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"Can an employer treat a worker who is impaired by a legal substance the same as a worker who is abusing an illegal drug?"

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Employer Drug Testing Policies: Legal Drugs are Different

ADA Limits on Medical Inquiries May Include Tests for Legal Drugs

Most employers today cite workplace safety as a significant factor in deciding whether to conduct drug and/or alcohol testing. Even in workplaces where the jobs themselves are not inherently dangerous, concerns about employee impairment or illegal conduct occurring on premises may motivate an employer to add a drug testing component to its workplace policies. Many employers, of course, do have concerns about workplace safety that extend beyond illegal conduct and impairment caused by illegal drugs. Workers who are not strong enough to do their jobs, not careful about following safety procedures, or who may be impaired by the legitimate use of prescribed medications may harm themselves or others in the course of their employment. Can an employer treat a worker who is impaired by a legal substance the same as a worker who is abusing an illegal drug, however?

The answer is Yes, and No. Employers should not allow workers who are unable to perform their jobs safely to put themselves, their co-workers, or even the general public at risk, regardless of the cause of the risk. Reaching the conclusion that a particular worker poses a safety risk because of his or her lawful use of a prescribed medication, however, is much more complicated and implicates the Americans with Disabilities Act's protections of those who are disabled AND the ADA's limits on medical examinations

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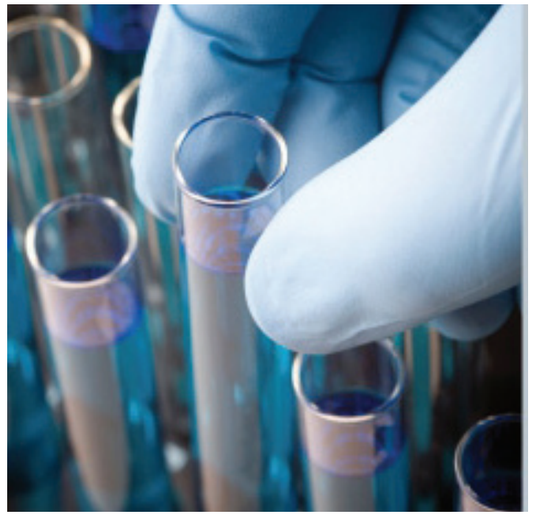
and inquiries about medical conditions, which apply to any medical inquiry made of an employee or applicant, regardless of whether an individual is disabled.

That is the interim conclusion recently reached in a case titled Bates v. Dura Automotive Systems, which is still ongoing before the U.S. District Court for the Middle District of Tennessee.[1] According to the allegations, Dura Automotive tested its employees for illegal drugs, but also tested them for lawful prescribed medication. So far, so good – after all, prescription medicine abuse now rivals or exceeds the use of marijuana, according to government studies. However, the company allegedly did not simply rely upon a Medical Review Officer to ensure that the prescribed medications were in fact used by those for whom they were prescribed. Rather, because management believed that workplace safety had been compromised by employee use of prescribed medications, if the Company learned that certain drugs detected were used legally, it nevertheless would bar employees from working for so long as they used those medications.

The employees allege that once the Company learned of the drug use, it would not budge, and refused to consider whether the employee was safely able to work while using the prescribed medications, even when their own physicians stated that they would be able to work safely. According to the plaintiff former employees, Dura then would suspend the employees until they stopped taking their prescription medications, and fired those who were unable to perform their job duties without the benefit of their prescription medications.



hire driver applicants who used medications demonstrated to have an adverse effect on safe driving, and the Company prevailed in that lawsuit.[2] Why are the cases different? Dura Automotive argues in this case that asking employees to reveal the medicines they are taking does not amount to either a medical examination or an inquiry about a medical condition, and the Court will have to decide whether that is the case.

It is too soon to say what the outcome of Bates v. Dura Automotive will be, but regardless of the outcome, there are a few practical steps employers with drug testing policies can take now to ensure that they don't become the focus of litigation. For example, most employers have stopped asking applicants and employees to list medications they have used recently when they go to submit a specimen for drug testing. If the specimen tests positive, the employer can ask the individual if he or she has any explanation for the positive test result, which may include information about recently used medications that might trigger a positive test, and the individual can choose (or choose not) to answer. At that point in the process, however, the employer arguably has a better reason to ask the question – the test is positive. And the best practice is to use a neutral Medical Review Officer who will not report information he or she learns about the employee's medical condition to the employer, unless he or she understands the employee's job and believes that the use of the medicine may pose a direct threat to workplace safety.

Employers should not allow workers who are unable to perform their jobs safely to put themselves, their co-workers, or even the general public at risk, regardless of the cause of the risk.

Assuming the employees' allegations are accurate, and further assuming that Dura acted in good faith to promote workplace safety, one might reasonably wonder where Dura went wrong. Properly implemented, a policy designed to ensure that workers are able to safely perform the essential functions of their job, with or without accommodation, is perfectly legal. In fact, not so long ago, the Equal Employment Opportunity Commission charged J.B. Hunt, the trucking giant, with violations of the ADA arising out of its policy of declining to

Employees often need prescription medications, and generally speaking, employers shouldn't try to stop employees from taking their prescribed medication – rather, the employer's role is to decline to allow the employee to work if the individual's medical condition poses a safety threat. If there is little or no likelihood that the use of a medication could cause a workplace problem, don't ask. If drug tests seeking information about the lawful use of prescribed medical conditions are medical examinations – and the language of the ADA suggests that this is so – then employers are prohibited from conducting such examinations unless they can establish that the inquiries are both job-related and consistent with business necessity.

The case against Dura Automotive seeks to prove that the employer not only required its employees to cease using medications they believed could impair performance, but also that the company would terminate the employees who could not then perform their jobs. Importantly, the employees allege that Dura refused to consider additional information regarding whether each employee could, or could not, safely perform the job while he or she used the prescription medicine. The ADA directs that determinations about whether an individual can safely perform the essential functions of his or her job, with or without reasonable accommodation, should be conducted on a case-by-case basis. Perhaps it is true that some medications always have an impact on an individuals' responses or reaction time that the use of that medication makes it unlikely that the employee can perform safely while using it. But how often must the employee use it – perhaps only twice a month, after which he or she could use a leave day? Or only once a day, after the work day is over, and which will have worn off before the employee returns to work? The regulations implementing the ADA grant each such worker an individualized assessment of his or her abilities, and in this the ADA is very different from other workplace laws that encourage employers to treat all employees alike.

The lesson of Bates v. Dura Automotive is not that employers must not conduct drug tests for prescription medications that may be abused, nor that employers must not take the use of prescription medications into consideration when making fitness-for-duty determinations. Rather, it is that if an employer wishes to ensure that its employees are able to perform their jobs safely, it must first take care that its fitness-for-duty policy meets the requirements of the ADA, not only with respect to what questions are asked and medical examinations required, but also in ensuring that individuals are not disqualified from their positions because of health conditions unless an individualized assessment shows they truly are unable to perform those positions safely.

About the Author

Nancy N. Delogu, *Esq.,* is the Washington, D.C. Office Managing Shareholder at labor and employment law firm Littler Mendelson, P.C..

Ms. Delogu is also a leading expert on federal and state drug-free workplace and drug-testing issues, and has drafted dozens of substance-abuse prevention policies, including Department of Transportation (DOT) mandated programs. In this realm, she advises both employers and testing service providers on compliance.

Ms Delogu will be the featured speaker at the Drugs Don't Work in NJ! Annual Members Meeting, scheduled for Wednesday, June 15, 2011, in Iselin, NJ.

1. The case is No. 1:08-0029. Recent decisions involving the application of the Americans with Disabilities Act as applied to the allegations made by six former employees can be found at 625 F.3d 283 (6th Cir. 2010) and 2010 U.S. Dist. LEXIS 133410 (M.D. Pa. December 15, 2010).
2. 321 F.3d 69 (2nd Cir. 2003).