

## 9th Circuit: Pre-employment 'One-Strike' Drug-Screening Policy Does Not Violate ADA

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By David J. Middlebrooks

A hiring policy that permanently disqualifies candidates for failing a drug test does not violate the Americans with Disabilities Act's (ADA) or California employment law's protection of rehabilitated drug addicts, according to the 9th U.S. Circuit Court of Appeals.

The Pacific Maritime Association rejected a rehabilitated drug addict's employment application under its drug-screen policy because he failed a pre-employment drug screen when applying for the same job seven years earlier. Santiago Lopez, who was addicted to alcohol and drugs at the time of the first screening, had since recovered from his addiction and was no longer using alcohol or drugs. Nevertheless, the association rejected his application under its pre-employment drug-screening policy.

The policy, which was incorporated into the association's collective bargaining agreement, provides candidates with a "one-shot" drug test and permanently disqualifies candidates who test positive. Candidates are given seven days notice of the drug test. The association adopted pre-employment drug testing in response to numerous serious job-site accidents and injuries caused partly by "a culture that accepted the use of drugs and alcohol in the workplace." The disqualification was permanent because the defendant thought that applicants who could not abstain from using an illegal drug, even after receiving advanced notice of the test, showed less responsibility and less interest in the job than those that passed the test.

Lopez brought suit under the ADA and the California Fair Employment and Housing Act, alleging that the policy discriminates against recovering drug addicts. The ADA and the California law expressly prohibit discrimination against rehabilitated drugs addicts who are not currently using illegal drugs. Lopez argued that the association adopted the policy to intentionally exclude recovering and recovered addicts.

The trial court ruled for the association, and the 9th Circuit affirmed. "The maritime association's one-strike rule bars applicants based on conduct, testing positive for illegal drugs, regardless of whether their failed test was attributable to recreational drug use or an addiction," the 9th Circuit stated.

The court held the policy did not violate the law on its face because the "rule eliminates all candidates who test positive for drug use," not just those whose test results were based on addictive use of drugs. The 9th Circuit noted "the triggering event was a failed drug test, not an applicant's drug problem." The court partly based its decision on the U.S. Supreme Court's decision in *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003), upholding an employer's policy of not rehiring workers who had lost their jobs because of drug-related misconduct.

Further, the court rejected Lopez's argument that because Lopez attempted to inform the association of his previous drug addiction after his rejection, the association intentionally discriminated against him because of his status as a recovered drug addict.

The court also held that Lopez had produced insufficient evidence to show that recovered and recovering drug addicts were more adversely affected by the policy than other candidates. Lopez was unable to show that the one-strike policy resulted in fewer rehabilitated drug addicts working in association jobs compared to the percentage of rehabilitated drug addicts in the relevant labor market.

*Lopez v. Pacific Mar. Ass'n*, 9th Cir., No. 09-55698 (March 2, 2011).

**Professional Pointer:** This case illustrates the importance of crafting generally applicable employment and hiring policies. The protections in the various employment laws do not prohibit an employer from adopting business policies and practices that serve legitimate business reasons, however, it is important to note those reasons. Genuine employment policies that are not intended to discriminate against a protected class will generally be valid.

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**Editor's Note: This article should not be construed as legal advice.**

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