

## **Fulcrum Search Science Inc.**

### **Developments Human Rights Law - Drug Testing**



The Ontario Human Rights Code states that every person has the right to equal treatment with respect to employment without discrimination on fourteen specified grounds. One of these grounds is handicap. Drug and alcohol dependency/addiction is considered a handicap under the Code. Two recent cases consider the legality of substance abuse testing introduced by two of Canada's largest employers.

The first case involves Imperial Oil. This company introduced a substance abuse policy which, among other things, required employees in safety sensitive positions to disclose whether they had (whether current or past) a substance abuse problem. After disclosing his substance abuse problem under the policy, a recovered alcoholic, Mr. Entrop, was removed from a risk sensitive position. He filed a complaint under the Code against Imperial Oil, alleging he had been discriminated against because of a handicap.

The adjudicator hearing Mr. Entrop's complaint concluded, among other things, that: the definition of substance abuse problem under the policy was too broad; the conditions for reinstating an employee to a safety sensitive position were more than were necessary; and, Imperial Oil failed to prove that a positive test result in pre-employment testing was correlated to impairment. The adjudicator also ordered that Imperial Oil pay Mr. Entrop \$10,000 in general damages, and \$10,000 for mental anguish. The Ontario Divisional Court upheld this decision and concluded that the flaws in the testing overreached the legitimate goal of ensuring an impairment-free workplace. The Divisional Court decision has been appealed to the Court of Appeal.

The second case involves the Toronto Dominion Bank. This corporation had a policy which required all new employees to submit to a drug test within 48 hours of accepting an offer of employment. The adjudicator appointed to hear a complaint filed by the Canadian Civil Liberties Association under the Canadian Human Rights Act dismissed a complaint that the drug testing discriminated on the basis of handicap. The Federal Court of Appeal, however, overturned the adjudicator in a 2-1 decision. This court concluded that the policy was discriminatory because it was likely to deprive drug dependent employees of employment opportunities contrary to the Act.

In the current legal environment, the introduction of a substance abuse policy could very well expose an employer to litigation, as well as possible legal liability. In this regard, public interest groups such as the Canadian Civil Liberties Association keep a close eye on the introduction of substance abuse policies and have been involved in initiating or supporting challenges to these policies. Before introducing any kind of substance abuse policy, an employer should be confident that the policy can withstand the close scrutiny of human rights adjudicators and the courts.

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