

Feature

Workplace Response to Substance Abuse

One size does not fit all

In large part triggered by a need to update workplace substance abuse policies as a result of legalization of cannabis, many employers have recently made great strides towards clear proactive substance abuse policies and procedures within their workplace. While the recent spotlight on this issue has led many employers to update and upgrade their approach, some employers rely too heavily on a standardized approach and application of their new policies and procedures without a proper assessment of the facts for each particular case that may require a differentiated approach.

A recent decision by the Alberta Human Rights Tribunal reaffirms the idea that the accommodation process involving a (potential) substance abuse disorder (SAD) is an individualized process and should not be treated in a one-size-fits-all manner. An employer must assess each occurrence on a case-by-case basis and consider all the evidence available, including information provided by any investigation of the situation (including supervisors and/or coworkers), medical personnel and the employee themselves. Attempting instead to apply a static strategy to every potential case of a disability can result in a finding that an employer has not discharged its obligation to accommodate.

In *Maude v NOV Enerflow ULC*, 2019 AHRC 54, the Tribunal considered whether an employer had discriminated against one of its employees on the basis of a perceived disability by insisting that the complainant seek a 28 day residential treatment for a SAD. While the employer had properly followed its policies and procedures leading to a drug test showing cocaine, referral to a substance abuse professional (SAP) and following the SAP recommendation for the 28 day residential treatment program, the Tribunal found the employer failed to give reasonable consideration to a number of other pieces of evidence including:

1. The assessment results indicated a "low" or "no risk" of dependency, including a zero score with regards to cocaine dependency specifically, yet still recommended a 28 day residential treatment program;
2. There was no evidence the employee had ever attended work impaired and this was verified by his supervisors;
3. Multiple other treatment and risk reduction options were available that did not involve a residential treatment program; and
4. There was non-safety sensitive work available while treatment was obtained.

Given the above, the Tribunal concluded that the employer did not take reasonable measures to accommodate as lesser treatment and risk mitigation measures were available and were more appropriate in all of the specific circumstances.

Other common missteps by employers include applying employer rights and testing measures supported by the case law for "safety sensitive positions" to non-safety sensitive positions.



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Here are some of the key lessons learned from this case example:

1. Yes, it is important to have a substance abuse policy and to follow it.
2. Yes, in the right circumstances, an employer will have the right to test and to insist on treatment recommended by the advising substance abuse professional.
3. However, the policy and an employer's implementation of the policy must be careful to permit and to actually conduct a careful case by case review and not to blindly follow the letter of a policy or treatment recommendation without a thorough review and consideration of the entire context, evidence and range of available accommodation approaches.
4. This could include an analysis of the assessment process, information collected from coworkers/supervisors, communication between medical personnel and the employer, consideration of other positions for an employee (i.e., non-safety sensitive) to occupy during any treatment and consideration of less restrictive treatment options.

In summary, we are very encouraged by the steps most employers have taken towards clear proactive substance abuse policies and procedures within their workplace. There have also been some "wins" for employer enforcement of workplace safety in this area within the case law in the last few years. However, in each case, it is still critically important that these policies and processes be implemented carefully considering each context and all of the available evidence and options for accommodation while protecting safety.

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