

## **Ames V. Home Depot And Employee Substance Abuse**

Law360, New York (February 4, 2011) -- It's a new year but employers are still facing many of the same old problems. Take, for example, the problem of the employee who habitually reports to work under the influence of alcohol or drugs.

For years, employers have been struggling to balance their obligation to provide leave or otherwise make reasonable accommodations for such employees against legitimate business concerns regarding workplace safety, attendance and job performance. However, a recent Seventh Circuit case confirms that there are ways to appropriately manage an alcoholic or drug-dependent employee at work.

In *Ames v. Home Depot Inc.*, No. 08 CV 06060 (7th Cir., Jan. 6, 2011), Home Depot discharged Diane Ames when she reported to work under the influence of alcohol and failed a blood alcohol test. Following her discharge, Ames sued Home Depot alleging that her employment was terminated in violation of the Family and Medical Leave Act, as well as the Americans with Disabilities Act.

Home Depot moved for summary judgment and the lower court granted judgment in its favor. On appeal, the Seventh Circuit affirmed. In doing so, the Seventh Circuit determined that Ames did not have a serious health condition within the meaning of the FMLA nor did she have a disability within the meaning of the ADA.

Moreover, the appellate court concluded that Home Depot terminated Ames because she reported to work under the influence of alcohol in violation of the company's rules and her own written agreement with company and not because of any alleged disability or requests for FMLA leave.

According to the court, Ames' conduct in reporting to work under the influence of alcohol was a failure to meet Home Depot's legitimate job expectations and Home Depot was not required to accommodate Ames' alcoholism by overlooking violations of its workplace rules. In reaching this conclusion, the Seventh Circuit focused on a number of actions taken by Home Depot and noted that Home Depot had made several attempts to accommodate Ames' condition prior to terminating her employment.

In particular, the court noted that when Home Depot first learned of Ames' problem with alcohol, Home Depot put Ames on paid administrative leave and informed her that she could return to work once she had received a treatment plan, obtained a return-to-work authorization, and passed a drug and alcohol test.

At the same time, Home Depot asked Ames to sign a written employee assistance agreement, which enrolled Ames in the company's employee assistance program (EAP) and explicitly stated that she would be subject to periodic drug and/or alcohol testing during the remainder of her employment with Home Depot. In the event that Ames refused to take a drug or alcohol test or failed the test, the employee assistance agreement provided for Ames' immediate termination.

After obtaining Ames' signature on the agreement, Home Depot allowed Ames to take unpaid leave and later returned Ames to work.

Moreover, even when Ames continued to have problems with alcohol after she returned to work, Home Depot did not immediately terminate her employment. Instead, when Ames was arrested for driving under the influence of alcohol, Ames was allowed to take a personal leave day without penalty.

When Home Depot learned of Ames' arrest, Ames' supervisor notified Ames that she was not in compliance with the terms of the written employee assistance agreement she had signed and informed Ames that she needed to schedule an appointment at an alcohol treatment facility for an evaluation.

When Ames failed to schedule the appointment within the time period specified by Home Depot, Home Depot extended its deadline to allow Ames additional time to schedule the required appointment. Finally, when Ames expressed concerns about who would pay for the mandated EAP evaluation, her Home Depot supervisor agreed to see whether Home Depot would pay for the evaluation.

Yet, despite these efforts by Home Depot, Ames subsequently reported to work under the influence of alcohol and her blood tested positive for alcohol. Accordingly, Home Depot terminated Ames' employment based on her violation of the company's work rule providing for immediate termination for employees who reported to work with detectable levels of alcohol in their blood.

Upon review, the Seventh Circuit concluded that Ames' termination under these circumstances did not violate the FMLA or ADA.

The Seventh Circuit's decision in Ames serves as useful road map for employers who are struggling to manage alcoholic or drug-dependent employees at work. The court's opinion identifies a number of pre-termination measures that may be taken by an employer in order to reduce its potential liability under the FMLA or ADA. Specifically, employers should:

- 1) Establish a policy that provides for severe consequences for employees who report to work under the influence of alcohol or drugs. The policy should be detailed in writing and should be provided to employees at the time of their hire. Employees should be required to review the policy and sign a form acknowledging their receipt and review of the policy at the time of hire and on a periodic basis throughout their employment.

- 2) Develop a drug and alcohol testing policy that complies with both federal and state law. Due to legal and privacy concerns, in most cases, testing should be limited to employees whose jobs involve safety or security concerns; employees who have been involved in accidents; employees who are currently involved in, or have recently completed, a drug or alcohol treatment program; or employees whom a supervisor reasonably suspects are reporting to work under the influence of alcohol or drugs. As with

the drug and alcohol use policy described above, an employer's drug and alcohol testing policy should be documented in writing and employees should be required to read the policy and sign an acknowledgment confirming that they have done so.

3) Establish an employee assistance program or identify other alternative sources for treatment. Employee assistance programs or drug and alcohol rehabilitation programs are recommended alternatives to discipline or discharge as they can be an effective way for employees to obtain the counseling and treatment that they need. In addition, referrals to such treatment programs can help satisfy an employer's obligation to reasonably accommodate an employee's medical condition and, thereby, help avoid liability under the ADA.

4) Offer the employee a leave of absence. A leave of absence is another alternative that employers should consider prior to terminating an employee for drug or alcohol related performance issues. As with EAPs or rehabilitation programs, a leave of absence may provide the employee the time necessary to obtain the help he or she needs and, likewise, is useful in demonstrating an employer's good faith attempts to accommodate the employee's condition.

5) Document alternatives to discipline or discharge in writing. When offering an employee alternatives to discipline or discharge for reporting to work under the influence of alcohol or drugs, employers should always document all offered alternatives in writing. This way, the employer will have a record of its attempts to assist the employee, regardless of whether the employee ultimately chooses to accept the assistance offered.

6) Develop and use "last chance" agreements to document the employee's rehabilitation obligations. Finally, in order to avoid potentially indefinite accommodation obligations, employers may want to develop and use a last chance agreement for employees who repeatedly report to work under the influence of alcohol or drugs. The last chance agreement should be in writing and should detail the specific conditions the employee must satisfy in order to remain employed. In addition, the last chance agreement should indicate the consequences for any failure on the employee's part to satisfy his or her obligations. In most cases, the penalty for an employee's failure to satisfy his or her obligations ought to be immediate discharge.

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*Foley & Lardner LLP has represented Home Depot in some matters but not in connection with the case analyzed in this article.*

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