

Connecticut Court Upholds Employer's Determination of "Reasonable Suspicion"

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A federal district court in Connecticut has upheld an employer's determination that it had "reasonable suspicion" that an employee was under the influence of drugs which could adversely affect his job performance, and dismissed the employee's claim that he was wrongfully terminated after he refused to submit to a drug test. *Imme v. Federal Express Corp.*, 193 F. Supp. 2d 519 (D. Conn. April 2, 2002).

The employee was employed as a team leader for Federal Express. He supervised ramp handlers who loaded and unloaded packages at the "ramp," a three-belt system which can move up to 3,000 packages per hour. The employee previously had held the position of courier, but was removed from that position after he pled guilty to charges of driving under the influence in 1996. During his employment, the employee was provided with copies of the employer's drug and alcohol policies, as well as general workplace conduct policies. In addition, the employee's immediate supervisor was familiar with the company's drug and alcohol policies, and received training once a year on how to administer the policies.

During the period from August 1998 through March 2000, the employee received six "documented conduct related deficiencies" that were placed in his personnel file. In March 2000, he pled guilty a second time to driving while under the influence.

On April 28, 2000, the employee's supervisors observed the employee behaving strangely. Specifically, his immediate supervisor observed the following conduct:

- the employee engaged in a verbal altercation with one of the employees under his supervision;
- the employee chewed rapidly on a large plastic tie used for securing document bags;
- the employee walked back and forth, for no apparent reason, among the belts used for sorting packages;
- the employee was overheard speaking in an incoherent manner about non-work-related issues over the radios carried by FedEx employees, and answering questions in a way that was "not normal" for him.

A second manager observed additional conduct by the employee:

- the employee was louder and more rambunctious than usual;
- the employee yelled at people but not in directing them to perform their jobs;
- the employee's pupils were dilated;
- earlier in the evening, the employee had been making a lot of noise, which seemed odd because the package sort had not started at that time, and the people he was talking to were standing right next to him.
- When the manager asked a co-worker what was going on with the employee, the co-worker said, "I don't know, but I don't know why nobody has done a drug test on him."

The employee's immediate supervisor and the second manager conferred with each other and concluded that the employee was under the influence of drugs. They then conferred with a Senior Manager, an individual in Corporate Security, an individual in the Company's "Alcohol and Drug Free Workplace" department, as well as an attorney in the Legal Department. After obtaining approval from all of these departments, the immediate supervisor met with the employee and informed him that she believed him to be under the influence of drugs. She told the employee about her observations that led her to make that conclusion, and directed him to take a drug test. The employee refused to submit to a test. He was suspended and then terminated a few days later. The Company's policy provided that employees who refuse to submit to a drug test would be terminated.

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The employee filed suit, claiming that the employer violated a Connecticut statute, which provides:

No employer may require an employee to submit to a urinalysis drug test unless the employer has reasonable suspicion that the employee is under the influence of drugs or alcohol which adversely affects or could adversely affect such employee's job performance.

The court stated that the key inquiry was whether the employer had "reasonable suspicion" that the employee was, at that time, under the influence of drugs or alcohol which adversely affected, or could have adversely affected, his job performance. The question was not whether the employee *actually was* under the influence of drugs or alcohol, but whether the supervisors had reasonable suspicion that he was.

The court stated that in determining whether there was reasonable suspicion to drug test an employee, the events leading up to the request to submit to the test must be analyzed from an objectively reasonable viewpoint. Specifically, the court said that reasonable suspicion must be analyzed in light of the "totality of the circumstances." The issue was *not* whether each one of the behaviors observed by the company's supervisors could have created a reasonable suspicion that the employee was under the influence of drugs. Rather the question was whether all of their observations, taken together, and viewed in the context of the supervisors' own experiences and knowledge as managers and their experiences with the particular employee, was sufficient to create reasonable suspicion.

The court held that the totality of circumstances in this case was sufficient to form a reasonable suspicion that the employee was under the influence of drugs. The court emphasized that the supervisors observed several things that were "strange" about the employee's behavior, in comparison to his "normal" behavior. Importantly, the supervisors did not rely on one occurrence of a single "strange" behavior. Although no one of the observed behaviors would have been sufficient to create a reasonable suspicion that the employee was under the influence of drugs, the totality of all of the supervisors' observations, together with the supervisors' experiences as managers and their past experiences with the employee, supported a reasonable suspicion that the employee was under the influence of drugs that was adversely affecting, or could adversely affect, his job performance.

Employers who conduct reasonable suspicion drug and/or alcohol testing (even those not located in Connecticut) should take note of this court's decision to make sure that their own reasonable suspicion determinations are valid. Although the standard for making reasonable suspicion determinations may vary from jurisdiction to jurisdiction, it is worthwhile noting that the United States Department of Transportation's drug and alcohol testing regulations require "reasonable suspicion" determinations to be based on "specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors" of the employee. These observations should be documented by the supervisors making the reasonable suspicion determinations.

In addition, employers should take care to train their supervisory personnel to recognize the signs and symptoms of possible drug use or alcohol misuse and to make reasonable suspicion determinations properly. The Connecticut court found it significant that:

- The company had written drug and alcohol policies, which had been provided to the employee.
- The supervisors were familiar with the company's drug and alcohol policies and had received training on how to administer them.
- The supervisors conferred with one another, a Senior Manager, an individual in Corporate Security, an individual in the Company's "Alcohol and Drug Free Workplace" department, an attorney in the Legal Department, and obtained approval from all of these individuals to proceed with a drug test.

In sum, the Company in this case acted "by the book" in making the reasonable suspicion determination and the employee's lawsuit for wrongful termination was dismissed.

If you have any questions, or would like to discuss "reasonable suspicion" testing or any other aspect of substance abuse testing further, please **contact the Jackson Lewis Substance Abuse Practice Group**.

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