

# TEXAS LAWYER

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## DRUG ABUSE POLICY NOW ADA TEST CASE

by ANGELA WARD

Senior U.S. District Judge Barefoot Sanders has given the go-ahead to the first trial on whether there are exceptions to an Americans with Disabilities Act requirement for individual evaluations of employees who may pose a direct threat to the safety of themselves or others.

Under the judge's ruling, Irving-based Exxon Corp. may be allowed to keep its policy — instituted in the wake of the *Valdez* disaster — that excludes employees considered at risk for substance abuse relapses from the roughly 10 percent of its U.S. job categories classified "safety-sensitive." At trial, Exxon will have to prove that individual assessment of employees would be impractical or impossible.

Sanders issued a memorandum opinion May 13 in *Equal*

# EEOC Suit Over Exxon Hazardous Job Policy Heads to Trial

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*Employment Opportunity Commission v. Exxon Corp.*, No. 3-95-CV-1311-H, in which he rejected summary judgment motions filed by both the EEOC and Exxon.

The progress of the Dallas case is being watched closely by ADA practitioners and experts.

"It's a darn important issue to discuss," says Rogge Dunn, an employment attorney and name partner at Dallas' Matthews, Carlton, Stein, Shiels, Pearce, Dunn & Knott. "It doesn't surprise me that the EEOC would take on that litigation. It's an issue that needs to be addressed."

The EEOC, led by senior trial attorney Katherine Bissell, filed suit in June 1995 on behalf of two former Exxon flight engineers who had been demoted to mechanics under the company's "1989 Alcohol and Drug Use Policy."

Exxon's policy targets positions in which "there is a high exposure to catastrophic public, environmental or employee incident; the person in such position performs a key and direct role in the operating process where failure could

cause a catastrophic incident; and there is either no direct supervision or very limited supervision."

Exxon identified some 1,500 types of positions as "safety-sensitive." It's unknown how many employees are covered by the policy, or how many were demoted because of it. The designation was put in place after the March 1989 disaster in which a drunken captain grounded his tanker in Prince William Sound, Alaska, spilling more than 10 million gallons of oil. Exxon was criminally prosecuted for the spill and, court documents show, spent about \$8 billion on environmental cleanup and defense costs.

The named plaintiffs in the EEOC case, Salvatore Filippone and Glenn Hale, both had undergone substance abuse rehabilitation before beginning work at Exxon. Two other cases involving four plaintiffs in Texas and California have been consolidated with the EEOC case.

## Little Precedent

Last July, Sanders stayed discovery and ordered both parties to file summary judgment motions on whether Exxon's policy was valid on its face.

The EEOC argued that Exxon's policy

violated ADA regulations by not individually assessing each affected employee. Exxon countered that the ADA offers an exception when such evaluation would be impractical or impossible, which applies here, the company argues, because the risk of substance abuse relapse is too great and too unpredictable.

Chrys Meador, a senior trial attorney in the Dallas office of the EEOC, says the class of employees involved in this case drew the agency's interest.

"It is significant to the extent that there is very little law in the area of dealing with employees that have a history of substance abuse," she says.

Mark A. Rothstein, director of the Health Law and Policy Institute at the University of Houston Law Center, says he, too, will be watching the case unfold because of the lack of precedent in this area.

Exxon's lead counsel is partner Ronald L. Palmer of the Dallas office of Houston's Baker & Botts. He and other Exxon attorneys declined comment.

## Mission: Impossible

In his order, Sanders wrote that while

the ADA regulations stipulate individualized assessment, they don't address the proper response to an employer's assertion that individual assessment would be impractical or impossible, as Exxon has.

So he relied on decisions pertaining to other employment discrimination statutes, such as the Rehabilitation Act of 1973. One case cited is *Joel R. Davis v. Edwin Meese III, et al*, No. 692 F.Supp. 505, in which a Pennsylvania federal court held that the FBI hadn't violated the Rehabilitation Act or the Fifth Amendment with its blanket policy excluding insulin-dependent diabetics from certain positions.

"I read his [Sanders'] decision to give the green light to exemptions in a proper case," says Laura M. Franze, a partner at Dallas' Akin, Gump, Strauss, Hauer & Feld and chairwoman of the employment law section of the Dallas Bar Association.

**TEXLAW**

Sanders' opinion is available on TexLaw. See page 25 for details.

[www.texlaw.com/special/dtpa.htm](http://www.texlaw.com/special/dtpa.htm)