

Claims go up in smoke because of positive drug test

by Jodi R. Bohr
Gallagher and Kennedy, P.A.

While an employee had high expectations that she would advance her race and national origin discrimination claims against her former employer, an Arizona federal court was blunt when it entered judgment against the Native American woman's claims and "reefered" her case to the clerk for closure. (OK, I'm done now.)

The court ruled that the employer terminated her employment after she tested positive for marijuana use following a random drug test, and she failed to demonstrate any discriminatory animus as a basis for her discharge. Although the employee is a member of a protected class, was qualified for her position, and experienced an adverse employment action, she was just blowing smoke because she offered no evidence to support her contention that similarly situated non-Native American employees tested positive for drugs but weren't discharged. (OK, I really am done now, I promise.)

Drug-testing policy for safety-sensitive positions

Vina Yazzie worked for Mohave County's Public Works Department (PWD) for more than 17 years. As a term of her employment, she was required to maintain a commercial driver's license (CDL). Employees at the PWD who maintain a CDL or operate commercial vehicles are considered to have safety-sensitive positions and are therefore subject to random drug testing.

The county maintains policies governing discipline of employees who test positive for drugs or alcohol while they're on duty. The policy expressly provides that employees in safety-sensitive positions who test positive for drugs while they're on duty "may be immediately dismissed." Since January 2010, all 10 PWD employees in safety-sensitive positions who

tested positive for alcohol or drugs were discharged or resigned in lieu of being fired.

The county conducts regular training sessions on its drug and alcohol policy. Yazzie attended a training session on July 15, 2013. During the training session, employees were encouraged to ask questions to fully understand the policy. A supervisor also discussed a draft zero-tolerance drug-use policy that was awaiting approval by the board of supervisors. At the training, Yazzie was reminded that the penalty under county policy is discharge for a failed drug test.

Yazzie was randomly selected for a drug screening and sent to Kingman Regional Medical Center for the test. She was notified that she had tested positive. She originally claimed it was a false positive because she had taken a prescription drug. She was placed on administrative leave and informed that she could have the sample retested, which she declined to do. She ultimately admitted to illegal marijuana use, and her employment was terminated.

Litigation ensues

Yazzie sued the county and several of her supervisors for race and national origin discrimination under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. (She filed other claims that were dismissed earlier in the case.) Specifically, she alleged that "the County did not terminate other similarly situated non-Native-American employees who violated [its] Drug and Alcohol Policies."

As a former employee alleging unlawful race and national origin discrimination against the county, Yazzie was required to show that (1) she belongs to a protected class, (2) she was qualified for her position, (3) she was subjected to an adverse employment action, and (4) similarly situated

individuals outside her protected class were treated more favorably. The county didn't dispute the first three elements because (1) Yazzie is Native American, (2) she had received satisfactory feedback from supervisors on her annual reviews, and (3) her employment was terminated. However, the county disputed the final element and asked that the court dismiss her claims. The county also argued that it should win because it had a legitimate reason for terminating her employment.

Treated more favorably?

The central premise of Yazzie's claim was that the county treated similarly situated non-Native American employees who violated the drug and alcohol policy more favorably by not firing them for positive drug and alcohol tests. Although she named several coworkers she believed had failed a drug test but were not fired, the county was able to demonstrate that those employees either had never tested positive for drugs or were fired after a positive test. Out of the 10 employees fired for a positive drug test since January 2010, eight are Caucasian, one is Hispanic, and one is Native American (Yazzie). Thus, Yazzie was unable to demonstrate that others outside her protected class were treated more favorably than she was.

What's more, the county's decision to fire Yazzie fell entirely within the PWD's policies, thereby establishing a legitimate nondiscriminatory reason for terminating her employment. Yazzie lost on her claims for both of those reasons.

Takeaway

In this case, having a clear policy that was uniformly enforced allowed the county to refute Yazzie's discrimination claims. It's important to be able to demonstrate that you fired every employee who tested positive for drugs, regardless of their race or any other protected characteristic. It's also important to note that Kingman Regional Medical Center, not the county, made the random drug-testing selections, which allowed the county to

The county also benefited from having a clearly defined drug and alcohol-use policy for other reasons. First, Arizona employers should engage in best practices by adopting a drug and alcohol-use policy before implementing screening. A policy that complies with the Drug Testing of Employees Act offers you safe harbors from employees' lawsuits challenging adverse employment actions made in good-faith reliance on positive drug tests. Second, a comprehensive policy will address whether you have safety-sensitive positions that aren't protected by the Arizona Medical Marijuana Act. Finally, a comprehensive policy communicates what you expect of your workers and how a breach of those expectations will be handled, which can often (but not always) help you avoid lawsuits.

Jodi R. Bohr is an attorney with [Gallagher & Kennedy, P.A.](#) and a contributor to [Arizona Employment Law Letter](#). She practices employment and labor law, with an emphasis on litigation, class actions, and HR matters, and is a frequent speaker on a wide range of employment law topics. She may be reached at jodi.bohr@gknet.com or 602-530-8035.

refute any allegations that Yazzie was selected for drug testing more often than other employees who aren't Native American.