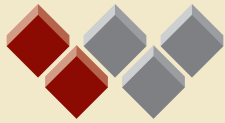

Wimberly Lawson
Wright Daves & Jones, PLLC
Attorneys & Counselors at Law

Briefly

January 2014 Volume 14, Issue 1

ALCOHOLIC TRUCK DRIVER REQUIRED TO REMAIN ALCOHOL-FREE AS A CONDITION OF RETURNING TO WORK

Ashley Griffith

"…a recent case from the Third Circuit Court of Appeals demonstrates that the ADAAA may give employers broad rights in rehabilitating alcohol and drug-dependent employees"

The Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") greatly expands the definition of those considered disabled, and thus the requirement to provide reasonable accommodations. However, a recent case from the Third Circuit Court of Appeals demonstrates that the ADAAA may give employers broad rights in rehabilitating alcohol and drug-dependent employees. Specifically, the Third Circuit upheld an employer's decision to require an alcoholic driver to remain drug and alcohol free as a condition of returning to work. *Ostrowski v. Con-Way Freight, Inc.*, No. 12-3800, 2013 WL 5814131 (3d Cir. 2013).

In this case, the plaintiff was employed as a driver sales representative. The employer was subject to federal motor carrier safety regulations, which required it to maintain strict drug and alcohol screening programs for its employees. The plaintiff requested a leave of absence pursuant to the Family and Medical Leave Act ("FMLA") to enter a rehabilitation program for the treatment of alcoholism. The employer granted the request and did not impose any discipline in connection with the leave. When the plaintiff returned to work, the employer required him to sign a "Return-to-Work Agreement," in which he agreed to remain "free of drugs and alcohol (on company time as well as off company time) for the duration of his employment." Within a month of signing this agreement, however, the plaintiff again admitted himself into a center for the treatment of alcohol abuse after he suffered a relapse and resumed consuming alcohol. The employer terminated the plaintiff's employment, with the sole reason being that he had consumed alcohol in violation of the Return-to-Work Agreement. The plaintiff then sued the employer, alleging violations of the FMLA, ADAAA, and other state laws. The district court granted summary judgment in favor of the employer, and the plaintiff appealed.

The Third Circuit upheld the district court's decision. First, the court noted that Congress intended to interpret the term "disability" broadly and that the plaintiff had successfully created a factual dispute as to whether his alcoholism was a disability pursuant to the ADAAA. However, the court noted that the plaintiff failed to demonstrate that the employer used the Return-to-Work Agreement as a pretext for disability discrimination. The court explained that employers do not violate the ADAAA merely by entering into return-to-work agreements that impose employment conditions different from those of other employees. Such agreements that bar an employee from consuming alcohol – whether at the workplace or otherwise – have been recognized and upheld in many circumstances. Although the plaintiff was subject to different standards than other employees who did not sign a return-to-work agreement, the difference results from the terms of the agreement rather than disability discrimination. The court reasoned that such agreements do not discriminate because of an alleged disability (alcoholism) or restrict the ability of individuals who suffer from alcoholism to work. Rather, such agreements merely regulate the conduct (drinking alcohol), prohibiting employees subject to its terms from doing so. Thus, such agreements are not invalid under the ADAAA.

NO RE-HIRE POLICY OF ALCOHOLIC DRIVER FOUND TO VIOLATE DISABILITIES LAW

Consider the following events: an employee telephones his supervisor and informs the supervisor that he drank too much alcohol over the weekend, that he thought he was an alcoholic, and that he was going to an Alcoholics Anonymous ("AA") meeting. The employer has an unwritten policy that it would not allow a driver who self-discloses an alcohol problem ever to return to driving. In *EEOC v. Old Dominion Freight Line, Inc.*, No. 11-2153, 2013 WL 3230670 (W.D. Ark. 2013), the court held that such a practice was a violation of the ADAAA.

In *Old Dominion*, the company argued that safety justifications underpinned its no-return policy. The company explained that it had made an appropriate policy decision that it is unsafe to entrust the driving of a commercial

Continued on page 4

Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville, Chattanooga and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.

Howard Jackson...

"The Board's announcement that it would not seek such an appeal means that it has effectively accepted the ruling by the Courts of Appeal, and will not seek to implement a mandatory notice posting rule."

NATIONAL LABOR RELATIONS BOARD
GIVES UP ON MANDATORY POSTING RULE

On January 6, 2014, the National Labor Relations Board's Office of Public Affairs issued a notice that the Board would not seek Supreme Court review of two decisions from U.S. Courts of Appeal that struck down the Board's mandatory Notice Posting Rule. As you may recall, the Board issued a mandatory posting rule, but before it went into effect the U.S. Court of Appeals for the District of Columbia ruled that the notice posting rule was unlawful. The U.S. Court of Appeals for the Fourth Circuit issued a similar decision.

A party that loses at the Court of Appeals can seek permission to appeal to the U.S. Supreme Court. The Board's announcement that it would not seek such an appeal means that it has effectively accepted the ruling by the Courts of Appeal, and will not seek to implement a mandatory notice posting rule.

In its announcement, the Board stated that it "remains committed to ensuring that workers, businesses and labor organizations are informed of their rights and obligations under the National Labor Relations Act." The Board further noted that it has established a free mobile app for iPhone and Android users to provide the public with information about the National Labor Relations Act. So the Board's efforts to publicize the law continue, but forcing employers to post is no longer part of such efforts.

NLRB UPHOLDS EMPLOYER POLICY
PROHIBITING USE OF RECORDING DEVICES AT WORK

"The General Counsel argued that the policy tended to chill employees in the exercise of their rights because they would not be permitted to record, for example, statements by supervisors that violated employee rights."

In recent years the National Labor Relations Board has struck down various employer rules on the ground that the rules tend to "chill" employees in the exercise of their rights to engage in acts that are protected by the National Labor Relations Act. The Board's General Counsel (the prosecutorial arm of the Board) continued that pattern in a case that attacked an employer's policy forbidding the electronic recording of conversations.

The employer, Whole Foods Market, implemented the policy in 2001 and placed it in its version of an employee handbook. In a statement preceding the rule, Whole Foods explained that it adopted the policy to "encourage open communication, free exchange of ideas, honest and open dialogue and an atmosphere of trust." Then the policy itself stated a purpose to "eliminate a chilling effect to the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded."

The General Counsel argued that the policy tended to chill employees in the exercise of their rights because they would not be permitted to record, for example, statements by supervisors that violated employee rights. The Administrative Law Judge disagreed. He noted that the rule did not prohibit employees from gathering evidence of such unlawful activity, as they could do so by taking notes or offering their own statements and testimony.

The Administrative Law Judge upheld the policy. In so doing, he noted that the policy expressly stated a legitimate purpose, and that it had not been implemented in response to union activity, nor used by the employer in an unlawful manner.

Editor's Note - This case illustrates both that the NLRB is continuing efforts to strike down employer policies that it views as restrictive toward employees' protected activities, and that policies that are carefully drafted for legitimate purposes can survive such attacks.

TO SUBSCRIBE to our complimentary newsletter, please go to our website at www.wimberlylawson.com or email bhoule@wimberlylawson.com

E-VERIFY NOW HAS TOOLS
TO DETERMINE SOME IDENTITY THEFT

"The agency says it will use a variety of detection systems to identify "patterns of fraudulent SSN use" and then lock that number in the E-Verify system…"

Jerome D. Pinn...

"The new rules are designed to increase the hiring and employment of military veterans and individuals with disabilities."

In a November announcement, the U.S. Citizenship and Immigration Services announced that the E-Verify system now has the ability to "lock" Social Security numbers that appear to be misused. The agency says it will use a variety of detection systems to identify "patterns of fraudulent SSN use" and then lock that number in the E-Verify system, much like credit card companies lock cards that appear to have been stolen. As a result, employees that use a locked Social Security number will receive a tentative non-confirmation, which they will have to contest with the Social Security Administration.

While this new system will undoubtedly assist in some way in lessening identify fraud, it should be noted that both the imposter and the true owner will have the same Social Security Number, and at least initially the system will lock out both.

NEW AFFIRMATIVE ACTION RULES FOR VETERANS AND THE DISABLED

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) on August 28, 2013 announced two new rules that apply to federal contractors and subcontractors. The new rules are designed to increase the hiring and employment of military veterans and individuals with disabilities. One rule updates the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA); the rule other updates Section 503 of the Rehabilitation Act of 1973. Probably the most notable change is the adoption of a hiring benchmark for veterans and a utilization goal for individuals with disabilities.

The new rules will take effect on March 24, 2014. Contractors and subcontractors with a written affirmative action program will not need to implement the hiring benchmark and utilization goal until the beginning of the next plan year. However, other parts of the new rules do require action by March 24, 2014.

Employers with affirmative action programs who have questions or seek assistance with the new OFCCP rules may contact Wimberly Lawson attorneys for assistance.

KNOW YOUR ATTORNEY
FREDRICK J. BISSINGER

FREDRICK J. BISSINGER is Regional Managing Member of the Nashville, Tennessee office of the firm, which he joined in 1999. His law practice includes an emphasis in handling employment discrimination and wrongful discharge matters at both the administrative level and in Federal and State Court litigation. His practice also includes an emphasis on ADA and FMLA compliance, workers' compensation, and general liability matters. He received his Bachelor of Science, *cum laude*, in Economics from Washington & Lee University and his law degree from the Seton Hall University School of Law. Prior to entering private practice, Fred served in the United States Navy Judge Advocate General Corps from 1993-1997. Fred is a member of the Tennessee Bar Association and served as the 2012-2013 Legal Advisor for Middle Tennessee Society for Human Resource Management and the 2012-2013 Diversity and Inclusion Committee Co-Chair for the Tennessee Society for Human Resource Management.

Be sure to visit www.wimberlylawson.com often for the latest legal updates, seminars, alerts and firm biographical information!

 continued from page 1

vehicle to an alcoholic under any circumstances, given the possibility of relapse and the difficult of supervising an employee who essentially carries out his job duties alone.

The court agreed with the EEOC in that such a policy violates the ADAAA. The court explained that it was discriminatory to use a qualification standard that screens out an individual with a disability, unless the standard is job-related and consistent with the business necessity. The court continued that the "business necessity" of not having an alcoholic driving a commercial vehicle is served by the referral/evaluation/treatment, but it would serve no process if there were no possibility that it could result in accommodating the disability of alcoholism.

The court recognized that Old Dominion's safety concern fell under the ADAAA's rubric of "direct threat," which is defined as a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodating." 29 C.F.R. § 1630(r). In determining whether an employee presents a direct threat, the employer shall conduct an individualized assessment. *Id*. The court concluded that Old Dominion's no-return policy contains no such individualized assessment and fails to consider the possibility of an accommodation. Finally, the court held that the no-return policy cannot be justified either on public safety concerns or business necessity considerations, and thus, it violated the ADAAA.

The EEOC also contended that it was a violation of the ADAAA to require Grams to successfully complete the referral/evaluation/treatment process before he could work as a dock hand. The court agreed and explained that Old Dominion cited no law, rule or regulation classifying dock work as a safety-sensitive position, or otherwise indicating that alcoholism is a disqualification for dock work. The court continued that Old Dominion cited nothing that would justify requiring an alcoholic employee to go through the referral/evaluation/treatment process, as opposed to AA or some other type of treatment before doing dock work. Ultimately, the court held that the EEOC was able to make out a *prima facie* case of discrimination against Old Dominion.

With regard to the ADAAA's regulations, § 12114(c)(4), permits an employer to "…hold an employee who . . . is an alcoholic to the same qualifications standards for employment or job performance and behavior that such [employer] holds other employees, even if unsatisfactory performance or behavior is related to . . . the alcoholism of such employee." In addition, case law strongly suggests that if an employee engages in conduct or has performance issues that would justify termination, the employer can instead suspend the employee and require successful rehabilitation and evaluation, prior to allowing the employee to return to work. The employer can condition an employee's return to work upon his/her compliance with special conditions not generally imposed on other employees, such as periodic alcohol and/or drug testing. For example, in *Clifford v. County of Rockland*, 528 F. App'x 6 (2d Cir. 2013), the court held that under the circumstances faced by the employer, it acted lawfully when, as a condition of continued employment, it prohibited the employee from having any alcohol in her blood stream and required that she submit to periodic testing, which effectively prohibited the employee from drinking on or off the job. The court also stated that the employer could insist the employee be evaluated to determine the likelihood of an imminent relapse.

With regard to the holding in *Old Dominion*, it is important to remember that Grams did not violate a company policy, nor did the case involve a neutral policy that applied to all employees. Contrast *Old Dominion* with the circumstances in *Altman v. NYC Health & Hospitals Corp.*, 903 F. Supp. 503 (S.D.N.Y. 1995). In *Altman*, the medical director of a hospital, who was responsible for supervising the hospital's medical staff and for critical administrative functions, had a history of substance abuse and had recently been found treating a patient while under the influence. The court held that the hospital was justified in refusing to return the doctor to his previous position, even after he received treatment. Although it would likely not be necessary to do so in all situations, the hospital did allow the doctor to return as a staff physician – in other words it provided him a position where he could be adequately monitored and perform the job safely without posing a direct threat to himself or others.

Also note that the court in *Old Dominion* rejected the company's justification for its no-return policy-that is, that a recovering alcoholic could relapse. The court suggested that even if true, there may have been accommodations that could have been made to reduce or eliminate such risk.

Finally, the court held that the employer cannot require an alcoholic driver to go through a specific treatment process before returning to work as a non-driver. The court stated that Old Dominion did not provide any support classifying such work as a safety-sensitive position, nor did it indicate that alcoholism was a disqualification for such work. While this holding is certainly far reaching, the court suggested that Old Dominion's requirement was merely a pretext for discrimination. Regardless, it is best to proceed with caution if presented with a similar issue.

©2014 Wimberly Lawson Wright Daves & Jones, PLLC. This publication is intended for general information purposes only and does not constitute legal advice. Readers may consult with any of the attorneys at Wimberly Lawson Wright Daves & Jones, PLLC to determine how laws, suggestions and illustrations apply to specific situations.