

Taking the “high” road

Alberta Court of Appeal clarifies enforcement of workplace drug and alcohol policies

BACKGROUND

WORKPLACE drug and alcohol policies often tread tricky ground. Employers obviously want to eliminate drugs and alcohol from the workplace and the risks potentially intoxicated employees could cause — especially in safety-sensitive workplaces — but it's not always as simple as getting rid of employees caught with or intoxicated from those substances. In many cases, an employee may be in possession of or intoxicated by drugs or alcohol because of an addiction that qualifies as a disability that must be accommodated. However, a well-written and thoughtful policy can help an employer effectively deal with the problem of drugs and alcohol in the workplace — and accommodation isn't always required, even if an employee claims a dependency.

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BY STEPHEN SHORE AND IOURI VOROBIEV

There is no doubt about it. Addiction to drugs and alcohol is a recognized disability and an employer has a duty to accommodate an employee who has such a disability.

This raises complex issues for an employer that has found an employee impaired or using drugs or alcohol in a way that negatively impacts the workplace. A common issue faced by employers is an employee who claims the protection of an addiction-based disability only after discipline (or termination) is meted out for breach of the employer's drug and alcohol policy.

This issue was addressed in a recent decision of the Court of Appeal for Alberta, *Stewart v. Elk Valley Coal Corp.* In this case, the Court of Appeal upheld a termination of a drug-dependent employee for a breach of a drug and alcohol policy.

The impact of the decision lies in the court's assessment of the policy and its finding that a breach of the policy was sufficient cause for termination. The Supreme Court of Canada has granted leave to appeal and is expected to hear arguments later this year. A review of the background and decision of the Alberta appeal court will set the stage for this evolving legal battle.

What happened?

Ian Stewart worked as a haul truck operator at a coal mine. His job involved the operation of large, 170-tonne and 260-tonne trucks. The coal mine, run by Elk Valley Coal Corporation, was a safety-sensitive operation and Stewart performed a safety-sensitive job.

Stewart's employment was terminated after he drove his load truck into another truck at the mine and thereafter tested positive for cocaine. Stewart admitted he had used cocaine the night before and that this had made him sleepy.

However, Stewart only disclosed his drug use to his employer after he was terminated. He claimed he did not know he was drug-

dependent until after the incident which led to his termination.

The employer's drug and alcohol policy

Stewart's employer had a drug and alcohol policy which allowed employees to self-disclose a dependency without fear of discipline or termination. The policy also stated Elk Valley would support and assist in an employee's rehabilitation if that employee proactively reached out for assistance. However, if an employee came forward only after an incident, the employee would not be shielded from discipline or termination.

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Stewart had attended a training session on Elk Valley's drug and alcohol policy and signed an acknowledgement confirming he read and understood the policy.

Stewart's employment was terminated two weeks after the incident for violating the drug and alcohol policy. In the termination letter, Elk Valley offered Stewart an opportunity to be reinstated to his job after six months, with proof of successful completion of a rehabilitation program, 50 per cent of the cost of which Elk Valley offered to cover.

Alberta Court of Appeal decision

In a 2-1 decision, the court found that

Stewart was not subject to discrimination on the basis of disability. The court applied the following three-part test for discrimination:

- Does the employee have a characteristic protected from discrimination?
- Has the employee experienced an adverse impact?
- Was the protected characteristic a factor in the adverse impact?

Only the third part of the test was in dispute: whether Stewart's disability was a factor in the decision to terminate his employment. Stewart's principal argument was that since he was influenced by his drug dependency at the time of the incident, his disability was the reason he breached the policy. As such, he claimed his subsequent termination was discriminatory.

The court rejected the argument on the basis of two related findings. First, expert evidence adduced at the initial tribunal hearing established that Stewart had control over his drug use and an ability to disclose. Second, his failure to disclose his drug use under Elk Valley's drug and alcohol policy was a conscious choice. Accordingly, the court held there was culpable conduct in Stewart's violation of the disclosure requirement of the policy, and Elk Valley was justified in relying on this as cause for his discharge.

Lessons for employers

The *Stewart* decision demonstrates the impact a well-designed drug and alcohol policy will have on court review. Namely, that a policy which offers immunity for prior self-disclosure and access to treatment can increase the likelihood that discipline for a violation of the policy will be upheld.

Elk Valley's policy did not contain a zero-tolerance standard with harsh and immediate consequences for a violation. Rather, it offered support for an employee with a dependency issue on the condition of self-reporting. By designing the policy in such



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a way, the onus was put back on Stewart to justify his decision to not disclose a dependency prior to the incident. As he failed to offer a persuasive justification, the court upheld his termination for cause.

At the same time, an employer is advised to proceed with caution when relying on *Stewart*, as the decision appears to brush up against some core principles that have governed the law of addiction — principally, that “denial” is considered a part of the disease. As stated above, leave to appeal to the Supreme Court of Canada has been granted and one might expect the “denial” argument to be front and centre in the hearing.

While the Supreme Court judgment will be the final say on the matter, there are present takeaways for employers:

- A drug and alcohol policy should have purposes beyond the mere stigmatization of drug and alcohol use. These purposes — accident prevention, absenteeism reduction,

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and employee well-being — should be discussed in the policy and reflected in how the policy operates and is applied.

- An employee’s claim to be drug or alcohol dependent does not automatically convert culpable conduct into non-culpable conduct. An employer should review all

relevant circumstances before concluding that the employee’s misconduct was truly disability-related.

For more information see:

- *Stewart v. Elk Valley Coal Corp.*, 2015 CarswellAlta 1190 (Alta. C.A.).

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