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Drug Testing, Medical Marijuana And CBD Oil . . . Oh, My!

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▶Denise Elliott, member with McNees Wallace and Nurick, examines two court decisions on drug testing and medical marijuana that have come into play during the pandemic shutdown.

Yes, we are in the middle of a global pandemic. Yes, the main focus of most employers is effective COVID-19 mitigation efforts to keep the business operating and to keep employees and customers safe. And for the past several months, companies have focused on applying for and properly using PPP loans and navigating new rules around the Families First Coronavirus Response Act (FFRCA) and expansions of the Family Medical Leave Act (FMLA). Yet, despite the pandemic, the tried and true employment issues have continued to be relevant and that includes issues around drug testing. During the shutdown, you may have missed two key court decisions regarding drug testing and medical marijuana. Understandably, you may have been distracted. So, here's what you need to know.

An employee who is fired for a positive drug test, but alleges use of CBD oil only, may be eligible for unemployment compensation.

This spring, the Pennsylvania Commonwealth Court addressed unemployment compensation eligibility for a claimant who was fired after testing positive for marijuana, despite denying illicit drug use and alleging that she used over the counter CBD oil to manage cancer-related symptoms. In *Washington Health System v. UCBR*, the Court held, in a 2-1 decision, that the claimant was eligible for unemployment benefits. While at first glance, the decision appears to be bad news for employers, the fallout of the case is not so dire. The Court's holding is limited and was based on an evidentiary failing of the employer. Notably, the Court did not hold that CBD use renders a positive drug test meaningless or that the alleged use of CBD products automatically means that the employee did not commit willful misconduct. So, what did the Court say and what does it mean for employers in Pennsylvania?

The Court reiterated the legal standard and burden of proof where the claimant is terminated for a failed drug test. The case is analyzed under Section 402(e.1) of the Unemployment Compensation Act, which places the burden on the employer to demonstrate that it had an established substance abuse policy and that the employee violated that policy. Where the employer meets its burden, the claimant will be ineligible for benefits unless she can show that the policy is in violation of the law or a collective bargaining agreement. The *Washington Health System* Court was careful to note that there is no mechanism under which a claimant is permitted to show good cause or justification for the policy violation.

For an employer to meet its burden of proof, absent an admission by the employee, test results are critical to demonstrating that a claimant violated an established drug testing policy. In *Washington Health System*, the employer failed to introduce documentation supporting the positive

test results. The only evidence regarding claimant's alleged violation of the employer's policy was claimant's testimony that the employer told her she tested positive for marijuana. However, the claimant denied that she failed the drug test. She testified that she did not use illegal drugs; that she only used over the counter CBD oil, which could cause a false positive for marijuana. Accordingly, the Court held that the employer did not carry its burden.

Following the *Washington Health System* decision, uncertainly remains regarding a claimant's eligibility for unemployment compensation when the claimant tests positive for marijuana, but alleges use of over the counter CBD oil only. One thing is certain, to contest eligibility, the employer should absolutely introduce testimony and documentation supporting the positive test result. Further, for employers who are concerned that employees may use the excuse "but I only use CBD oil" as a proverbial get out of jail free card, a well written policy is key.

Reasonable suspicion drug tests remain critical for ensuring a safe workplace in the age of marijuana legalization and even a medical marijuana user can be tested where there are reasonable grounds to suspect impairment.

In May, the Rhode Island Supreme Court rejected a former employee's claim that his employer violated the Rhode Island drug testing statute when he was fired for refusing to submit to a drug test. The former employee was certified to use medical marijuana and alleged that the employer requested that he submit to a drug test without reasonable grounds. The Court disagreed.

In *Colpitts v. W.B. Mason*, the plaintiff, a disabled veteran, worked as a delivery driver for employer from 2015 – 2018. In 2017, he began using medical marijuana to treat his military injuries and PTSD. The plaintiff denied ever using marijuana on the clock and said he was never impaired at

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work. In May 2018, the plaintiff reported a work injury. While questioning the employee about the work injury, the plaintiff's supervisor observed and documented "weird behavior." The supervisor sought assistance from a human resources manager, who suggested that another warehouse manager observe the plaintiff. The second manager confirmed the "weird" behavior. Specifically, the manager reported that the plaintiff used the "F" word excessively, did not complete his sentences, could not articulate which hand was injured, staggered back and forth and would repeatedly bend over saying "I'm f**cked up," and that he was going to vomit. As a result of this behavior, the supervisor told plaintiff he must undergo a drug test. The plaintiff became agitated and said he was fine and would just go back to work. When the supervisor repeated the directive that the plaintiff undergo a drug test, the plaintiff produced his medical marijuana card in support of his refusal and explained that he would no doubt test positive, while continuing to deny that he was under the influence. The employer ultimately terminated the plaintiff's employment for refusing to submit the drug test in violation of employer policy.

The trial judge noted that for "reasonable suspicion," the standard of reasonableness is a low standard to meet. While there could be an alternative explanation for strange behavior – i.e. someone being in pain – it is also reasonable that strange behavior may be a result of drug use. Accordingly, she found that the employer was within its rights to request that plaintiff submit to a reasonable suspicion drug test.

The Rhode Island Supreme Court agreed, noting: "The trial justice expressly relied on the testimony of [the employer supervisors] in holding that they had reasonable grounds to believe that Mr. Colpitts was under the influence of a controlled substance on March 5 and that, therefore, they were authorized to require that he undergo a drug test. In our judgment, the trial justice clearly did not abuse her discretion in so concluding." Notably, neither the trial judge nor the appellate court addressed plaintiff's secondary justification for refusing to undergo the test – his medical marijuana use.

Though the *Colpitts* decision turned on the specific facts of the case, the case is nonetheless instructive to employers who may be concerned that their ability to drug test is hamstrung by marijuana legalization. Simply, this is not the case and employers remain able to use reasonable suspicion drug testing as a mechanism for maintaining a safe and drugfree workplace. Further, employees who refuse a reasonable request to undergo drug testing may be disciplined, even terminated. There are a few best practices that employers should utilize in connection with a reasonable suspicion drug testing policy. Managers and supervisors should receive reasonable suspicion training, at least two managers or supervisors should observe and interact with the employee, and the suspicion factors should be clearly articulated and documented. ■

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