



183 Investigating Drug Abuse in the Public Sector

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PRESENTATION TO:
OHIO SAFETY CONGRESS

INVESTIGATING DRUG ABUSE IN THE PUBLIC SECTOR

PRESENTED BY:
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Columbus, Ohio
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DFHK was recognized as one of the 2011-2012 U.S. News-Best Lawyers® in areas of Employment Law-Management, Labor Law-Management and Litigation-Labor & Employment. Additionally, several attorneys in the firm have been recognized by their peers as Super Lawyers® and Best Lawyers® for their outstanding work in areas of Employment and Labor Law and Litigation.



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CONDUCTING EFFECTIVE INVESTIGATIONS OF WORKPLACE DRUG ABUSE

I. BEGINNING THE INVESTIGATION

A. When to Investigate?

Employers should investigate allegations of employee drug abuse any time an employer has reasonable suspicion to believe an employee is using illegal drugs or abusing prescribed drugs. So long as the employer has a good faith belief that an employee is abusing drugs which may have violated a work rule, then an investigation should ensue. Allegations of employee drug abuse can be made by other employees and members of the general public that witness the alleged misconduct. Investigations may be necessary for both on-duty and off-duty drug abuse. Employers should not disregard any complaint until it has considered whether the complaint has any basis.

Reasonable Suspicion – Arises when a supervisor has reasonable cause to believe that that an employee may be impaired as a result of drug or alcohol use. The supervisor's assessment should be based on personal observation of the employee's behavior. Supervisors should document in writing the behaviors that give rise to the suspicion that the employee is under the influence of drugs and/or alcohol.

According to Ohio Adm. Code Section 123:1-76-10(B), such reasonable suspicion must be based upon objective facts or specific circumstances found to exist that present a reasonable basis to believe that an employee is under the influence of, or is using or abusing, alcohol and/or other drugs. Examples of reasonable suspicion shall include, but need not be limited to, slurred speech, disorientation, and abnormal conduct or behavior.

B. Why Investigate?

Undoubtedly, investigations may be both timely and costly. Therefore, employers may wonder why an investigation is necessary. Several reasons exist as to why employers should investigate allegations of employee drug abuse.

1. Avoiding Liability. One answer to the question “Why should we investigate allegations of employee drug abuse?” is to avoid liability. Employers can be found liable for the improper acts of its employees. In many instances, courts have levied large monetary awards against employers for the conduct of their employees. However, a strong employer defense is that it promptly acted to discontinue or alleviate the alleged misconduct. Prompt action is evidenced by an investigation. By acting in a timely manner to investigate and resolve the allegation, employers can insulate themselves from large jury verdicts.

2. Imposing Discipline. When an investigation has the potential outcome of disciplinary action, an employer must gather sufficient evidence to support its decision. If an employee is disciplined as the result of an investigation, the information obtained during the investigation will be useful should the employee challenge the decision to implement discipline. Regardless of whether the employee challenges the discipline through a grievance process culminating with binding arbitration, in a judicial forum or at the State Personnel Board of Review, a neutral party will more likely uphold the employer's decision to discipline an employee if it is supported by facts and documentation gathered during an investigation during which the employee was afforded the required rights.

It is also necessary to impose discipline against an employee for drug abuse so that the employer can establish a practice for dealing with future instances of similar conduct. Properly investigating all allegations of employee drug abuse and imposing discipline in a similar manner will avoid employee claims of disparate treatment.

3. Quieting Workplace Rumors. Rumors of employee drug abuse may result in inefficiency or poor production in the workplace. A thorough employee investigation can be fruitful for dispelling rumors of employee drug abuse and restoring harmony into the workplace. The conclusions of an investigation may determine that there is wrongdoing requiring that further action be taken. Conversely, an investigation may determine that the rumors are in fact just rumors.

Employers should not hesitate to investigate rumors that it believes may be truthful because the investigation may determine that employee statements that started out as rumors actually had a truthful basis that must be addressed.

II. PREPARING FOR THE INVESTIGATION

The following are considerations and actions that should be taken by an employer prior to beginning the employee investigation:

- Contact law enforcement;
- Establish the Issue;
- Appoint an Investigator or Form an Investigation Team;
- Determine Where/When the Investigation Should Commence and Occur;
- Establish a Preliminary Timeframe for Completion;
- Review the Allegation(s);
- Interview the Accuser;
- Assess the Nature of the Alleged Misconduct;
- Review Collective Bargaining Agreement or Policy Governing the Complaint Process;
- Decide upon Individuals to Interview;
- Appoint an Interviewer;

- Gather any Relevant Documents/Records;
- Establish how Documents/Records will be Maintained; and
- Agree upon the Format of Report;

When determining who should lead the investigation, the employer should consider the following questions:

- Is the investigator involved, or likely to be to be involved, in the facts surrounding the matter being investigated?
- Does the investigator, or any member of the investigation team, have a relationship with any of the parties associated with the allegation?
- Can the members of the investigation team remain impartial and uninfluenced by outside parties throughout the investigation?
- Is the investigation team familiar with the position of the employee being investigated?
- Is the investigation team familiar with all relevant collective bargaining agreements, personnel rules, or employer policies?
- Have the members of the investigation team been sufficiently informed of the potential legal principles and procedures involved in the investigation?
- Does the investigation team have prior experience conducting investigations?

Potential members of an investigation team include:

- Members of Management;
- Human Resource Directors;
- Outside Counsel;
- Outside Agency;
- Private Investigators; and
- In-House Investigators.

III. INTERIM ACTIONS—WHAT TO DO WITH THE ACCUSED?

After the pre-investigation interviews and document gathering has been concluded, and it has been determined that a full-scale investigation is necessary, employers are faced with the question of what to do with the accused during the investigation. Several options exist.

- Do nothing
- Reassign internally
- Reassign to home
- Paid or Unpaid Administrative Leave

Note: Some courts have that held administrative leave constitutes an adverse employment action when it includes additional discipline, i.e. restricted duty, loss of overtime, thus affording the employee placed leave pending investigation with certain

rights. See Franko v. City of Cleveland, 654 F.Supp.2d 711, 719 (N.D.Ohio 2009). In Franko, the plaintiff was a police officer who was placed on restricted duty for eight months and denied overtime or secondary employment during the pendency of an internal investigation.

These cases, however, do not support a proposition that any internal investigation of an employee by his employer is an adverse employment action. Szeinbach v. Ohio State University, 758 F.Supp.2d 448, 474 (S.D.Ohio, 2010). “We have repeatedly held, however, that neither an internal investigation into suspected wrongdoing by an employee nor that employee's placement on paid administrative leave pending the outcome of such an investigation constitutes an adverse employment action.”. Stayner v. Ohio Dept. of Rehabilitation and Corrections, 2011 WL 3900617, 11 (S.D.Ohio,2011).

- Based upon the allegations in the complaint and the weight of the pre-investigation interview with the accuser, the employer may decide to suspend the employee pending the outcome of the investigation. Suspending the employee without pay pending the outcome of the investigation is a serious act. Employers should give this plenty of thought prior to suspending an employee. Employers may be subject to awards of back-pay if the investigation clears the employee. Also, before suspending an employee during the investigation, employers should consult relevant provisions of their collective bargaining agreement, if applicable.
- Another option for dealing with the accused is that the employer may reassign the accused to “home duty” during the investigation. A “home duty” assignment can be made provided the assignment is made in good faith, serves a legitimate purpose and does not violate any relevant collective bargaining agreement. Assigning the accused to “home duty” is helpful because the accused will not be in the workplace and will always be readily available to be questioned by the investigator.

IV. CONDUCTING THE INVESTIGATION

Employers must consider several factors when conducting investigatory interviews. Among the considerations facing investigators and employers are:

- What involvement, if any, should law enforcement have;
- Who to interview;
- What questions to ask;
- Should you request statements;
- Should you interview people more than once;
- How to preserve the evidence;
- What procedural requirements are necessary; and
- How should the results of the investigation be preserved or recorded.

A. What Policies and Documents Are Necessary?

Once an employer determines that a full investigation into the allegations is necessary, the employer should begin gathering any supporting documentation that may be used to conduct a thorough investigation. All documents should be maintained together in the same file.

For example, the investigator, or investigation team, should gather:

- A copy of the Employer's Personnel Policy or Rules;
- Signed Code of Ethics;
- Employee Handbook and Signed Signature Page (indicating employee received the work rules);
- Any Collective Bargaining Agreement;
- Any relevant Laws or Rules;
- The Employer's Grievance Procedure;
- The Terms of a Pre- and Post-Disciplinary Appeals Process;
- The Accused's Personnel File;
- The Accused's Performance Evaluations, if any;
- Any Prior Discipline;
- Information from the Pre-Investigation Phase; and
- Copy of the Complaint.

B. Who to Interview?

1. The Accused.
2. The Accuser.
3. All Witnesses.
 - eyewitness
 - "ear" witness
4. Other people who could help confirm or deny the allegations.
5. The Union's Role.

C. What to Ask?

Examples of useful interview questions may include:

- Do you know why we are here?
- Explain exactly what occurred?
- When did it occur?
- Where were you when the incident occurred?
- How did it occur?
- What happened prior to the incident?

- Who was involved?
- Who was present during the incident?
- What was said?
- Who said it?
- Do you know why the incident happened?
- Did you do anything in response to the incident?
- Did you happen to write anything down summarizing the incident?
- Do you know of anyone else who may have relevant information?

D. How Should the Investigation Be Documented?

There is no standard for documenting an investigation. Nonetheless, every interview or step taken during an investigation should be documented in one manner or another. As a general rule, any form of documentation relied upon during an investigation should be understandable and clear so that another party can review and understand the documentation at a later date. Once the investigation begins, it is helpful to take notes or memorialize discussions in a consistent manner.

All dates and times of the investigation should be noted. For example, note the time and date of visiting the scene of the incident or the date and time of every interview. Keeping accurate detailed records of each step of the investigation will be helpful in drafting the final report of the investigation.

The more detailed the documentation is, the more accurate, thorough and defensible the investigation.

1. Recommendations for Record-Keeping

- Keep a list of all individuals interviewed during the investigation;
- Retain records of all dates and times of interviews;
- Keep detailed notes of all interviews (tape recording interviews may be helpful);
- Maintain any relevant photographs helpful to the investigation;
- Retain and review all documentation obtained during the investigation;
- Maintain a separate investigation file, including the accused's personnel records;
- Keep copies of the work rules and policies involved in the investigation; and
- Any other records required by law, employer policy, or collective bargaining agreement.

E. Due Process Requirements

Garrity Warnings. All employees interviewed during the course of an investigation should be provided a Garrity warning. Simply stated, a Garrity warning notifies an employee that if an employee's refusal to answer is based on his or her concern that such answers will incriminate him or her, he or she may not be removed for failing to answer

unless and until he or she is told that his or her answers will not be used against him or her in any criminal proceeding. Garrity v. New Jersey, 385 U.S. 493 (1967).

Piper Warnings Any person appearing as a witness before any public official, department, board, bureau, commission, agency, or representative thereof, in any administrative or executive proceeding or investigation, public or private, if he so requests, shall be permitted to be accompanied, represented, and advised by an attorney, whose participation in the hearing shall be limited to the protection of the rights of the witness, and who may not examine or cross-examine witnesses, and the witness shall be advised of his right to counsel before he is interrogated. This section shall not apply to proceedings before a grand jury. Ohio Revised Code, Section 9.84; In re Civil Service Charges & Specs. Against Piper (2000), 88 Ohio St.3d 308.

Collective Bargaining Agreements Labor agreements often contain due process requirements for its employees. The structure and procedure of collective bargaining provisions are generally very simple. However, it is important to note that if an employee is in a collective bargaining unit but the contract does not contain due process procedures, public employers must still provide the employees their Garrity and Piper warnings. Otherwise the unions will raise the issue and try to convince the arbitrator that the discipline should be set aside for failure to provide the necessary due process rights to both the accused and other witnesses.

V. **CONCLUDING THE INVESTIGATION**

A thorough investigation should conclude with a report summarizing the findings of the investigation. The report should be drafted after all witnesses have been interviewed and all documents reviewed and the investigator is certain that additional information is not necessary.

The report should culminate with a conclusion as to whether the alleged incident occurred. It is helpful to include all relevant materials with the report, so that the individual making the decision as to the appropriate course of action has all the facts. For example, a report can consist of not only a summary completed by the investigator, but also testimony, documents, work rules and other exhibits.

The report can conclude by providing a recommended course of action. In other words, the investigator can recommend that based upon the findings, discipline is warranted.

Neutrality. The report should provide sufficient information so that a neutral, outside party is able to gain a clear understanding of what happened, as well as, an understanding as to what rules may or may not have been violated. The report should also be crafted in a manner that demonstrates the credibility of the witnesses and the unbiased nature of the investigation.

Contents. The Report should provide sufficient information establishing that the allegation either did occur or did not occur. **The report should not recommend specific discipline.**

The report should include the following:

- Summary of the issue/allegation of the investigation;
- Copies of policies or work rules involved;
- Chronology of events;
- Factual findings of the investigation (interviews, documents, policies, for example);
- Analysis of the factual findings noting any discrepancies in testimony, credibility of witnesses, and any other pertinent observations; and
- Conclusion (did the incident occur and/or did the occurrence violate policy).

After the investigation is concluded, employers should advise both the accuser and the accused of the outcome of the investigation.

PARAMATERS OF ALLOWABLE DRUG TESTING IN THE PUBLIC SECTOR WORKPLACE

I. INTRODUCTION

A. Background Information

1. Government mandated drug testing is a “search and seizure” under the Fourth Amendment of the United States Constitution. Employees of government and public entities have a constitutional right to privacy and a government employee does not lose his right to privacy simply by the conditions of his employment. However, under certain circumstances, a public employer may engage in:
 - a. Pre-employment drug testing,
 - b. Random drug testing, and
 - c. Reasonable suspicion drug testing.

B. Pre-Employment Drug Testing:

Knox County Education Association v. Knox County Board of Education, 158 F.3d 361, 373 (1998).

Pre-employment drug testing can be done when a “**special need**” exists. When determining whether a “special need” exists to permit suspicionless drug testing, a two-part test must be used. First, the public interest in the testing must be considered. In reviewing the public interest in the testing, courts will consider whether the group occupies a unique position whereby the existence of a pronounced drug problem is unnecessary to justify suspicionless testing and the magnitude of harm that could result from the use of illicit drugs. Second, the privacy interests of the employees must be considered.

In Knox County, the Sixth Circuit upheld a school board policy that required drug testing for all individuals who apply for, transfer to, or are promoted to “safety sensitive” positions. Ultimately, the court upheld the school board’s drug testing policy which did not require reasonable suspicion because of the nature of the duties performed by the individuals subject to the policy.

C. Random Drug Testing:

1. “Special Needs”

a. Skinner v. Railway Labor Executive Association, (1989) 489 U.S. 602.

The Supreme Court recognized “special needs” cases, where the courts have balanced the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in employee drug testing cases.

- Since the Skinner decision, if the employer can demonstrate that the particular employee occupies a position of “special need,” then the reasonable suspicion requirement is suspended.
- These occupations normally include public safety positions and governmental employees equipped with special knowledge or confidential information.

b. What Constitutes “Special Needs?”

i. Safety Sensitive Positions Exception

The U.S. Code of Federal Regulations, 49 C.F.R. 653.35, defines “safety-sensitive employees” as “employees who perform job duties related to the safe operation of mass transit service including the operation, dispatch and control, maintenance, and supervision of revenue service vehicles, and any employee who holds a commercial drivers license.”

However, the courts have interpreted “safety sensitive” positions beyond the language of the statute. Employees need not fit the traditional definition of the statute to be subject to the employer’s interests in random drug testing.

- The safety sensitive position exception to suspicionless drug testing often manifests itself in the form of the operation of public transportation or vehicles. The courts generally recognize the government’s interest in testing employees, focusing on two factors:

(1) Whether the group of people targeted exhibits a pronounced drug problem; and, if not, whether the group occupies a unique position such that the existence of a pronounced drug problem is unnecessary to justify suspicionless testing; and,

(2) The magnitude of the harm that could result from the use of illicit drugs on the job.

ii. Safety Sensitive Positions Subject to Suspicionless Testing

The following positions are established by case law to be safety-sensitive and consequently subject to suspicionless drug testing: nuclear power plant workers, seaman operating oil tankers, meter repairmen for a gas company, firefighters and emergency medical technicians, process technicians at a petrol-refining facility, police officers, bus drivers, pipeline operators, airline industry personnel, correctional officers, and Justice Department personnel with top-secret security clearance. See *Rushton v. Nebraska Public Power District*, 844 F.2d 562 (8th Cir. 1988); *Exxon v. Exxon Seaman's Union*, 73 F.3d 1287 (3rd Cir. 1996); *Mountaineer Gas Company v. Oil, Chemical & Atomic Workers International Union*, 76 F.3d 606 (4th Cir. 1996); *Gulf Coast Industrial Workers Union v. Exxon*, 991 F.2d 244 (5th Cir. 1993); *Ford v. Dowd*, 931 F.2d 1286, *Tanks v. Greater Cleveland Regional Transit Authority*, 930 F.2d 475 (6th Cir. 1991); *International Brotherhood of Electrical Workers v. Skinner*, 913 F.2d 1454 (9th Cir. 1990) (noting cases in which courts have upheld random drug tests for employees with safety-sensitive, security-sensitive, or public integrity-sensitive jobs.).

2. "Reasonable Suspicion"

Absent special needs, an Employer needs **reasonable suspicion** to perform random drug test.

a. Reasonable Suspicion Defined:

The following are examples of court-made or statutorily enacted definitions of "reasonable suspicion:

i. Under **Ohio Administrative Code**, reasonable suspicion:

"...Must be based upon objective facts or specific circumstances found to exist that present a reasonable basis to believe that an employee is under the influence of, or is using or abusing, alcohol and/or other drugs.

"Examples of reasonable suspicion shall include, but need not be limited to: Slurred speech, disorientation, and abnormal conduct or behavior. OAC 123:1-76-10.

- "Reasonable-suspicion drug testing' means drug or alcohol testing based on a belief that an employee is using or has used drugs or alcohol in violation of the covered employer's policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience.

ii. Case Law Interpretation:

Courts will generally look at the totality of the circumstances to determine if reasonable suspicion is present.

- Pernell v. Montgomery County Board of Commissioners, 1996 Ohio App. LEXIS 4954 (November 15, 1996), Montgomery App. No. 94-929.

The court upheld a drug screening test of a county solid waste manager based on reasonable suspicion. The employee refused to submit to a drug screening test by his supervisor. After discharged from his position for insubordination, Pernell claimed his employer did not have reasonable suspicion to require him to submit to a drug test.

The Court of Appeals found the employer did in fact establish reasonable suspicion. The court pointed to such factors as Pernell's knowledge of the employer's drug policy, Pernell providing marijuana off-duty to another employee, the odor of marijuana emanating from Pernell's office on two prior occasions, and marijuana found in Pernell's home after a deputy executed a warrant. After the culmination of these factors, he was ordered to submit to a drug test by his supervisor. The court reasoned that under the county's policy, all that was required was "reasonable suspicion that substances are affecting performance in the workplace," and Pernell's conduct definitely met this standard.

- Other Factors Leading to "Reasonable Suspicion."

In determining whether "reasonable suspicion" exists to compel an employee to submit to random drug testing, courts generally look to the following factors:

- The conviction of illegal drug use or abuse of alcohol, or employee involvement where the abuse of substances is suspected.
- Observed use or possession of illegal substances, including the sale or use of illegal drugs or prescription medications, while on the job.
- Recent, marked changes in personal behavior.
- Physical impairment and the inability to perform related job tasks.

Practice Tip: The existence of an employer policy regarding drug testing is imperative to withstand later employee challenges.

PRESCRIPTION DRUGS IN THE WORKPLACE – DETERMINING APPROPRIATE USE VERSUS ABUSE

I. INTRODUCTION

Alcohol and illegal drug abuse can lead to serious problems in the workplace. Now, many employers are facing additional issues brought on by worker abuse of prescription drugs. Besides affecting worker productivity, the abuse of prescription drugs in the workplace can lead to unsafe working conditions. This is especially true in occupations that require the use of vehicles or machinery, including factory workers, transportation workers and construction workers. Employees who perform high-risk services, such as healthcare providers, firefighters and police officers, also pose a safety risk when they abuse prescription drugs. Safety professionals tasked with running an effective drug-free workplace program are facing new challenges to keep employees safe while avoiding liability issues.

II. BACKGROUND INFORMATION:

Abuse of prescription pain killers now ranks second as the United States' most prevalent illegal drug problem, following marijuana. The White House, Office of National Drug Control Policy. *Prescription drug abuse prevention*. Available at: http://www.whitehousedrugpolicy.gov/drugfact/prescr_drg_abuse.html.

While approximately 50% of Americans use at least one prescription drug for medical reasons on a regular basis, an estimated 20% have used prescription drugs for nonmedical reasons in their lifetime. Substance Abuse and Mental Health Services Administration (SAMHSA) Health Information Network. National Institutes of Health. *Medline plus: prescription drug abuse*. Available at: <http://www.nlm.nih.gov/medlineplus/prescriptiondrugabuse.html>

- A 2008 survey by the Substance Abuse and Mental Health Services Administration (SAMHSA) found that an estimated 4.7 million Americans were found to have used prescription pain relievers for nonmedical reasons in the previous month. National Institute on Drug Abuse. *Prescription medications*. Available at: <http://www.nida.nih.gov/DrugPages/prescription.html>
- In 2000, 43% of those who ended up in hospital emergency rooms from drug overdoses, estimated at 500,000 visits per year, were there because of misusing prescription drugs. Substance Abuse and Mental Health Services Administration (SAMHSA) Health Information Network.
- From 1998 to 2000, the number of people entering an emergency room because of misusing:
 - hydrocodone (Vicodin®) increased 48%,

- oxycodone (OxyContin®) increased 108%
- methadone (a synthetic opioid) increased 63%

Substance Abuse and Mental Health Services Administration (SAMHSA) Health Information Network.

- More than 17% of adults over 60 intentionally or unintentionally abuse prescription drugs. Substance Abuse and Mental Health Services Administration (SAMHSA) Health Information Network. *Prescription drug abuse statistics: trouble in the medicine chest, rx drug abuse growing*. Available at: <http://ncadi.samhsa.gov/govpubs/prevalert/v6/4.aspx>

There are three classes of prescription drugs that are most commonly abused:

- **opioids** such as codeine (Darvocet®, Tylenol with Codeine®), oxycodone (OxyContin®, Percocet®), hydrocodone (Vicodin®) and morphine;
- **central nervous system (CNS) depressants** such as barbiturates (Amytal®, Butisol®, Tuinal®) and benzodiazepines (Valium®, Doral®, Xanax®);
- **stimulants** such as dextroamphetamine (Adderall®), methylphenidate (Ritalin®). The White House, Office of National Drug Control Policy. *Prescription drug abuse prevention*. Available at: http://www.whitehousedrugpolicy.gov/drugfact/prescr_drg_abuse.html

III. TESTING FOR PRESCRIPTION DRUGS

The Supreme Court of the United States has upheld the right of employers to test for drugs in the workplace, but most of the subsequent case law has addressed employer testing for illegal drug use and employee discipline based on illegal drug use or alcohol abuse.

Employers have crafted company policies addressing the use of and testing for prescription drugs as well as illegal ones. Many employers justify the expansion of their policy as an effort to maintain a safe work environment, as employers are becoming more concerned that employees under the influence of certain prescription medication may pose a safety hazard.

Employees have complained about employer policies regulating prescription drug use, citing privacy concerns. Further, employees contend that they should not be fired for taking legal medications. “Drug Testing Poses Quandary for Employers,” *The New York Times*, Zezima, Katie & Goodnough, Abby (October 24, 2010).

A. Americans With Disabilities Act (ADA)

The Americans with Disabilities Act (“ADA”) makes it unlawful for an employer to discriminate against an employee on the basis of a disability. The ADA was enacted to ensure that individuals with disabilities are given the same consideration for employment that individuals without disabilities are given. Under the ADA, individuals who have a

disability and who are otherwise qualified to perform the job requirements, with or without a reasonable accommodation, are entitled to equal opportunity to benefit from the full range of employment-related opportunities available to others.

Pursuant to the ADA, an employer may not ask a job applicant to answer medical questions or take a medical exam before extending a job offer. Also, an employer may not ask a job applicant if they have a disability. An employer may ask a job applicant whether they can perform the functions of the job, with or without a reasonable accommodation. Once a job offer is extended, the employer can condition employment on the passing of a medical examination or answering medical questions, but only if all new employees in the same type of job have to answer the questions or take the exam. Once a person is hired and has started work, an employer generally can only ask medical questions or require a medical exam if the employer needs medical documentation to support an employee request for reasonable accommodation or if the employer believes that an employee is not able to perform a job successfully or safely because of a medical condition.

Under the ADA, a person who is illegally using drugs is excluded from coverage. However, an individual who no longer engages in the use of illegal drugs may be an individual with a disability if he or she has: (1) Successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully; or (2) Is participating in a supervised rehabilitation program.

1. Is Testing for Prescription Drug Use Allowable under the Americans With Disabilities Act?

In pertinent part, the ADA provides:

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A).

Bates v. Dura Automotive Systems, Inc., 6th Cir. No. 09-6351 (6th Cir. Nov. 3, 2010) 625 F.3d 283.

The Lawrenceburg, Tennessee, plant of Dura Automotive Systems, an auto-parts manufacturer, had a high accident rate (compared to similar manufacturing plants). The plant implemented a 12-panel drug-test program in which banned substances included prescription drugs known to cause impairment and thus, create safety risks (e.g., Xanax, Lortab, and Oxycodone). Seven employees tested positive for legal substances banned by the program.

All employees who tested positive for banned prescription drugs were given the option of switching to other drugs not containing the banned substances. After the seven employees tested positive again for the banned substances, they were terminated.

The employees sued, claiming the drug-testing program violated the ADA. The company argued the plaintiffs had no standing to sue under the statute. The trial court disagreed and held the plaintiffs had standing to sue under the ADA's provisions on qualification tests and standards (42 U.S.C. §§ 12112(a) and (b)(6)).

Ruling that only persons with disabilities can pursue claims under the Americans with Disabilities Act's provisions on qualification tests and standards (42 U.S.C. §§ 12112(a) and (b)(6)), the federal appeals court upheld the employer's dismissal of seven employees for testing positive for prescription-drug use. Notwithstanding that some provisions of the ADA generally have been interpreted to cover non-disabled individuals who are discriminated against (e.g., a "perception" of disability), the Court said it based its conclusion on a straightforward reading of the statute and noted that its interpretation was consistent with that of the Fifth Circuit's (*citing Fuzy v. S&B Engineers & Constructors Ltd.*, 332 F.3d 301, 14 AD Cases 676 (5th Cir. 2003)). (The Court had previously ruled in another case that the 2008 amendments to the ADA did not apply retroactively. Thus, they were inapplicable in this case.)

The Sixth Circuit reversed the lower court and ordered dismissal of the plaintiffs' claims under the ADA because "the plain text of subsection (b)(6) only covers individuals with disabilities." It ruled, "A straightforward reading of this statute compels the conclusion that only a 'qualified individual with a disability' is protected from the prohibited form of discrimination described in subsection (b)(6) -- the use of qualification standards and other tests that tend to screen out disabled individuals." The Court did not address whether Dura's prescription-drug-testing and terminations fell within the exception in the ADA's non-discrimination standards of "job-relatedness" and "consistent with business necessity."

2. Disability Discrimination

Wagner v. Regional Medical Center of Ohio et al., 957 N.E.2d 351, 2011 Ohio 2991 (9th Dist. 2011).

Wagner worked at Allen Community as a critical-care agency nurse, a temporary position, for approximately ten months before she decided to apply for a full-time position with Community Regional, Allen Community's owner. Wagner indicated on her employment application that she was not currently taking any medications. In fact, she was taking prescription methadone as part of a treatment program for her chemical dependency. Wagner stated that she told several individuals at Allen Community about her drug addiction during the interview process, but did not disclose her methadone use on her employment application.

Community Regional extended Wagner an offer of employment and she began working as an intensive-care nurse. As a condition of her employment, Wagner completed a drug screen. There was a delay in receiving the results of the drug screen so Regional Medical asked Wagner about the delay. Wagner then disclosed that she was taking prescription medication and Regional Medical terminated her for being untruthful on her employment application.

Wagner sued, arguing that she was wrongfully terminated due to disability discrimination. However, the court found that Wagner could point to no evidence that the employer terminated her for any reason other than the reason it gave: that she had falsified her medical history. Further, Wagner signed a certification statement that all the information provided on the application was true, accurate, and complete to the best of her knowledge and belief. Therefore, Wagner was on notice that any falsification, misrepresentation, or omission on her part was a terminable offense, which was upheld by the appellate court.

Lee v. City of Columbus, 636 F.3d 245 (6th Cir. 2011).

The Columbus City Police Department issued a directive requiring employees, in certain circumstances, to submit a copy to their immediate supervisor a note from their physician stating the “nature of the illness” and whether the employee was capable of returning to regular duty. The employees sued, claiming this directive violated their rights under the Rehabilitation Act of 1973, 29 U.S.C. § 790 *et seq.*, a statute that incorporates many of the provisions of the American with Disabilities Act of 1990, 42 U.S.C. § 12111 *et seq.* (“ADA”), including the ADA’s rules against improper inquiries regarding an employee’s disability.

The Sixth Circuit decided that the Police Department’s policy of requiring officers to furnish information regarding a general diagnosis following certain periods of sick leave was not an inquiry that violated either the ADA or the Rehabilitation Act. Such inquiries did not go far enough as to question whether the employee actually had a disability or to the nature or severity of any disability. According to the court, to find otherwise would sweep into the statutes’ prohibition “numerous legitimate and innocuous inquiries that are not aimed at identifying a disability.”

The Sixth Circuit also mentioned that asking whether an employee is taking prescription drugs or medication or seeking information about illnesses, mental conditions, or other impairments an employee has or had in the past will trigger the protections of the ADA and Rehabilitation Act. In contrast, the act of asking an employee returning to work to describe the nature of his illness according to an across-the-board sick leave policy is not necessarily a question about whether the employee is disabled. Such questioning, according to the Circuit, is a “valid and acceptable inquiry.”

The employees further alleged that the employer directive and the disclosure of their personal medical information to immediate supervisors violated their privacy rights protected by the First, Fifth, and Fourteenth Amendments to the United States Constitution. The Sixth Circuit discussed the individual's privacy interest in avoiding disclosure of personal matters. In a United States Supreme Court case, the justices' found that a statute requiring that the state be provided with a copy of certain drug prescriptions implicated the individual's interest in non-disclosure, but the Court upheld the law because the statute contained adequate security measures (i.e. confidentiality). *Paul v. Davis*, 424 U.S. 693 (1976).

Equal Employment Opportunity Commission v. Product Fabricators, Inc., 2012 WL 264605 (C.A. 8 (Minn.))(Jan. 31, 2012).

For at least 15 years, Product Fabricators' "drug policy" required employees to report to their supervisor when they took any medication causing dizziness or drowsiness, or otherwise affecting their senses, motor ability, judgment, reflexes, or ability to perform their jobs. Failure to comply could result in termination.

One of Product Fabricators' employees did not work for several days due to back pain. His doctor said he could return to work "with no restrictions." He returned to work in a position that was less physically strenuous. He left work early due to a sore back and did not work for the next two days. Two days later, he reported the injury, adding that he was medicated while working. Product Fabricators terminated him for violating the drug policy.

The EEOC alleged that under the drug policy, Product Fabricators made unlawful medical inquiries of employees, failed to keep confidential their medical information, and discharged the employee because of his disability and/or as a result of an unlawful application of the drug policy—all in violation of the ADA.

The parties presented a consent decree to the district court, which requested justification for continuing jurisdiction. The decree was to ensure compliance with the ADA. The proposed decree required the destruction of records containing unlawfully-obtained medical information within 30 days, annual employee training about the ADA, posting an agreed upon notice to employees, and annual reporting of company compliance and employee complaints to the EEOC. It also enjoined an ongoing pattern or practice of medical inquiries that violated the ADA, further use of medical information collected through those inquiries, and other forms of disability discrimination and retaliation. The proposed decree would remain in effect for two years. The district court rejected this proposed decree and the EEOC appealed.

The district court agreed with Product Fabricators that the allegations involved isolated acts of discrimination insufficient for continuing jurisdiction, whereas the EEOC argued that the drug policy constituted a longstanding ADA violation. However, the district court's order does not mention the drug policy. It addressed

only the discrimination against this particular employee. According to the Supreme Court, it is the private right of action that remains an essential means of obtaining judicial enforcement. According to the Supreme Court, in discrimination cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices. *Alexander v. Gardener-Denver Co.*, 415 U.S. 36, 45 (1974).

The court went on to state that continuing jurisdiction is the norm and often the motivation for consent decrees. As a result, the court found that the district court gave no consideration to the strong preference for settlement agreements as a means for protecting the federal interest in employment discrimination cases. Also, the district court improperly gave significant weight to Product Fabricators' contention that its acts of discrimination were insufficiently widespread to justify continuing jurisdiction in the face of the EEOC's allegations. The court found that the district court abused its discretion and vacated the decision of the district court. The case was remanded for further proceedings.

VI. NOTABLE STATE PROGRAMS, LEGISLATION, AND CURRENT EVENTS:

A. Drug-Free Safety Program (DFSP) Information:

The Drug-Free Safety Program (DFSP) offers a premium discount to eligible employers for implementing a loss-prevention strategy addressing workplace use and misuse of alcohol and other drugs, especially illegal drugs. The DFSP was designed to help employers more effectively prevent on-the-job injuries and illness by integrating drug-free efforts into their overall workplace safety program. The DFSP can help employers achieve both long-range safety and cost-saving benefits.

1. Who is Eligible for the DFSP?

Only state-funded employers may receive a discount. This includes private employers and public employer taxing districts. State agencies may not participate in the DFSP. Self-insuring employers and state agencies are not eligible for program discounts, but may receive technical assistance from the Ohio BWC to establish a drug-free workplace.

2. Ohio Administrative Code 123:1-76-01: Drug-Free Workplace Programs.

a. Drug-Free Workplace Definitions of Terms

i. For purposes of the drug-free workplace services program:

- "Abuse" means:

- Any use of an illegal drug;
 - Intentional misuse of any over-the-counter drug in cases where such misuse impairs job performance;
 - Use of any prescription drug in a manner inconsistent with its medically prescribed intended use, or under circumstances where use is not permitted;
 - Use of alcohol where such use impairs job performance; and
 - Intentional and inappropriate use of any substance, legal or illegal, which impairs job performance.
- “Prescription” means a written or oral order for a controlled substance for the use of a particular person or a particular animal given by a practitioner in the course of professional practice and in accordance with the regulations promulgated by the director of the United States Drug Enforcement Administration pursuant to the federal drug abuse control laws.

B. House Bill 64: K2, Spice and Bath Salts.

This Act added five synthetic cannabinoids commonly known as K2 or Spice as Schedule I controlled substances with the result that all Ohio Revised Code provisions pertaining to Schedule I controlled substances, including the drug offenses, apply to those given synthetic cannabinoids except as provided in this Act. The Act also adds six synthetic derivatives of cathinone that have been found in bath salts to the list of Schedule I controlled hallucinogenic substances. These substances had been sold legally at convenience stores, tobacco shops, and other businesses.

The K2 or Spice contains organic leaves coated with chemicals that provide a marijuana-like high when smoked, and bath salts drugs (which are also included in this legislation) are crystallized chemicals typically snorted or injected that provide a cocaine-like high. These substances have been known to cause reactions including hallucinations, paranoia, severe agitation and seizures. In addition, bath salts reportedly have been linked to deaths in Ohio and elsewhere. Source: “Ohio Law Banning K2 and Bath Salts Drugs to Begin,” The Associated Press, <http://www.herald-dispatch.com>, *last visited*: February 15, 2012.

1. Impact of the New Law

- a. Under Ohio’s new law, penalties for possession or trafficking of K2 or Spice will be the same as those for marijuana:

- i. Possession of Spice is a minor misdemeanor;
- ii. Trafficking in Spice is a fifth degree felony or, if committed in the vicinity of a school or juvenile, a fourth degree felony; and
- iii. If Spice is the drug involved in the offense of “corrupting another with drugs” the penalty for the offense is a fourth degree felony or, if committed in the vicinity of a school, a third degree felony.

C. State Personnel Board of Review

Ohio Rev. Code Section 124.34(A) provides in pertinent part:

Conviction of a felony is a separate basis for reducing in pay or position, suspending, or removing an officer or employee, even if the officer or employee has already been reduced in pay or position, suspended, or removed for the same conduct that is the basis of the felony. An officer or employee may not appeal to the state personnel board of review or the commission any disciplinary action taken by an appointing authority as a result of the officer's or employee's conviction of a felony. If an officer or employee removed under this section is reinstated as a result of an appeal of the removal, any conviction of a felony that occurs during the pendency of the appeal is a basis for further disciplinary action under this section upon the officer's or employee's reinstatement.

A person convicted of a felony immediately forfeits the person's status as a classified employee in any public employment on and after the date of the conviction for the felony. If an officer or employee is removed under this section as a result of being convicted of a felony or is subsequently convicted of a felony that involves the same conduct that was the basis for the removal, the officer or employee is barred from receiving any compensation after the removal notwithstanding any modification or disaffirmance of the removal, unless the conviction for the felony is subsequently reversed or annulled.

Any person removed for conviction of a felony is entitled to a cash payment for any accrued but unused sick, personal, and vacation leave as authorized by law. If subsequently reemployed in the public sector, the person shall qualify for and accrue these forms of leave in the manner specified by law for a newly appointed employee and shall not be credited with prior public service for the purpose of receiving these forms of leave.

As used in this division, “felony” means any of the following:

- (1) A felony that is an offense of violence as defined in section 2901.01 of the Revised Code;
- (2) A felony that is a felony drug abuse offense as defined in section 2925.01 of the Revised Code;
- (3) A felony under the laws of this or any other state or the United States that is a crime of moral turpitude;
- (4) A felony involving dishonesty, fraud, or theft; and
- (5) A felony that is a violation of section 2921.05, 2921.32, or 2921.42 of the Revised Code.

Presentations/Topic/Drug/PrescriptionDrugUseintheWorkplace

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