Employer Liability For Medical Marijuana Bias Is Growing

By Alicia J. Samolis

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In the recent case of Whitmire v. Wal-Mart Stores Inc.,[1] the U.S. District Court for the District of Arizona granted summary judgment on anti-discrimination claims in favor of the plaintiff and against Walmart under Arizona's medical marijuana statute. The plaintiff, a former employee of Walmart, had been terminated by Walmart after allegedly testing positive for marijuana.

As more and more states are adopting medical marijuana laws, the case is representative of the growing risks to employers who engage in adverse employment actions against medical marijuana users.

The Whitmire decision also appears to represent a growing trend in jurisdictions across the country to hold employers liable for allegedly wrongful termination of employees under (1) applicable state medical marijuana or (2) more general disability discrimination statutes, particularly in the absence of proof (a) that the employee was impaired on the job; (b) that the employee was employed in a safety-sensitive position; (c) that the employer engaged in an "interactive process" with the employee and attempted to provide a reasonable accommodation; or (d) that the employer's failure to terminate the employee would have subjected the employer to the loss of a federal monetary or contractual benefit.

The Arizona Medical Marijuana Act, or AMMA[2] at issue in the Whitmire case contains an anti-discrimination paragraph which provides that "[u]nless a failure to do so would cause an employer to lose a monetary or licensing benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon either: (1) [t]he person's status as a card holder," or (2) the person's "positive drug test for marijuana components or metabolites, unless [she] used, possessed or was impaired by marijuana on the premises of employment or during the hours of employment."[3]

The AMMA further specifies that "a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment."[4]

The second statute materially relevant to the court's decision was Arizona's Drug Testing of Employees Act, or DTEA.[5] The DTEA allows employers to establish drug testing programs, and provides that "[n]o cause of action is or may be established for any person against an employer who established a policy and initiated" such a program for "[a]ctions based on the employer's good faith belief that an employee had an impairment while working on the employer's premises or during hours of employment."[6] The DTEA further provides that such a "good faith belief may be based on" any number of things including the "[r]esults of a test for the use of alcohol or drugs."[7]

In Whitmire, the plaintiff claimed that Walmart discriminated against her, in violation of the AMMA, by suspending her without pay, and then terminating her, because of a positive drug test without a showing of impairment. It was undisputed that the plaintiff, who was a qualified registered patient under the AMMA, smoked marijuana approximately 12 hours before arriving for her scheduled shift at Walmart on the day that she was tested for drugs. It was also undisputed that the only reason given by Walmart to the plaintiff for the adverse actions against her was her positive drug test.

Walmart contended that the results of the test, which were positive for marijuana metabolites, gave Walmart a

"good faith basis" to believe that the plaintiff was impaired by marijuana on Walmart's work premises and that Walmart was therefore entitled to terminate her "solely on that basis." Walmart argued as an affirmative defense that it was protected from litigation under the DTEA because Walmart "has established a policy and implemented a drug testing program" in compliance with the DTEA and was therefore exempt from liability for "actions based on the employer's good faith belief that an employee had an impairment while working while on the employer's premises or during hours of employment."

The plaintiff contended that Walmart's admitted policy of terminating a registered qualifying patient who tests positive for marijuana "regardless of whether the employee possesses a medical marijuana card and regardless of the level of marijuana detected" constituted a "complete and 'bright line' disregard" for the AMMA's anti-discrimination provisions.

The court determined that, reading the "DTEA and AMMA in harmony, an employer cannot be sued for suspending or firing a registered qualifying patient based on the employer's good faith belief that the employee was impaired by marijuana at work, where that belief is based on a drug test which establishes the presence of metabolites or components of marijuana in sufficient concentration to cause impairment.[8]

At issue, however, was "whether the plaintiff's positive drug screen is alone sufficient to support [Walmart's] 'good faith belief' that plaintiff was impaired by marijuana at work … in the absence of any other evidence of impairment or any expert testimony establishing that the level of metabolites present in plaintiff's drug screen demonstrates that marijuana was present in her system in a sufficient concentration to cause impairment."[9]

The court stated that it was "clear to the Court that proving impairment based on the results of a drug screen is a scientific matter which requires expert testimony."[10] The court determined that, without such expert testimony, Walmart was unable to prove that the plaintiff's positive drug screen gave Walmart a "good faith basis" to believe the plaintiff was impaired on the day in question. Accordingly, the court ruled that Walmart's affirmative defense under the DTEA must fail.

The court agreed with the plaintiff and ruled that, without having produced any evidence that the plaintiff "used, possessed or was impaired by marijuana," Walmart had discriminated against her in violation of the AMMA by suspending and then terminating her solely based on her positive drug screen.[11] Accordingly, in the absence of the requisite expert testimony, the court granted summary judgment in favor of the plaintiff on her AMMA discrimination claim.[12]

As in Whitmire, courts in other states that have medical marijuana statutes seem to be increasingly finding implied private rights of action. For example, in Noffsinger v. SSC Niantic Operating Co. LLC,[13] the U.S. District Court for the District of Connecticut reviewed anti-discrimination provisions similar to those in the AMMA and concluded that Connecticut's Palliative Use of Marijuana Act, or PUMA, which expressly prohibits discrimination by employers against qualifying patients who use marijuana outside the workplace, provided a private right of action.

In Chance v. Kraft Heinz Foods Co.,[14] the Delaware Superior Court made a similar determination based on the anti-discrimination provisions in Delaware's Medical Marijuana Act and in Callaghan v. Darlington Fabrics Corp., et al.,[15] a state superior court in Rhode Island held that a private right of action existed under a medical marijuana statute that provides that "[n]o school, employer, or landlord may refuse to enroll, employ, or lease to, or otherwise penalize, a person solely for his or her status as a cardholder."

In Barbuto v. Advantage Sales and Marketing LLC, [16] the Massachusetts Supreme Judicial Court ruled that medical marijuana users could assert claims for handicap discrimination under the Massachusetts Fair Employment Practices Act, while, at the same time, holding that the Massachusetts Act for the Humanitarian Medical Use of Marijuana
does not provide an implied private right of action by employees against employers.

The court held that if a medical marijuana user has a handicap or disability, such individual could potentially assert a claim for handicap discrimination. The court further held that the employer was required to engage in

an “interactive process” with a medical marijuana user to determine whether the employee can continue to perform their job duties with a reasonable accommodation.

The following are some of the more important takeaways from the Whitmire decision and other recent decisions in this area of the law:

1. State medical marijuana laws vary dramatically. Accordingly, multistate employers must be cautious in adopting a single policy applicable to all employees. A policy which simply mandates that any employee who fails a drug test shall be terminated can lead to significant risk of liability.
2. An employee’s execution of an employer’s alcohol and drug policy, indicating the employee’s understanding and agreement that they will be terminated if testing indicates the presence of illegal drugs, does not likely provide a defense.
3. A human resources employee is not qualified to determine whether the results of a drug test demonstrate that an employee was impaired. Expert testimony is likely required.
4. Depending on the applicable statute, a positive drug test alone may not be sufficient to terminate an employee for use of “illegal” drugs, particularly if impairment must be proven.
5. Even if applicable state marijuana statutes do not have an express or implied privateright of action, a court might determine that an employer violated a state’s disability discrimination or other statute. Under disability discrimination laws, the question may hinge on whether the employee was performing the essential functions of their job and there may be an obligation to engage in the “interactive process” with medical marijuana users to determine whether they can perform essential job functions with a reasonable accommodation.
6. Employers who wish to maintain workplace drug policies should consider the retention of experts for the purpose of analyzing and reporting on drug test results.
7. The fact that the use and possession of marijuana is illegal under federal law may not be a legitimate basis for terminating an employee who fails a drug test. Courts have taken differing views on this issue.
8. Before terminating an employee for failing a drug test, multiple factors should be considered in advance of the termination, including but not limited to: (1) whether there is evidence of impairment or inability to perform essential functions of the job other than a failed drug test; (2) whether the employee is employed in a safety-sensitive position; (3) whether retaining the employee could negatively impact the employer with respect to a federal benefit; and (4) additional state laws which restrict drug testing.
9. Could these decisions ultimately be extended to recreational marijuana users who claim they use marijuana for legitimate medical reasons?

Conclusion

In light of the court’s decision in Whitmire, and decisions in other jurisdictions across the country where medical marijuana laws have been enacted, employers must become increasingly aware of the risks of taking adverse employment actions against medical marijuana users. As more states enact medical marijuana laws, courts may find implied private rights of action or determine that other anti-discrimination statutes protect employees who use medical marijuana.

Furthermore, state statutes that are designed to protect employers who have a policy of drug screening may not provide the protections that an employer might assume they provide. Finally, employers must be cognizant of the evidence that they may need to defend a discrimination claim, including (1) evidence of an employee’s impairment on the job or inability to perform essential job functions; (2) evidence of having engaged in an “interactive process” and attempting to provide a reasonable accommodation; or (3) having expert analysis and testimony regarding drug testing and related levels of job impairment.

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[1] Whitmire v. Wal-Mart Stores Inc. , No. 3:17-cv-08108 (D. Ariz. Feb. 7, 2019).

[2] A.R.S. § 36-2813(B).

[3] Id.

[4] A.R.S. § 2814(A)(3).

[5] A.R.S. § 23-493.06.

[6] Id. at § 23-493.06(A)(6).

[7] Id. at § 23-493.06(A)(7).

[8] Whitmire at 33.

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