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Illinois employers in gray area following Arizona court ruling

LABOR DAZE

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In the murky waters of state-by-state cannabis laws, many employers have held onto their zero-tolerance policies under the cover of federal law, which still considers marijuana use illegal whether or not it is permitted by a state law. But this is no longer an acceptable status quo for employers with employees in certain states.

In the wake of *Whitmire v. Wal-Mart Stores Inc*., 2019 WL 479842 (D. Ariz. Feb. 7, 2019), employers with operations in Arizona must revisit their drug-testing policies and procedures to ensure they do not violate the anti-discrimination provision of the Arizona Medical Marijuana Act.

Further, in this rapidly developing area of law, *Whitmire* is a cautionary tale for employers across the country — bright-line, zero-tolerance policies for employees testing positive for marijuana are unlawful in Arizona, Delaware, Connecticut, Rhode Island and possibly five other states, including Illinois.

In *Whitmire*, the plaintiff, Carol M. Whitmire, was sent for a compulsory drug test following a workplace injury, consistent with Walmart's policy. She tested positive because, at her admission, she smoked marijuana at approximately 2 a.m. the day before reporting for her 2 p.m. shift.

It was undisputed that Whitmire held a valid medical marijuana card. Yet Walmart terminated the plaintiff's employment for the positive drug test, also consistent with its policy, arguing "Walmart has a policy of terminating [a]ssociates if they test positive for marijuana while on Walmart's premises or during working hours regardless of whether the employee possesses a medical marijuana card and regardless of the level of marijuana detected."

The U.S. District Court, District of Arizona, found that Walmart's dismissal ran afoul of the anti-discrimination provision of the Arizona Medical Marijuana Act.

The statute provides in part: "Unless a failure to do so would cause an employer to lose a monetary or licensing[-]related 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 … [a] registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment."

Importantly, the district court first found that while the state's medical marijuana act does not expressly create a private right of action for employment discrimination, it creates an implied private cause of action.

The court distinguished state statutes that are either "silent on employment, or expressly authorize[] discrimination against medical marijuana users" and aligned itself with the courts of Connecticut, Rhode Island and Delaware, which similarly found an implied private right of action for employees under the states' anti-discrimination provision for medical marijuana users. See *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F.Supp.3d 326 (D. Conn. 2017), *Callaghan v. Darlington Fabrics Corp*., No. PC-2014-5680, 2017 WL 2321181 (R.I. Super., May 23, 2017), and *Chance v. Kraft Heinz Foods Co.*, No. CV-K18C-01-056 NEP, 2018 WL 6655670 (Del. Super. Ct., Dec. 17, 2018).

To be sure, the Arizona act does not protect employees under the influence of marijuana at work, but specifically states, "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."

The *Whitmire* court then had to contend with the competing language of Arizona's Drug Testing of Employees Act, which protects employers when taking employment action based on a "good-faith belief that an employee had an impairment while working" and one of the bases for "good-faith belief" is the results of a drug test.

The court found there was no evidence that Walmart had a good-faith belief that plaintiff was using or impaired by marijuana while at work. In part, Walmart was unable to present testimony as to whether the level of marijuana metabolites detected in the plaintiff's drug test indicated that she was impaired during working hours because the test itself was not designed to measure levels in excess of 1,000 ng/ml. She was fired directly as a result of her positive drug test.

This was a matter of first impression for the Arizona federal court and other states with similar medical marijuana laws containing anti-discrimination provisions may follow suit.

But what does *Whitmire*

mean for Illinois employers, if anything?

First, the Illinois Compassionate Use of Medical Cannabis Pilot Program Act, 410 ILCS 130/1, et seq., contains two anti-discrimination provisions applicable to employers but no express private right of action. Following *Whitmire* and others, an Illinois court may find an implied cause of action for employees subject to discrimination on the basis of "status as a registered qualifying patient." See 410 ILCS 130/40(a)(1).

Second, the Illinois law, similar to Arizona's, also allows an employer to discipline employees for which it has a good-faith belief of impairment at work, setting forth specific factors that may guide that determination such as "symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, negligence or carelessness in operating equipment or machinery."

The Compassionate Use Act similarly allows employers to prohibit the possession of cannabis at work.

But the gray area arises under the Illinois act when applied to exactly the same factual scenario that faced the court in *Whitmire*: Is it discriminatory to terminate an employee solely on the basis of a positive test for marijuana, absent the presence of other factors?

The statute attempts to address this question with two exceptions, neither of which has been tested or interpreted in a published court opinion to date:

- "(b) Nothing in this [a]ct shall prohibit an employer from enforcing a policy concerning drug testing, zero-tolerance[] or a drug-free workplace provided the policy is applied in a nondiscriminatory manner."
- "(c) Nothing in this [a]ct shall limit an employer from disciplining a registered qualifying patient for violating a workplace drug policy." 410 ILCS 130/50(b), (c).

On the one hand, these carve-outs seem to suggest that employers are permitted to maintain their zero-tolerance policies for cannabis as long as all employees are treated the same. But, on the other hand, this interpretation seems to directly conflict with the anti-discrimination protection for registered qualifying patients in the prior section.

As the U.S. District Court, District of Connecticut, in *Noffsinger* noted, if employers are "free to fire status-qualifying patients based on their actual use of marijuana — the very purpose for which a patient has sought and obtained a qualifying status," the statute's anti-discrimination provisions are rendered a nullity.

As federal and state courts begin to confront the employment issues created by recreational and medical cannabis laws, *Whitmire* and the cases it relied upon have resolved anti-discrimination provisions in favor of protection for employees.

In Illinois, we continue to wait for clear guidance.