

## DRUG-TESTING IN THE WORKPLACE

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In a recent case, *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Co.*, the Alberta Court of Appeal decided that persons who use drugs, even casually, can be a safety risk in an already dangerous workplace. Given this finding, the Court went on to declare that random drug-testing is justified in some situations. However, this decision runs counter to *Entrop et al. v. Imperial Oil Limited et al.*, previously considered the leading case on this issue; in this decision, the Ontario Court of Appeal firmly held that, while alcohol- testing and post-incident drug-testing are permissible in some circumstances, random and unannounced drug-testing is not.

The issue in *Entrop* was whether random drug-testing was defensible as a *bona fide* occupational requirement under Ontario's *Human Rights Code* as it could detect a worker's past drug use as well as his or her current state of impairment. The Ontario Court decided that Imperial Oil's drugtesting policy was unlawful because it identified drug addicts (or workers perceived to be drug addicts) who would be discharged or disciplined due to their addiction—which is a disability. The company's drug-testing therefore infringed on the right of disabled employees to have employers accommodate their disabilities.

The Alberta Court in *Kellogg Brown & Root* took a different approach, using a risksbased analysis to decide on the issue. The employer in this case — Kellogg Brown & Root (KBR), a construction company — was building an expansion of an oil-and-gas plant. KBR's employees operated large-scale equipment and the accident risk on the construction site was high. The consequences of accidents could impact both workers and the environment.

KBR's hiring policy required that all prospective workers take a pre-employment/ post-offer drug test. The potential employee in this case was a recreational marijuana smoker who failed the test. The Court decided that the potential employee was not refused employment based on the perception that he was addicted. On the contrary, the Court found that, because the purpose of KBR's drug-testing policy was to reduce workplace accidents by prohibiting on-the-job impairment, the policy was justified because there was a clear connection between the policy and its purpose.

The consequences of the *Kellogg Brown & Root* decision can impact any employer that operates in safety-sensitive environments, such as construction sites, chemical plants and the forestry sector. This is important for obvious reasons and, in addition, because employers have a legal duty to provide a safe workplace; in fact, they can be held criminally liable for occupational health and safety negligence.

This decision and the issues arising from it demonstrate a critical need for employers to make certain they have a comprehensive policy to ensure a safe workplace and to limit their liability. However, it remains to be seen whether other Canadian courts will follow *Kellogg Brown & Root* and allow drug-testing or *Entrop* which prohibits it. Since the law in this regard is now uncertain, employers should seek legal advice before implementing a drug-and-alcohol policy, particularly one that considers random testing.