NO._____

IN THE

Supreme Court of the United States

October Term 2020

JEFF KITCHEN
Appellant-Petitioner

vs.

BASF
Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-41119

United States Court of Appeals
Fifth Circuit
FILED
February 28, 2020
Lyle W. Cayce
Clerk

JEFF KITCHEN,

Plaintiff - Appellant

v.

BASF,

Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Texas

Before SOUTHWICK, GRAVES, and ENGELHARDT, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

A discharged employee sued his former employer alleging discrimination under the Americans with Disabilities Act and the Age Discrimination in Employment Act. The district court granted the former employer's motion for summary judgment. We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

Jeff Kitchen began his employment with BASF in 2006. BASF is a chemical company based in Germany whose corporate name is the acronym formed from its earlier German-language name. It describes itself as a producer and marketer of chemicals and related products. While a BASF

employee, Kitchen was twice convicted of driving while intoxicated ("DWI"). He also consumed alcohol during working hours, even though he knew it was a violation of company policy. On multiple occasions, BASF permitted him to take substantial leave to undergo inpatient and outpatient alcohol-abuse treatment.

In May 2014, while Kitchen was on leave, he was arrested for and convicted of DWI with a Blood Alcohol Content ("BAC") of 0.15 and convicted. Even though BASF was aware of Kitchen's alcohol abuse, BASF allowed him to return to work in October 2014 under special conditions. During his deposition testimony, Kitchen stated the conditions included not getting another DWI and staying sober at work. On October 6, Kitchen signed a Return to Work Agreement which required him, among other things, to submit to future breath alcohol testing. The agreement provided that failure to meet the stated requirements could result in termination. A separate Testing Agreement signed at the same time specifically provided that testing positive for alcohol could result in termination.

On October 24, 2014, Kitchen signed a Final Written Warning that any further violations of company policy, testing positive for alcohol at work, or a felony conviction of DWI could result in termination. At that time, BASF's operative policy regarding alcohol and substance abuse stated that post-rehabilitation testing would be conducted by the Site Human Resources Representative, and the Representative was to keep the BASF Employee Assistance Program case manager informed of the test results. Significantly, the policy did not define a minimum level of BAC for test results to be considered "positive." This policy superseded a policy from December 2012.

On September 28, 2015, Kitchen arrived at work at 7:30 a.m. At 10:40 a.m., Kitchen underwent a breath alcohol test that showed a BAC of 0.014. At 10:55 a.m., he underwent a second breath alcohol test that showed

a BAC of 0.010. The nurse who was acting as the breath alcohol technician and who administered the test was certified to administer breath alcohol tests using an Intoxylyzer 5000. The record does not clearly indicate what kind of breath alcohol testing machine was used for Kitchen's breath test. Based on these test results, Kitchen's supervisor, Mark Damron, believed Kitchen had arrived to work under the influence of alcohol. Damron believed these test results showed Kitchen was in violation of BASF's alcohol policy, the Return to Work Agreement, and the Final Written Warning. BASF discharged Kitchen effective October 2, 2015.

Kitchen filed his complaint against BASF on February 3, 2017, asserting claims under the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA"). The parties filed cross motions for summary judgment. Kitchen filed his response to BASF's motion for summary judgment on its due date with no attached exhibits or record evidence. BASF filed its reply in support of its motion for summary judgment the following day. After BASF filed its reply, and after Kitchen's deadline to file his response had passed, Kitchen filed a "corrected" response to BASF's motion for summary judgment with exhibits. The district court ordered the clerk to strike Kitchen's "corrected" response because it was untimely filed.

Ultimately, the district court granted summary judgment in favor of BASF, simultaneously denying Kitchen's motion for summary judgment. Kitchen appeals the district court's judgment dismissing his case.

In addition to challenging the judgment against him, Kitchen also challenges the district court's order striking his "corrected" response to BASF's motion for summary judgment and certain evidentiary rulings made by the district court.

DISCUSSION

We review a district court's grant of summary judgment *de novo*. *Ibarra v. UPS*, 695 F.3d 354, 355 (5th Cir. 2012). Summary judgment is appropriate where the movant demonstrates "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When cross motions for summary judgment have been filed, "we review each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party." *Green v. Life Ins. Co. of N. Am.*, 754 F.3d 324, 329 (5th Cir. 2014).

I. ADA claim

The ADA prohibits employers from discriminating "on the basis of disability in regard to . . . discharge of employees." 42 U.S.C. § 12112(a). The ADA expressly provides that an employer can hold alcoholic employees to the same standards as other employees, even if the behavior in question is related to alcoholism. *See* § 12114(c)(4). "In a discriminatory-termination action under the ADA, the employee may either present direct evidence that she was discriminated against because of her disability or alternatively proceed under the burden-shifting analysis first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)." *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 694 (5th Cir. 2014).

Kitchen argues he has produced direct evidence of discrimination and therefore does not need to rely on the burden-shifting framework of *McDonnell Douglas*. To support this argument, he states BASF admits it discharged him because he failed a breath alcohol test, and this constitutes direct evidence he

was discharged because of a disability — alcoholism — in violation of the ADA. Alternatively, he argues BASF did not adhere to its policy in discharging him and he was not technically "impaired" or "intoxicated."

We have held in an ADA-termination case that evidence is direct when, if believed, it proves the fact of "discriminatory animus without inference or presumption." *Rodriguez v. Eli Lilly & Co.*, 820 F.3d 759, 765 (5th Cir. 2016) (quoting *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002)). Kitchen's evidence at most would show that BASF discharged him based on the results of his alcohol test, which undeniably were above zero, or that BASF misapplied its policy or was mistaken in Kitchen's level of intoxication while he was at work. Firing Kitchen for arriving to work under the influence of alcohol is not equivalent to firing Kitchen because of a prejudice against alcoholics. An inferential leap is required to arrive at the conclusion BASF discharged Kitchen out of discriminatory animus against him as an alcoholic. Thus, Kitchen has not produced direct evidence to support his case.

Kitchen also makes a burden-shifting argument. The first step requires Kitchen to establish "(1) he had a disability, (2) he was qualified for the job, and (3) there was a causal connection between an adverse employment action and his disability." *Rodriguez*, 820 F.3d at 765. If Kitchen is successful in establishing all three requirements, a presumption of discrimination arises, and the burden shifts to BASF to articulate a legitimate, non-discriminatory reason for the termination. *See Caldwell v. KHOU-TV*, 850 F.3d 237, 241–42 (5th Cir. 2017). If BASF does so, the burden then shifts back to Kitchen to show BASF's reason was pretextual; Kitchen could do that through evidence of disparate treatment or by showing BASF's explanation was false or unbelievable. *Id.* at 242.

We need not discuss each step in the shifting evidentiary presentation because Kitchen offered no evidence of a causal connection between his

discharge and his alcoholism. Kitchen was discharged for failing a breath alcohol test. He argues that means he effectively was discharged because of his alcoholism. He presented no evidence, though, that his discharge was based on any discriminatory animus against him as an alcoholic. The evidence shows BASF had a post-rehabilitation alcohol testing policy and Kitchen had signed a Final Written Warning informing him that testing positive for alcohol while at work could result in his termination. Kitchen's supervisor, Damron, believed Kitchen had arrived to work under the influence of alcohol, meaning Kitchen violated company policy and the Final Written Warning. The ADA states that covered entities "may require that employees shall not be under the influence of alcohol . . . at the workplace" and that they "may hold an employee . . . who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the . . . alcoholism of such employee." 42 U.S.C. § 12114(c)(2), (4). Kitchen has not offered evidence to support a causal connection between alcoholism and his discharge. He thus fails to establish a *prima facie* case of discrimination under the ADA.

Further, Kitchen has failed to show BASF's legitimate, non-discriminatory reason for discharging him, the apparent positive results of his alcohol test and violation of company policy, was pretextual. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 53–54 (2003). The focus of the pretext inquiry is not whether the alcohol test was accurate but whether BASF reasonably believed its non-discriminatory reason for discharging Kitchen and then acted on that basis. *See Waggoner v. City of Garland*, 987 F.2d 1160, 1165–66 (5th Cir. 1993). In *Waggoner*, we stated, "the inquiry is limited to whether the employer believed the allegation in good faith and whether the decision to discharge the employee was based on that belief." *Id.* Kitchen, who does not dispute his BAC test results were above zero, focuses his arguments on the

accuracy of the test, the credentials of the technician who administered the test, and whether he in fact did violate BASF company policy. The argument fails because Kitchen provided no evidence BASF did not reasonably believe its non-discriminatory reason for discharging him.

Kitchen also argues that BASF violated the ADA by failing to make reasonable accommodations. Kitchen did not make this allegation in his complaint, in his motion for summary judgment, or in his response to BASF's motion for summary judgment. Because Kitchen did not present this argument to the district court, and he makes no attempt to demonstrate extraordinary circumstances for why we should consider it, this argument is waived. *See Law Funder, L.L.C. v. Munoz*, 924 F.3d 753, 759 (5th Cir. 2019).

Even if we considered Kitchen's failure-to-accommodate argument, it would fail. The ADA prohibits covered entities like BASF from discrimination by failing to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A). Nevertheless, the ADA does not provide a right to an employee's preferred accommodation but only to a reasonable accommodation. *See EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 471 (5th Cir. 2009).

Kitchen argues he had requested a blood alcohol test to be conducted after the breath tests showed a BAC of 0.014 and 0.010, which are levels that would not show legal intoxication. He claims by refusing to provide him with this additional test, BASF violated the ADA by failing to accommodate him. BASF had done more than necessary to accommodate him in a reasonable manner by allowing him several leaves for treatment, even after he had been convicted of DWIs and violated company policy by consuming alcohol while at

work. Not conducting an additional alcohol test is not evidence that BASF failed to reasonably accommodate him.

For these reasons, his ADA claim was properly dismissed.

II. ADEA claim

Kitchen concedes he "could not substantiate [his] claims for discrimination on the basis of age." His argument consists of asserting he was unable to produce any evidence in support of his ADEA claim because BASF objected to his discovery request for all documents related to all employees and terminations at BASF's Freeport location reaching back to 2010 and the district court "did not mandate that [BASF] produce such information."

"We review the discovery decisions of a District Court for abuse of discretion, including a decision, as here, to forego additional discovery and rule on a summary judgment motion." *United States ex rel. Taylor-Vick v. Smith*, 513 F.3d 228, 232 (5th Cir. 2008). Kitchen produces no evidence to support his ADEA claim, and there was no abuse of discretion in the district court's decision to not mandate the requested production.

III. Striking response

Kitchen challenges the district court's order striking his late-filed "corrected" response to BASF's motion for summary judgment. The Federal Rules allow district courts, for good cause, to extend time with or without motion if the court acts before the original time or its extension expires, or on motion made after time has expired if there was excusable neglect. FED. R. CIV. P. 6(b)(1). Kitchen made no request to extend the time to file his response before the deadline, and he did not file a motion for an extension arguing excusable neglect. Even if Kitchen had filed such a motion, it was no abuse of the district court's discretion to strike his late-filed motion. We have held a

district court has discretion to refuse to accept a party's dilatory response to a motion for summary judgment, even if the court acknowledges reading the response, and has discretion to deny extending the deadline when no excusable neglect is shown. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 161 (5th Cir. 2006).

IV. Evidentiary rulings

We review evidentiary decisions for abuse of discretion, subject to harmless error review. *United States v. McCann*, 613 F.3d 486, 500 (5th Cir. 2010). Kitchen argues the district court abused its discretion in relying on Damron's testimony that Kitchen had arrived to work under the influence of alcohol. Kitchen argues because Damron consulted with a doctor regarding the alcohol test results, and because Damron's testimony is not based on Damron's personal knowledge as an expert, his testimony is hearsay and should not be considered at summary judgment. It is true BASF's motion for summary judgment cited to BASF's in-house physician's calculations, in which the physician concluded Kitchen had likely been under the influence of alcohol at work based on Kitchen's positive alcohol test, and the physician communicated this conclusion to Damron. The district court, though, did not rely directly on the physician's testimony or calculations when granting summary judgment to BASF. Instead, it relied on Damron's own testimony that he personally believed Kitchen had violated BASF policy and Kitchen had been under the influence of alcohol while at work, which is not an ADA-prohibited reason for discharging an employee. Damron's testimony incorporating the physician's opinion was not hearsay because it was not offered for the truth of whether Kitchen was intoxicated, but rather for the effect the physician's opinion had on Damron, namely the formation of his honest belief Kitchen had been intoxicated while at work. *See Chevron Oronite*

Co., L.L.C. v. Jacobs Field Servs. N. Am., Inc., --- F.3d ----, No. 19-30088, 2020 WL 773287, at *6 (5th Cir. Feb. 18, 2020). Because Damron's testimony was not hearsay, and because Kitchen has offered no evidence to suggest Damron's testimony was not trustworthy, the district court did not abuse its discretion in relying on it.

Kitchen also argues medical records included as exhibits in BASF's motion for summary judgment should not have been admitted. These medical records show on September 29, 2015, the day after Kitchen's at-work BAC test results of 0.014 and 0.010, Kitchen reported to a physician that Kitchen had been having a recent alcohol binge and drinking heavily for the previous ten days. Though it is not entirely clear, it appears Kitchen argues these documents are inadmissible as hearsay and the hearsay exceptions found in Federal Rules of Evidence 803(4) and 803(7) do not apply. Contrary to Kitchen's argument, it was not an abuse of discretion to admit these medical records. Under Rule 803(4), statements made for medical diagnosis or treatment that describe medical history, past or present symptoms or sensations, their inception, or their general cause are not excluded as hearsay. FED. R. EVID. 803(4). The medical records in question fall squarely into this exception. Rule 803(7) involves the admissibility of the absence of a record of a regularly conducted activity. Though it is not clear how Rule 803(7) applies, to the extent Kitchen argues the records should have been excluded because they indicate a lack of trustworthiness under Rule 803(6)(E), it was not an abuse of discretion to admit what appear to be routine medical records. Even if there had been an abuse, the error was harmless because the district court did not rely on these records in dismissing Kitchen's claims.

AFFIRMED.

B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JEFF KITCHEN	§	
	§	
Plaintiff.	§	
	§	
VS.	§	CIVIL ACTION NO. 3:17–CV–00040
	§	
BASF	§	
	§	
Defendant.	§	

MEMORANDUM AND RECOMMENDATION

Plaintiff Jeff Kitchen ("Kitchen") brings this employment discrimination case alleging that BASF Corporation ("BASF") discriminated against him based on a disability in violation of the American with Disabilities Act ("ADA"), discriminated against him based on his age in violation of the Age Discrimination in Employment ("ADEA"), and violated 42 U.S.C. § 1981 ("Section 1981"). BASF has filed a Motion for Judgment on the Pleadings (Dkt. 31) and a Motion for Summary Judgment (Dkt. 77). Kitchen has also moved for summary judgment. Dkt. 71.

All dispositive pretrial motions in this case have been referred to this Court for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). Dkt. 112. Having considered the parties' briefing, the applicable legal authorities, oral argument, and the summary judgment record, the Court RECOMMENDS that BASF Defendant's Motion for Summary Judgment (Dkt. 77) be GRANTED; Plaintiff's Second Motion for Summary

Judgment (Dkt. 71) be DENIED; and BASF's Motion for Judgment on the Pleadings (Dkt. 31) be DENIED AS MOOT. The Court's reasoning is explained in detail below.

BACKGROUND

Kitchen began working for BASF, a producer and marketer of chemicals and related products, in 2006 at a chemical plant in Seaford, Delaware. In the fall of 2010, Kitchen was involved in a drunk driving accident in which he injured two people while driving with an alcohol level of approximately 0.13. Instead of immediately terminating Kitchen's employment, BASF permitted him to take a 30-day leave of absence to undergo inpatient alcohol abuse treatment. Kitchen rejoined BASF after completing the treatment.

When BASF closed the Seaford, Delaware plant in 2013, BASF offered Kitchen the opportunity to transfer to its Freeport, Texas facility. Around October 2013, before Kitchen relocated to Texas, BASF allowed Kitchen to take another leave of absence for alcohol abuse treatment. After participating in this two-month treatment program, Kitchen moved halfway across the country and, in February 2014, started his new position at BASF's Freeport, Texas location.

In April 2014, a co-worker reported to management that Kitchen's breath smelled like alcohol. Kitchen admitted that it was certainly plausible since he probably had four drinks that day **after** he arrived at the plant for work. Instead of terminating him this time around, BASF told Kitchen they wanted to get him help, and arranged for him to take approximately five months off work to seek outpatient treatment.

Unfortunately, the alcohol treatment did not resolve Kitchen's problems with alcohol. In May 2014, police pulled Kitchen over for driving erratically, and charged him

with driving under the influence after a breathalyzer test indicated that he was driving with an alcohol level of 0.15. Kitchen pled guilty and spent 19 days in jail. While incarcerated, Kitchen wrote BASF a letter requesting that he be allowed to keep his job: "Whatever your decision is just know I appr[e]ciate the opportunity you gave me, the kindness and support you have shown and making me feel at home with BASF." Dkt. 77-3 at 32. Somewhat incredibly, BASF did not terminate Kitchen. Instead, the company again accommodated him, requiring him to complete an Employee Assistance Program at an outpatient facility.

Kitchen returned to work at BASF in October 2014. As a condition of his return to work, Kitchen agreed:

- He would remain sober at work;
- He would continue treatment for alcohol abuse;
- He would undergo follow-up testing at work; and
- He would conduct himself professionally and appropriately.

Before Kitchen rejoined BASF, the company issued a Final Warning and Return to Work, notifying Kitchen that any subsequent violations of the above conditions would result in immediate termination.

On September 28, 2015, Kitchen was scheduled for an alcohol test. He arrived for work at 7:30 a.m. that day, two hours late. The test was not administered until 10:40 a.m., and the results showed an alcohol level of 0.014. A second test was administered approximately 15 minutes later, showing an alcohol level of 0.010.

Kitchen's supervisor, Mark Damron ("Damron"), reviewed these results and conferred with BASF's in-house physician regarding the rate alcohol is metabolized in the body over time. Based on the company doctor's calculations, Damron's understanding

was that, assuming Kitchen had not been drinking at work and that alcohol levels in his body had decreased normally over time, Kitchen must have been under the influence of alcohol when he arrived at work at 7:30 a.m. Because Damron believed Kitchen had turned up at work under the influence of alcohol in violation of company policy and his Return to Work Agreement and Final Warning, Kitchen's employment was terminated effective October 2, 2015. At the time of his termination, Kitchen was over the age of 55.

Kitchen contends that the alcohol testing process conducted by BASF was replete with problems in the administration of the test and interpretation of the test results. These alleged problems included a lack of proper certification by the individual who administered the alcohol test, the use of a defective machine, false test results, and a failure to properly calibrate the testing machine.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine dispute of material fact does not exist unless "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Burell v. Prudential Ins. Co. of Am.*, 820 F.3d 132, 136 (5th Cir. 2016) (citation omitted). "The moving party . . . bears the initial responsibility of informing the district court of the basis for its motion." *Brandon v. Sage Corp.*, 808 F.3d 266, 269–70 (5th Cir. 2015) (citation omitted). If the burden of production at trial "ultimately rests on the nonmovant, the movant must merely demonstrate an absence of evidentiary support in the record for the nonmovant's case." *Lyles v. Medtronic Sofamor Danek, USA, Inc.*, 871 F.3d 305, 310–11 (5th Cir. 2017). Once

a party "meets the initial burden of demonstrating that there exists no genuine issue of material fact for trial, the burden shifts to the non-movant to produce evidence of the existence of such an issue for trial." *Brandon*, 808 F.3d at 270. The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts. [It] must go beyond the pleadings and come forward with specific facts indicating a genuine issue for trial to avoid summary judgment." *Id.* (citations and quotation marks omitted). "In deciding whether a fact issue exists, courts must view the facts and draw reasonable inferences in the light most favorable to the nonmoving party." *Rayborn v. Bossier Par. Sch. Bd.*, 881 F.3d 409, 414 (5th Cir. 2018) (quotation marks and citation omitted).

DISCUSSION

In his Second Motion for Summary Judgment,[1] Kitchen contends that he is entitled to summary judgment on his ADA claim. In a nutshell, Kitchen asserts that he can establish a prima facie case of ADA discrimination, and BASF cannot rebut the presumption because the company's proffered reason for terminating his employment is a mere pretext, with the

[1] In his first Motion for Summary Judgment, Kitchen also sought summary judgment on his ADA claim. Kitchen contended that:

> [He] was neither impaired nor did he test positive for alcohol at the time of testing which was the basis for his termination. [He] neither violated BASF policy, the Department of Transportation standards and regulation, nor the Texas Penal Code with respect to the standard for impairment or intoxication. Therefore, the reasons for termination were pretextual and were discriminatory on the basis of a disability recognized by the [ADA].

Dkt. 22 at 10–11 (emphasis omitted). The Court denied the motion, explaining that Kitchen "failed to show there is no genuine dispute as to any material fact." Dkt. 60.

real reason for his termination having been based on impermissible animus. Meanwhile, BASF has filed its own Motion for Summary Judgment, arguing that Kitchen cannot establish a prima facie case of disability discrimination under the ADA and cannot show that BASF's legitimate reason for his termination is a mere pretext for a discriminatory animus against disabled persons. BASF also argues that Kitchen's age discrimination claim under the ADEA and his Section 1981 claim fail as matter of law.

Plaintiff's Opposition/Response to Defendant's Motion for Summary Judgment ("Summary Judgment Response") contains 24-pages of argument but has no summary judgment evidence attached.[2] This is a problem for Kitchen because it is well-established in the Fifth Circuit that unsworn pleadings do not constitute summary judgment evidence. *See Johnson v. City of Houston*, 14 F.3d 1056, 1060 (5th Cir. 1994) ("Unsworn pleadings, memoranda or the like are not, of course, competent summary judgment evidence.") (citation omitted). Although Kitchen failed to introduce competent summary judgment evidence in response to BASF's Motion for Summary Judgment, this Court is not permitted to automatically enter a summary judgment against him. As the movant, BASF must still show there is no genuine issue of material fact and that it is entitled to summary judgment as a matter of law. *See Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360, 362 n.3 (5th Cir. 1995). If BASF fails to meet its initial burden, the Court must deny the motion for

[2] Kitchen filed the Summary Judgment Response at 11:59 p.m. on July 26, 2018, the same date a response to BASF's Motion for Summary Judgment was due. The Summary Judgment Response had no evidence attached to it. Kitchen late-filed a Corrected Opposition/Response to Defendant's Motion for Summary Judgment (with summary judgment evidence attached) at 10:27 p.m. on July 27, 2018. The Court struck the "corrected" response as untimely under the local rules. Dkt. 95.

summary judgment even if the nonmovant fails present any evidence or file a response. *See Eversley v. Mbank Dallas*, 843 F.2d 172, 174 (5th Cir. 1988).

For convenience sake, the Court will address both parties' summary judgment motions at the same time. To be clear, although Kitchen failed to timely submit summary judgment evidence in conjunction with his response to BASF's Motion for Summary Judgment, he did submit evidence in conjunction with his own Second Motion for Summary Judgment. The Court considers this evidence for the purpose of assessing both pending motions for summary judgment.

A. The ADA Claim

1. Elements of an ADA Disability Discrimination Claim

The ADA is a "broad mandate of comprehensive character and sweeping purpose intended to eliminate discrimination against disabled individuals, and to integrate them into the economic and social mainstream of American life." *Frame v. City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011) (quoting *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (internal quotation marks omitted)). The specific language of the ADA prohibits employers from "discriminat[ing] against a qualified individual on the basis of disability" by, among other things, terminating an individual's employment. 42 U.S.C. § 12112(a).

When analyzing an ADA claim, the Court must utilize the familiar burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this framework, a plaintiff must first establish a prima facie case of disability discrimination by showing that (1) he is disabled, has a record of having a disability, or is regarded as disabled; (2) he is qualified for his job; and (3) he was subjected to an adverse employment

action on account of his disability. *See Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 230 (5th Cir. 2015); *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 853 (5th Cir. 1999).

Once a plaintiff establishes a prima facie case, "the defendant bears the burden of producing evidence that its employment decision was based on a legitimate nondiscriminatory reason." *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1089 (5th Cir. 1995). The defendant's burden is low—it is merely one of production not persuasion. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 257–58 (1981). "If the employer produces any evidence 'which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action,' then the employer has satisfied its burden of production." *Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394, 396 (5th Cir. 1995) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993)).

If an employer articulates a legitimate nondiscriminatory reason for its action, the presumption of discrimination disappears, and "[t]he burden then shifts back to the plaintiff to prove that the defendant's proffered reasons were a pretext for discrimination." *Mayberry*, 55 F.3d at 1089. At the summary judgment stage, this means "the plaintiff must substantiate his claim of pretext through evidence demonstrating that discrimination lay at the heart of the employer's decision." *Price v. Fed. Exp. Corp.*, 283 F.3d 715, 720 (5th Cir. 2002). Pretext may be established "either through evidence of disparate treatment or by showing that the employer's proffered explanation is false or 'unworthy of credence.'" *Delaval v. PTech Drilling Tubulars, LLC*, 824 F.3d 476, 480 (5th Cir. 2016) (quoting *Laxton v. Gap Inc.*, 333 F.3d 572, 578 (5th Cir. 2003)). "In conducting a pretext analysis,

the court does not 'engage in second-guessing of an employer's business decisions.'" *Roberson-King v. State of La. Workforce Comm'n*, --- F.3d ---, 2018 WL 4402110, at *2 (5th Cir. 2018) (quoting *LeMaire v. La. Dep't. of Transp. & Dev.*, 480 F.3d 383, 391 (5th Cir. 2007)). An employee's subjective belief that he has suffered discrimination is not sufficient to establish pretext. *See EEOC v. La. Office of Cmty. Servs.*, 47 F.3d 1438, 1448 (5th Cir. 1995) (a "subjective belief of discrimination . . . cannot be the basis of judicial relief").

2. Kitchen Cannot Show That He Was Disabled Within the Meaning of the ADA

BASF first argues that Kitchen cannot establish a prima facie case of disability discrimination because he fails to demonstrate that he is disabled within the meaning of the ADA. The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). "Failure to establish an actual or perceived disability is fatal to a plaintiff's case, and no further consideration is required." *Willis v. Noble Envtl. Power, LLC*, 143 F. Supp. 3d 475, 479 (N.D. Tex. 2015) (citation, internal quotation marks, and brackets omitted). It is Kitchen's burden to show that he is disabled, has a record of having a disability, or is regarded as disabled. *See EEOC v. Chevron Phillips Chemical Co., LP*, 570 F.3d 606, 615 (5th Cir. 2009).

"[T]here is no *per se* rule that categorizes recovering alcoholics . . . as disabled." *Oxford House, Inc. v. City of Baton Rouge*, 932 F. Supp. 2d 683, 688 (M.D. La. 2013).

Indeed, "mere status as an alcoholic or substance abuser does not necessarily imply [the requisite] 'limitation' [for a disability determination]." *Oxford House, Inc.*, 932 F. Supp. at 689 (quoting *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 47 (2d Cir. 2002)). Instead, a case-by-case evaluation is necessary "to determine whether a particular plaintiff, who is a recovering alcoholic, qualifies as disabled, because of his addiction." *Radick v. Union Pac. Corp.*, No. 4:14-CV-02075; 2016 WL 639126, at *5 (S.D. Tex. Jan. 25, 2016). To prove that he is disabled, Kitchen "must provide evidence that his alcoholism substantially limits his ability to perform a major life activity, as compared to most people in the general population." *Id.* (citation omitted). Under the ADA, major life activities "include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2).

Although Kitchen asserts that he is a recovering alcoholic, there are no allegations—nor evidence—that his alcoholism impaired a major life activity at the time of his termination in October 2015. In fact, Kitchen's own pleadings and testimony actually contradict any claim that his major life activities were substantially impaired at the time of his termination. By way of example, Kitchen's live pleading alleges that he was sober for approximately two years prior to his termination. Moreover, Kitchen testified in deposition that, far from being an incoherent and floundering drunk, he drank only "[v]ery minor amounts" of alcohol in the year preceding his termination. Dkt. 77-4 at 32. There is absolutely no evidence to be found anywhere in the record that Kitchen's alcoholism

impacted his ability care for himself, perform manual tasks, see, hear, eat, sleep, walk, stand, lift, bend, speak, breath, learn, read, concentrate, think, communicate, or work. *See* 42 U.S.C. § 12102(2). Indeed, the uncontroverted evidence is that Kitchen had no issues in performing the major life activity of working for a living; he readily acknowledges that he worked for BASF for nine years prior to his termination. Years ago, the Fifth Circuit provided guidance that applies with equal force to this case today: "[T]he evidence [is] insufficient to support a finding that [the employer] regarded [the employee] as anything other than what he actually was: an alcoholic whose alcoholism did not substantially impair any major life activity, including the major life activity of working." *Burch v. Coca-Cola Co.*, 119 F.3d 305, 322 (5th Cir. 1997).

In an effort to avoid summary judgment, Kitchen argues that he was "regarded by [BASF] as having a disability" because BASF knew he was recovering alcoholic, allowed him to participate in an Employee Assistance Program, and required him to submit to alcohol tests. Dkt. 80 at 21. If the Court accepts Kitchen's theory, "every employee ever subjected to alcohol testing or placed on leave for drinking at work necessarily would be disabled under the statute." Dkt. 79 at 4. That is an absurd result that finds no support in the case law. In truth, it is black-letter law that Kitchen's "burden under the ADA is not satisfied merely by showing that [BASF] regarded him as a[n alcoholic]: the fact that a person is perceived to be a[n alcoholic] does not necessarily mean that person is perceived to be disabled under the ADA." *Zenor*, 176 F.3d at 859. *See also Deas v. River West, L.P.*, 152 F.3d 471, 479 (rejecting argument that employer regarded plaintiff as disabled merely because employer regarded plaintiff as suffering from seizure disorder); *Bridges v. City of*

Bossier, 92 F.3d 329, 336 n.11 (5th Cir. 1996) (rejecting argument that employer regarded plaintiff as disabled merely because employer regarded plaintiff as suffering from hemophilia). "Thus, even a plaintiff who suffers from a condition such as alcoholism or drug addiction—or is perceived as suffering from such a condition—must demonstrate that the condition substantially limits, or is perceived by his employer as substantially limiting, his ability to perform a major life function." *Zenor*, 176 F.3d at 860. The fact that Kitchen might have been previously hospitalized for alcoholism does not necessarily give rise to a disability determination. *See Burch*, 119 F.3d at 316; *Zenor*, 176 F.3d at 860. Nor does the fact that BASF caught Kitchen drinking on the job and subsequently required him to submit to alcohol testing. As noted above, Kitchen has failed to identify a major life activity that is substantially limited by his alleged alcoholism. *See Garza v. City of Donna*, No. 7:16-CV-00558, 2017 WL 2861456, at *8 (S.D. Tex. July 5, 2017) ("the relevant legal question is whether [plaintiff's] alleged substance addiction substantially limited at least one of his major life activities"). Moreover, Kitchen's BASF supervisor, the same individual who made the decision to terminate his employment, testified that he did not regard Kitchen as disabled. *See* Dkt. 77-7 at 13. As a whole, there is no issue of material fact from which a reasonable jury could find that Kitchen has presented a prima facie case of disability. Because Kitchen is not disabled within the meaning of the ADA, the Court recommends summary judgment be granted on the ADA claim.

3. Kitchen Cannot Establish That BASF's Legitimate Nondiscriminatory Reason For His Termination Was A Mere Pretext For Discrimination

Even if Kitchen could, hypothetically, establish a prima facie case of retaliation, the burden would then shift to BASF to produce its legitimate, non-retaliatory reason for terminating Kitchen's employment. *See Davis v. Fort Bend Cnty.*, 765 F.3d 480, 490 (5th Cir. 2014). In the present case, BASF has articulated a legitimate nondiscriminatory reason for firing Kitchen: its good faith belief based on alcohol test results that Kitchen violated BASF's policies and his Final Warning and Return to Work Agreement. *See Clark v. Boyd Tunica, Inc.*, 665 F. App'x 367, 370–71 (5th Cir. 2016) (holding that a positive alcohol test constitutes a legitimate, nondiscriminatory reason for termination); *Hunter v. Union Pac. R. Co.*, No. H-11-3408, 2013 WL 3229910, at *7 (S.D. Tex. June 25, 2013) (same).

To survive summary judgment under the *McDonnell Douglas* framework once BASF provides a legitimate nondiscriminatory reason for the termination, Kitchen must "offer sufficient evidence to create a genuine issue of material fact . . . that [BASF's] reason is not true, but is instead a pretext for discrimination." *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 702 (5th Cir. 2014) (quoting *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)).

Kitchen falls woefully short of discharging his burden to demonstrate pretext. He simply cannot demonstrate pretext for retaliation under the "but-for" pretext standard applicable to claims under the ADA. As the Fifth Circuit has noted: "At the end of the day, the pretext inquiry asks whether there is sufficient evidence 'demonstrating the falsity of the employer's explanation, taken together with the prima facie case,' to allow the jury to

find that discrimination was the but-for cause of the termination." *Goudeau v. Nat'l Oilwell Varco, L.P.*, 793 F.3d 470, 478 (5th Cir. 2015) (quoting *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002)).

Although Kitchen vociferously complains that the alcohol testing process BASF implemented was replete with problems (both in the administration of the test and the interpretation and extrapolation of the test results), such problems do not show discriminatory intent as a matter of law. *See, e.g., Clark,* 665 F. App'x at 371–72 (holding that, because the employer reasonably believed test result showing employee had consumed alcohol, employee could not establish pretext); *Graham v. Long Island R.R.*, 230 F.3d 34, 44 (2d Cir. 2000) ("Reasonable reliance by an employer on a laboratory test, even where misplaced, does not provide any basis for a jury to find pretext."); *Arrieta v. Yellow Transp., Inc.*, No. 3:05-CV-2271-D, 2008 WL 5220569, at *9 (N.D. Tex. Dec. 12, 2008) ("The inquiry is not whether [the employee] actually committed the alleged infraction, but whether [the employer] believed that he had and based its decision to discharge him on that belief."); *Hall v. Smurfit-Stone Container Enters., Inc.*, No. 3:07-CV-0501-G, 2008 WL 3823252, at *4 (N.D. Tex. Aug. 14, 2008) (holding that an employee's failed drug tests were a legitimate, nondiscriminatory reason for job termination regardless of whether the positive result was caused by prescription drugs). For the purposes of considering the summary judgment motions in this case, the Court can simply assume that there were, indeed, problems with the underlying reliability of the test results. As a legal matter, it is simply immaterial whether the test results were accurate or not.

> In pretext cases, it is not enough that the company was wrong about the underlying facts that motivated the adverse employment action. The only question is whether the employer had a good-faith belief that the facts that motivated the adverse action were true. A factual dispute over the employee's innocence of the allegations against him is not enough to survive summary judgment; the plaintiff must put forward evidence sufficient to create a factual dispute as to whether or not the company subjectively believed that the allegations were true. The plaintiff has the ultimate burden of showing a genuine material factual dispute over whether the defendant discriminated against him on the basis of the plaintiff's membership in the protected class.

Lucas v. T-Mobile USA, Inc., 217 F. Supp. 3d 951, 957 (S.D. Tex. 2016) (citations omitted).

In this case, Kitchen has completely failed to meet his burden to establish pretext. He has presented no summary judgment evidence that Damron's decision to terminate him—regardless of whether that decision was correct—was motivated by any unlawful discriminatory animus. Kitchen's failure to present such evidence is fatal to his claim. *See Clark*, 665 F. App'x at 371–372 ("The focus of the pretext inquiry is not whether the alcohol in Clark's sample was, in fact, attributable to her improper consumption of alcohol, but whether Sam's Town reasonably believed it was and acted on that basis."); *Waggoner v. City of Garland*, 987 F.2d 1160, 1165–66 (5th Cir. 1993) ("[T]he inquiry is limited to whether the employer believed the allegation in good faith and whether the decision to discharge the employee was based on that belief."). There is no evidence that Damron ever expressed any animus toward disabled persons or alcoholics. Nor is there any evidence that any non-disabled employee was every allowed to remain employed under nearly identical circumstances. It is telling that the only admissible summary judgment

evidence establishes that Damron terminated Kitchen because he genuinely believed that Kitchen showed up for work under the influence of alcohol in violation of company policy and his pledge not to do so. Damron's declaration submitted in support of BASF's Motion for Summary Judgment states as follows:

> When I learned that Plaintiff Kitchen's alcohol test results were 0.014 at 10:40 a.m. and 0.010 approximately 15 minutes later, I was concerned. Assuming that Plaintiff Kitchen had not been drinking at work, I believed his alcohol level must have been higher when he had arrived at work at 7:30 a.m. several hours earlier. This, combined with his arriving late to work, his prior history of drinking on the job, and his failure to provide any reasonable excuse for why there was any level of alcohol in his blood, convinced me that Plaintiff Kitchen had likely been drinking before his shift and had likely arrived to work that morning under the influence of alcohol.
>
> . . . .
>
> . . . Based on these concerns, BASF concluded that Plaintiff Kitchen had violated his final warning and return-to-work agreement and terminated Plaintiff Kitchen's employment effective October 2, 2015.

Dkt. 77-5 at 2–3.[3] Because Kitchen cannot demonstrate that BASF's legitimate reason for his termination was a mere pretext, BASF is entitled to judgment as a matter of law.

[3] Citing a 2012 BASF policy, Kitchen argues that a blood alcohol test must register at least 0.04 to constitute a positive test. Because Kitchen did not blow a 0.04, Kitchen claims that it was improper for BASF to terminate him based on 0.014 and 0.010 test results. This argument is misplaced. For starters, the uncontroverted summary judgment evidence establishes that a June 2013 BASF policy replaced the 2012 policy to which Kitchen relies, and the 2013 policy did not mandate any positive test threshold. Moreover, the Final Warning and Return to Work also did not contain any test threshold. It simply provided that "testing positive, may lead to discipline up to, and including, termination of employment." Dkt. 77-3 at 50.

B. ADEA

In addition to claiming that BASF discriminated against him based on a disability, Kitchen asserts that BASF discriminated against him because of his age. The federal statute that governs age discrimination claims is the ADEA, which expressly prohibits employers from discriminating against employees who are at least 40 years old on the basis of age. *See* 29 U.S.C. § 623(a)(1).

Absent direct evidence of age discrimination, a plaintiff seeking to establish prima facie ADEA claim must show that "(1) he was discharged; (2) he was qualified for the position; (3) he was within the protected class at the time of discharge; and (4) he was either i) replaced by someone outside the protected class, ii) replaced by someone younger, or iii) otherwise discharged because of his age." *Kilgore v. Brookeland Indep. Sch. Dist.*, 538 F. App'x 473, 476 (5th Cir. 2013) (quoting *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993)). If a plaintiff sets forth a prima facie case of age discrimination, his employer must articulate a legitimate, nondiscriminatory reason for the employee's discharge. *See id.* at 476. "If [defendant] carries its burden, [plaintiff] must prove that [defendant's] 'reasons are pretexts for unlawful discrimination either by showing that a discriminatory reason more likely motivated' [defendant] or by showing that [defendant's] 'reason is unworthy of credence.'" *Id.* (quoting *Bienkowski v. Am. Airlines, Inc.*, 851 F.2d 1503, 1505 (5th Cir. 1988)). The plaintiff "retains the burden of persuading the fact finder that impermissible discrimination motivated the adverse employment decision." *Id.* (quoting *Bienkowski*, 851 F.2d at 1505). *See also Moss v. BMC Software, Inc.*, 610 F.3d 917, 922 (5th Cir. 2010) (to ultimately succeed on a claim of age discrimination, "[a]

plaintiff must prove by a preponderance of evidence . . . that age was the 'but-for' cause of the challenged employer decision").

Kitchen presents absolutely no evidence whatsoever to establish a prima facie case under the ADEA that "he was either i) replaced by someone outside the protected class, ii) replaced by someone younger, or iii) otherwise discharged because of his age." *Kilgore*, 538 F. App'x at 476 (citation omitted). Even assuming Kitchen could establish a prima facie case under the ADEA, he has failed to show that BASF's reasons for his termination were mere pretext for age discrimination. The burden rests with Kitchen and he comes nowhere close to meeting that burden.

Kitchen's ADEA claim is based entirely on his subjective belief that he was terminated, in part, because of his age. As a legal matter, Kitchen's subjective belief that age played a role in his termination is insufficient to establish a prima facie case of discrimination under the ADEA. *See Vasquez v. Nueces Cnty.*, 551 F. App'x 91, 93–94 (5th Cir. 2013) ("[W]e have held that the subjective belief of a plaintiff is not sufficient to establish a *prima facie* case of discrimination under . . . the ADEA"). Kitchen provides zero evidence that he was treated differently than any other BASF employees under similar circumstances.

Although Kitchen dismisses the fact that Damron, the individual who fired him, is also in his 50s and thus a member of the same protected class as Kitchen, the law is clear: "When decision makers are in the same protected class as the plaintiff, there is a presumption that unlawful discrimination is not a factor in the discharge." *Agoh v. Hyatt Corp.*, 992 F. Supp. 2d 722, 744 (S.D. Tex. 2014) (citation omitted). *See also Rhodes v.*

Guiberson Oil Tools, 75 F.3d 989, 1002 (5th Cir. 1996) ("[W]hen the *decision makers* are all of the same protected class as the discharged employee, it is similarly less likely that unlawful discrimination was the reason for the discharge.").

In short, Kitchen's ADEA claim falls flat. Summary judgment is appropriate in favor of BASF on the ADEA cause of action.

C. Section 1981

Kitchen's Original Complaint also cites Section 1981, which "provides a cause of action for public or private discrimination based on race or alienage." *Jett v. Dallas Indep. Sch. Dist.*, 798 F.2d 748, 762 (5th Cir. 1986) (citations omitted). *See also David v. Signal Int'l, LLC*, No. CIV.A. 08-1220, 2015 WL 65290, at *2 (E.D. La. Jan. 5, 2015) ("Section 1981 refers to discrimination in the making and enforcement of contracts and is designed to include a federal remedy against discrimination in employment on the basis of race or alienage.") (citations, internal quotation marks, and brackets omitted). Since Kitchen does not even identify his race or alienage, BASF argues Kitchen's Section 1981 claim must fail as matter of law. In response, Kitchen notes that the reference to Section 1981 in the Original Complaint was a typographical error, and acknowledges that he has no Section 1981 claim. Out of an abundance of caution, the Court recommends BASF's motion for summary judgment on the Section 1981 claim be granted.

CONCLUSION AND RECOMMENDATION

For the reasons stated above, the Court RECOMMENDS that Defendant's Motion for Summary Judgment (Dkt. 77) be GRANTED, Plaintiff's Second Motion for Summary

Judgment (Dkt. 71) be DENIED, and BASF's Motion for Judgment on the Pleadings (Dkt. 31) be DENIED AS MOOT.

The Clerk shall provide copies of this Memorandum and Recommendation to the respective parties who have fourteen days from the receipt thereof to file written objections pursuant to Federal Rule of Civil Procedure 72(b) and General Order 2002–13. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

SIGNED at Galveston, Texas, this 16th day of October, 2018.

ANDREW M. EDISON
UNITED STATES MAGISTRATE JUDGE

C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JEFF KITCHEN	§	
	§	
Plaintiff.	§	
	§	
VS.	§	CIVIL ACTION NO. 3:17–CV–00040
	§	
BASF	§	
	§	
Defendant.	§	

ORDER ADOPTING MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION

Pending before the Court is Plaintiff's Opposition to the Recommendation of the Magistrate and Request for Review by the Sitting Judge/Reconsideration ("Objections"). Dkt. 116. On August 17, 2018, all dispositive pretrial motions were referred to Magistrate Judge Andrew M. Edison pursuant to 28 U.S.C. § 636(b)(1)(B). Dkt. 112. On October 16, 2018, Judge Edison filed a Memorandum and Recommendation (Dkt. 115) recommending that Defendant's Motion for Summary Judgment (Dkt. 77) be **GRANTED**, Plaintiff's Second Motion for Summary Judgment (Dkt. 71) be **DENIED**, and Defendant's Motion for Judgment on the Pleadings (Dkt. 31) be **DENIED AS MOOT**.

On October 30, 2018, Plaintiff filed his Objections. In accordance with 28 U.S.C. § 636(b)(1)(C), this Court is required to "make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection [has been] made." After conducting this de novo review, the Court may

"accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.*; *see also* FED. R. CIV. P. 72(b)(3).

The Court has carefully considered the Objections; the Memorandum and Recommendation; the pleadings and summary judgment record; and the briefing and arguments of the parties. The Court **ACCEPTS** Judge Edison's Memorandum and Recommendation and **ADOPTS** it as the opinion of the Court. It is therefore **ORDERED** that:

(1) Judge Edison's Memorandum and Recommendation (Dkt. 115) be **APPROVED AND ADOPTED** in its entirety as the holding of the Court;

(2) Defendant's Motion for Summary Judgment (Dkt. 77) be **GRANTED**;

(3) Plaintiff's Second Motion for Summary Judgment (Dkt. 71) be **DENIED**; and

(4) Defendant's Motion for Judgment on the Pleadings (Dkt. 31) and all other pending motions are **DENIED AS MOOT**.

It is so **ORDERED**.

SIGNED and ENTERED this 1st day of November, 2018.

George C. Hanks, Jr.

GEORGE C. HANKS, JR.
UNITED STATES DISTRICT JUDGE

D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JEFF KITCHEN	§	
	§	
Plaintiff.	§	
	§	
VS.	§	CIVIL ACTION NO. 3:17–CV–00040
	§	
BASF	§	
	§	
Defendant.	§	

FINAL JUDGMENT

Pursuant to the Court's Order Adopting Magistrate's Memorandum and Recommendation, it is **ORDERED** that this matter be **DISMISSED**.

THIS IS A FINAL JUDGMENT.

The Clerk will provide copies of this judgment to the parties.

SIGNED at Galveston, Texas, this 6th day of November, 2018.

George C. Hanks Jr.
United States District Judge

APPENDIX E

BASF The Chemical Company	Title: Controlled Substances/Authorized Substances/Alcohol					
	Function: Legal—Environmental Health & Safety - Medical					
	No.: BC008				Page: 1 of 6	
	Reviewed:	12/5/12	Effective:	12/12/12 (Rev.4)	Supersedes:	5/30/12 (Rev. 3)

Preparer:	Owner:	Approver:
Associate Medical Director *(Signature on File)*	Vice President, Corporate Medical *(Signature on File)*	Senior Vice President, Environmental Health & Safety *(Signature on File)*
Sr. Compliance & Employment Counsel *(Signature on File)*	Sr. Compliance & Employment Counsel *(Signature on File)*	Senior Vice President and General Counsel *(Signature on File)*

1. PURPOSE

To provide guidance to Employees, Contractors and Temporary Workers of BASF Corporation ("BC") regarding Controlled Substances, Authorized Substances and alcohol on any BC Work Site.

2. DEFINITIONS

2.1. Authorized Substances

Authorized Substances include only

- lawful over-the-counter drugs (excluding alcohol) used in accordance with label/insert recommendations,
- drugs used in accordance with physician directions, when medically prescribed, with the exception of medical marijuana, and
- alcohol at business and social functions, the consumption and possession of which management has been advised of and has approved in advance, which does not make the Employee or Non-employee Impaired.

2.2. Contractor

A non-employee engaged through a third party agency for the performance of specific functions. These individuals:

- perform services with the general oversight of the company;
- and generally do not, but may, perform services for third parties at the same time.

2.3. Contractor/Agency

A company which will be either placing or bringing Contractor(s), Temporary Employee(s) or Contractor Employee(s) onto a BC site.

2.4. Contractor Employee

An individual engaged by or through a third party to perform services principally for the third party.

2.5. Controlled Substances

Drugs and narcotics that are illegal under federal, state or local law, including, but not limited to, recreational and medical marijuana.

2. DEFINITIONS cont'd.

2.6. Employee
An individual who performs services for, and under the direction and control of, BC. Such direction and control includes the results to be accomplished and the methods and means by which such results are accomplished. Neither contracting firms nor Contractors or Temporary Workers who are characterized by BC as Independent Contractors are Employees.

2.7. Employee Assistance Program ("EAP")
A BC sponsored counseling and referral service offered at no cost to Employees and their dependents.

- Services are usually provided on a voluntary and confidential basis by professional EAP counselors in the local community regarding;
  - marital, family or emotional difficulties,
  - concerns about the Employee's or a family member's alcohol or Controlled Substances abuse, and
  - other personal difficulties or lifestyle crises that affect health, well-being or job performance.

2.8. Impaired
Under the influence of a Controlled Substance, Authorized Substance or alcohol. In the case of

- a Controlled Substance, this means its presence above the established confirmation level.
- Alcohol, this means a blood alcohol level at or above .04%.
- an Authorized Substance, this means its presence to a level that any of the individual's motor senses (e.g., sight, hearing, balance, reaction, reflex) or judgment either is, or may reasonably be, presumed to be, affected.

2.9. Incidental Visitor
A non-employee occasional Visitor to a BC site for a minimal period and limited purpose, e.g., to attend a meeting, perform intermittent services, delivery or pickup of mail or goods, etc.

2.10. Non-employee
As used in this policy, a Non-employee means a Contractor, Temporary Worker, Incidental Visitor, Contractor Employee, and/or a Transport Employee.

2.11. Possession
To have either in or on an individual's person or control (e.g., in personal effects, motor vehicles, tool boxes and areas substantially entrusted to the control of the individual, such as desks, files and lockers).

2. DEFINITIONS cont'd.

2.12. Temporary Worker
A non-employee engaged through a third-party agency for the purpose of temporarily filling a vacant authorized position, typically for a period of less than 6 months. The vacant position must be for a BASF employee.

2.13. Transport Employee
An individual engaged by or through a transportation carrier to perform services directly involved in the transport of goods or materials which performance requires the individual to have a governmental license, permit or the like, e.g., truck drivers, bargemen, etc.

2.14. Visitor
An individual who comes to a BC site for reasons of business, duty or pleasure (by invitation). BC Employees are considered Visitors at a site which is not their regular work location.

2.15. Work Site
Any office, building or property (including parking lots) owned, leased or operated by BC or any vehicle or equipment owned, leased or operated (including rental and leased vehicles and equipment) by BC.

3. POLICY

3.1. Controlled Substances/Alcohol
- The use, sale, distribution and possession of Controlled Substances and/or alcohol on any Work Site are prohibited.
- The reporting for work or working while Impaired by any Authorized Substance, Controlled Substance or alcohol is prohibited.

3.2. Authorized Substances
The use of Authorized Substances on a Work Site or at work is permitted only if such use does not cause the Employee or Non-employee to be Impaired.

3.3. Non-employees
BC may elect to implement this policy directly with respect to Non-employees, or may elect to have it implemented by the Contractor Agency.

3.4. Drug Free Workplace Act
It is a requirement of the Drug-Free Workplace Act of 1988, and of this policy, that each Employee and Non-employee must notify BC of any criminal drug statute conviction for a violation occurring in the Work Site, no later than five (5) days after such conviction.

3. **POLICY cont'd.**

3.5. Professional Counseling

- BC makes help available to Employees through the EAP and supports Employees in solving their problems; provided, however, job performance must remain satisfactory.
- Voluntary participation in an EAP will neither be used as a reason for disciplinary action against an Employee, nor will it excuse the Employee from disciplinary action for violation of this policy.
- BC reserves the right to make participation in an EAP, or other form of assessment or treatment, mandatory when BC deems it to be appropriate as an aid in correcting a performance problem, including a violation of this policy.
- BC does not make EAP counseling available to Non-employees.

3.6. Testing

- BC reserves the right to test for the use of Authorized Substances, Controlled Substances and alcohol at its Work Sites or while an Employee is at work.
- Site/Unit management may only initiate a substance abuse testing program pursuant to, and consistent with, this policy.
- Only laboratories and protocols approved by the Vice President, Corporate Medical shall be used.

3.7. Inspections

For purposes of assuring compliance with the prohibition of Possession of Controlled Substances and alcohol, Employees and Non-employees are subject to inspections under the circumstances described below:

3.7.1. Suspected Possession

- Where a member of management has a reasonable belief that a Controlled Substance or alcohol is present on the Work Site, e.g., the member of management
  - smells marijuana or alcohol,
  - observes what the member of management reasonably believes is a Controlled Substance or alcohol, or
  - has acquired evidence (including a report by Employees or a Non-employee which appears to be credible under the circumstances), leading the member of management to reasonably conclude that Controlled Substances or alcohol are present.

- In such cases, the member of management shall, if reasonably practicable under the circumstances, obtain the concurrence of another member of management. The member of management may request any or all individuals in the immediate area to submit to a search of their persons, lockers, handbags, toolboxes, desks, automobiles or any other property, including personal property under their Possession.

3. **POLICY cont'd.**

3.7. Inspections cont'd.

3.7.2. Safety Concerns
Upon entering or exiting a Work Site when management deems this advisable because of safety concerns.

3.7.3. Inspection of a Person
Any inspection of an individual's person shall be conducted by a member of the same sex and only with a witness of the same sex present. All inspections shall be conducted in a reasonable manner and, to the extent practicable given the nature of the inspection, in a minimally intrusive manner.

3.7.4. Refusal to Submit to Inspection
Any refusal to submit to such an inspection or any interference with an inspection shall be a violation of this policy.

3.8. Violations

- For a first violation of this policy or its related procedures by reason of using Controlled Substances or alcohol on a Work Site, or reporting to work, or working, while Impaired, by an Employee who has been employed for more than 90 days, the Employee will be required to immediately enter and to successfully complete a treatment program. If the Employee refuses to enter such a program, or fails to successfully complete it, their employment will be terminated. A second violation of this policy or its related procedures by reason of using Controlled Substances or alcohol on a Work Site, or reporting to work, or working, while Impaired, will result in termination of employment.

- For a first violation of this policy or its related procedures by reason of using Controlled Substances or alcohol on a Work Site, or reporting to work, or working, while Impaired, by an Employee who has been employed for less than 90 days, the Employee will have their employment terminated.

- For a first violation of this policy or its related procedures by reason of using Controlled Substances or alcohol on a Work Site, or reporting to work, or working, while Impaired, or refusing to submit to testing when requested to do so, by a Non-employee, the Non-employee will be permanently barred from the Work Site.

- For any violation of this policy or its related procedures other than by reason of using Controlled Substances or alcohol on a Work Site, or reporting to work, or working, while Impaired, discipline, up to and including termination of employment, will be determined by management, provided that, if an Employee refuses to submit to testing when requested to do so, their employment will be terminated.

4. SCOPE

Applies to applicants, Employees (other than those who are Visitors at a site), Contractors and Temporary Workers of BC and its United States subsidiaries.

5. RESPONSIBILITIES

5.1. Corporate Legal

Administers and interprets this policy together with Corporate Medical.

5.2. Corporate Medical

Administers and interprets this policy together with Corporate Legal. The Vice President, Corporate Medical may assign any of the responsibilities under this Policy and related Procedures to a designee who is a licensed physician.

6. RELATED DOCUMENTS

BC008.001 Controlled Substances/Authorized Substances/Alcohol - Testing Categories for U.S. Sites.

BC008.002 Controlled Substances/Authorized Substances/Alcohol - Testing Procedures for U.S. Sites

BC008.004 Controlled Substances/Authorized Substances/Alcohol – Random Testing Requirements for U.S. Sites

BASF The Chemical Company	Title: Controlled Substances/Authorized Substances/Alcohol – Testing Categories for U.S. Sites			
	Function: Legal – Environmental Health & Safety - Medical			
	No.: BC008.001		Page:	2 of 13
Corporate Procedure	Reviewed: 6/13/13	Effective: 6/13/13 (Rev.6)	Supersedes: 12/12/12 (Rev.5)	

2. **DEFINITIONS cont'd.**

2.6. Controlled Substance and Alcohol Testing
Testing of blood, urine, breath, saliva or other substance as reasonably deemed necessary by BC to determine presence of a Controlled Substance or alc

2.7. Employee
An individual who performs services for, and under the direction and control of, BC. Such direction and control includes the results to be accomplished and the methods and means by which such results are accomplished. Neither contracting firms nor Non-employees who are characterized by BC as independent Contractors are Employees.

2.8. Employee Assistance Program ("EAP")
A BC sponsored counseling and referral service offered at no cost to Employees and their dependents.

- Services are usually provided on a voluntary and confidential basis by professional EAP counselors in the local community regarding:
  - marital, family or emotional difficulties,
  - concerns about the Employee's or a family member's alcohol or Controlled Substances abuse, and
  - other personal difficulties or lifestyle crises that affect health, well-being, or job performance.
- The terms of the EAP services are set forth in separate documents, which may be obtained from the Human Resources Department.

2.9. Incidental Visitor
A non-employee occasional Visitor to a BC site for a minimal period and limited purpose, e.g., to attend a meeting, perform intermittent services, delivery or pickup of mail or goods, etc.

2.10. Non-employee
As used in this procedure, a Non-employee means Contractors and Temporary Workers.

2.11. Temporary Worker
A non-employee engaged through a third party agency for the purpose of temporarily filling a vacant authorized position, typically for a period of less than 6 months. The vacant position must be for a BC employee and is generally due to illness, vacation, turnover, termination, etc.

2.12. Transport Employee
An individual engaged by or through a transportation carrier to perform services directly involved in the transport of goods or materials which performance requires the individual to have a governmental license, permit or the like, e.g., truck drivers, bargemen, etc.

2. DEFINITIONS cont'd.

2.13. Visitor
An individual who comes to a BC site for reasons of business, duty or pleasure (by invitation). BC Employees are considered Visitors at a site which is not their regular work location.

3. SCOPE
Applies to all applicants, Employees (other than those who are Visitors at a site), Contractors and Temporary Workers of BC and its United States subsidiaries.

4. PROCEDURE

4.1. Pre-placement Testing
Pre-placement testing will be performed for Controlled Substances only.

4.1.1. General
- Prior to being placed on the payroll, an applicant who has received an offer of employment will undergo Controlled Substances testing as part of the pre-placement physical examination.
- Refusal to submit to such testing will result in withdrawal of the offer of employment.
- A positive Controlled Substances test result will result in withdrawal of the offer of employment.

4.1.2. Information to Applicant
An applicant who has received an offer of employment shall be informed in writing of BC policy and testing procedures. This information will include a request to sign the attached consent form (*see* **Attachment 1**) for Controlled Substances testing, which includes:
- notice that the results of the testing will be provided to the site Human Resources Department, and
- notice that failure to sign the consent to the test will result in the remainder of the pre-placement examination (as applicable) not being completed and withdrawal of the offer of employment.

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4. PROCEDURE cont'd.

4.2. Employee/Non-employee Testing

4.2.1. General

- All Employees to be tested will be required to sign a consent form (**Attachment 1**) for all Controlled Substance and/or Alcohol Testing.
- All Non-employees to be tested will be required to sign a consent form (**Attachment 1**) for all Controlled Substance and/or Alcohol testing.
- Each site (in conjunction with the Purchasing Department) shall require suppliers of Non-employees who will be on-site for more than a minimum period (to be determined by the site manager) to establish a controlled substances/authorized substances/alcohol testing program which shall be generally equivalent to the one described in this Corporate Procedure.
- Refusal to submit to testing or to sign the consent form, specimen adulteration, refusal to cooperate during the testing, or tampering with the test, collection or results in any way is a violation of policy ***BC008, Controlled Substances/ Authorized Substances/Alcohol***, and will result in disciplinary action up to, and including, termination of employment for Employees and permanent removal from the work site for Non-employees.
- An Employee or Non-employee may be required to submit to Controlled Substances and Alcohol Testing under the circumstances described below.

4.2.2. Suspected Impairment

Employees or Non-employees may be required to submit to testing when there is a reasonable belief to suspect any Employee or Non-employee has reported to work, or is working, impaired.

A. Reasonable Belief

A reasonable belief exists that an Employee or Non-employee is impaired when the individual's supervisor or other member of management:

- Observes, or has acquired evidence (including a report by an Employee or Non-employee which appears to be credible under the circumstances) that:
  - the individual may have ingested or otherwise placed into their system, a Controlled Substance or alcohol, or
  - the individual appears to be intoxicated, confused, uncoordinated, is exhibiting a marked personality change, or appears otherwise to be impaired.

4. PROCEDURE cont'd.

4.2. Employee/Non-employee Testing cont'd.

4.2.2 Suspected Impairment cont'd.

- A Quick Reference Card for Suspected Impairment is available to provide guidance regarding the establishment and documentation of reasonable belief. This Quick Reference Card is set forth in **Attachment 3.**

B. Suspected Impairment Testing Sequence

Suspected Impairment Controlled Substances and/or alcohol testing of an Employee or Non-employee may be undertaken as follows:

Stage	Who	Description
1	Supervisor or Other Member of Management	Shall review the circumstances and reach a reasonable belief that one of the circumstances permitting testing described above applies.
2	Supervisor or Other Member of Management	Discusses the situation with the appropriate site Human Resources representative.
3	Site HR Representative	Arranges for specimen collection at an approved facility.
4	Supervisor, Other Member of Management, or HR Representative	Accompanies the individual to the specimen collection facility.
5	Employee/Non-employee	Registers at the specimen collection facility where the Controlled Substance and/or alcohol test specimen shall be obtained in accordance with the procedure, ***BC008.002 Controlled Substances/Authorized Substances/Alcohol – Testing Procedures for U.S. Sites.***

4. PROCEDURE cont'd.

4.2. Employee/Non-employee Testing cont'd.

4.2.3. Random Testing

Employees or Non-employees shall be subject to non-discriminatory, periodic, random, unannounced testing as a term and condition of employment or of permitting Non-employees to continue to perform services for BC, except where prohibited by law. Technical requirements for Random Testing are set forth in ***BC008.004 Controlled Substances/Authorized Substances/Alcohol – Random Testing Requirements***

A. State – specific Legal Limitations

In those states where random testing is permitted only for Employees and Non-employees who work in safety sensitive positions (California, Connecticut, Maine, Massachusetts, Minnesota, New Jersey, and West Virginia), the site manager at each BC site or Vice President, Human Resources Operations for employees away from fixed BC sites, or their designee, shall determine which Employees and Non-employees work in safety sensitive positions in consultation with the Legal Department. **Random testing will not be conducted in Vermont, Rhode Island, Boulder, CO., San Francisco, CA., and any other state\municipal unit where such testing is not permitted.** *Note: The site manager at a site with union represented employees must consult with the Industrial Relations Department to install a random testing process for such employees.*

B. Testing Rate – Fixed Sites

Random testing for drugs and alcohol shall be administered at a predetermined minimum annual rate of 25% of the average number of employees subject to testing during the prior twelve (12) consecutive calendar months, provided that, if the rate of positive test results during the prior twelve (12) consecutive calendar months is 1% or less of the total number of Employees tested, the site manager may reduce the minimum annual rate to 10%, and further provided, that if the rate of positive tests results during the prior twelve (12) consecutive calendar months is 2.5% or more of the total number of Employees tested, the site manager may increase the minimum annual rate to 50%. Each site, regardless of size, must conduct a minimum of one test per quarter.

4. PROCEDURE cont'd.

4.2. Employee/Non-employee Testing cont'd.

4.2.3. Random Testing cont'd.

C. **Testing Rate – Sales and Other Employees in the Field**
Random testing for drugs shall be administered at a predetermined minimum annual rate of 10% of the average number of employees subject to testing during the prior twelve (12) consecutive calendar months, provided that, if the rate of positive tests results during the prior twelve (12) consecutive calendar months is between 1.0% to 2.5% of the total number of Employees tested, the minimum annual testing rate will be increased to 25%, and if 2.5% or more of the total number of Employees test positive for drug or alcohol, the minimum annual testing rate will be increased to 50%.

D. **Notice of Random Testing Protocol**
Employees or Non-employees subject to random testing shall be so notified. The posting of this procedure on the BASF intranet shall serve as the notice.

4.2.4. **Post-accident Testing**

- Employees or Non-employees may be subject to post-accident testing as a term and condition of employment or of permitting Non-employees to continue to perform services for BC, based on a reasonable belief of impairment (as set forth in Section 4.2.2 above) or where site management has determined such screening is necessary as a matter of site safety.
- All such testing may be done only pursuant to a written protocol, which has been approved by the Deputy General Counsel and the Vice President, Corporate Medical, or their designees.
- Employees or Non-employees subject to such testing shall be so notified, and a copy of the protocol shall be posted at the work site. The posting shall serve as the notice.

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4. PROCEDURE cont'd.

4.2. Employee/Non-employee Testing cont'd.

4.2.5. Government Mandated Testing

Drug and alcohol testing required by regulation shall be performed in compliance with state and federal laws and regulations, as applicable.

4.2.6. Customer Required Testing

Employees or Non-employees who are performing work at a customer's location who may be requested to undergo Controlled Substances or Alcohol Testing shall comply with the conditions set forth by the customer as a condition of employment or permitting Non-employees to continue to perform services for BC.

When any Employee, or Non-employee receives a request from a customer to undergo a Controlled Substance or Alcohol Test, then:

Stage	Who	Description
1	Employee/ Non-employee	Immediately advises their site Human Resources representative.
2	Site Human Resources Representative	Immediately advises Corporate Medical and Legal.
3	Corporate Medical and Legal	Reviews the testing request and methodology and then advises the Human Resources representative whether the testing and methodology are lawful and appropriate.
4	Site Human Resources Representative	Advises the Employee/Non-employee:

IF Testing Methodology is ...	THEN ...
acceptable,	the individual must submit to the testing.
not acceptable,	Corporate Medical will advise on how to proceed. - The individual may refuse testing by the customer, if BC Medical cannot support the customer's program. - The individual will be provided a wallet card to attest that they have been tested, the date that results were negative, and that they remain in a testing pool.

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4. PROCEDURE cont'd.

4.2. Employee/Non-employee Testing cont'd.

4.2.7. Post-Rehabilitation Testing

Post-rehabilitation testing may be conducted as part of a structured substance abuse/alcohol rehabilitation program. If such testing is to be conducted as part of such a program, a post-rehabilitation testing program for the Employee shall be established by the Site Human Resources Representative in consultation with the Corporate Medical Department.

- Each post-rehabilitation testing program shall be established in writing between the Employee and BC. Sample forms for such a written program are set forth in **Attachment 2**.
- The Vice President, Corporate Medical and site Human Resources Representative shall be responsible for determination of the testing schedule.
- The maximum frequency, duration, timing, and method of specimen analysis of the testing program shall be provided to the Employee.
- Arrangements for the performance of post-rehabilitation testing are the responsibility of the Site Human Resources Representative, and should be coordinated with either the local BASF medical provider or a substance abuse testing administration service.
- The Employee shall be required to sign the program as a condition of employment, and the documentation shall be maintained in the Employee's medical record, provided that the Site Human Resources Representative shall be entitled to keep one copy of the plan in a confidential file, which may be accessed on a "need to know" basis.
- The BASF EAP case manager for the structured rehabilitation program should be kept informed, by the Site Human Resources Representative, of both positive and negative test results to assist in monitoring compliance with the recommended post-rehabilitation testing schedule.

4.2.8. Fitness for Duty Testing

A. The Vice President, Corporate Medical will be notified if

- testing identifies the presence of a prescription drug or over-the-counter medication which may cause, in the Medical Review Officer's reasonable judgment, an Employee or Non-employee to become impaired while working; or
- it comes to the attention of a BC Medical Department that an individual is taking a prescription drug or over-the-counter medication which may cause, in the Medical Department's reasonable judgment, and Employee or Non-employee to become impaired while work ; or

4. PROCEDURE cont'd.

4.2. Employee/Non-employee Testing cont'd.

4.2.8. Fitness for Duty Testing cont'd.

- it comes to the attention of the Medical Department that an Employee or Non-employee has previously, or is currently, being treated for Controlled Substances, other substances or alcohol abuse and there exists a reasonable belief of suspected impairment while working.

B. In any such event, the Vice President, Corporate Medical may require the Employee or Non-employee to undergo a fitness for duty examination.

- In the event the individual is found fit for duty, the individual will be allowed to return to duty, provided that, the Vice President, Corporate Medical and Site Human Resources Representative may place the Employee or Non-employee on an examination testing program in order to verify that the individual continues to be fit for duty while taking such drug/medication, utilizing the sample forms set forth as **Attachment 2**.
- The maximum frequency, duration, timing, and method of specimen analysis of the testing program shall be provided to the individual.
- The Employee shall be required to sign the program as a condition of employment, and the documentation shall be maintained in the Employee's medical record, provided that the Site Human Resources Representative shall be entitled to keep one copy of the plan in a confidential file, which may be accessed on a "need to know" basis.

5. NOTIFICATION OF RESULTS

5.1. Breath Alcohol Rest Results

- Information to be reported to the Site Human Resources Representative will include
  - Positive
  - Negative.
  - Refusal to test.
  - Test cancelled
- Positive breath alcohol test results should be immediately available from the collection testing facility. It is recommended that advance arrangements are made for safe transport home of the individual with a positive test, for instance by use of taxi or car service.

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5. NOTIFICATION OF RESULTS cont'd.

5.2. Urine Drug Test Results

Information to be reported to the Site Human Resources Representative will be limited to the following:

- Positive (Neither the substance detected nor its amount will be reported.)
- Negative.
- Refusal to test.
- Test cancelled, with notation of invalid result, when appropriate.
- Recommendation for immediate recollection under direct observation.

Notwithstanding the foregoing, additional information will be furnished to Site Human Resources to the extent necessary for BC to meet its obligations under any applicable collective bargaining agreement.

5.3. Opportunity to Provide Explanation and Retest Initial Sample

- When required by state law, within three (3) business days of being notified of a positive result, the individual may provide an explanation or statement to the MRO explaining the positive urine drug test result. The MRO will take this information into consideration when making his or her determination.
- Within three (3) business days of being notified of a positive result, the individual may request that the initial sample be retested at his or her own expense. If the retest yields a negative result, BC will pay for the cost of the test.

5.4. Prescription Drugs

If the laboratory testing identifies the presence of a prescription drug in the urine screen and the medical evaluation indicates that the prescription drug is being used as prescribed, the test shall be reported as negative to management, provided that the Vice President, Corporate Medical shall advise the Site Human Resources Representative of any required job restrictions.

5.5. Over-the-Counter Medication

If the laboratory testing identifies the presence of an over-the-counter medication and the medical evaluation indicates that the medication is being used appropriately by the individual, the test shall be reported as negative to management, provided that the Vice President, Corporate Medical shall advise the Site Human Resources Representative of any required job restrictions.

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6. RESPONSIBILITIES

6.1. Corporate Legal
Responsible for administering and interpreting this policy together with Corporate Medical.

6.2. Corporate Medical
Responsible for the administering and interpreting of this policy together with Corporate Legal. The Vice President, Corporate Medical may assign any of the responsibilities under this Procedure to a designee who is a licensed physician.

6.3. Site Human Resources Representative
Responsible for administering this procedure at their site(s) together with Site Medical where there is one.

6.4. Site Medical
Responsible for administering this procedure at their site(s) together with the Site Human Resources Representative.

6.5. Site Manager
- Responsible for determining (in consultation with the Legal Department in the states listed in **Section 4.2.3.** above) which employees at the site hold safety sensitive positions.
- Responsible (in conjunction with the Purchasing Department) for making supplier of Non-employees establish a controlled substances/authorized substances/alcohol testing policy.

6.6. Purchasing Department
Responsible for assisting the Site Manager as described in **Section 6.5.** above.

6.7. Vice President, Human Resources Operations
Responsible for determining (in consultation with the Legal Department in the states listed in **Section 4.2.3.** above) which employees away from fixed BC sites hold safety sensitive positions.

7. RELATED DOCUMENTS

BC008	Controlled Substances/Authorized Substances/Alcohol Policy
BC008.002	Controlled Substances/Authorized Substances/Alcohol – Testing Procedures for U. S. Sites
BC008.004	Controlled Substances/Authorized Substances/Alcohol – Random Testing for U. S. Sites

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Attachment 1 Controlled Substances/Authorized Substances/Alcohol Screening Authorization for Release of Information

Attachment 2 Controlled Substances/Authorized Substances/Alcohol/Post-Rehabilitation – Testing Agreement Sample Forms

Attachment 3 Quick Reference Card – Suspected Impairment Drug and Alcohol Testing

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Preparer:	**Owner:**	**Approver:**
Associate Medical Director *(Signature on File)*	Vice President, Corporate Medical *(Signature on File)*	Senior Vice President, Environmental Health & Safety *(Signature on File)*
Sr. Compliance & Employment Counsel *(Signatures on File)*	Sr. Compliance & Employment Counsel *(Signatures on File)*	Senior Vice President and General Counsel *(Signature on File)*

1. PURPOSE

To establish procedures for non-federally regulated testing for Controlled Substances, Authorized Substances and alcohol at BASF Corporation ("BC").

2. DEFINITIONS

2.1. Authorized Substances

Authorized Substances include only

- Lawful over-the-counter drugs (excluding alcohol) used in accordance with label/insert recommendations,
- drugs used in accordance with physician directions, when medically prescribed, with the exception of medical marijuana, and,
- alcohol at business and social functions, the consumption and possession of which management has been advised of and has approved in advance which does not make the applicant, Employee, or Non-employee impaired.

2.2. Breath Alcohol Technician ("BAT")

An individual who meets the requirements set forth in *49 C.F.R. Section 40.51*.

2.3. Contractor

A non-employee engaged through a third party agency for the performance of specific functions. These individuals

- perform services with the general oversight of the company, and
- generally do not, but may, perform services for third parties at the same time.

2.4. Contractor Employee

An individual engaged by or through a third party to perform services principally for the third party.

2.5. Contractor Agency

A company which will be either placing or bringing Contractor(s), Temporary Employee(s) or Contractor Employee(s) onto a BC site.

2. DEFINITIONS cont'd.

2.6. Controlled Substances
Drugs and narcotics that are illegal under federal, state or local law, including, but not limited to, recreational and medical marijuana.

2.7. Controlled Substance and Alcohol Testing
Testing of blood, urine, breath, saliva or other substance as reasonably deemed necessary by BC to determine presence of a Controlled Substance or alcohol.

2.8. Employee
An individual who performs services for, and under the direction and control of, BC. Such direction and control includes the results to be accomplished and the methods and means by which such results are accomplished. Neither contracting firms nor Non-employees who are characterized by BC as Independent Contractors are Employees.

2.9. Employee Assistance Program ("EAP")
A BC sponsored counseling and referral service offered at no cost to Employees and their dependents.

- Services are usually provided on a voluntary and confidential basis by professional EAP counselors in the local community regarding:
  - marital, family or emotional difficulties,
  - concerns about the Employee's or a family member's alcohol or Controlled Substances abuse, and
  - other personal difficulties or lifestyle crises that affect health, well-being or job performance.
- The terms of the EAP services are set forth in separate documents, which may be obtained from the Human Resources Department.

2.10. Evidential Breath Testing ("EBT") Device
A breath-testing device approved by the National Highway Traffic Safety Administration ("NHTSA"). EBTs approved by NHTSA under ***49 CFR 40.63*** are placed on the "Conforming Products List of Evidential Breath Measurement Devices".

2.11. Incidental Visitor
A non-employee occasional Visitor to a BC site for a minimal period and limited purpose, e.g., to attend a meeting, perform intermittent services, delivery or pickup of mail or goods, etc.

3. SCOPE

Applies to all applicants, Employees (other than those who are Visitors at a site), Contractors and Temporary Workers of BC and its United States subsidiaries.

4. PROCEDURE

DRUG PANELS AND LABORATORIES

4.1. Laboratory

- The actual analysis of urine samples to determine the presence of Controlled Substances will be conducted by an independent laboratory, certified to meet standards established by the U.S. Department of Health and Human Services ("DHHS") Substance Abuse and Mental Health Services Agency ("SAMHSA").
- Any laboratory used for Controlled Substance or Alcohol Testing must be approved by the Vice President, Corporate Medical and site Human Resources shall verify such approval before sending a sample to a laboratory.

4.2. Drug Panel

- BC uses a drug panel equivalent to the U.S. Department of Transportation drug test panel, in accordance with the DHHS SAMHSA Mandatory Guidelines for Federal Workplace Testing Programs. A urine drug test will be performed and analyzed for marijuana, opiates (including 6-acetylmorphine (6-AM)), amphetamines (including methylenedioxymethamphetamine (MDMA) methylenedioxyamphetamine (MDA) and methylenedioxyethylamphetamine (MDEA), cocaine, and phencyclidine.
- Specimen Validity Testing will be performed and reported as per the testing protocols and criteria of the DHHS SAMHSA Mandatory Guidelines for Federal Workplace Testing Programs.
- All positive results will be confirmed by Gas Chromatography/Mass Spectrometry analysis. Please note that the DHHS SAMHSA panel does not test for alcohol.
- BC reserves the right to use a DHHS SAMHSA equivalent 10-drug panel or other suitable panel, when the Vice President, Corporate Medical deems this appropriate.

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4. PROCEDURE cont'd.

4.3. Alcohol

4.3.1. Breath Alcohol Analysis

Breath alcohol analysis will be performed in accordance with the Department of Transportation ("DOT") regulatory guidance **49 CFR 40 Subparts L and M.**

- The testing should be performed by a BAT on breath Alcohol Testing equipment that meets the NHTSA conforming products list for evidential breath testing.
- A positive Alcohol Test result shall be deemed to be confirmed when a second breath alcohol measurement of 0.04% or higher is obtained.

4.3.2. Alternative Method for Alcohol Testing

A. Saliva Test

If breath Alcohol Testing equipment is not readily available, a saliva Alcohol Test may be performed.

- The saliva test should use test equipment that meets the NHTSA conforming products list for non-evidential testing devices for Alcohol Testing.
- The saliva alcohol analysis shall be performed in accordance with the DOT regulatory guidance in ***49 CFR 40, Subpart L.***

B. Saliva Confirmatory Test

A confirmatory test for a positive saliva Alcohol Test (e.g., an alcohol measurement of 0.04% or higher) must be performed before the test can be considered to be positive.

- Confirmatory assessment should be performed by means of a blood alcohol analysis or breath alcohol analysis (*see* **Section 4.3.1.**).
- The sample should be obtained promptly after the saliva Alcohol Test. The blood alcohol sample should be handled as a chain of custody specimen (*see* **Section 6.**) and sent to an approved laboratory.

5. SPECIMEN COLLECTION cont'd.

5.4. Refusal to Test cont'd.

5.4.2. Violations

Refusal to test is a violation of this procedure and BC policy ***BC008, Controlled Substances/Authorized Substances/Alcohol*** and may result in disciplinary action up to an including, termination of employment for Employees and permanent removal from the work site for Non-employees.

6. EVALUATIONS

Tests with significant procedural or technical errors shall be reported as cancelled and another specimen collected. The test cancellation criteria are as follows.

6.1. Chain of Custody/Specimen Condition: Fatal Flaws

The specimen shall be considered as "rejected for testing" and the test cancelled for any of the following:

- The chain of custody does not have both the printed collector's name and collector's signature.
- Specimen ID number is omitted from specimen bottle, or does not match the specimen ID on the chain of custody form.
- *Specimen volume below 30 ml. If the volume is between 27 and 30 ml, the* specimen may be accepted if the laboratory can ensure that sufficient volume will be available for storage and any necessary reanalysis for quality control and/or for confirmation of results.
- Specimen bottle seal is broken (e.g., specimen leaks) or shows evidence of tampering.
  Note: *A break in the seal of the shipping container does not constitute a fatal flaw, but this shall be noted on the laboratory test report.*
- Specimen shows obvious adulteration (e.g., color, foreign objects, unusual odor).
  Note: *If the collection site has reason to believe the specimen has been altered, or substituted, a second, witnessed (same sex witness) specimen shall be collected. Both specimens are then considered valid and shall be put into the chain of custody and sent for analysis.*

6. EVALUATIONS cont'd.

6.2. Chain of Custody Form: Correctable Flaws

The test shall not be automatically cancelled for any of the following correctable flaws:

- Donor ID number is omitted on form - unless the donor's refusal to provide the ID number is noted on the form.
- Incomplete chain of custody information (Minimum requirements, however are: two signatures, and shipping and entry dates).
- Collector's signature is omitted from the certification statement.
- Donor's signature is omitted from the certification statement - unless the form elsewhere indicates that the donor refused to sign it.
- Certifying scientist's signature is omitted on the laboratory copy of the CCF for a positive, adulterated, substituted, or invalid test result.
- The specimen temperature is not checked and the "Remarks" line does not contain an entry regarding the temperature being out of range.

6.3. Positive Test Results

All positive drug test results must be reviewed with the donor by an MRO prior to any notification of Human Resources personnel. The MRO evaluation of positive alcohol and drug test laboratory results shall include the following:

- Whenever the analysis is positive for a prescription medication, a careful investigation shall be conducted by an MRO to evaluate whether the drug is currently prescribed by a licensed physician and whether the individual is taking the medication as prescribed. Proof of use, by means of the physician note, copy of the prescription or prescription label, or confirmation by the pharmacy, is required for determination of an Authorized Substance, with the exception of medical marijuana..

- Whenever the analysis is positive for a substance that could be consumed in an over-the-counter medication, an investigation shall be conducted into the use of that medication by an MRO before any action is taken. If the use is in accordance with label or package insert directions, it shall be considered an Authorized Substance.

- Where a prescription or over-the-counter medication is identified by the testing procedures outlined above, the MRO shall promptly so advise the Vice President, Corporate Medical. The Vice President, Corporate Medical shall, in consultation with the MRO, make a determination as to whether or not the medication or drug may cause the Employee or Non-employee to be impaired and, if so, whether job restrictions shall be required.