

Just Say No? Employee Drug and Alcohol Testing in the Education Context

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1. Introduction

For employers, the terrain of human rights law is becoming ever increasingly difficult to navigate. It's now well settled that an employer must not discriminate on grounds of disability, except where the *bona fide* requirements of the job so require,¹ and must accommodate a disabled employee to the point of undue hardship.² But how do these basic principals affect an employer wishing to test its employees for drug or alcohol use? How is an educator to know what conduct is acceptable, and what crosses the line? When it comes to testing employees for drug or alcohol use in the workplace, is it best to “just say no”?

In order to fully address these questions, it is necessary to take a careful look at the applicable legislation, which varies from province to province. It is submitted that only by carefully considering the human rights legislation applicable to each educational organization can these questions be answered in a meaningful and comprehensive manner.

2. Cross-Jurisdictional Analysis

A. Canada (Federal)

While it is recognized that with the exception of First Nations providing on-reserve education, most educational bodies will not be subject to federal jurisdiction, the author has included an analysis of the federal law on this topic given the in-depth analysis provided by the Canadian Human Rights Commission in its “Policy on Alcohol and Drug Testing in the Workplace.”³

Federally governed bodies, including First Nations, will be subject to the *Canada Labour Code*,⁴ which sets out certain minimum working conditions and imposes a number of obligations

¹ *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1.

² *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 S.C.R. 561 [“*Hydro-Quebec*”].

³ Canadian Human Rights Commission, “Policy on Alcohol and Drug Testing in the Workplace, online: (2009) <http://www.chrc-ccdp.ca/pdf/padt_pdda_eng.pdf>.

⁴ R.S.C. 1985, c. L-2.

on both employer and employee. Of particular importance are sections 124 and 125 which set out general and specific obligations on employers with respect to maintenance of a safe working environment, and section 126, which sets out the obligations on an employee. By these sections, the obligation to maintain a safe working environment is placed upon both employer and employee. When drug use or abuse begins to affect the safety of the workplace, whether for that specific employee, for other employees, or for members of the public, these sections come into play. However, in ensuring the safety of the workplace, the employer must ensure that it does not infringe on other rights of its employees, including the right to be free from discrimination.

An employer is generally only entitled to inquire as to the employee's use of drugs or alcohol where the employer can demonstrate that the need for this information is linked to a requirement of the job, as this information is essentially medical in nature and need not be shared with the employer in every circumstance. In some occupations, the need for drug and alcohol use inquiries is self-evident. For instance, truck drivers or bus drivers may be asked about their current and recent past drug use, and may be required to submit to pre-employment testing. However, in other occupations, where there is no direct physical risk of harm which would arise from an employee's drug use, caution must be exercised in determining what inquiries may properly be made of the employee.

The basis for the necessary caution on the part of the employer is found in the *Canadian Human Rights Act*.⁵ Section 7 of the Act prohibits discrimination in employment matters based on disability or perceived disability, which is defined to include present or past substance addiction. Therefore, a drug or alcohol addiction may not be a factor in the dismissal, demotion, suspension or discipline of an employee, but must be dealt with in the same manner as any other disability; that is, through accommodation.

Where federal jurisdiction is concerned, Canadian Human Rights Commission in its "Policy on Alcohol and Drug Testing", concludes that drug and alcohol testing is *prima facie* discriminatory.⁶ The Commission expresses particular concern with respect to drug testing, as opposed to alcohol testing, as drug testing confirms past, but not current, drug use.⁷ Therefore, a drug test is of no assistance in determining whether an employee is under the influence of drugs *while on the job*. It is therefore recommended that drug testing be used exceedingly sparingly.

⁵ R.S.C., 1985, c. H-6.

⁶ Canadian Human Rights Commission, *supra* note 3 at 6.

⁷ *Ibid.* at 3.

For similar reasons, where alcohol testing is warranted, it must be carried out in an expedient manner, in order to ensure that impairment in the workplace is measured.

Pre-employment drug or alcohol testing will typically only be justified for employees such as bus or truck drivers, as there is an obvious and intuitive link between the sobriety of the employees in these positions and the safety of the operation. These employees may also be questioned about past and current drug use. However, even where these preliminary tests and inquiries reveal drug or alcohol use, the employer will need to address the issue of accommodation, as discussed below, prior to withdrawing an offer of employment or refusing to employ the individual. With respect to all other positions, the employer will not be justified in making inquiries or testing into the prospective employee's drug and alcohol use unless the individual has voluntarily disclosed a history of drug or alcohol abuse or there is other reliable information on which to reasonably suspect the same.

Following employment, there are some circumstances where an employer may require its employee to submit to drug or alcohol testing. Random testing may be permitted where the employee is engaged in a safety-sensitive operation, provided that the testing is integrated into a broader program of medical assessment, monitoring and support. Some factors to be assessed in determining whether the occupation justifies random testing are: whether the employee is under direct supervision; whether there are less invasion means of gathering the information required; whether there is evidence of a high incidence of drug and alcohol use in the workplace or industry; whether the employer offers a supported rehabilitation program; and whether the employer is required to comply with legislation or regulations which as occupational health and safety legislation or U.S. Department of Transportation regulations, which compliance might be affected by an employee's drug use.⁸ Based on these factors, it is safe to conclude that random testing in federally regulated operations will generally only be justified where there is a risk of physical injury or regulatory sanction due to an employee's drug or alcohol use.

Drug or alcohol testing may also be justified following an on-the-job incident caused by the act or omission of the employee. For instance, where an accident occurs and the employer reasonably believes that it was caused by the drug abuse of an employee, the employer will be justified in making further inquiries as to that employee's use. However, such testing must be done as soon as reasonably possible following the event in question, and should not be

⁸ *Ibid.* at 6.

undertaken where there is evidence to suggest that the accident was caused by something other than an employee's drug use.

Finally, drug and alcohol testing may be undertaken where the employer has reasonable cause, based on the employee's on-the-job conduct, to believe that the employee has been using drugs or alcohol. Reasonable cause may exist where the employee reports for work in an unfit state and there is evidence of substance abuse. Generally speaking, unsubstantiated allegations by others of drug abuse by an employee would not meet this threshold. Though there is not yet any court guidance with respect to this issue, the Canadian Human Rights Commission suggests that an employer may justify drug testing based on "reasonable cause" as a *bona fide* occupational requirement.⁹ In other words, the employer may be able to assert that although the practice of requiring a drug test may be discriminatory under the *Canadian Human Rights Act*, it is a *bona fide* occupational requirement that employees remain drug-free while at their employment. It must be emphasized that only on-the-job conduct will be sufficient to justify requiring an employee to submit to a drug test, and that the use of post-incident drug and alcohol testing in non-safety sensitive positions must be undertaken with caution. It must also be noted that action on the part of the employer such as medical assessment, referral to counselling or appropriate disciplinary measures need not be dependent on the outcome of a drug or alcohol test where the employee has reported for work in an unfit condition.

If an employer receives a positive test result on a drug test by one of its employees, or the employee confesses to drug addiction, the employer must respond in a measured and appropriate manner. Typically, the result alone will not provide justification for dismissal or demotion.

Whether or not the protection provided by the *Canadian Human Rights Act* extends to all users of drugs or alcohol or only to those who suffer from addiction remains a point of contention. As discussed in further detail below, in certain provinces, and most notably Alberta, it is unlikely that a casual drug user is entitled to any protection. However, there is room for suggestion that disciplinary action taken by an employer on the basis of a positive test result falls under the meaning of "perceived disability", which is a prohibited ground of discrimination. The Canadian Human Rights Commission appears, in its decisions in *Milazzo v. Autocar Connaisseur Inc.*¹⁰ and *Dennis v. Eskasoni Band Council*¹¹ to have taken the view that a casual user is not entitled to protection; however, the Commission states in its policy that it will continue to

⁹ *Ibid.* at 8.

¹⁰ [2003] C.H.R.D. No. 24.

¹¹ [2008] C.H.R.D. No. 38.

consider complaints from all employees who are disciplined due to a positive drug test, regardless of whether they are addicted or not.¹² Therefore, it is recommended that absent specific caselaw in one's own province expressly stating that a casual user is not entitled to human rights protection, all employees who are found to have used drugs or alcohol be accommodated. Where accommodation is required, the employer must attempt to accommodate the employee to the point of undue hardship.¹³

Generally, accommodation of the employee will involve referral to an appropriate treatment plan, and full reinstatement once the employee has successfully completed the program. It may also involve temporary reassignment of the employee until treatment is completed. Accommodation will need to be tailored to each unique set of facts. As with the accommodation of any disability, there are a number of factors that will be considered in determining whether the employer has met its obligation to accommodate the employee to the point of undue hardship, including the size of the employer, the availability of alternate positions, prognosis for treatment, disruption of a collective agreement and, to a more limited extent, the cost of accommodation.¹⁴ Follow-up testing may be permitted where safety on the job is of fundamental importance; in all other cases, follow-up testing may only take place where the employee's on-the-job conduct gives rise to reasonable cause for further testing.¹⁵

It must also be noted that even a relapse by an employee may not be sufficient to justify dismissal. The employer still must show that it has attempted to accommodate the employee to the point of undue hardship. The Canadian Human Rights Commission notes that it will not give effect to "last chance agreements" which provide that the employee will be fired if he or she relapses, but will take these into account in determining whether the employer has met its duty to accommodate.¹⁶

The employee has an obligation to actively participate in the accommodation process. If the employee simply refuses to participate, the employer may have met the burden of undue hardship. However, in the words of the Canadian Human Rights Commission, "[i]f an employer has reasonable cause to believe an employee is abusing drugs or alcohol, or an employee tests positive, and the employee refuses to acknowledge their use of drugs or alcohol or seek treatment,

¹² Canadian Human Rights Commission, *supra* note 3 at 4.

¹³ *Hydro-Quebec*, *supra* note 2.

¹⁴ *Ibid.*

¹⁵ Canadian Human Rights Commission, *supra* note 3 at 9.

¹⁶ *Ibid.* at 10.

this fact does not in and of itself constitute undue hardship and does not justify immediate dismissal. Before terminating an employee, an employer has to demonstrate that it has warned the employee through progressive discipline, and that the employee is unable to perform the essential requirements of the position.¹⁷ This may involve giving the employee multiple opportunities to avail him or herself to the treatment options available.

B. Saskatchewan

In most regards, the law in Saskatchewan regarding workplace drug and alcohol testing does not differ from that discussed above with respect to federal workplaces. Saskatchewan's *Occupational Health and Safety Act*¹⁸ set out the obligations upon the employer and the employee with respect to the maintenance of a safe workplace. Where the drug or alcohol use of the employee puts the safety of the workplace in jeopardy, or where it fundamentally interferes with the ability of the employee to carry out his or her job, the employer may be justified in making further inquiries.

Like the *Canadian Human Rights Act*, Saskatchewan's *Human Rights Code*¹⁹ will provide protection to an employee from dismissal or discipline on the basis of disability. Unlike the federal legislation, Saskatchewan's Code does not expressly include substance addiction in its definition of disability; however, it is likely that a substance addiction would fall within the definition set out at s. 2(1)(d.1).²⁰ In addition, Saskatchewan's Code does not expressly prohibit discrimination on the basis of "perceived" disability, though the Saskatchewan Human Rights Commission indicates that discrimination on the basis of perceived disability is also prohibited.²¹ Accordingly, in Saskatchewan there may be an argument that a casual user of drugs or alcohol is not entitled to protection under the Code, while an addict will be. As the Saskatchewan Human Rights Commission notes in its recent drug and alcohol testing guide, the issue of protection for a casual user has not been considered by the Saskatchewan courts.²² The Commission does suggest that Saskatchewan employers will generally be justified in conducting drug or alcohol testing

¹⁷ *Ibid.* at 11.

¹⁸ S.S. 1993, c. O-1.1.

¹⁹ S.S. 1979, c. S-24.1.

²⁰ *Ibid.* at s. 2(1)(d.1).

²¹ The Saskatchewan Human Rights Commission, "Drug & Alcohol Testing – A General Guide", online: (2011) <<http://www.shrc.gov.sk.ca/pdfs/Drug%20and%20Alcohol%20Testing%20Guide%20-%20Final%20Jan2011.pdf>> at 2.

²² *Ibid.* at 5.

where the position is safety sensitive, there has been an incident in which drugs or alcohol are reasonably suspected, or the employee is in the return-to-work phase of a treatment program.²³ Moreover, the Commission states that random alcohol testing, particularly in safety-sensitive workplaces, will generally be permissible.²⁴

C. Alberta

Alberta is in a unique position within the country and has been selected for this review given the decision of that province's Court of Appeal in the case of *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company*.²⁵ There, the pre-employment drug test of a potential employee with a construction company revealed that he had consumed marijuana. He was terminated, and brought a complaint before the Alberta Human Rights and Citizenship Commission, pursuant to Alberta's *Human Rights, Citizenship and Multiculturalism Act*,²⁶ alleging discrimination on the basis of disability. The complainant's unequivocal evidence was that he was not addicted to marijuana, and was only a casual user. Accordingly, the Commission determined that he had not been discriminated against, and dismissed the complaint, though it found that the employer's policy would have been discriminatory against any person actually addicted to drugs. On appeal to the Court of Queen's Bench, it was determined that the complainant had been discriminated against on the basis of perceived disability. The employer brought the case forward to the appellate level, where the Commission's decision was restored. In rejecting the position that the policy had the effect of treating all drug users as addicts, the Court offered the following:

The evidence disclosed that the effects of casual use of cannabis sometimes linger for several days after its use. Some of the lingering effects raise concerns regarding the user's ability to function in a safety challenged environment. The purpose of the policy is to reduce workplace accidents by prohibiting workplace impairment. There is a clear connection between the policy, as it applies to recreational users of cannabis, and its purpose. The policy is directed at actual effects suffered by recreational cannabis users, not perceived effects suffered by cannabis addicts. Although there is no doubt overlap between effects of casual use and use by addicts, that does not mean there is a mistaken perception that the casual user is an addict.²⁷

²³ *Ibid.* at 4.

²⁴ *Ibid.*

²⁵ 2007 ABCA 426, 425 A.R. 35 [*"Chiasson"*].

²⁶ R.S.A. 2000, c. H-14.

²⁷ *Chiasson*, supra note 25 at para. 33.

There was therefore nothing inherently discriminatory about the drug testing policy, at least as applied to casual users.

From this decision, it follows that an employer in Alberta has considerably more leeway in conducting drug testing of its employees, and in particular, in the range of responses that it may take upon a positive test result. In fact, the Alberta Human Rights and Citizenship Commission has taken the position that it has no jurisdiction to tell an employee whether or not it is entitled to conduct drug or alcohol testing on its employees.²⁸ The Commission's only role, in its own view, is to ensure that those employees who are disabled through drug or alcohol dependency are not discriminated against.²⁹

D. Ontario

Like the other provinces that have been considered, Ontario's Human Rights Code prohibits discrimination in employment on the basis of disability.³⁰ The Province's Human Rights Commission takes the position that drug and alcohol testing is *prima facie* discriminatory, and should only be used in circumstances where current impairment can be measured.³¹ The Commission expresses particular concern with drug testing, given its inability to measure the employee's impairment during work hours.

Ontario's Court of Appeal has specifically considered these issues, in the case of *Entrop v. Imperial Oil Ltd.*³² In that case, the Court concluded that blanket drug and alcohol testing policies were discriminatory against addicts, as well as casual users, as the effect of the policies was to treat all of those testing positive as if they are addicted, by assuming that they will likely report to work impaired. In this manner, the decision of the Court of Appeal of Ontario is at odds with that of the Court of Appeal of Alberta.

Despite the firm pronouncement of the Court on this issue in Ontario, the Province's Human Rights Commission continues to recognize that drug and alcohol testing may be justified in certain circumstances. The Commission suggests that employers address the following three points in determining whether drug and alcohol testing is appropriate:

²⁸ Alberta Human Rights and Citizenship Commission, "Drug and alcohol dependencies in Alberta workplaces", online: (2009) <http://www.albertahumanrights.ab.ca/DrugAlcoholDependencies_PW.pdf> at 3.

²⁹ *Ibid.*

³⁰ R.S.O. 1990, c. H-19.

³¹ Ontario Human Rights Commission, "Policy on drug and alcohol testing", online: (2000, revised 2009) <<http://www.ohrc.on.ca/en/resources/Policies/PolicyDrugAlch/pdf>> at 4.

³² Unreported, 21 July, 2000 (Ont. C.A.).

1. Is there an objective basis for believing that job performance would be impaired by drug or alcohol dependency? In other words, is there a rational connection between testing and job performance?
2. In respect of a specific employee, is there an objective basis for believing that unscheduled or recurring absences from work, or habitual lateness to work, or inappropriate or erratic behaviour at work are related to alcoholism or drug addiction/dependency? These factors could demonstrate a basis for “for cause” or “post incident” testing provided there is a reasonable basis for the conclusions drawn.
3. Is there an objective basis to believe that the degree, nature, scope and probability of risk caused by alcohol or drug abuse or dependency will adversely affect the safety of co-workers or members of the public?³³

It is submitted that an employer following these three points will generally be in conformity with the law in Ontario.

E. Newfoundland

Newfoundland’s *Human Rights Act*³⁴ prohibits discrimination on the basis of disability, perceived disability and actual or perceived predisposition towards disability.³⁵ In applying this standard to employment drug or alcohol testing, the Newfoundland Human Rights Commission provides that drug testing may only be carried out where the employer “can establish the drug testing as a good faith occupational requirement, or for post-incident assessment.”³⁶ The Commission does not go so far as to comment upon whether a casual user of drugs or alcohol would be entitled to human rights protection. The issue does not appear to have received consideration in that Province, and accordingly, it is unclear as to whether such protection exists. The issue is uniquely complicated in that the *Human Rights Act* contains an express prohibition on discrimination on the basis of a “pre-disposition” to disability. It may be argued that a casual user is perceived by his or her employer to have a pre-disposition to abuse or become addicted to drugs or alcohol.

It is suggested that an employer in Newfoundland exercise an abundance of caution in carrying out random drug or alcohol testing. In particular, upon receipt of a positive test result, the employer must take careful measures to ensure that its obligation to accommodate has been fulfilled. Given the possibility of discrimination on the basis of a perceived disposition to

³³ Ontario Human Rights Commission, *supra* note 31 at 7.

³⁴ S.N.L., 2010, c. H-13.1.

³⁵ *Ibid.* at s. 9(3).

³⁶ Newfoundland and Labrador Human Rights Commission, “Employer’s Guide to the Human Rights Act”, online: (undated) <http://www.justice.gov.nl.ca/hrc/publications/employer_guide.pdf>, at 4.

disability, the most cautious response would be to ensure that all employees testing positive are accommodated to the point of undue hardship.

3. Implications for Educators

It is evident from the foregoing that the situation of an educator will vary considerably depending on his or her geographical location. It is submitted, however, that an employer may follow these general guidelines:

- (a) Pre-employment drug and alcohol testing may only be carried out where the physical safety of other staff, students or members of the public may reasonably be endangered by the employee's drug or alcohol use. Realistically, this kind of testing will be confined to bus or transport drivers.
- (b) Following employment, these same employees may be subject to random alcohol testing, which measures impairment during the course of the job. These employees may also be subject to random drug testing, provided that it is carried out in a overall system of health monitoring and management.
- (c) Other staff, such as teachers, administrators, clerical and janitorial staff, testing may be carried out following a specific incident (often with respect to safety) for which drugs or alcohol are reasonably suspected to be the cause, or where the employer has reasonable cause to believe that the employee's unfit state is the result of drug or alcohol use. For instance, there could be an on-site incident in which a teacher fails to adequately supervise a group of students under his or her control. Alternatively, it could be the case that an employee arrives late for work and exhibits symptoms of alcohol impairment. In these circumstances, the employer will be justified in requiring the employee to submit to drug or alcohol testing.
- (d) It is imperative that the testing and the results thereof are carried out in a confidential manner. Information should only be shared with those who need to know.

- (e) Upon receipt of a positive test result, additional inquiries should be made of the employee to determine the extent of the problem. Where the employee has a substance abuse problem, he or she should be referred for treatment. Where the employee does not have an abuse problem, but rather is a casual user, care should be taken to ensure that the law of the employer's province is adhered to. In Alberta, no accommodation is likely to be required, while in Ontario, the employee must be accommodated the same as an addicted employee. The law in other provinces is less clear.
- (f) In all circumstances, the employer should review the provisions of the collective agreement, to ensure that the course of action contemplated by the employer with respect to in-scope employees is permitted. The issues with respect to labour unions and drug/alcohol testing are beyond the scope of this paper.

4. Conclusion

There are no easy answers when it comes to an employer's ability to test its employees for drug and alcohol use and abuse. Though the safety and integrity of the education system is the paramount consideration for educators in this country, these considerations must be balanced against an employee's right to be free from discrimination. Only by ensuring that drug and alcohol testing is carried out in a manner which is relevant, respectful, and carefully designed to meet the employer's *bona fide* objectives can these two competing interests be reconciled. While it's not necessary for an employer to say "no" to all drug and alcohol testing, care must be taken to ensure that employee's rights are respected.