Is a Positive Drug Test Grounds to Discipline Safety-Sensitive Employees?



No, because testing positive for marijuana doesn't prove a worker was high on the job.

While marijuana may be legal, being high at work is still grounds for discipline and even termination if the employee has a safety-sensitive job. So, if those employees test positive for marijuana, you have just cause to discipline or terminate. Right?

Actually, maybe not.

It's a matter of science + law. **Science:** Tetrahydrocannabinol (THC), the ingredient in marijuana that causes impairment, metabolizes slowly and can remain in the system long after the buzz wears off. Unfortunately, current lab tests can detect the presence of THC but can't reliably indicate whether the test subject was actually impaired at the time of testing. **Law:** After historically siding with employers, courts and arbitrators around the country are now reinstating employees fired for testing positive for pot unless the employer can produce evidence showing they were actually impaired **at the time of testing**.

The Federal Railway Cases

The situation with railway workers encapsulates what's taking place in the rest of Canada right now. For decades, a positive marijuana test was all the railway needed to impose discipline on conductors and other safety-sensitive workers, assuming, of course that the worker was only a casual user and didn't have a dependency or disability protected by human rights laws. True, the employee might have just gotten high the night before and was sober upon arriving for work. But the fact that employee knew the railway had a zero tolerance disciplinary and testing policy and got high at home knowing the risk of testing positive the next day at work was enough to justify discipline, regardless of his/her actual impairment at the time of testing.

However, the rules have changed in recent years. A recent case involving a firm called Bombardier Transport is a perfect example. At issue was a safety-sensitive railway worker involved in a collision incident who got fired after his post-incident urine test came back positive for cannabis. The worker admitted to smoking pot while off duty the night before but insisted he wasn't high when the incident occurred. But the railway claimed it had the right to terminate him for failing the drug test to

deter others regardless of whether he was actually impaired at the time of testing.

The federal arbitrator disagreed and ordered the company to reinstate the worker. A drug policy allowing for termination merely because of a positive test without requiring proof of impairment is unreasonable even for a safety-sensitive worker and operation, the arbitrator concluded [*Bombardier Transportation Canada Inc. v Teamsters Canada Rail Conference*, 2020 CanLII 53040 (CA LA), August 4, 2020].

The *Lower Churchill* Case

Although railway workers are subject to special industry rules, the same thinking has spread to litigation involving mainstream industries, including what is arguably the most significant case decided since recreational marijuana became legal in Canada in October 2018. It began when a safety-sensitive construction worker admitted to legally vaping 1.5 grams of medical marijuana containing high THC levels after work for Crohn's disease pain. Because Crohn's disease is a disability, the employer had to accommodate the worker. All agreed that the worker couldn't be allowed to be impaired on the job, even if his medical pot was legal. And because testing can't detect current impairment, the employer argued, hiring him and requiring him to undergo testing was too risky.

The arbitrator and lower court agreed but the Newfound Court of Appeal reversed and said the employer didn't do enough to accommodate the worker. The lack of a reliable test is too easy an excuse since all employers must do to deny employment to medical marijuana users is show their jobs are safety-sensitive. The Court said the standard should be higher. Maybe there are other ways to determine a worker's fitness for duty. Employers should have the burden of proving they considered these alternatives and explaining why they were rejected [*IBEW, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc*., 2020 NLCA 20 (CanLII), June 4, 2020].

Takeaway & Compliance Strategy

There are 2 lessons for HR directors to keep in mind the next time their organization needs to decide what to do when a safety-sensitive worker who's not disabled tests positive for marijuana:

1. Confirmation of Impairment Needed for Discipline

A positive marijuana test may no longer be enough to justify discipline of a safety-sensitive worker. This is definitely true in Newfoundland and may be true in other parts of the country and in specific industries like railways. What you'll need, then, is evidence that the employee was actually impaired at the time of testing.

2. Accommodations of Medical Cannabis Use

The fact that the position is safety-sensitive doesn't necessarily get you to the "undue hardship" finishing line when accommodating workers with addictions or who use legally authorized marijuana for a disabling condition. While letting the worker do the job high is never required, you have to at least reach out to the worker and union to discuss the possibility of alternative ways to evaluate the particular individual's fitness to do the job, such as performing a functional assessment of the worker before each shift. Although the search for alternatives may ultimately prove fruitless, you must be able to document the steps you took and efforts you made to engage in it. Thus, the employer in *Lower Churchill* was unable to prove undue hardship not because it didn't offer any alternatives but because it didn't bother to

even search for them.