

Going “AWOL” At Drug Test Site Warrants Dismissal Of Discrimination Claim, Court Holds

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A Florida county park ranger was lawfully terminated from his job after he failed to take a drug test following a vehicular accident, where the county believed he had sustained an injury and where its drug testing policy provided that the county could require him to seek workers' compensation medical treatment for the injury. Granting summary judgment to Manatee County in the ranger's lawsuit for discrimination and, in part, for retaliation, allegedly in violation of the ***Age Discrimination in Employment act*** and the ***Florida Civil Rights Act***, the United States District Court in Tampa concluded that the undisputed evidence showed that he was terminated for a legitimate, non-pretextual reason.

Alan Behrens was a passenger in a county truck driven by his supervisor when the truck was involved in a minor accident. County policy required the accident to be reported immediately and that post-accident drug and alcohol testing be conducted within 2 hours of the accident. Behrens was not scheduled to work again for another 6 days, but on the day he was to return he called in sick. Believing the absence was linked to the accident, the park ranger's supervisor submitted, for the first time, a drug test referral form for Behrens based on a request for workers' compensation. Behrens denied he requested workers' compensation, but reported to a medical facility approved by the county for workers' compensation claims, as “ordered” by his supervisor. Behrens waited for some time to be called in for his examination. He began to experience low blood sugar symptoms. The nurse who was escorting him quoted him as saying he felt a little hungry, that he was going out to eat half a sandwich which he had in his truck, and that he would return. He then left. The medical facility advised the County, however, that he did not return and closed the workers' compensation claim. The County treated Behrens's actions as a refusal to submit to a test. Behrens claimed he did not realize this conduct was a refusal. He was terminated for violating the drug testing policy, and brought suit after filing a charge with the EEOC.

The County's zero-tolerance drug policy stated, in part, “[a]ny on-the-job injury, for which an employee requests or is required to seek Workers' Compensation medical treatment, amounts to sufficient reasonable suspicion to require drug testing. All employees reporting for such medical treatment will submit to a drug/alcohol test as part of the evaluation.” Violations result in automatic termination.

The court concluded that the county had carried its burden of establishing that Behrens was

terminated for a legitimate, non-discriminatory reason: Behrens was required by the county to seek medical treatment related to his involvement in the accident; that allowed the county to require his submission to a drug test, which it did; and, Behrens did not submit to a test. The county thus maintained it believed that Behrens had violated its policy and should be fired.

The court concluded the park ranger could not show the county's reason for his dismissal was pretextual and unlawful. Behrens could not rely on his assertions that the policy was unfair or mistaken; rather, he had to show the county did not rely on the reasons it offered, and that it did not honestly believe he had violated its drug-free policy. Behrens could not do so, the court held. Behrens' contentions about his beliefs – disclaiming workers compensation, not realizing he was refusing a drug test, lack of notification that the test was mandatory – “cast no doubt on the County's motivations,” the court found. That the test allegedly was improper under the policy because it was not administered within 32 hours of the incident involving the truck also was of “no moment”; the county could reasonably interpret its policy as requiring a drug test in the course of seeking workers' compensation independent of the requirement for post-accident testing, as was indicated by the language of the referral form. Likewise, the fact none of the terminations for non-compliance with the County's drug policy were based on refusals to test failed to undermine the County's assertion that a refusal resulted in termination on an automatic, non-discriminatory basis.

Courts afford employers considerable discretion in interpreting their own published substance abuse policies. Here the employee's disappearance after reporting to the medical facility for a workers' compensation-related examination, including a drug test, as his supervisor directed, may have weighed heavily in the court's decision because the test was authorized by the County's policy, even if it was not a post-accident test. In general, employers seek to administer post-accident tests as soon as possible after the incident triggering the need for a test, so as to better assure the tests reflect the employee's condition at the time of the accident. (Drivers covered by DOT substance abuse testing rules are required to be drug tested within 32 hours of an accident, as defined by the rules, and alcohol tested within 8 hours (but preferably within 2).) Employers also should be mindful of a proposed OSHA rule that may restrict post-injury drug and alcohol testing in the absence of reasonable suspicion. Although the county's policy here stated that a referral for a workers' compensation medical examination amounted to reasonable suspicion for testing, some states' laws may prohibit substance abuse testing only for a claimed workers' compensation injury.

More importantly, leaving a testing facility before giving a specimen for drug or alcohol testing constitutes a refusal to test under many workplace substance abuse policies. This case highlights the necessity of including a comprehensive definition of “refusing to submit” in a drug and alcohol testing policy, and communicating the policy clearly to employees. Employees should be made aware that if they do not submit to testing in the time and manner specified by the employer, they will be deemed to have refused the test and will be terminated.

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