Will Employers in Ohio Have to Accommodate Their Workers' Medical Marijuana Use?

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A March 27, 2019, ruling in a New Jersey case, Wild v. Carriage Funeral Holdings, Inc. et al., provides some interesting insights and continues the recent trend among courts in other states Delaware (2018), Connecticut (2017), Massachusetts (2017), and Rhode Island (2017) to expand the rights of card carrying medical marijuana users.

The New Jersey Compassionate Use Medical Marijuana Act (NJMMA) expressly states, "Nothing in this act shall be construed to require … *an employer to accommodate the medical use of marijuana in any workplace."* Mr. Wild, a funeral director, was legally using medical marijuana as part of his cancer treatment. He was injured in a work-related driving accident, for which he was not at fault, and disclosed to the hospital that he was using medical marijuana. The treating physician did not order any drug tests for Mr. Wild because Mr. Wild did not appear to be impaired.

Nevertheless, Mr. Wild's employer required him to get tested prior to returning to work, even after being warned that he would test positive because of his medical marijuana use. Mr. Wild was subsequently fired for violating a policy requiring employees to tell their supervisor if they were using any medication that would negatively impact their ability to safely perform their job.

Mr. Wild sued under New Jersey's Law Against Discrimination (LAD), which makes it unlawful for employers to discriminate on the basis of a disability. The lower court dismissed the LAD claim, but the appellate Court, remanded for further proceedings. The Court determined that merely because the NJMMA is not construed to require an accommodation in the workplace, employers are not absolved from requirements to accommodate based on other statutes, like the LAD.

Ohio's Medical Marijuana Control Program (OMMCP) statute is similar to the NJMMA because it too expressly states that employers are not required to accommodate an employee's medical marijuana use. Ohio's statute goes even further, however, and expressly states that the law does not prohibit an employer from refusing to hire, discharge, discipline, or otherwise take an adverse employment action because of a person's use of medical marijuana. Nevertheless, employers are cautioned not to rely exclusively on a positive test result as the basis for a terminating an employee who is legally using medical marijuana. Indeed, the law seems to be evolving towards showing a reasonable suspicion of actual impairment while at work.

A recent case out of Arizona illustrates this point. In *Whitmire v. Walmart*, decided on February 7, 2019, the United States District Court for the District of Arizona found in favor of Plaintiff Carol Whitmire, who had been using medical marijuana to treat chronic pain. Walmart's Alcohol and Drug Use policy specifically prohibited employees from reporting to work under the influence of medical marijuana. Ms. Whitmire fell on a bag of ice at work and injured her wrist, but did not seek medical treatment

and completed her shift. When she reported to work the next day and complained of pain and swelling, she was sent for treatment and a drug test. After she tested positive for marijuana metabolites in a high concentration in her urine of greater than 1000 ng/ml, she was suspended from work and subsequently fired. The concentrations were at the highest level that the urine test could detect.

Whitmire sued under the Arizona Medical Marijuana Act (AMMA), the Arizona Civil Rights Act, and similar statutes. The AMMA prohibits employers from discriminating against a person in hiring, termination, and other term and conditions of employment based on a qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana at work during business hours. The Court found that, because Walmart could not establish that Ms. Whitmire was *actually* impaired, or used or possessed marijuana at work, it violated the AMMA in firing her.

Demonstrating actual impairment will prove challenging for employers with the currently available testing methods. None of the employees who have successfully contested their terminations had used medical marijuana on the job. Rather, they used it at night prior to going to sleep. Accordingly, there would still be marijuana metabolites or components in their system the following morning, even if they were not then impaired. Presently, there are no guidelines for private non-DOT or government contractor employers to follow in conclusively establishing impairment levels for medical marijuana. As a result, determining whether someone is impaired at work will remain, for now, a visual assessment - but one that should be done deliberately and should be well documented.

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