



# Employment Edge 99th Edition - Employers Beware: Failure to Strictly Comply with Minnesota's Drug Testing Law Can Cause Unexpected Liability

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Common sense and a commitment to treating people fairly can go a long way in avoiding liability for employment law claims. But there are many traps for the well-intentioned but unwary employer. One of those traps is the Minnesota Drug and Alcohol Testing in the Workplace Act (DATWA). A recent decision by a federal district court in Minnesota provides an important reminder for employers of the potential liability that could result if employers do not precisely follow the terms of DATWA.

*In Wehlage v. ING Bank, FSB*, the federal district court in Minnesota held that DATWA prohibits an employer from firing an employee who is undergoing chemical dependency treatment at the employer's request after a first positive test for illegal drugs under the employer's drug-testing policy. This is true even when the employee has previously taken a leave of absence to undergo chemical dependency treatment. Furthermore, the Wehlage court also held that the employer's termination of the employee without consideration of the employee's rights under DATWA was sufficient to support a showing that the employer acted with "deliberate disregard" for the employee's rights, thereby entitling the employee to add a claim for punitive damages.

## **The Court's Decision**

Wehlage had been employed with the defendant, ING, for approximately three years when he informed his immediate supervisor that he planned to enter drug treatment for methamphetamine use. Wehlage entered a drug treatment program involving five weeks of intensive treatment and approximately eight total weeks of time off from work. Wehlage utilized a combination of vacation and short-term disability leave during his time off. He then returned to work and worked steadily for several weeks. However, he quickly began re-using methamphetamine.

Approximately four weeks after Wehlage's return to work, ING asked him to submit to a drug test. Wehlage admitted the test would be positive, but submitted to the test anyway. Following the positive drug test, ING offered Wehlage two choices:



- 1) take a severance package and quit his job
- 2) go into treatment and use unpaid leave under the Family and Medical Leave Act (FMLA)

Wehlage opted to enter treatment.

Wehlage entered a treatment program in mid-November 2005. The treating physician told ING that the treatment would last until the end of February 2006. In mid-February 2006, the physician revised his estimate of Wehlage's treatment needs and said treatment would need to continue through May 2006. In mid-May, the physician again revised his estimate, saying Wehlage would need time off work for treatment through October 2006.

In mid-February 2006, at the suggestion of ING's human resources department, Wehlage applied for long term disability insurance benefits. His application was approved in early March. By letter dated March 27, 2006, ING informed Wehlage that he was terminated effective March 1, stating:

As of February 16, 2006, you were approved for long term disability ... and therefore your employment [ ] has been terminated effective March 1, 2006.

After successfully completing treatment, Wehlage sued ING, claiming that his termination violated DATWA.

In ruling on Wehlage's claim, the court was required to interpret the following provision of DATWA:

[A]n employer may not discharge an employee for whom a positive test result on a confirmatory test was the first such result for the employee on a drug or alcohol test requested by the employer unless the following conditions have been met:

(1) the employer has first given the employee an opportunity to participate in, at the employee's own expense or pursuant to coverage under an employee benefit plan, either a drug or alcohol counseling or rehabilitation program, whichever is more appropriate, as determined by the employer after consultation with a certified chemical use counselor or a physician trained in the diagnosis and treatment of chemical dependency

(2) the employee has either refused to participate in the counseling or rehabilitation program or has failed to successfully complete the program, as evidenced by withdrawal from the program before its completion or by a positive test result on a confirmatory test after completion of the program

Minn. Stat. § 181.953, subd. 10(b).

The district court held that when an employer first obtains a positive drug test on an employee, the employer may not fire the employee until it has given the employee an opportunity to participate in a counseling or



rehabilitation program as determined by the employer, and the employee has either refused to participate or failed to successfully complete the program. Even though ING had previously, and recently, allowed Wehlage to enter a treatment program, the court found that the treatment program referred to in the statute is one offered after an employee's first positive drug test. Here, Wehlage's first positive drug test occurred in November 2005-after his earlier failed treatment program. Since the obligation to allow treatment is triggered by the positive drug test under Minnesota law, ING was required to allow Wehlage another shot at treatment if it wanted to use his drug test as a reason for termination.

The court found that DATWA protected Wehlage from being fired while undergoing the treatment program that had been approved by ING. The court therefore granted his motion for summary judgment, finding that ING violated DATWA by firing Wehlage in March of 2006.

The court then turned to Wehlage's request to add a claim for punitive damages. Wehlage presented evidence that none of ING's human resources personnel considered whether their decision to fire him would violate DATWA or ING's drug testing policy. The court found that the absence of evidence showing that any of ING's employees involved in firing Wehlage "gave a moment's thought to DATWA" demonstrated that ING acted with deliberate disregard for Wehlage's rights under DATWA. The court therefore allowed Wehlage to pursue his claim for punitive damages.

This case highlights the importance of carefully reviewing and strictly complying with the provisions of DATWA in implementing drug testing of employees. All employers who conduct drug or alcohol tests must have a policy that complies with DATWA and should have their policies reviewed by a lawyer. An employer may not terminate an employee after a first positive test result unless the employer first offers the employee an option to undergo treatment or counseling. The Wehlage decision makes clear that all employees who test positive on a first employer-ordered drug test must be treated the same, regardless of their past treatment history, and must be given the opportunity to complete the counseling or rehabilitation program approved by the employer.

The Wehlage decision is also an important reminder that employers must be extremely careful in dealing with employees with a known history of substance abuse. State and federal laws prohibit discrimination against individuals on the basis of disability, and an individual's drug or alcohol addiction or history of an addiction may be considered a disability. The disability laws also require reasonable accommodations, such as granting an employee's request to seek treatment for an addiction. An employee's current use of illegal drugs or alcohol is not considered a disability. The DATWA, on the other hand, limits an employer's ability to terminate an employee who has received a first positive test result. Neither the discrimination laws nor the DATWA, however, prohibit an employer from taking appropriate corrective action in response to workplace misconduct that may be caused by drug or alcohol use. If you suspect an employee may be under the influence of drugs or alcohol at work, it is a good idea to carefully analyze disciplinary options before



requesting a drug or alcohol test.

If you have any questions about DATWA or other employment law matters, please contact a member of the Gray Plant Mooty Employment and Labor Law practice group.

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