

HR QUESTION ? of the month



Can you terminate an employee for drinking on the job after a request for assistance?

Question: We have a restaurant/bar. We have a company policy that if you are caught drinking on the job, you can be suspended and/or terminated. We found a bartender in a beer cooler drinking while he was on the clock. He denied and lied about the situation, but later admitted this happened. After admitting this happened, he told a manager he needs help and wants to go to a drug re-habitation program and wanted to know if our company would help to pay for this. Question: Can we still fire this employee for breaking company policy even though after the fact he states he needs personal help and might need to take a leave of absence?

Response: There is no statutory protection for employees whose violation of a company policy is grounds for dismissal. While the federal Americans with Disabilities Act (ADA) does offer protection to employees who are alcoholics or drug addicts, such protection does not clothe such employee with immunity from the consequences of their actions at work. This means that while employers cannot unlawfully discriminate against employees who are disabled (including those disabled by alcoholism or drug addiction), and must offer such employees a reasonable accommodation when applicable, employers are not required to excuse disabled employees who violate a company policy that would be grounds for discharge if any other employee committed the violation. The EEOC and Department of Justice explain this as follows: "While a current illegal user of drugs is not protected by the ADA if an employer acts on the basis of such use, a person who currently uses alcohol is not automatically denied protection. An alcoholic is a person with a disability and is protected by the ADA if s/he is qualified to perform the essential functions of the job. An employer may be required to provide an accommodation to an alcoholic. However, an employer can discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct. An employer also may prohibit the use of alcohol in the workplace and can require that employees not be under the influence of alcohol." See <http://www.ada.gov/employt.htm> (about 2/3 of the way down the page).

Here you indicate that an employee was "found" drinking beer on company property and while on the clock, and when confronted, denied that he had done this. He later admitted to the infraction as well as to having lied about it. If this is grounds for termination of employment consistent with employer policy and practice (and the employment relationship is at will), we are not aware of any law that requires the employer to be more lenient with this employee on account of his subsequent claim that he "needs personal help" or wants to attend a drug rehabilitation program (which, incidentally, does not necessarily mean he is an alcoholic or addict and thus may not be disabled under the ADA at all). If, however, other employees who were caught drinking on the job were suspended and/or otherwise not discharged, and the employer seeks to terminate the employment of the bartender in question, there could be exposure to a claim -- indeed the employee could argue that he was treated more harshly (i.e., discharged) because he disclosed a potential disability and/or the employer regarded him as though he had one. The employer might be able to defend a claim of this nature by showing that the employee's dishonesty also contributed to the decision, if that is the case, but the best practice is to seek to avoid such claims in the first place by treating similarly situated employees in a uniform manner.

The best practice is to treat the employee here consistently with employer policy and past practice, and in the same way as he would have been treated had he never mentioned his need for "personal help" or desire to take leave to seek rehabilitation.

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