

## **Preventive Law: Substance Abuse and the ADA**

Who can forget the Exxon Valdez disaster, when an impaired ship captain's error caused catastrophic damage both to the environment and Exxon's bottom line? In an attempt to avoid a repeat of this disaster, Exxon implemented a policy permanently removing any employee who has ever undergone treatment for substance abuse from certain safety-sensitive, little supervised positions (such as a ship captain) - even if the employee has not had a problem for decades. This policy impacted approximately 10 percent of Exxon's workforce.

The EEOC was not happy and filed suit on behalf of a number of Exxon's employees. *EEOC v. Exxon Corp.*, 2000 U.S. App. Lexis 1886 203 F.3d 871 (5th Cir. 2000), claiming that the policy violated the ADA. The district court initially agreed with the EEOC; however, after reviewing the history and public policy behind these regulations, the 5<sup>th</sup> Circuit appeals court rejected the EEOC's position that the defendant had to prove that each affected employee personally posed a direct threat to other employees or to the public safety.

The court held that employees who established proper business necessity standards, such as fitness requirements for firefighters, and applied those evenhandedly across the pool of employees did not have to prove that each individual employee excluded was a direct threat. The court stressed that this does not give employees carte blanche to exclude the disabled, but changes the nature of the proof that plaintiff must show to prevail. To attack a business necessity standard, the plaintiff must show that it is either not a necessity or that it is not evenly applied.

### **Facts of the Case**

Exxon claimed that, because the policy minimized the risk of accidents should an employee relapse into substance abuse, it promoted job safety, furthered environmental protection, and reduced Exxon's future tort liability. The Equal Employment Opportunity Commission ("EEOC") argued that, by screening out a broad class of individuals with disabilities, Exxon's policy violated the Americans with Disabilities Act ("ADA"). Based upon its own Interpretive Guidance, the EEOC claimed that, in order to institute a safety-related, broad-based qualification standard based upon a disability, an employer must always demonstrate that the individual employees affected by the policy posed a direct threat to the health or safety of themselves or others to prove that the qualification standard is job-related and consistent with business necessity.

Reversing the ruling of the U.S. District Court for the Northern District of Texas granting partial summary judgment in favor of the EEOC, the Fifth Circuit held that, if an employer institutes a policy affecting a broad class of disabled employees, the policy must be consistent with business necessity, but the employer need not demonstrate a direct threat in every case.

### **ADA Analysis and Impact**

The ADA prohibits an employer from using general qualification standards to screen out a broad class of disabled individuals. Nevertheless, if physical or mental qualification standards adversely impact individuals with disabilities, employers may raise two affirmative defenses. First, Section 12113(a) of the ADA permits an employer to screen out an individual if the qualification standard is job-related and consistent with business necessity: It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity.

Second, Section 12113(b) allows an employer to raise a “direct threat” affirmative defense if the employee's disability poses a significant threat of harm to the himself/herself or others. This defense is much more difficult to establish because it requires that an employer be able to prove - in each individual case- that a particular employee poses a significant threat in the workplace because of his or her inability to satisfy the qualification standard. Speculation that a threat may be posed will not sustain the direct threat defense.

The Exxon decision suggests that employers will have more leeway to design and implement safety policies and procedures without risk of violating the ADA even if the qualification standard screens out a broad class of disabled individuals, as long as the employer can prove that the standard is job-related and consistent with business necessity. In addition, although no other court of appeal had addressed this specific issue, the Fifth Circuit noted a "general trend" among the appellate circuits to rule that employees who are unable to meet general safety requirements are unqualified for their jobs regardless of whether the employer can prove the direct threat defense

### **Employees Under the Influence**

There is no way to predict the opinions of the courts in the future with respect to substance abuse and the ADA. The courts have, however, already strongly enforced the belief that a company has a duty to provide assistance to its employees who may have a substance abuse problem. Help begins with detection; without question, a person who is dependent on drugs or alcohol is not the same person s/he was before using. Often, behavior changes appear as “warning signs” signs on the job. The most common signs of a drug or alcohol problem are changes in:

**Personal Appearance** - Comes to work inappropriately dressed; does not appear healthy or physically capable (e.g. slurred speech, unsteady gait, blood-shot eyes, sleepy); appears unclean or unwashed at the beginning of **work**; no regular change of clothes; offensive odors such as bad breath or body odor.

**Dependability** - Takes extended weekends (Monday/Friday absences); consistently late; leaves early; absent from work area; excessive sick leave; takes unauthorized leave; repeated absences, misses deadlines, doesn't follow procedures .

**Problem Solving** - Solutions which are presented are usually ineffective; rarely follows through and checks for results; can't handle complex assignments; tends to ignore problems or delegate inappropriately; relies too heavily on others to complete the work; cannot define the problem; covers up the problem; blames others, work frequently needs to be redone.

**Job Knowledge** - skills are not current; doesn't understand regulations; misuses equipment; doesn't retain instructions; needs constant supervision; doesn't understand or follow safety/security procedures; requires frequent instruction or assistance; learns very slowly; unable to work independently.

**Productivity** - Low volume of work; takes many breaks; wastes time; needs constant reminders to complete work; does not complete assigned tasks; overwhelmed by realistic workload; unavailable for extra work; cannot increase workload when needed; volatile; easily upset; inconsistent in the workplace.

**Judgment** - Makes decisions without regarding available information; will not reverse decisions in face of mistakes; insensitive; tactless; does not use common sense; illogical reasons for behaviors; violates confidentiality; poor ability to size up situations; does not understand the whole picture; takes inappropriate actions; inattentive to safety procedures

**Working With People** - Poor listening skills; inability to communicate; uncooperative; projects negative attitude to customers, co-workers, and the public; unable to resolve conflicts; openly mistrusts many people; edgy; easily and frequently angered or hurt by others; slows work of others; complains; is hostile; argues; stimulates complaints from co-workers; tends to blame others.

### **The Codependent Manager**

It's hard to watch an employee throw his or her life away. Which is probably why the number one mistake managers make is to fall into the trap of thinking if they pick up the slack or cover for the employee long enough, s/he will get his or her life back together and everyone will live happily ever after. I've seen managers ignore performance or productivity problems, coworkers cover up for substance-abusing employee, and employees pick up the additional workload created by a substance dependent manager.

Unfortunately, not only do these "favors" ultimately hurt the substance abuser, they create legal liability for the employer through 1) an increase in the likelihood the employee will engage in risky or inappropriate behavior; 2) a higher chance the person will be involved in on-the-job accidents; and 3) better odds the person will damage equipment or property. By recognizing and intervening to hold a substance abuser responsible for his/her own behavior, you are helping him/her to take the first step on the road to recovery.

In order to deal with drugs in the workplace, companies should do the following:

1. Write a clear and thorough company policy on drugs, including drug-

testing procedures.

2. Conduct a thorough pre-employment screening of all new hires.
3. Implement a pre-employment drug-screening program.
4. Implement an Employee Assistance Program (EAP).
5. Communicate your policy to all employees. The policy should be communicated via a live or audiovisual presentation.
6. Train your supervisors and managers to recognize signs of drug abuse and to use an effective documentation system.
7. Implement an anonymous information tip line.
8. Give your supervisors and managers an action plan to follow once they report a suspected employee.
9. Conduct a thorough investigation into reported drug usage and document all evidence.
10. Confront the employee and follow through with the appropriate action as indicated by company policy.

Outside counsels can help their employers by insuring that human resource professionals understand the legal issues overlapping workplace substance abuse – issues ranging from right to privacy and the ADA all the way to criminal offenses including illegal drug possession or pedaling. In particular, they can help internal staff understand the limits of their role and the need to call in qualified professionals to deal with the legal implications. They can also encourage human resource professionals to train their managers in the following steps:

**1. Observation:** Managers and supervisors need clearly delineated performance standards as well as training in how to accurately develop, communicate, and monitor objective job performance standards. They must also understand the need to observe and document any time these standards are not being met.

**2.. Documentation:** Managers should be trained to document any actions, appearance, or conduct that suggests drug use while on duty. This report should be completed within 24 hours of the observed behavior, and should focus exclusively on the observed behaviors and the impact of those behaviors.

**3. Make a Plan:** Supervisors need to know how to counsel and/or discipline an employee for poor performance. In particular, they should plan the meeting in advance, set clear goals, anticipate the employee's possible responses, and plan a reply. They should also know what resources are available.

**4. Talk to the Employee:** In talking with an employee about behavior or performance changes, a manager should have an appropriate second party, preferably someone from employee relations, attend as a witness and document your meeting.

**5. Follow Up:** Managers should continue to monitor the employee's progress. When an employee has undergone substance abuse treatment and returned to the workplace:

- Offer no preferential or special treatment.
- Give the individual plenty of feedback concerning his/her progress.
- Continue to document observed behaviors.

### **Unfit for Duty**

As can be seen from the Exxon decision, safety is always an employer's top consideration. Supervisors should be taught to take an employee off the job if any doubt exists about the employee's fitness to perform a specific task. When an employee is showing obvious signs of impairment (drowsy, careless, inattentive) on the job, the following steps should be followed:

- Do not allow an individual with safety sensitive duties to operate any equipment.
- Do not yell at or threaten him/her. **Never argue with someone under the influence.**
- Do not confront an impaired employee in public. Bring him/her into a private office to discuss the situation. Have a witness present.
- Never accuse anyone of alcohol or drug abuse. Even when there is overwhelming evidence of drug or alcohol use, you are taking an unnecessary legal risk to make the statement that an employee is an alcoholic, drug user, or addict. There is no risk in asking an employee what is wrong, or asking whether he/she is feeling all right.
- In fact, there is an obligation to make an inquiry. There is no risk in recording what you saw or heard. Simply use your own eyes, ears, nose, and common sense and record your observations objectively. Do not give your opinion, or diagnosis of what the problem is even if you are correct. Make inquiries about observed behaviors, but **do not diagnose!**

### **A Policy that Promotes Prevention**

In spite of the court's endorsement of Exxon's substance abuse policy, employers must proceed with caution. Safety policies related to disabilities should (1) narrowly tailor their policies to address the specific business concern; (2) base their policies on empirical evidence, including scientific and medical research; and (3) avoid policies based on prejudices and stereotypes. In evaluating whether the risks addressed by a safety-related policy are in keeping with business necessity, courts will likely weigh the magnitude of the possible harm as well as the probability of occurrence. The high relapse rates following substance abuse treatment (more than 50 percent two to four years after

treatment) likely worked in Exxon's' favor in proving the practical business necessity of their policy.

In general, an effective substance abuse policy:

- Applies to everyone, including top managers.
- Encourages voluntary participation in substance abuse treatment, whenever possible, and assures the employee that job security will not be prejudiced..
- Includes information about prevention, identification, treatment and rehabilitation.
- Includes a program on the prevention of alcohol and drug related problems in the workplace through information, education and training.
- Addresses how treatment or evaluation referrals are made.
- Clearly explains the organization's drug testing policy.
- Describe the duties and responsibilities of the individual during and after treatment.
- Encourages reviews of the policy and program at regular intervals
- Ensures employees that participation in treatment and information arising from that participation shall remain strictly confidential.
- Makes clear that the procedures for assisting employees with substance misuse related problems are separate from the disciplinary procedure.
- Addresses at what stage or in what circumstances the disciplinary procedures will be invoked, for example if an individual with a drug or alcohol related problem refuses assistance, denies the problem, or discontinues a course of treatment and reverts to unsatisfactory levels of performance and conduct.
- Outlines which tasks are "safety critical," so being under the influence of drugs or alcohol becomes an immediate disciplinary offence.

Blues singer Billie Holiday once said, "There is no solitary confinement outside of jail." A drug or alcohol habit not only affects the addicted employee, it can wreak havoc on the work of coworkers and managers who must deal with him. An employer who proactively addresses workplace substance abuse through effective policies, procedures, and program is not only helping prevent an abusive or enabling work environment; s/he may ultimately help the employee escape from the prison of addiction.

