

Employer liable for firing cardholder over positive drug test

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

In November 2010, Arizona voters passed the Arizona Medical Marijuana Act (AMMA) by ballot initiative. Under the AMMA, an employer may not discriminate against a registered medical marijuana cardholder in hiring, firing, or any term or condition of employment or otherwise penalize a cardholder for testing positive for marijuana components or metabolites unless its failure to take adverse action would cause it to lose a monetary or licensing-related benefit under federal law.

The AMMA does not prohibit employers from taking adverse employment actions against registered cardholders for using, possessing, or being impaired by marijuana at the workplace or during working hours. However, the fact that a cardholder tests positive for the presence of metabolites or components of marijuana doesn't necessarily mean she is under the influence. Therefore, you should seek the advice of counsel on your next steps if a cardholder tests positive for marijuana.

A prelude to litigation

Carol Whitmire worked for Walmart for approximately eight years, eventually becoming the customer service supervisor. During her employment, she obtained an Arizona medical marijuana card, which she maintained for the duration of her tenure at Walmart.

On May 21, 2016, Whitmire suffered an injury to her wrist while she was at work. She reported the incident to management, finished her shift, and went home without seeking medical attention. A couple of days later, she reported continued swelling and pain in her wrist to HR. She went home and, just before 2:00 a.m. on May 24, smoked

medical marijuana before going to sleep. When she clocked in for her scheduled shift at 2:00 p.m. that day, she told the personnel coordinator that her wrist still hurt. She was directed to urgent care for a wrist examination and postaccident urine drug test.

Whitmire informed the clinic of her medical marijuana card. Her drug test came up positive for marijuana metabolites at a quantitative value higher than 1,000 ng/ml. (For marijuana novices like me, that's apparently the maximum reading the test can measure for marijuana.) That same day, she verified her medical marijuana card with Walmart's medical review officer. She was later suspended and ultimately fired. Walmart cited the positive drug test as the only reason for her discharge.

Whitmire sued Walmart, alleging, among other things, that she was discriminated against in violation of the AMMA. Walmart asked the Arizona federal court to enter judgment in its favor.

Compliance with state drug-testing law

During new-hire orientation, Walmart employees receive training on the store's alcohol and drug abuse policy. They also receive a written copy of the policy and sign an acknowledgment of their understanding that it allows for drug testing and they will be fired if the testing indicates the presence of drugs in any detectable amount. Walmart established those policies and practices to comply with Arizona's Drug Testing of Employees Act.

Walmart contended that because it had established a policy and implemented a drug-testing program in compliance with Arizona law, its actions toward Whitmire were protected from litigation. While that's true under the Drug Testing of Employees

Act, Whitmire is a registered medical marijuana cardholder, which provides her a layer of protection against discrimination under the AMMA.

Right to sue under AMMA

Walmart contended that the AMMA does not create an individual right for a registered cardholder to sue her employer for discrimination when the discharge was based on a positive drug test. Although nine years have passed since voters approved the AMMA, this marked the first time an Arizona court has considered this issue. The court noted the AMMA doesn't expressly create a right to sue to enforce its terms. In fact, the Act is silent on how an employee can seek enforcement of its antidiscrimination provision.

Whitmire directed the court to the Arizona Legislature's amendments to the Drug Testing of Employees Act, passed in April 2011 after voters adopted the AMMA, expanding protections for an employer that discharges an employee "based on the employer's good[-]faith belief that [the] employee had an impairment while working while on the employer's premises or during hours of employment." Lawmakers also added the "safety-sensitive" concept to the Act, permitting an employer to "exclude an employee from performing a safety-sensitive position" if it has a good-faith belief she is using any drug that could cause impairment.

Based on those exceptions and modifications, Whitmire argued, the legislature clearly believed the AMMA exposed employers to lawsuits by employees. The court agreed, allowing Whitmire to proceed with her discrimination claim under the AMMA.

Harmonizing AMMA and Drug Testing of Employees Act

The court was able to harmonize the AMMA's antidiscrimination provisions with the added protections for employers in the amended Drug Testing of Employees Act. As we noted above, the AMMA provides that an employer may not fire a cardholder based on a positive drug test for marijuana unless she used, possessed, or was impaired by the drug at work. It also provides that a positive drug test doesn't mean the cardholder is

impaired if the amount of marijuana detected in her system is an insufficient concentration to cause impairment. That implies that if marijuana metabolites are sufficiently concentrated in her system to cause impairment, a cardholder may be considered under the influence and fired as a result of the positive test.

Unfortunately, science is unclear about what constitutes a sufficient concentration of marijuana metabolites that causes impairment. That's where the Drug Testing of Employees Act's employer protections come in. Under the Act, an employer is shielded from liability for firing an employee based on its good-faith belief that she was impaired while working. At issue in this case was whether Whitmire's positive drug screen alone was sufficient to support Walmart's asserted "good-faith belief" that she was impaired at work on May 24.

The court held that Walmart's good-faith defense failed because it didn't present an expert witness to provide evidence that the level of metabolites present in Whitmire's drug screen was a sufficient concentration to cause impairment. Because the employer had no further defense of its actions, the court entered judgment against it as to liability for discrimination under the AMMA. The remaining issue in the case is the amount of damages Whitmire should receive.

Safety-sensitive positions

You probably noted we briefly mentioned that the Drug Testing of Employees Act allows an employer to designate certain positions as safety-sensitive and exclude an employee from performing those jobs if the employer has a good-faith belief that she is currently using any drugs that would cause impairment. Whether Whitmore was in a safety-sensitive position wasn't at issue in this case. Nonetheless, we should consider when and how employers should designate positions as safety-sensitive.

In a perfect world, employers will designate positions as safety-sensitive in job descriptions or their drug-testing policies. The definition of a safety-sensitive position in your policy should closely parallel the positions or duties outlined as safety-sensitive in the Drug Testing of Employees Act. Failure to designate a job as safety-sensitive

could result in the loss of a critical defense during litigation.

Recommendations

You should consider reviewing and revising your drug-testing policies in light of this recent decision. Your policy should closely follow the language of both the AMMA and the Drug Testing of Employees Act to ensure it harmonizes the two laws like the court did in this case. Make an effort to delineate in your policy which positions are clearly safety-sensitive and which ones are potentially safety-sensitive.

This case also serves as a good reminder that HR personnel and managers should be trained and on the lookout for signs that employees are impaired at work. Document any indications of drug use by employees, especially when someone has been injured on the job or is being sent to take a drug test. Good documentation along with a drug test that's positive for marijuana metabolites may provide a good-faith basis for believing that marijuana is sufficiently concentrated in her system to cause impairment.

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.