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## **9th Circuit Upholds the One-Strike Rule Regarding Drug Use by Job Applicant**

On Sept. 21, the 9th U.S. Circuit Court of Appeals issued its decision in *Lopez v. Pacific Maritime Association*, 2011 DJDAR 14348 (9th Cir. Sept. 21, 2011), finding that the Americans with Disabilities Act and the Fair Employment Housing Act do not protect people who are using illegal drugs when they apply for a job. Companies may lawfully exclude job applicants who were using illegal drugs when they apply for a job, and a disparate impact claim will fail absent any evidence that the practice of permanently disqualifying applicants with drug use excluded recovering or recovered drug addicts disproportionately.

The Pacific Maritime Association had a policy called the "one-strike" rule. This rule eliminates from consideration any applicant who tests positive for drug use during the pre-employment screening process. Failing the drug test even once, disqualifies an applicant permanently from future employment.

Santiago Lopez wanted to be a longshoreman. He first applied in 1997. At that time, Lopez suffered from an addiction to drugs and tested positive for marijuana. Lopez became clean and sober and in 2004 and reapplied for the position. Because of the one-strike rule, Pacific Maritime rejected Lopez's application.

Lopez sued, claiming that Pacific Maritime violated the ADA and the FEHA by discriminating against him on the basis of his protected status as a rehabilitated drug addict. Specifically, a person who has "been rehabilitated successfully and is no longer engaging in illegal drug use" may not be discriminated against by employers.

Lopez alleged that the one-strike rule facially discriminates against recovering or recovered drug addicts. The 9th Circuit disagreed as the rule eliminates *all* candidates who test positive for drug use, whether due to a drug addiction, or because of an untimely decision to try drugs for the first time. However, as the court pointed out, this rule also conversely allows a drug-addicted applicant who happens to be sober at the time of the testing to complete pre-employment processing successfully.

Lopez next argued that the one-strike rule intentionally excludes recovering and recovered drug addicts from the work force. The 9th Circuit again rejected this argument based on Pacific Maritime's reasoning for disqualifying such applicants, which was the belief that applicants who could not abstain from using an illegal drug, even after receiving advance notice of an upcoming drug test, showed less responsibility and less interest in the job than applicants who passed the drug test. Again, the defendant's reasons for rejecting applicants who test positive had nothing to do with a possible drug addiction, although it could pertain to recreational use.

The court stated, "The ADA and the FEHA protect people who are recovering or who have recovered from a drug addiction; they do not protect people who are using illegal drugs when they apply for a job."

Lastly, the 9th Circuit rejected Lopez's disparate impact claim. He argued that the one-strike rule disparately affects recovering drug addicts by eliminating anyone who previously tested positive for drug use. However, the court found no evidence to support the disparate impact claim. Lopez contended that the difficulty in proving such a claim placed an undue burden on him because there was no way to know how many recovering or recovered drug addicts Pacific Maritime had disqualified. He also had no way of determining the proportion of recovering or recovered drug addicts in the relevant labor market because of state privacy rights. While the court acknowledged these challenges, it nonetheless required Lopez to offer some evidence tending to show that the one-strike rule excluded recovering or recovered drug addicts disproportionately.

In conclusion, the 9th Circuit found that Lopez failed to establish that Pacific Maritime intentionally discriminated against him on the basis of his protected status or that the one-strike rule disparately affects recovered addicts. The court clearly enunciated the problems facing such plaintiffs and stated, "We recognize that the one-strike rule imposes a harsh penalty on applicants who test positive for drug use. As Defendant candidly concedes, many people question the rule's reasonableness in light of the fact that many people who use drugs later rehabilitate themselves, as Plaintiff exemplifies. But unreasonable rules do not necessarily violate the ADA or FEHA."