

SECTION: Application

Effective date: February 25, 2005

SUBJECT: EMPLOYMENT — DRUG AND ALCOHOL TESTING

Purpose:

This policy is intended to assist in the understanding and application of *The Human Rights Code* ("The Code"). Where there is any conflict between this policy and *The Code*, *The Code* prevails.

Context:

Drug and alcohol use/abuse in the workplace is a matter of legitimate concern for employers, from a variety of perspectives. It may be desirable to prohibit any alcohol or illegal drug possession or consumption in the workplace. Similarly, it is generally undesirable that employees should be under the influence of such substances during work hours, even if consumption occurs earlier. In some job situations, the impairment of an employee's skills or judgment by alcohol or drugs can place that employee or others at risk of serious harm, or seriously jeopardise an employer's operations in other ways.

In an attempt to deal with such harms, drug and alcohol testing programs have become increasingly common. Such testing may be performed on a random basis (either universally or with respect to specific individuals), or following a specific workplace incident which generates concerns about an individual's behaviour, or even as a pre-employment requirement. However, drug and alcohol testing potentially generates significant human rights concerns.¹

While the objective of preventing employees from possessing, using, or being under the influence of illegal drugs or alcohol while on the job is, in itself, not discriminatory, unreasonable testing and/or automatic or severe discipline (or other job-related consequences) for positive test results discriminates against certain employees in a manner prohibited by *The Code*.

Although this policy addresses the issue in an employment context, it is also applicable

¹ Testing programs frequently arise in the context of "zero tolerance" policies. While the other components of zero tolerance initiatives are not the subject of this document, to the extent that such policies directly or indirectly affect employees because of their disabilities [or indeed other protected group characteristics: eg. zero tolerance of absenteeism, and religious observance] both the adoption of the policy and the consequences flowing from a breach must comply with the *Meiorin* principles (see below).

(with the necessary contextual changes) to services provided to the public, etc. Such testing has been seen, for example, in the context of schools, sports including school athletics, certain corrections and health care contexts, etc.

The Manitoba Human Rights Code

The Code prohibits unreasonable discrimination based on certain prohibited characteristics, primarily enumerated in s.9 (2). It does this by prohibiting practices, policies, rules, standards etc. which directly or indirectly discriminate with respect to any activity to which *The Code* applies, unless there is bona fide and reasonable justification, as described in *Meiorin*² and *Grismer*³. The case law is clear that dependence or a perceived dependence on drugs or alcohol is a 'disability' within the meaning of *The Code*. This does not mean any employer must tolerate unacceptable work performance by an employee. However, it does mean that an employer must take reasonable steps to ascertain whether the behaviour is due to a dependency disability. If that is the case, repercussions such as denial or termination of employment because of the disability (including drug or alcohol dependence) or a perceived disability are unlawful unless the employer (service provider, etc.) can establish that the employer's standard is reasonably necessary and that it has taken reasonable steps to accommodate the individual.

How Does Drug and Alcohol Testing Potentially Violate The Code?

Drug and alcohol testing is considered on its face to violate *The Code*, simply because of the potential for such activity to have a serious negative impact on those who have a drug or alcohol dependency.

As a result, the imposition of testing, in circumstances where such testing cannot be justified under established human rights principles, amounts to differential treatment based on disability. Moreover, the consequences imposed for failing a test (even where testing in itself may otherwise be considered reasonable) may in themselves constitute a violation of *The Code*, unless the employer can establish that it has taken reasonable steps to accommodate any dependency disability.

This is where the *Meiorin* test (modified by *Grismer* for a services context) comes into play: see Commission Policy # G-4, "Employment: *Bona Fide* and Reasonable Cause". The Supreme Court held that in order to justify what would otherwise be discrimination, the employer must show: (1) that the employer adopted the practice (testing) for a purpose rationally connected to the performance of the job; (2) that the employer acted honestly and in good faith believing that the practice was necessary for the fulfillment of the work-related purpose and (3) that the practice is reasonably necessary for the fulfillment of the work-related purpose. This last requirement includes a stipulation that

² *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 S.C.R. 3

³ *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [1999] 3 S.C.R. 868

the employer must show (a) that the employment practice which has the discriminatory effect does, in fact, achieve the purpose; (b) that the practice does not go further than necessary to achieve the purpose and (c) that, to the point of undue hardship, the employer has attempted to accommodate individuals who have suffered discriminatory effect because of the employment practice.

What Purposes Might Be Rationally Connected to Random Drug or Alcohol Testing?

The purpose which has commonly been identified in the case law as having a rational connection to a drug or alcohol testing standard is workplace safety. This requires more than the general concern for safety implicit in any workplace. An employer must show that this is a real and significant concern arising from the circumstances of that particular workplace. Is there something about the nature of the job site or the activities that means that performance or safety concerns cannot be addressed as they arise? It is far easier to identify a rational connection between safe performance and random drug or alcohol testing where mistakes by an impaired employee can have disastrous consequences, such as in a refinery situation.⁴

The 'Good Faith' Element?

The employer should show that it genuinely implemented testing because it believed the testing was necessary to meet the business purpose identified earlier. Where it has carefully examined the potential problems generated by drug and/or alcohol abuse in the workplace, and consulted appropriately with its employees and experts on how best to address those problems, it is unlikely to experience any difficulty in establishing good faith.

When Can Drug or Alcohol Testing be Shown to be Reasonably Necessary?

Each case has to be determined in its own factual context, in light of the specific business purpose identified at Step 1. For instance, what is being tested for? If one is attempting to identify present impairment, this may be accomplished by a positive result on an alcohol test, but not readily by a positive result on a drug test (at least under currently-available testing procedures). This makes drug testing as a means of addressing the risk of impairment harder to justify, even in safety-sensitive jobs.⁵ It is also important to identify who is to be the subject of testing, because not all employees may be carrying out duties that are equally safety-sensitive.

What steps has the employer taken to ascertain that testing is the least intrusive means

⁴ *Imperial Oil Ltd. v. Entrop* (2000), 37 CHRR D/481 (Ont. C.A.)

⁵ But not impossible-see *Milazzo v. Autocar Connaissance Inc.* (No. 2) (2003), 47 CHRR D/468, which upheld random drug testing where charter bus drivers spent extended periods of time in the U.S., with its strict drug/alcohol testing regime. The decision has a detailed discussion of the expert evidence on testing for marijuana use. Even though testing was upheld, there was still a requirement to accommodate persons with dependency disabilities (although the complainant could not avail himself of this as he denied having a dependency).

of achieving the identified purpose? Can the purpose be met through enhanced supervision? Will post-incident testing meet the objective just as well as broader random testing?

The timing of testing is also of significance. It is especially difficult for an employer to justify pre-employment alcohol or drug testing: see Commission Policy # G-6, "Pre-employment Inquiries and s. 14(4)".

Post-incident testing, especially in safety-sensitive jobs, may be easier to justify, as may be situations where the smell of alcohol or cannabis smoke raises a reasonable suspicion of alcohol and/or drug use, or in situations where there are other reasonable grounds to believe that impairment may be present.

Testing may also be justified in some circumstances as part of a rehabilitation or return to work program: e.g. a situation where an employee working in a safety-sensitive job has been caught on several occasions consuming drugs in the workplace, admits to a drug dependency, and agrees to participate in a rehabilitation program. In a local labour arbitration case, this was considered reasonable in this particular context even though the testing might only identify drug use which occurred outside work hours.⁶

Also crucial to establishing reasonable necessity is an analysis of the consequences of testing. Where a person has a drug or alcohol dependency, an employer is obligated to reasonably accommodate to the point of undue hardship. This can mean, for example, exploring the possibility of transferring the individual to a less safety-sensitive position (providing the person has the necessary qualifications or training), permitting (indeed encouraging) the person to participate in appropriate EAP programs, granting a reasonable leave of absence to allow an employee to participate in a rehabilitation program, etc.

Are there any obligations on the employee?

Reasonable accommodation is a process which requires appropriate cooperation from the employee, as well. As a result, where drug or alcohol dependency is suggested to be the source of poor work performance, employees may be expected to reasonably avail themselves of employee assistance and rehabilitation programs that are made available. Such employees must take reasonable steps to communicate their needs to their employer. Employees who refuse to acknowledge the existence of a dependency problem, or to seek appropriate help, may do so at their own risk. (However, employers need to inform themselves about the facts concerning drug and alcohol dependency. For instance, denial is a frequent symptom of people suffering from these conditions, as is the occasional 'slip'. Part of the accommodation process is to appropriately factor such considerations into the employer response).

⁶ *Re City of Winnipeg and CUPE, Local 500* (1991), 23 L.A.C. (4th) 441

NOTE: Those Manitoba employers, service providers, etc who are subject to this province's Freedom of Information and Protection of Privacy Act and Personal Health Information Act must also be aware of the significant restrictions placed on the collection and use of personal and personal health information by those statutes. Drug and alcohol testing practices clearly fall within their scope.

APPROVED BY:

"Janet Baldwin"
Chairperson

May 18, 2005
Date