

Arizona federal court rules for medical marijuana cardholder in wrongful discharge case

Arizona employers who utilize workplace drug testing policies need to be aware of a recent case in which a federal court ruled that an employer violated state law when it terminated a “medical marijuana cardholder” solely on the basis of a positive post-injury drug test.

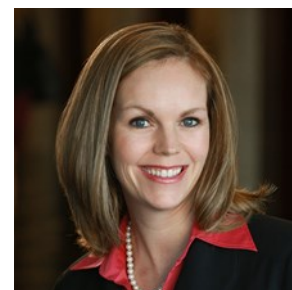
Arizona Medical Marijuana Act

Voters adopted the Arizona Medical Marijuana Act (“AMMA”) in 2010 by ballot initiative. Among other things, the AMMA generally prohibits employers from discriminating on the basis of an individual’s status as a cardholder. The AMMA also prohibits discrimination on the basis of a cardholder’s positive drug test for marijuana, unless the individual used, possessed, or was impaired by marijuana on the employer’s premises or during the hours of employment.

After the voters’ adoption of the AMMA, the Arizona Legislature enacted separate laws in 2011 purporting to give employers somewhat more leeway in dealing with marijuana users. Under those laws, an employer may discipline and even terminate an employees on the basis of a “good faith belief” that the employee is impaired while working or while on the premises, and may base its “good faith belief” on a number of factors, including “the results of a test for the use of alcohol or drugs.” Those laws also provide that an employer may reassign, suspend, or even terminate an employee in a “safety-sensitive” position on the basis of a “good faith belief” that the employee is engaged in the use of any drug that could impair performance, and that the employer may base its belief on, among other things, “results of a test for the use of alcohol or drugs.”



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Wrongful Discharge Claim

In the case at issue, the plaintiff reported a workplace injury and then underwent a drug test in accord with the employer's written policy providing for post-injury testing. Her drug screen tested positive for marijuana metabolites at a level greater than 1,000 ng/ml, and the employer thereafter terminated her.

The plaintiff claimed that the termination was a straightforward violation of her rights under the AMMA. The employer responded that the plaintiff's positive test results gave it a "good faith basis" to believe that she was impaired on the job, and that its actions, therefore, were in compliance with the statutory provisions added in 2011. In a 51-page written ruling, the federal court agreed with the plaintiff.

The court concluded that the Legislature's 2011 enactments (purporting to allow employers to act on the basis of positive test results) did not alter the core provisions of the 2010 AMMA (protecting cardholders unless they are impaired on the premises or during working hours). The court essentially held that an employer may indeed take a cardholder's positive test result for marijuana into consideration, but that the employer may not discipline or terminate the cardholder unless it also has other evidence of impairment (such as the cardholder's speech, actions, movement, demeanor, appearance, clothing, odor, and so on), or expert testimony establishing that the cardholder's test result demonstrated a concentration of marijuana in a sufficient concentration to cause impairment. In the case at issue, because the employer did not present such other evidence of impairment or expert testimony, the court concluded that termination did indeed violate the cardholder's rights under the AMMA.

Recommendations

Arizona employers who utilize workplace drug testing policies need to exercise caution and should consult with legal counsel before disciplining or terminating any medical marijuana cardholder after a positive drug test.

The federal court ruling acknowledges that the AMMA does not protect cardholders who are impaired on the premises or during working hours. The case highlights the importance of additional evidence of impairment beyond a positive drug test. Arizona law lists a variety of factors that can be indicative of impairment; employers should consider training human resources personnel and managers to be alert for such possible signs of impairment, and to document those signs when present.

As the federal court noted, an employer also might try to rely upon expert medical, pharmacological, or other scientific confirmation that a cardholder's positive test result demonstrates impairment. An expert might be able to assist the employer in interpreting a positive test result, particularly in light of any other indicators of "impairment." However, experts tend to be wary of making definitive pronouncements that a test subject actually was "impaired" at any given time.

Employers who utilize urinalysis in their normal workplace testing process need to be aware that urinalysis typically does not document the presence of the impairing metabolite of marijuana. A typical urinalysis will record whether marijuana was present in the system at some point, but is not likely to constitute reliable evidence that the test subject actually was “impaired” at the time of the specimen collection. A positive urinalysis, therefore, is not likely to support a “good faith belief” of impairment.

Finally, employers who have testing policies in place, or who are contemplating implementing such policies, should have legal counsel review those policies to ensure that their express language does not violate any provision of the AMMA, as applied in this recent federal court ruling, and to ensure that those policies provide the employer with the legal protections afforded under other provisions of Arizona law.

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Gallagher & Kennedy’s attorneys regularly work with business clients to draft, implement, and enforce workplace drug and alcohol testing policies. We encourage employers who have specific questions about potential AMMA liability (or any employment law topics) to contact any of the members of Gallagher & Kennedy’s Employment & Labor Law practice.