

Pre-employment drug testing: Another hot spot for the EEOC



James J. Boutrous II | Friday, December 4, 2015

In a trend of recent lawsuits and administrative actions, the EEOC has taken aim at employers that refuse accommodations to pre-employment applicants in the administration of drug testing.

Notably, in *EEOC v. Kmart Corporation, et al.*, Case No. 13-cv-02576 (United States District Court for the District of Maryland), the EEOC filed suit against Kmart when Kmart, after offering Lorenzo Cook a job at its Hyattsville, MD store, refused to bring Mr. Cook on board when he could not produce a urine sample for the pre-employment drug test due to Mr. Cook's kidney disease and dialysis. Cook requested alternate forms of testing as an accommodation to his kidney disability, such as a blood test, hair test, or other form of drug test that did not require a urine sample. Kmart however refused the alternatives.

The EEOC alleged that Kmart's refusal to allow the alternate tests was a violation of the Americans with Disabilities Act (ADA). Kmart ultimately settled the matter with the EEOC for \$102,048 in monetary relief to Cook, and significant equitable relief as spelled out in the consent decree. Notably, Kmart was and is enjoined from taking adverse employment actions on the basis of disability and failing to provide a reasonable accommodation. Kmart also is required to revise its drug testing policies to provide for alternate forms of testing as an accommodation to applicants who present with disabilities like Cook. The decree also required Kmart to provide training to its store managers, assistant store managers and human resources managers on the equal employment laws enforced by the EEOC, including the ADA, and to post the decree at Kmart regarding the results of the lawsuit.

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Likewise, the EEOC targeted Wal-Mart in *EEOC v. Wal-Mart Stores East, LP*, Case No. 1:14-cv-00862 (United States District Court for the District of Maryland), under a similar set of facts. Again, the individual at issue suffered from renal disease and was unable to produce a urine sample as a result at the pre-employment drug test. Like, Kmart, Wal-Mart refused any alternate testing and ultimately paid a monetary remedy to the individual at issue, Laura Jones, plus the same equitable remedies set forth in the Kmart decree.

In addition to the above referenced matters, the EEOC has brought actions against employers under similar circumstances in the additional following matters: *EEOC v. Forth Worth Center of Rehabilitation*, Case No. 3:13-cv-1736 (United States District Court for the Northern District of Texas), which settled for \$30,000 and equitable relief; and, *EEOC v. G2 Secure Staff, LLC*, Case No. 5:11-cv-475 (United States District Court for North Carolina), which settled for \$30,000 and equitable relief.

From the above, it is a fair conclusion that pre-employment drug testing and accommodating individuals who are unable to complete the “standard” test will remain a trigger point for the EEOC into the foreseeable future.

Employer takeaways

1. Review any pre-employment drug testing policies and ensure that they allow for alternate forms of testing in the event an applicant is unable to complete the “standard” test.
2. Ensure that your management, supervisory and human resources team is well trained on the potential need for such accommodations to ensure that they are able to identify the issue and address it accordingly.



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