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## EMPLOYMENT PRACTICES HOTLINE

# Beware The EPL Perils Of Drug Testing

By **Lisa Bee** and **Gerald L. Maatman, Jr.**

A building management company in Illinois—ZZZ Inc.—received anonymous complaints from residents at one of its properties that two onsite managers were using and selling drugs to other employees and residents.

ZZZ Inc. has a drug testing policy that reserves discretion to the employer to drug test employees based on reasonable suspicion. The policy also prohibits an employee from possessing, using or selling contraband in the workplace.

Seeking to fire the employees instead of doing any independent investigations into the reports of the employees' activities, the employer immediately arranged for drug tests on both managers. One manager, a Caucasian, tested positive for drugs and the other, an African-American, tested negative.

The employer called the hotline seeking counseling as to what to do next. The company's goal was to terminate each employee as soon as possible.

**Hotline Counseling:** Given the information that the company received regarding the possibility of the managers using and selling drugs in the workplace, the employer arguably had a sufficient basis to request the employees to undergo the drug tests.

Given that one flunked the test and the other passed, there are certainly grounds to terminate the employee that did not pass. However, the employer's goal is to rid its workplace of employees who use drugs or engage in illegal activities.

While in the jurisdiction in question (Illinois), an at-will employee can be terminated for any reason with or without cause, the African-American employee might argue that by testing negative, there were insufficient grounds to terminate his employment.

This is because employees in litigation are often successful in proving employment discrimination by arguing that the claimed reason for the personnel decision is insufficient to justify the decision. In this case, a plaintiff's attorney would argue that as the employee passed the drug test, a firing is not justified.

The employer could redouble its investigation and attempt to uncover additional evidence to demonstrate that the employee who passed the drug test had nonetheless violated the employer's personnel policy. However, that would be more difficult and open up the employer to charges that it was treating the two employees in a dissimilar fashion.

Although a termination in these circumstances could be defensible, it likely would pose risks for potential litigation without any other factual basis to support the dismissal of the employee who passed the drug test.

In this situation, the employer might have been able to avoid this problem if it conducted an independent investigation before ordering any drug tests. It could have interviewed other employees and residents to uncover evidence to substantiate the fact that both managers

had violated the employer's personnel policy.

If it had uncovered sufficient evidence upon which to base an assessment that the two employees had violated the personnel policy prohibiting the possession, use or sale of illegal drugs in the workplace, that would be a legitimate, non-discriminatory reason for the termination of both employees.

A broader personnel policy also could have avoided the necessity of administering a drug test. Some employers achieve this goal through the use of a drug-free workplace policy, the focal point of which is a written pledge by employees. Typically, this type of personnel policy requires each employee to sign an acknowledgment form by which they pledge to abide by the employer's policy and agree to be fired if they bring drugs into the workplace, or if they are under the influence while on duty.

If a worker violates the pledge, employers have maximum discretion in disciplining and/or terminating them.



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Termination becomes much easier and less vulnerable to legal challenge when a worker violates the terms of the pledge.

In this instance, the employer would need only an honest belief that the employee had violated the terms of the

pledge—that there are sufficient credible reports of the possession or sale of contraband—to support the decision to terminate the employee for violation of the personnel policy.

So long as the employer honestly believed in the legitimacy of

the reason for the termination, the reason cannot be a pretext for discrimination, even if the employer is mistaken in its belief. This would allow an employer in these circumstances to terminate both employees. 