



## **"THE SMELL TEST": A Practical Solution for Dealing with Drug and Alcohol Abuse on the Job**

by Kimberly L. Russell  
Employment and Commercial Litigation  
610.941.2541  
krussell@kaplaw.com

All too often, employers find themselves in the difficult position of dealing with an employee who reports to work under the influence of drugs or alcohol, leaving the employer in the difficult position of deciding what to do with that employee - send the employee home? Let the employee stay at work? What about the safety of other employees and third parties at the office? If I send the employee home for suspicion of being under the influence of drugs or alcohol and I am wrong, what will happen? What if I don't send the employee home and someone gets hurt at the office or on a job site? Drug and alcohol abuse policies continue to be a hot topic in employment law and litigation. However, the Pennsylvania Commonwealth Court has given employers guidance on a practical solution to that problem - a broadly worded drug and alcohol abuse policy, also known as a "fitness for duty" policy, which covers all the bases.

In *Lindsay v. Unemployment Compensation Board of Review*, an employee was fired by the Medical Center where she worked for reporting to work under the influence of alcohol. The employee filed for unemployment compensation benefits and was denied when the employer submitted the results of a blood alcohol screening test that it had administered to the employee the day she was fired and stated that the employee was fired for violating the Medical Center's drug and alcohol abuse policy. The employee appealed the denial of benefits to the Commonwealth Court, and the Court initially agreed with the employee by concluding that the Medical Center had failed to produce sufficient evidence of the test's accuracy. Then the Court did something interesting - and helpful to - the Medical Center. The Court noted that the Medical Center's drug and alcohol abuse policy also prohibited employees from reporting to work "unfit for duty" and concluded that if an employee did so, that employee could be fired immediately.

The Medical Center's drug and alcohol abuse policy that the Court approved defined a "lack of fitness for duty" as the observation by

a supervisor of an employee's symptoms or behaviors that indicate (1) that the employee may not be able to perform his or her duties safely and effectively, (2) inappropriate behavior that may diminish the employee's coworkers' confidence in the employee's ability to perform his or her job satisfactorily, or (3) "uncharacteristic behavior generally associated with intoxication, such as odor, dilated pupils, staggering, boisterous speech, drowsiness, etc." The Court concluded that if an employer has a fitness for duty rule prohibiting employees from reporting to work smelling of alcohol and the employee does so anyway, the employee can be fired immediately for "willful misconduct" for violating that policy. The Court stated in a later decision in the case that where an employer has a fitness for duty policy and a supervisor observes an employee's physical symptoms like blood shot eyes or a strong aroma of alcohol, that employee must pass "the smell test" - and the burden is on the employee to report to work in a condition to pass that test.

All employers should have a fitness for duty policy that incorporates a "smell test" like the one above. The advantage of having that policy is obvious. Having a fitness for duty policy gives managers and supervisors a practical way to handle an urgent problem on a worksite. A fitness for duty policy takes the burden away from the employer to prove that an employee was legally "under the influence" and allows employers to exercise common sense in dealing with intoxicated employees. As long as a supervisor or manager can state what symptoms he or she observed that led to the conclusion that the employee was under the influence of drugs or alcohol, the employer should be protected in enforcing its policy.

As with any employment relations policy, employers who want the benefit of a fitness for duty policy should clearly communicate that policy to its employees. Employers should make a fitness for duty policy part of the employer's personnel handbook and post the policy in a prominent place in the office or at a job site. Dealing with employees who report to work under the influence is much easier for the employer who can simply tell the employee "sorry, but that is our policy."

For help in creating a fitness for duty/drug and alcohol abuse policy, please feel free to contact me.

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