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## Mandatory Follow-Up Alcohol Testing Violates Rights of Alcoholic Employees, NJ Appeals Court Concludes

By Nancy Delogu and Eric Savage

A workplace policy requiring all employees who self-identify as in need of substance abuse treatment to submit to random alcohol testing following their return to work constitutes disability discrimination on its face, according to a recent published decision of the New Jersey Appellate Division, *A.D.P. v. ExxonMobil Research and Engineering Co.*, No. A-4806-10T4 (Oct. 26, 2012). Finding that the employer's demand for random follow-up alcohol tests could not be justified as either a reasonable safety measure or compelled by "business necessity," as applied to an office worker with no history of poor performance, the court reinstated the employee's claim of disability discrimination brought under the New Jersey Law Against Discrimination (LAD).

"A.D.P.," a long-term ExxonMobil employee, voluntarily informed the company that she needed assistance with alcohol abuse, and took a leave of absence to pursue treatment. In response, ExxonMobil required her to sign an aftercare agreement that required her, as a condition of continued employment, to abstain completely from consuming alcohol and to submit to random breathalyzer tests. Significantly, A.D.P., who had worked for ExxonMobil for 29 years and had a history of good to excellent performance, had not violated the ExxonMobil rules on drug and alcohol use, was not subject to discipline for any other reason, and did not work in a safety-sensitive role. Rather, ExxonMobil's representative testified that ExxonMobil policy required A.D.P. to sign the abstinence and follow-up testing agreement simply because she had self-identified as an alcoholic.

After A.D.P. completed both inpatient and outpatient treatment and returned to work, she was required to submit to random breath tests. Over the next 11 months, she took and passed nine suspicionless, unannounced alcohol tests. Two days after her last test, she was again selected for testing, and this time she tested positive, with results between 0.04 and 0.05 percent alcohol in her system. ExxonMobil discharged her on the basis of those test results.

Examining the allegations, including the fact that the ExxonMobil policy required only employees who self-identified as alcoholics to submit to random alcohol tests, the court concluded that the policy discriminated on its face against employees based on their status as alcoholics, and was, therefore, direct evidence of discrimination. As such, the court explained, to defeat A.D.P.'s suit ExxonMobil was required to show that its policy and its actions pursuant to the policy were justified either because the nature and extent of A.D.P.'s disability reasonably precluded her from performing her job, or that she had given her employer another reason to discharge her, such as by engaging in misconduct or otherwise failing to meet legitimate performance expectations.

In defense of its policy, ExxonMobil argued that its rule reflected only a legitimate desire to provide for the health, safety, and effective functioning of its employees, as permitted by the LAD's provisions on disability discrimination. The company also argued that the alcohol testing program was part of an employee wellness program, and that the policy was employed to accommodate A.D.P.'s alcoholism. Ultimately, ExxonMobil's arguments were unavailing, at least with respect to its application of the policy to A.D.P.

Safety concerns could not justify the policy as applied, the court held, because ExxonMobil had no reason to believe A.D.P.'s condition would pose a serious threat to the health and safety of herself or other employees. The LAD's "safety" defense (which is similar to a "direct threat" defense under the Americans with Disabilities Act) requires an employer to demonstrate that it "reasonably arrived at the conclusion that the employee's handicap presented a materially enhanced risk of substantial harm in the workplace." To be considered reasonable, however, an employer must have made an individualized assessment of the safety risk posed by the individual employee based on objective medical evidence, work duties, and medical history. Because no individualized assessment of any kind was conducted in A.D.P.'s case, the court reasoned, ExxonMobil had no reason to believe that A.D.P. might pose a threat to workplace safety because of her status as an alcoholic. In fact, the court concluded that ExxonMobil's stated policy of imposing uniform follow-up testing requirements on any identified alcoholic served only to confirm the facially discriminatory nature of the policy.

The court also rejected ExxonMobil's assertion that its policy served as a reasonable accommodation, as A.D.P. had not asked for an accommodation other than leave to attend an in-patient program. Noting that ExxonMobil's duty to accommodate A.D.P.'s condition ended once it had provided that accommodation, the court also pointed out that there was no interactive process between A.D.P. and ExxonMobil regarding the terms of her after-care contract, as would be required in evaluating a reasonable accommodation. The court flatly rejected the assertion that ExxonMobil's unannounced alcohol testing policy qualified as a voluntary employee wellness program. In a small win for ExxonMobil, the court also rejected A.D.P.'s assertion that her termination also violated her right to privacy guaranteed by the New Jersey Constitution, stating simply that because her claim did not seek to vindicate interests independent of those already protected by the LAD, it was barred.

The LAD's provisions protecting individuals with disabilities are very similar to the protections offered under the Americans with Disabilities Act (ADA), a fact the court acknowledged, although New Jersey courts have in the past recognized that the LAD may be more protective of alcoholics than the ADA. In this case, the court drew upon ADA jurisprudence, and guidance from the federal Equal Employment Opportunity Commission, to illustrate its analysis. Reviewing the EEOC guidance in particular, the court concluded that under the ADA an employer may not require an employee to submit to random, unannounced alcohol testing absent an individualized determination that testing is necessary to ensure that the employee poses no risk to himself or others in the workplace. The court also noted that A.D.P. had not violated ExxonMobil's rules on drug or alcohol use prior to identifying as an alcoholic, and that, therefore, ExxonMobil could not defend its actions as a reasonable condition of a last-chance agreement as New Jersey law might permit.

It is important for employers to recognize that this case does not hold that employers may never require random alcohol tests of employees who have self-identified as alcoholics (or, presumably, of those who have previously violated an employer's rules on workplace alcohol use). Rather, it warns against overreaching by requiring employees to submit to medical examinations (alcohol tests) when those tests do not meet the requirements of state (or federal) law. Reading between the lines of the opinion, it seems clear that had A.D.P. worked in an ExxonMobil refinery in a safety-sensitive job, ExxonMobil may have had reason for concern about her ability to work safely in that environment. Presumably, ExxonMobil could have obtained information about A.D.P.'s condition and prognosis from a medical professional that would have allowed it to determine whether and for how long unannounced follow-up alcohol tests were reasonably necessary to ensure that she did not pose a safety risk to herself or others. The case does serve as a useful reminder that, even if employees work in safety-sensitive roles, employers should not prescribe follow-up alcohol tests and other medical monitoring of those employees as a matter of policy, but must tailor their inquiries to individualized circumstances as permitted by law.

[Nancy Delogu](#) is a Shareholder in Littler Mendelson's Washington, D.C., and Northern Virginia offices, and [Eric Savage](#) is a Shareholder in the New York City and Newark offices. If you would like further information, please contact your Littler attorney at 1.888.Littler or [info@littler.com](mailto:info@littler.com), Ms. Delogu at [ndelogu@littler.com](mailto:ndelogu@littler.com), or Mr. Savage at [esavage@littler.com](mailto:esavage@littler.com).