

<p>U.S. DEPARTMENT OF LABOR EMPLOYMENT AND TRAINING ADMINISTRATION</p> <p>Bureau of Apprenticeship and Training Washington, D.C. 20213</p> <p>Symbols: TDT/MRM</p>	<p><u>Distribution:</u></p> <p>A-539 All Tech. Hdqtrs.</p> <p>A-544 All Field Techs.</p>	<p><u>SUBJECT:</u> <u>CODE:</u> 446.2</p> <p>Urinalysis Testing of Apprenticeship Applicants for Drugs (NSOL No. 200 42331)</p> <p><u>ACTION:</u> Due date:</p>
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PURPOSE: To advise the staff of the results of a legal review made by the Associate Solicitor for Civil Rights concerning Urinalysis Testing of Apprenticeship Applicants for Drugs.

BACKGROUND: An apprenticeship program sponsor advised one of BAT's regional directors that they wanted permission to add a urinalysis test for drugs to their physical examination in the selection of apprentices. This addition to the physical examination appeared to raise a question regarding compliance with Title 29 CFR Parts 29 and 30, and in particular Part 30, Section 30.5(4)(B), Qualification standards, with regard to occupationally essential health requirements. BAT initially considered the inclusion of such a test as a part of the physical examination to be permissible under Title 29 provisions stated above, provided the test was administered for all apprenticeship applicants and the program sponsor could demonstrate that it was an occupationally essential health requirement. The Associate Solicitor for Civil Rights, however, was requested to review that position for clarification prior to issuance.

LEGAL CONSIDERATIONS - Following is a summary of the legal review:

- o A urinalysis test for drugs constitutes a selection procedure under the guidelines.
- o The burden of the program sponsor to demonstrate that such a test is an "occupationally essential health requirement" carries with it the added responsibility that the sponsor be prepared to validate, under accepted Guidelines procedures, the relationship between the selection procedure and measures of successful job performance.
- o It would be insufficient for the employer, in applying a drug test which results in an adverse impact, to merely demonstrate that there is a rational basis for doing so.
- o The alternative selection methods under 29 CFR 30 provide that in the application of such standards, the apprenticeship sponsor must comply with the Uniform Guidelines on Employee Selection Procedures, 41 CFR Part 60.3. Under those Guidelines, sponsors must maintain records by race, sex, and ethnicity to determine whether that selection process has an "adverse impact" on any members of those groups.
- o The use of the test to create a blanket exclusion of all users of illicit drugs from apprenticeship positions may give rise to a violation of the Rehabilitation Act of 1973.

POLICY: BAT staff should be guided by the following policies in responding to requests or inquiries from apprenticeship program sponsors relative to the use of urinalysis testing for drugs as a part of the apprentice selection process:

- o Apprenticeship sponsors who are either covered Government contractors or recipients of Federal financial assistance may not summarily exclude drug user applicants from their programs; rather, in employing the urinalysis test, sponsors should make individualized determinations as to each applicant's ability to perform the pertinent apprenticeship position.
- o Program sponsors may be permitted to administer urinalysis tests for drugs if it is clearly shown that abstinence is job related, e.g., where the job is safety sensitive, and be prepared to validate any adverse impact that may result from the administration of the test.

Attachments



MAY 29 1985

MEMORANDUM FOR: FRED E. ROMERO
Office of Strategic Planning
and Policy Development, ESA

FROM: JAMES D. HENRY *JDH*
Associate Solicitor for
Civil Rights

SUBJECT: Legal Review of BAT Proposed Policy
Statement re: Urinalysis Testing
of Apprenticeship Applicants for Drugs
(NSOL No. 200402331)

This responds to your request for legal review of a draft proposed BAT policy statement.^{1/} The draft memorandum, responding to a program sponsor's request for a written statement that it is permissible to include a urinalysis test for drugs as part of its medical examination for the selection of apprentices, advises that such a test may properly be administered under 29 CFR Parts 29 and 30, provided that the test is given to all applicants and the program sponsor can demonstrate, pursuant to 29 CFR 30.5(b)(4)(B), that it is an "occupationally essential health requirement." As discussed more fully below, while the policy statement contains nothing contrary to BAT's regulations, we recommend that the statement be redrafted in order to inform apprenticeship sponsors of their obligations relating to the use of this test under the Uniform Guidelines on Employee Selection Procedures, and under the Rehabilitation Act of 1973.

The policy statement implicates the application of qualification standards under the alternative selection methods for apprentices under 29 CFR 30.5(b)(4)(B). This regulation, in pertinent part, provides that:

^{1/} Your memorandum, which was originally directed to the Division of Employment and Training Legal Services, was referred to us from that Division, since we have responsibility for providing legal services relating to 29 CFR Part 30.

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Apprentices shall be selected on the basis of objective and specific qualification standards. Examples of such standards [include] . . . occupationally essential health requirements. . . .

Significantly, the regulation further states that in the application of such standards, the apprenticeship sponsor must comply with the Uniform Guidelines on Employee Selection Procedures (the Guidelines), 41 CFR Part 60-3.

Under the Guidelines, employers must maintain records by race, sex and ethnicity in order to determine whether their total selection process (the combined effect of all selection procedures) has an "adverse impact" (see 41 CFR 60-3.4D) with respect to the employment of members of these groups. 41 CFR 60-3.4A and B; see also 41 CFR 60-3.15. (There is an analogous requirement for program sponsors under 29 CFR 30.8(a).) Where an employer's total selection process has been shown to have an adverse impact, each selection procedure must be examined for adverse impact; if the procedure has an adverse impact, it must be validated or its discriminatory effect eliminated. 41 CFR 60-3.4C, 3.5D and 3.6; Question and Answer 13, "Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures" (hereinafter Question and Answer), 44 F.R. 11996 (March 2, 1979).

A urinalysis test for drugs constitutes a selection procedure under the Guidelines.^{2/} Accordingly, the burden of the program sponsor to demonstrate that such a test is an "occupationally essential health requirement" carries with it the added responsibility that the sponsor be prepared to validate, under accepted Guidelines procedures, the relationship between the selection procedure and measures of successful job performance. See 41 CFR 60-3.5. Thus, it would be insufficient for the employer, in applying a drug test which results in an adverse impact, to merely demonstrate that there is a rational basis for doing so. See Question and Answer 37.

We note that the application of a urinalysis test for drugs when used, for instance, to create a blanket exclusion of all users of illicit drugs from apprenticeship

^{2/} The Guidelines define a "selection procedure" as "[a]ny measure, or combination of measures, or procedure used as a basis for any employment decision." 41 CFR 60-3.16Q. Such procedures include physical requirements. Id.

positions, may result in an adverse impact against minorities.^{3/} Accordingly, apprenticeship sponsors should administer drug tests only with respect to jobs where abstinence (or minimal levels of usage) is job-related, e.g., where the job is safety sensitive, and be prepared to validate any adverse impact that may result from the administration of the test.

Additionally, we note that such use of the test to create a blanket exclusion may give rise to a violation of the Rehabilitation Act of 1973, 29 U.S.C. §701 et seq. Section 503 (29 U.S.C. §793) of that Act requires that Government contractors and subcontractors take affirmative action to employ and advance in employment qualified handicapped

3/ See New York City Transit Authority v. Beazer, 440 U.S. 568 (1979); Davis v. City of Dallas, 487 F. Supp. 389 (N.D. Tex. 1980). Although in Beazer the Court held that the Transit Authority's blanket exclusion from employment of regular current narcotics users did not give rise to a prima facie violation of Title VII of the Civil Rights Act of 1964, the holding specifically relied on the finding that the record's statistical showing of adverse impact against blacks and Hispanics was methodologically flawed. 440 U.S. at 585. Specifically, the Court found that while respondents showed that methadone users in the relevant labor pool were predominantly black and Hispanic, they produced no data pertaining to the racial composition of Transit Authority applicants and employees receiving methadone treatment. Moreover, the Court determined that, in any case, the no-drug-use policy was job-related. The Court stated that the "legitimate goals of safety and efficiency require the exclusion of all users of illegal narcotics, barbiturates and amphetamines, and a majority of methadone-users." Id. at 587, n. 31.

In Davis the court rejected defendant's argument that a no-drug-use requirement for police officer applicants, which had a disparate impact on black applicants, was "job-related and essential to the operation of the police department." 487 F. Supp. 392. The court noted that "[i]t may intuitively seem that . . . absence of . . . drug usage [is] related to good police performance, but the court cannot take judicial notice that [the policy is] related to the hiring of quality law enforcement personnel. The relationship is no more obvious than that between high school education and performance as an industrial worker" Id.

individuals. See 41 CFR Part 60-741. Section 504 (29 U.S.C. §794) of the Act prohibits exclusion from participation in, denial of benefits, and discrimination against otherwise qualified handicapped individuals in any program or activity receiving Federal financial assistance or which is a federally conducted program or activity.^{4/} See 29 CFR Part 32. Individuals who are impaired or regarded as having an impairment because of their drug abuse are "handicapped individuals" within the meaning of the Act, and thus, will be protected thereunder if they are otherwise "qualified." 43 Op. Att'y. Gen. No. 12, p.2 (April 12, 1977); Davis v. Bucher, 451 F. Supp. 791 (E.D. Penn. 1978).

"Qualified handicapped individuals" are "handicapped individuals" (under Section 503) who, with reasonable accommodation, are capable of performing a particular job, 41 CFR 60-741.2, or (under Section 504) who meet the eligibility requirements of the program in issue in spite of their handicap, Southeastern Community College v. Davis, 441 U.S. 421 (1979).^{5/} Thus, "[i]f in any individual situation it can be shown that a particular addiction or prior drug abuse prevents successful performance of the job, the applicant need not be provided the employment opportunity in question." Davis v. Bucher, supra 451 F. Supp. at 797, n.4 (emphasis added).

^{4/} We have been advised by BAT staff that DOL does not currently extend financial assistance to apprenticeship sponsors. Consequently, because DOL has enforcement responsibility only in connection with its particular grantee programs or activities (see 29 CFR 32.2), DOL is not presently engaged in compliance activity under Section 504 with respect to apprenticeship sponsors. However, to the extent that such sponsors receive financial assistance from other Federal agencies, they are subject to compliance review under Section 504 by such agencies.

^{5/} The 1978 Amendments to the Rehabilitation Act specifically excluded from the definition of "handicapped individual" (with respect to Sections 503 and 504 as such Sections relate to employment) drug abusers "whose current use of drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current . . . drug abuse, would constitute a direct threat to property or the safety of others." 29 U.S.C. §706(7)(B).

However, employers may not use "employment criteria [to] categorically exclude persons on the basis of the handicap to which they belong, unless it could be shown that all or substantially all persons in the handicap category could not do the job" B. Schlei and P. Grossman, Employment Discrimination Law 282-83 (2d ed. 1983). The Section 503 implementing regulation on this issue, in pertinent part, provides:

Whenever a contractor applies physical or mental job qualification requirements in the selection of applicants or employees for employment . . . , to the extent that qualification requirements tend to screen out qualified handicapped individuals, the requirements shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and the safe performance of the job. The contractor shall have the burden to demonstrate that it has complied with [these] requirements

41 CFR 60-741.6(2)(C).

Thus, apprenticeship sponsors who are either covered Government contractors or recipients of Federal financial assistance may not summarily exclude drug user applicants from their programs; rather, in employing the urinalysis test, sponsors should make individualized determinations as to each applicant's ability to perform the pertinent apprenticeship position. Bucher, supra; see also Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1100 (D. Hawaii 1980).