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Zero-Tolerance for Upside-Down Burritos

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A recent decision from the U.S. Court of Appeals for the Eleventh Circuit provides some useful reminders for employers on the benefits of establishing and enforcing zero-tolerance drug policies and effectively documenting performance actions. The case is *Caporicci v. Chipotle Mexican Grill, Inc.*, Eleventh Circuit Case No. 16-13494.

Like many employers, Chipotle has a drug policy, which prohibits any employee from reporting to work under the influence of alcohol, drugs or controlled substances, and also requires that employees who use medically prescribed or over-the-counter drugs that may adversely affect their ability to perform work in a safe manner notify their manager prior to starting work.

This particular case involved a Chipotle team member at a restaurant in Tampa, Florida. The employee suffers from bipolar disorder and takes medication to control it. The employee's nurse practitioner changed her prescription to a new medication, which caused the employee to become dizzy and disoriented at work. She began messing up orders, including turning a burrito upside down so that all of the contents spilled out. The manager sent her home and then called to terminate her employment because she was intoxicated at work. The manager thereafter emailed the company, informing them that the employee had come into work appearing to be intoxicated in violation of company policy and that he had terminated her employment.

The employee sued, alleging that she had been terminated because of her disability in violation of the ADA. The District Court granted summary judgment, which the Eleventh Circuit affirmed.

The company did not dispute that the employee had a disability. For her part, the employee did not dispute that the company's stated reason for her termination was that she was intoxicated at work, or that she had appeared disoriented and incoherent on her last day.

On appeal, the employee argued that she notified her manager at the start of her shift that she was on medication and thereby (in her view) complied with the company's policy. The problem, however, is that this was only the second part of the policy. As the District Court found and was affirmed on appeal, the issue lay more with the first part of the policy: showing up for work under the influence. In the Court of Appeals' view, this was the stated reason given by the manager for her termination and was documented by him in a contemporaneous email to the company about why he had decided to fire her. As a result, the reason given for her termination was intoxication, not her disability, and summary judgment for the company was affirmed.

The case illustrates that a zero-tolerance drug policy can be an effective tool for employers. The case also illustrates the importance of contemporaneous documentation – the fact the manager explained the reason for his decision, albeit by email – cemented that this was why he had terminated her and that it had nothing to do with her disability. The result may have been much different if the company would not have been able to rely on the policy and the email.

A couple of other points bear mentioning: consistency and discipline. Saying that a company has zero-tolerance in a policy is one thing, but it only works if the company consistently applies the policy. Once a company starts cutting people breaks, it will erode what zero-tolerance means: for example, letting an employee off with a warning for a zero-tolerance offense is not “zero-tolerance;” it means the company is tolerating the behavior – even if just a little bit. And if the same company that gives one employee a pass fires another one for the same type of behavior, this will – quite rightly – create the impression of a double-standard. Consistently enforcing a zero-tolerance policy requires a lot of discipline, and frankly, may also require some discomfort on the part of managers and HR professionals with respect to implementation. Of course, no one ever said this job would be easy.

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