

Federal Court Rules Employer Did Not Violate Illinois Privacy Law for Firing Worker Testing Positive for Cannabis

Labor & Employment Law Update

By John Hayes on July 29, 2024

It seems like a lifetime ago that we first posted on the legalization of cannabis in Illinois and its effect on Illinois employers, way back in November 2019. At that time we provided a detailed overview of the clarifications and updates to the Illinois Cannabis Regulation and Tax Act ("Cannabis Act") as it relates to use in the workplace. Of course, use of cannabis at the workplace, or use that leads to impairment of an employee while on duty at the workplace, is allowed to be prohibited by the employer, even in a state where it is legal, such as Illinois. That is essentially a common sense no-brainer as it implicates safety concerns, and can be analogized to the use of alcohol at the workplace. But, the question remained to what extent can a positive drug test for cannabis (separate from impairment or use at the workplace) be used to deny or terminate employment, especially when that use was "recreational" and done off duty? While the Cannabis Act gave some guidance, its application in the real world had not been tested, until recently.

A recent federal court decision, in the Northern District of Illinois, provides employers some clarification on the use of drug screens in employment decisions in Illinois. In *White v. Timken Gears & Servs., Inc.*, No. 21-cv-02290 the court reviewed plaintiff's claim of unlawful termination under the Illinois Right to Privacy in the Workplace Act ("Privacy Act"). On its face, the Privacy Act prohibits an employer from refusing to hire (or terminating) an individual based on the use of "lawful products" off premises. However, the Privacy Act specifically excludes from its "unlawful" prohibitions Section 10-50 of the Cannabis Act. That section of the Cannabis Act specifically excludes a cause of action against an employer for "actions taken pursuant to an employer's reasonable workplace drug policy, including but not limited to subjecting an employee or applicant to reasonable drug and alcohol testing...or withdrawal of a job offer due to a failure of a drug test." 410 ILCS 705/10-50(e)(1). Based on the plain language of the Act it seemed likely that a "reasonable" workplace drug-free policy would be sufficient to defeat actions under the Privacy Act. *White* supports this conclusion.

In *White* the court granted summary judgment for the defendant employer where the plaintiff failed a drug test (after being randomly chosen pursuant to the company's policies) for marijuana and was ultimately fired. The plaintiff in *White* brought a claim under the Privacy Act and the court reviewed the plain language of that Act, while pointing to Section 10-50 of the Cannabis Act in finding that such a test and termination were lawful based on the plain language in both statutes. There, the employer had a clearly stated and consistently applied Drug and Alcohol policy, which prohibited testing positive for controlled substances. The plaintiff tested positive after a random drug screen, was given counseling pursuant to the employer's policies, and ultimately tested positive again, which resulted in his termination. There is nothing in the court's decision as to whether this was recreational or medical use, but it is assumed to be recreational based on the fact the employee received substance abuse counseling and there is no mention of medical use in the decision. The plaintiff then sued his employer under the Privacy Act, alleging that the defendant violated the Privacy Act when it terminated him for testing positive for marijuana, as the Act prohibits termination (and other adverse employment actions) simply because the employee uses "lawful" products off premises during nonworking and non-call hours. The court specifically called cannabis a "lawful product" under the Privacy Act as cannabis is legal under Illinois law, beginning on January 1, 2020.

The court in *White* then pointed out the "critical exemption" in the Privacy Act, in that it "excludes from its reach" Section 10-50 of the Cannabis Act. The court entered into a detailed analysis in interpreting both statutes, and ultimately finding that the Privacy Act by "its plain language precludes claims against employers for certain actions taken pursuant to their drug policies." The court then looked at the defendant's drug free workplace policy, as enforced through drug testing. The court found that such a policy is permissible under the plain language of the Cannabis Act, so long as the testing is "reasonable and nondiscriminatory." In looking at the facts of the case, the court determined that the policy was reasonable, was not applied in a discriminatory manner, and therefore the plaintiff had no cause of action under the Privacy Act.

Quite frankly, this decision is a sigh of relief for employers in Illinois as it definitively states the exclusions in the Privacy Act relating to certain sections of the Cannabis Act can preclude claims of wrongful termination for a positive cannabis test under the Privacy Act.

However, while the *White* decision is good news for employers in Illinois, they must remain vigilant. In order to receive the protections of the Cannabis Act as it relates to drug screens, such screens must be part of reasonable drug policy. One that should be published to, and acknowledged by, all employees and applicants. The policy should clearly state the reason for the drug screens, that they are required as part of employment, and a positive test may result in termination or non-hire. Such screens should be reasonable and not applied in a discriminatory manner, and should be truly "random" – if not part of a pre-

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employment screen for all new hires. It should also be noted that the court in *White* felt it necessary to mention that the drug policy in place was developed “with the assistance of a medical review officer.” While this is certainly not necessary for such a policy, it may be good practice to have it reviewed by a medical review officer prior to implementation.

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