



**Canadian Human
Rights Commission**

**Commission canadienne
des droits de la personne**



***Canadian Human Rights
Commission's Policy on
Alcohol and Drug Testing***

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CANADIAN
HUMAN RIGHTS
COMMISSION

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CANADIENNE DES
DROITS DE LA PERSONNE

Canadian Human Rights Commission's Policy on Alcohol and Drug Testing

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Canadian Human Rights Commission's Policy on Alcohol and Drug Testing

1. Introduction

The Commission recognizes that the inappropriate use of alcohol or drugs can have serious adverse effects on a person's health, job performance and workplace safety. Safety is important to employees and employers. However, safety must be ensured in ways that do not discriminate against employees on the basis of a prohibited ground of discrimination. Workplace rules and standards that have no demonstrable relationship to job safety and performance have been found to violate an employee's human rights.

This policy focuses on the proper and improper use of employment related drug and alcohol testing. The Commission recognizes that the issues surrounding alcohol and drug abuse are complex, including the causes and effects of alcohol and drug use, the high co-occurrence of addictions and mental illness, and the challenges and stigma facing those who are dependent. Addressing these issues is important, but fall outside the scope of this policy.

Impairment may result from a variety of conditions, most of which are unrelated to the consumption of drugs or alcohol. If impairment is a concern in the workplace—whether impairment is due to stress, anxiety, fatigue or drug/alcohol use—an employer should focus on ways of identifying and minimizing potential safety risks, including employee assistance programs, drug education and health promotion programs, off-site counselling and referral services, and peer or supervisor monitoring.

2. Policy Objective

The objective of this policy is to clarify the rights and responsibilities of employers, employees, and job applicants regarding employment-related drug and alcohol testing. It sets out the Commission's interpretation of the human rights limits on drug and alcohol testing programs, and provides practical guidance on compliance with the *Canadian Human Rights Act*. This policy is subject to decisions by human rights tribunals and the Courts, and should be read in conjunction with those decisions and the Act.

This policy is not a substitute for legal advice. Any employer considering adopting a drug and alcohol testing program should seek legal guidance on this issue.

3. General Policy Statement

In accordance with current case law on the issue of drug and alcohol testing¹, and consistent with the Act's prohibition of discrimination on the ground of real or perceived disability, drug and alcohol testing are *prima facie* discriminatory.²

Given that a drug test cannot measure impairment at the time of the test, requiring an employee or applicant for employment to undergo a drug test as a condition of employment may be considered a discriminatory practice on the ground of disability or perceived disability.

Requiring an employee in, or an applicant for, a safety-sensitive position³ to undergo alcohol testing as a condition of employment may be acceptable, given that alcohol testing can measure impairment at the time of the test, but only if the employer accommodates the needs of those who test positive and who are determined to be dependent on alcohol.

4. Dependent and Recreational Users of Drugs and Alcohol under the *Canadian Human Rights Act*

The *Canadian Human Rights Act* prohibits discrimination on the basis of disability and perceived disability⁴. Disability includes a previous or existing dependence on alcohol or a drug⁵. Further, the Act also prohibits discrimination based on the actual or perceived possibility that an individual may develop a drug or alcohol dependency in the

¹ See overview of relevant caselaw in the Reference section of the Policy.

² *Entrop v. Imperial Oil*, [2000] 50 O.R. (3d) 18 C.A.

³ A safety-sensitive position is one in which incapacity due to drug or alcohol impairment could result in direct and significant risk of injury to the employee, others or the environment. When determining whether a job is safety sensitive, one must consider the context of the industry, the particular workplace and an employee's direct involvement in a high-risk operation. Any definition must take into account the role of properly trained supervisors, and the checks and balances present in the workplace.

⁴ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montreal (City)*; *Québec (Commission des droits de la personne) v Boisbriand* (2000) 1 S.C.R. 665

⁵ Canadian Human Rights Act. s 25

future.⁶

In 2003, the Canadian Human Rights Tribunal released a decision, *Milazzo v Autocar Connaisseur*, which distinguished between casual or recreational drug users and dependent drug users, finding that only dependent drug users have a disability and are therefore afforded protection under human rights law.⁷ The Tribunal notes that “the onus is on the employee or prospective employee to demonstrate that they are entitled to the protection of the CHRA”. According to the Tribunal, employees can prove that they are dependent users of alcohol or drugs, “by submitting to a professional assessment by an appropriate health care practitioner”.

Similarly, a more recent case from the Alberta Court of Appeal, *Alberta (Human Rights and Citizenship Commission) v Kellogg, Brown & Root*,⁸ found that recreational users of drugs were not entitled to protection under human rights legislation.

Despite these decisions, the issue of whether casual or recreational users are protected under human rights legislation is still a matter of debate and has not been settled to a degree of certainty by the Courts.

The Courts have said that the grounds of prohibited discrimination under the *Canadian Human Rights Act* are to be given a large, liberal and remedial interpretation, and they are to be interpreted and applied in accordance with the purposes they serve. The purpose of Canadian human rights legislation is to protect against discrimination and to guarantee rights and freedoms. With respect to employment, its more specific objective is to eliminate exclusion that is arbitrary and based on preconceived ideas concerning personal characteristics which may not affect a person’s ability to do a job. When investigating complaints of discrimination in employment based on disability, the focus is on the effects of the distinction, exclusion or preference by an employer.

Depending on the facts of each case, the Commission will continue to consider complaints from employees who were disciplined or terminated because of a positive drug test, regardless of whether they are recreational or dependent users of drugs.

⁶ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montreal (City); Québec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand* (2000) 1 S.C.R. 665

⁷ *Milazzo v Autocar Connaisseur* (2003) 47 C.H.R.R. D/468. More recently, the Tribunal followed this finding in *Dennis v Eskasoni Band Council* (September 2008).

⁸ *Alberta (Human Rights and Citizenship Commission) v Kellogg Brown & Root* (2007) ABCA 426. Leave to appeal denied by SCC May 29, 2008.

The Commission may also investigate whether the employer has a policy or practice of drug and alcohol testing, which by its purpose or effect is discriminatory, on the basis of either disability or perceived disability (see section 10 of the *Canadian Human Rights Act* in the Reference section of the Policy).

5. Drug and Alcohol Testing as a *Bona Fide Occupational Requirement*

Drug and alcohol testing is *prima facie* discriminatory under Canadian human rights law. Nevertheless, employers can justify discriminatory practices and rules if they are a *bona fide* occupational requirement (BFOR).

In *Entrop v. Imperial Oil*,⁹ the Ontario Court of Appeal noted a critical difference between alcohol and drug tests. Alcohol tests such as a Breathalyzer test can determine whether a person is actually impaired at the moment the test is administered. In other words, an alcohol test, if applied to a person while on the job, can tell whether that person is fit to do their job. On the other hand, the Court noted that drug tests such as urinalysis cannot measure whether a person is under the effect of a drug at the time the test is administered. A drug test can only detect past drug use. An employer who administers a drug test cannot tell whether that person is impaired at that moment, or is likely to be impaired while on the job.

If testing is part of a broader program of medical assessment, monitoring and support, employers can test for **alcohol** in any of the following situations:

- on a random basis, for employees who hold safety-sensitive positions;
- for "reasonable cause," where an employee reports for work in an unfit state and there is evidence of substance abuse;
- after a significant incident or accident has occurred and there is evidence that an employee's act or omission may have contributed to the incident or accident; or
- following treatment for alcohol abuse, or disclosure of a current alcohol dependency or abuse.

If testing is part of a broader program of medical assessment, monitoring and support, employers can test for **drugs** in any of the following situations:

- for "reasonable cause," where an employee reports for work in an unfit state and there is evidence of substance abuse;
- after a significant incident or accident has occurred and there is evidence that an employee's act or omission may have contributed to the incident or accident; or
- following treatment for drug abuse, or disclosure of a current drug dependency or abuse. (Usually, a physician or substance abuse professional will determine whether follow-up testing is necessary for a particular individual.)

⁹ *Entrop v. Imperial Oil*, *supra* note 2.

Furthermore, in accordance with a 2003 Canadian Human Rights Tribunal decision,¹⁰ commercial bus operators can subject their drivers to pre-employment and random alcohol and drug testing as long as they accommodate employees who are found to be drug or alcohol dependent. The Commission has extended the Tribunal's decision to trucking operations.

If an employer, other than those in commercial bus and trucking operations, believes that it may be able to justify random and pre-employment testing of its employees in safety-sensitive positions, these are the some of the factors that may be considered by the Commission in determining whether testing is a *bona fide* occupational requirement:

- whether employees are under direct supervision;
- whether there are less invasive alternatives to drug and alcohol testing that may help employers determine whether employees in safety-sensitive positions are impaired on the job;
- whether there is evidence of a high incidence of drug use in the workplace or industry;
- whether the employer offers a comprehensive employer-supported rehabilitation program; and
- whether the employer is required to comply with legislation or regulations, such as occupational health and safety legislation, or U.S. Department of Transportation regulations.

6. Specific Drug and Alcohol Testing Practices

6.1 Pre-Employment Drug and Alcohol Testing

Testing for alcohol or drugs is a form of medical examination. Any employment-related medical examination or inquiry must be limited to determining an individual's ability to perform the essential requirements of the job. An employer must therefore demonstrate that pre-employment drug or alcohol testing effectively assesses an applicant's ability to discharge their employment responsibilities. Since a positive pre-employment drug or alcohol test cannot predict whether the individual will be impaired at any time while on the job, pre-employment testing may not be shown to be reasonably necessary to accomplish the legitimate goal of hiring workers who will not be impaired at work.¹¹

Pre-employment drug or alcohol testing is permitted only in limited circumstances, such as when the individual has disclosed an existing or recent history of drug or alcohol abuse, or where a pre-employment medical exam provides the physician with

¹⁰ *Milazzo v. Autocar Connaisseur*, [2003] 47 C.H.R.R. D/468.

¹¹ *Entrop v. Imperial Oil*, *supra* note 2.

reasonable cause to believe that an individual may be abusing drugs or alcohol and therefore may become impaired on the job. In addition, commercial bus and truck operations can subject their drivers to pre-employment testing.¹²

However, an employer cannot automatically withdraw offers of employment from prospective employees who fail their drug or alcohol test, without first addressing the issue of accommodation.¹³

Applicants for employment who have signed a waiver or release agreeing to undergo a pre-employment drug test may still be able to file a human rights complaint if they have been treated unfavourably or are denied employment as a result of testing positively.

6.2 Random Testing for Drugs and Alcohol

Since a positive drug test cannot measure present impairment and can only confirm that a person has been exposed to drugs at some point in the past (sometimes as much as several weeks in the past), a positive test cannot determine whether a person was impaired on the job. Therefore, random drug tests cannot be shown to be reasonably necessary to accomplish the goal of ensuring that workers are not impaired by drugs while on the job.¹⁴ Note the exception in the case of bus and truck operators.

As long as employees are notified that alcohol testing is a condition of employment, random alcohol testing of employees in safety-sensitive positions may be permissible, but only if the employer accommodates the needs of those who test positive and are determined to be dependent on alcohol.¹⁵

Random alcohol testing of an employee in a non-safety-sensitive position is not appropriate.

6.3 Reasonable Cause and Post-Incident Drug and Alcohol Testing

Reasonable cause or post-incident/accident testing for alcohol or drugs may be acceptable in specific circumstances in a safety-sensitive work environment. For example, following a significant accident, near miss or report of dangerous behaviour, an employer will have a legitimate interest in assessing whether an employee has used substances that may have contributed to the accident or incident.

¹² *Milazzo v. Autocar Connaisseur*, *supra* note 7.

¹³ *Ibid.*

¹⁴ *Entrop v. Imperial Oil*, *supra* note 2.

¹⁵ *Ibid.*

Post-accident testing, if justified, should be conducted as soon as is reasonably practical. It should not be conducted when there is evidence that the act or omission of the employee could not have contributed to the accident—for example, when the accident is due to structural or mechanical failure.

Testing may also be acceptable when an employee reports to work in an unfit condition and there are reasonable grounds to suspect substance abuse. An employer can generally establish that reasonable cause and post-incident testing are necessary to meet the heightened safety standards required in risk-sensitive environments, as long as testing is part of a broader program of medical assessment, monitoring and support.

Although there has been no clear guidance from the Courts, an employer may be able to justify reasonable cause and post-incident/accident drug and alcohol testing of employees in non-safety-sensitive positions as a BFOR. Testing should be considered only where an employee's on-the-job behaviour provides reasonable grounds to believe the employee is impaired by drugs or alcohol.

It is not necessary for an employer to resort to drug or alcohol testing where an employee reports to work in an unfit condition and is suspected of abusing drugs and/or alcohol. Appropriate action can be taken, where there is reasonable cause, such as medical assessment, referral to counselling or employee assistance programs, monitoring and appropriate disciplinary measures.

6.4 Disclosure of Drug or Alcohol Use

As part of screening for fitness to perform work of a safety sensitive nature, an employer may ask employees to provide personal medical information through a pre-employment questionnaire or application form, or as part of a medical examination. Questions concerning use of alcohol or drugs may also be included.

Employers can require employees who work in safety-sensitive positions to disclose current use of alcohol and drugs, as well as a history of alcohol or drug abuse within the last five or six years for alcohol dependency, and six years for drug dependency, the point where the risk of relapse is “no greater than the risk a member of the general population will suffer a substance abuse problem.”¹⁶

Generally, employees in non-safety-sensitive positions need not disclose past dependency on alcohol or drugs, unless an employer can establish that such a disclosure is a *BFOR*.

Automatic dismissal or refusal to employ someone based on a disclosure of past or present dependency on drugs or alcohol is contrary to the *Canadian Human Rights Act*.

¹⁶ *Entrop v. Imperial Oil*, *supra* note 2.

In most cases, failure to disclose alcohol or drug use or dependency is not grounds for dismissal, since denial can be a symptom of addiction.

An employee who requests assistance because of alcohol or drug use should not be disciplined for seeking help.

7. The Duty to Accommodate and Undue Hardship

In the limited circumstances where testing is justified, employees who test positive and are determined to be dependent on drugs or alcohol, must be accommodated to the point of undue hardship. The Act requires individualized or personalized accommodation measures. Policies that result in automatic loss of employment or reassignment, or that impose inflexible reinstatement conditions without regard for personal circumstances, are unlikely to meet this requirement.

The extent to which the employer is required to accommodate an employee who is dependent on drugs or alcohol depends on a variety of factors, including the following:

- health and safety concerns;
- past efforts to accommodate;
- the response to prior treatment or corrective programs and prognosis;
- the nature and seriousness of the violation;
- the costs of the required accommodation;
- the size of the operation;
- the economic conditions facing the employer; and
- the availability of other, non-safety sensitive, positions.

In most cases, employees or applicants should be referred to a substance abuse professional to determine whether, in fact, they are drug or alcohol dependent. If they are dependent on alcohol or drugs, the employer should accommodate them by providing the necessary support to permit them to undergo treatment or a rehabilitation program. An employer may be justified in temporarily removing an employee who is an active user or has a recent history of substance abuse from a safety-sensitive position.

Once the employee has successfully completed a rehabilitation program, the employee should be returned to his or her position. Follow-up testing, conducted at reasonable intervals, may be a condition of continued employment where safety is of fundamental importance. If follow-up testing reveals continuing drug or alcohol use, further employer action, up to dismissal, may be justified. However, given the nature of alcohol and drug dependence, there is a significant risk of relapse. In some circumstances, an employer may be expected to accommodate, to the point of undue hardship, those employees who continue to inappropriately use drugs or alcohol.

An employer can best prove undue hardship by demonstrating that the employee continues to repeatedly lapse despite participating in comprehensive employer-

supported rehabilitation programs.

If a substance abuse professional determines that the employee is **not** dependent on alcohol or drugs, the employee should be returned to his or her position and appropriate action may be taken. Appropriate consequences for a breach of an employer's drug or alcohol use policy depend on the facts of the case, including the nature and seriousness of the violation, the existence of prior infractions and the response to prior corrective programs.

"Last chance agreements", which employees are asked to sign after a positive test or upon their return to work following treatment, will not be enforced by the Canadian Human Rights Commission. The fact that an employee has agreed that his or her employment may be terminated if there is any repetition of problematic behaviour, and has waived any right to complain under human rights legislation, "does not, of itself, confirm whether there has been sufficient compliance with the duty of accommodation established under human rights legislation, legislation which the parties cannot contract out."¹⁷ An analysis must be done by the Commission in each case to determine whether the employer has accommodated, to the point of undue hardship, the needs of the employee.¹⁸ The existence of a 'last chance agreement', is a factor to be considered by the Commission in this analysis.

There are limits on the duty to accommodate, especially where an employee deliberately misleads an employer. Denial of the extent of drug or alcohol use is often a symptom of addiction. However, accommodation is contingent on an employee's responsibility to take matters into their own hands and ask for help.¹⁹ As pointed out by the Supreme Court,²⁰ the search for accommodation is a multi-party inquiry²¹ that requires the employee's active participation. An employee's failure to disclose a disability may negate the duty to accommodate, particularly where the employee repeatedly denies using drugs or alcohol.

An employer has a duty to accommodate. However, if the employee is not prepared to

¹⁷ *Milazzo v. Autocar Connaissance* (No. 3) [2005] 51 C.H.R.R.

¹⁸ *Ibid.*

¹⁹ *Benoit v. Bell Canada*, [2004] 51 C.H.R.R.

²⁰ *Central Okanagan School District No. 23 v. Renaud*, [1992] S.C.J. 75.

²¹ Unions can have a role to play in the accommodation process. This might include counselling, assisting in the determination of appropriate accommodation measures, representation during the negotiation continuing employment contracts and other disciplinary measures.

participate in a meaningful way in any of the accommodation process or the measures the employer offers, then the employer may have established undue hardship. At some point, the employee must take responsibility for their own behaviour, especially if it is related to drugs or alcohol.²²

If an employer has reasonable cause to believe an employee is abusing drugs or alcohol, or an employee tests positive, and the employee refuses to acknowledge their use of drugs or alcohol or seek treatment, this fact does not in and of itself constitute undue hardship and does not justify immediate dismissal. Before terminating an employee, an employer has to demonstrate that it has warned the employee through progressive discipline, and that the employee is unable to perform the essential requirements of the position.

8. Factors in Ensuring Compliance

In addition to the many factors discussed in this policy, the Commission may also consider some of the following elements when reviewing a drug or alcohol testing policy:

- Does the employer notify applicants and employees that they will be subjected to drug or alcohol testing? The circumstances under which testing may be required should be made clear to employees and applicants.
- Are drug or alcohol testing samples collected by qualified professionals, and are the results analyzed by a competent laboratory?
- Are procedures in place to ensure that a health care professional or medical review officer reviews the test results with the employee or applicant concerned? All non-negative test results should be evaluated to determine whether there is an explanation for the result other than drug or alcohol use. An accredited laboratory should conduct a second confirmation test to ensure fairness and accuracy of the test results.
- Are procedures in place to ensure confidentiality of test results? Any records concerning drug and alcohol tests should be kept in a separate, confidential file away from other employee records.

9. Conclusion

In addition to alcohol and drug use, there are many other factors—such as fatigue, stress, anxiety and personal problems—that lead to employee impairment and jeopardize workplace safety. The Commission encourages employers to adopt programs and policies that focus on identifying impairment and safety risks, and that are remedial, not punitive. An employer should consider adopting comprehensive workplace health policies that may include employee assistance programs, drug education and health promotion programs, off-site counselling and referral services, and peer or

²²*Benoit v. Bell Canada*, *supra* note 19.

supervisor monitoring.

This policy has been approved by the Commission and came into effect on September 29, 2009.

References

Applicable Sections of the *Canadian Human Rights Act*

Section 2

The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

Section 25

Disability means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

Section 7

It is a discriminatory practice, directly or indirectly,

- a) to refuse to employ or continue to employ any individual, or
- b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

Section 10

It is a discriminatory practice for an employer . . . or organization of employers

- a) to establish or pursue a policy or practice, or
- b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

Section 15

15(1) It is not a discriminatory practice if

- a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement . . .

15(2) For any practice mentioned in paragraph 1(a) to be considered a *bona fide* occupational requirement . . . it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the

person who would have to accommodate those needs, considering health, safety and cost.

Applicable Legal Decisions

British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (Meiorin)

In the *Meiorin*²³ case, the Supreme Court of Canada set out the test for determining whether an employer has established a BFOR and satisfied the duty to accommodate short of undue hardship. Under the test, the following questions must be asked:

- Did the employer adopt the policy or standard for a purpose rationally connected to the performance of the job?
- Did the employer adopt the particular policy or standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate, work-related purpose?
- Is the policy or standard reasonably necessary to the accomplishment of that legitimate, work-related purpose?

This last element requires the employer to show that the policy or standard adopted is the least discriminatory way to achieve the purpose or goal in relation to the particular jobs to which the policy or standard applies. The employer must also show that it is impossible to accommodate individual employees without imposing undue hardship on the employer.

As a result of the *Meiorin* decision, all allegedly discriminatory standards and policies have to be justified as rationally connected to the work or service, made in good faith, and reasonably necessary. The investigation of a human rights complaint will also consider whether the standard or policy has the effect of excluding members of a particular group on impressionistic assumptions, or treating one or more groups more harshly than others without apparent justification. The onus is on the employer to provide evidence that it has met each of the elements of the test set out by the Court.

Entrop v. Imperial Oil

In *Entrop v. Imperial Oil*,²⁴ the Ontario Court of Appeal noted a critical difference between alcohol and drug tests. Alcohol tests such as a Breathalyzer test can determine whether a person is actually impaired at the moment the test is administered.

²³ *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3.

²⁴ *Entrop v. Imperial Oil*, *supra* note 2.

In other words, an alcohol test, if applied to a person while on the job, can tell whether that person is fit to do their job. On the other hand, the Court noted that drug tests such as urinalysis cannot measure whether a person is under the effect of a drug at the time the test is administered. A drug test can only detect past drug use. An employer who administers a drug test cannot tell whether that person is impaired at that moment, or whether they are likely to be impaired while on the job.

With this distinction established, the Court concluded that random alcohol testing of employees was permissible for employees in safety-sensitive positions. In the opinion of the Court, employers can legitimately take steps to detect alcohol impairment among its employees in safety-sensitive positions where supervision is limited or non-existent.

However, because drug testing cannot measure present impairment, future impairment or likely impairment on the job, Imperial Oil could not justify pre-employment testing or random drug testing for employees in safety-sensitive (or other) positions as reasonably necessary to accomplish Imperial Oil's legitimate goal of ensuring a safe workplace, free from impairment (the third branch of the Supreme Court test). Further, the Ontario Court of Appeal found that drug testing programs had not been shown to be effective in reducing drug use, work accidents or work performance problems.

The Court held that drug testing for cause—or drug testing done post-accident, pre-certification or post-reinstatement—may be acceptable if "necessary as one facet of a larger process of assessment of drug abuse."

Milazzo v. Autocar Connaisseur

In 2003, the Canadian Human Rights Tribunal ruled that allowing charter bus operators to subject their drivers to pre-employment and random alcohol and drug testing was permissible, as long as they accommodated employees who were found to be drug or alcohol dependent. The Tribunal held in *Milazzo v. Autocar Connaisseur*²⁵ that, while pre-employment and random drug testing is *prima facie* discriminatory, it can be justified as a BFOR when employees occupy safety-sensitive positions with little or no supervision. The Tribunal acknowledged that, while a positive drug test does not indicate that a bus driver is impaired on the job, it is a "red flag". Based on the evidence before it, the Tribunal said that testing for drugs "is a legitimate way to promote road safety," as it helps employers identify drivers at a higher risk of accident. The Tribunal also found that the existence of a drug testing policy would deter at least some employees from using drugs and alcohol in the workplace, and that the company had an obligation to comply with U.S. Department of Transportation legislation.

As a consequence of this ruling, commercial bus operators can subject their drivers to pre-employment and random alcohol and drug testing, as long as they accommodate

²⁵ *Milazzo v. Autocar Connaisseur*, *supra* note 7.

employees who are found to be drug or alcohol dependent. The Commission has extended the Tribunal's decision to trucking operations.