuit, after receiving this letter the medical center removed the physician from the schedule pending further evaluation of his condition. The medical center then notified the physician of its intention to terminate his contract unless he resigned because, according to the lawsuit, the medical center believed he could not meet the requirement of his job duties due to his pain medications and spinal injections. The EEOC's complaint alleges that the physician could have performed his job safely and competently and therefore the medical center's termination decision and purported failure to have any dialogue with the doctor about the issue violated the ADA.

According to the EEOC's press release issued in conjunction with the filing of this action, "[e]mployers have an obligation to conduct individualized assessments when they have a concern about an employee's ability to safely perform his or her job duties. ... [The] EEOC will continue to hold employers accountable when they summarily dismiss employees based on unsubstantiated fears about a perceived disability."²

Implications for Employers

Employers can lawfully test employees for prescription drug abuse and can regulate such abuse in the workplace and test pre-employment applicants. The ADA specifically states that tests for illegal drug use are not medical examinations and are not evidence of discrimination against recovering drug abusers when used to ensure the individual has not resumed the illegal drug use. If an employee uses a prescription drug that is not prescribed to him or her, this is considered illegal drug use and the employer can impose discipline for violating its policy against illegal drug use.

That said, these cases serve as a reminder that employers should avoid making adverse decisions based on misperceptions or a lack of information about the effect of prescription drug use on the employees' ability to perform their job duties. Moreover, employers should take precautions before implementing blanket drug-testing policies that do not account for the need under the ADA to engage in an interactive process with individuals taking prescription medications and, if necessary, provide reasonable accommodations. Finally, these cases demonstrate the importance of ensuring that certain policies and practices, including requirements that employees report their prescription drug use, be limited to those working in safety-sensitive positions.

2 Press Release, EEOC, [EEOC Sues Physicians Management Groups For Disability Discrimination](#) (Sept. 28, 2016).