

Can an employee who is fired for violating their employer's drug-free workplace policy be denied unemployment benefits?

Donald L. Knapp, Jr.
(248) 380-0000 ext. 3213
dknapp@fb-firm.com
www.FB-Firm.com

Most employers have an employee handbook which sets forth vacation and sick time benefits, forbids discrimination, bans sexual harassment, and mandates a drug-free workplace. These policies make it clear that employees are subject to random drug tests which can result in the termination of employment if one tests positive for an illicit narcotic, including marijuana.

In *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir.) (2012), the Sixth Circuit of the U.S. Court of Appeals held that the Michigan Medical Marijuana Act (“MMMA”) does not regulate private employers. As such, a person who possesses a valid Medical Marijuana Registry Card who violates his or her employer's drug-free workplace policy can be terminated if he or she fails a drug test.

The MMMA also provides that a person who has been issued and possesses a valid registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau... [MCL 333.26424(a)]

Braska v. Challenge Manufacturing Company, et al. ___ Mich. App. ___ (2014), was a consolidation of three separate cases involving (1) a material handler/hi-lo operator who worked for an automotive part manufacturing company, (2) CT technician at a hospital, and (3) an in-home service technician for a furniture retailer. The key question before the Michigan Court of Appeals (“Court”) was whether an employee who possesses a valid medical marijuana registry card who is discharged after failing their employer's drug test and terminated can also be denied unemployment benefits.

Mr. Braska was a material handler/hi-lo operator beginning in September of 2009. In June of 2010, Mr. Braska injured his ankle on the job, and was sent to a medical center and required to take a drug test.¹ At that time, Mr. Braska admitted that he obtained a medical marijuana card and routinely used medical marijuana to treat his chronic back pain. Because Mr. Braska violated his employer's drug-free workplace policy, his employment was terminated. Thereafter, Mr. Braska applied for unemployment benefits. The Unemployment Insurance Agency (“UIA”) held that while a person would ordinarily be disqualified from receiving unemployment benefits pursuant to MCL 421.29(1)(m)² (Michigan

¹ Despite the fact that Mr. Braska's drug test revealed that he had 225 ng/mL of THC in his system, the Administrative Law Judge (“ALJ”) found that there was no evidence that Mr. Braska operated a hi-lo under the influence of marijuana. To put this amount of THC into perspective, in Colorado, where marijuana has been legalized for recreational use, the law provides that if a driver has **5ng/mL of THC** or a metabolite, “such fact gives rise to permissible inference that the defendant was under the influence. Colo. Rev. Stat. § 42-4-1301(6)(a)(IV)

² MCL 429.29(1)(m) states, in pertinent part, that “an individual is disqualified from receiving benefits if he or she: ‘Was discharged for illegally ingesting, injecting, inhaling, or possessing a controlled substance on the premises of the employer; refusing to submit to a drug test that was required to be administered in a nondiscriminatory manner; or testing positive on a drug test, if the test was administered in a nondiscriminatory manner.’”

Employment Security Act or “MESA”) if he or she tested positive for a controlled substance, because Mr. Braska had a valid medical marijuana registry card, he was not disqualified from unemployment benefits by MCL 421.29(1)(m). Braska’s employer appealed the UIA’s decision to the Michigan Compensation Appellate Commission (“MCAC”), which overturned the UIA’s decision and held that Mr. Braska was disqualified from receiving unemployment benefits because Mr. Braska’s employer only needed to present evidence that Mr. Braska tested positive for a controlled substance on a nondiscriminatory drug test. Thereafter, Mr. Braska appealed the MCAC’s decision to the circuit court, which reversed the MCAC’s decision.

In the second of the consolidated cases, *Kemp v. Hayes Green Beach Memorial Hospital*, Ms. Kemp, who was a CT Technician was asked to undertake a drug test after the hospital had reasonable suspicion that she used marijuana in violation of the hospital’s zero-tolerance drug policy. At the time of the drug test, Ms. Kemp admitted that she used marijuana.³ Because of her positive drug test, Ms. Kemp’s employment with the hospital was terminated. Thereafter, Ms. Kemp’s request for unemployment benefits was initially denied pursuant to MCL 429.29(1)(m) because she tested positive on drug test; however, that decision was reversed after she provided evidence of a valid medical marijuana registry card. The hospital appealed the decision to the MCAC, which reversed the UIA’s decision to grant unemployment benefits. Ms. Kemp appealed the MCAC’s decision to the Ingham County Circuit Court, which reversed the MCAC and reinstated the unemployment benefits. The Ingham County Judge ruled that an employee who uses medical marijuana but is not intoxicated at work should not be disqualified from unemployment benefits.

In the last of the consolidated cases, *Kudzia v. Avasi Services Inc.* (“Avasi”), Mr. Kudzia, who worked as an in-home service technician for Avasi. Avasi was a drug-free company which subjected its employees to random drug tests. Pursuant to that policy, Mr. Kudzia was subject to a random drug test even though he showed no signs of intoxication. Mr. Kudzia tested positive for metabolized marijuana. Although Mr. Kudzia did not dispute the test result, he informed his employer that he was a medical marijuana registry card holder. Like the other appellants, Mr. Kudzia’s employment was terminated and he applied for unemployment benefits. The UIA initially found that Mr. Kudzia was eligible for unemployment benefits even though he failed a drug test. Avasi appealed that decision and a hearing was held before an ALJ who held that Mr. Kudzia was not eligible for unemployment benefits because he acted in direct contravention of his employer’s drug-free policy because he did not request an exemption so that he could use medical marijuana. The ALJ also held that Mr. Kudzia was denied unemployment benefits because he failed a drug test. No evidence was presented that Mr. Kudzia violated the MMMA. Mr. Kudzia appealed the ALJ’s decision to the MCAC, which held that a person who tests positive for a controlled substance on drug test is disqualified from unemployment benefits. The Macomb County Circuit Court reversed those decisions and found that to the extent that the MMMA and the MESA were in conflict, the MMMA controlled. The Macomb Circuit Court also held that the disqualification of unemployment benefits was contrary to the MMMA because it was a penalty or the denial of a right or privilege because of the use of medical marijuana.

The Michigan Court of Appeals noted that to reach a decision regarding whether medical marijuana registry card holders are entitled to unemployment benefits, it must answer the following questions:

- (1) Did the terminated employees meet the threshold requirements for unemployment compensation under the MESA?

³ There was no evidence that Ms. Kemp was under the influence of marijuana while she was on the job. Moreover, Ms. Kemp’s test did not reveal that she tested positive for THC but rather “11-carboxy-THC”, which is a metabolite of THC that is not illegal.

- (2) Even if the terminated employees met the threshold requirements for unemployment benefits, are they nevertheless disqualified from receiving benefits under of the MESA's disqualification provisions?
- (3) If the terminated employees are disqualified from receiving unemployment benefits because they tested positive for marijuana, does the immunity provided to them by the MMMA preempt the disqualification provisions in the MESA?

In answer to the first question, it was undisputed that all of the claimants met the threshold requirements for benefits. That is to say, none of them were recently hired employees.

As the Court addressed the second question, it noted that Mr. Braska, Ms. Kemp, and Mr. Kudzia were disqualified from unemployment benefits because each of them had failed a drug test that was administered in a nondiscriminatory manner. [MCL 421.29(1)(m)] The Court also acknowledged that (a) none of them had illegally ingested, injected, inhaled or possessed a controlled substance at work; (b) they did not refuse to submit to a required drug test; and, (c) there was no allegation that they were under the influence of marijuana during work hours. In that Mr. Braska, Ms. Kemp, and Mr. Kudzia were denied unemployment benefits solely because they tested positive on a drug test, and not because they used or possessed marijuana, the positive drug test could be the only basis to deny unemployment benefits. As such, the Court turned to the third and final question...whether the MMMA preempts that disqualification provision in the MESA.

Mr. Braska, Ms. Kemp, and Mr. Kudzia each possessed a valid medical marijuana registry card at the time their employment was terminated. The Court acknowledged that the immunity provided by the MMMA in Section 4, which protects against "arrest, prosecution, or penalty in any manner..." is broad as it wrote:

The issue raised in this case is not whether the employers violated the MMMA because they terminated claimants. The issue is whether, in denying unemployment benefits, the MCAC—a state actor—imposed a penalty upon claimants that ran afoul of the MMMA's broad immunity clause. When an individual is denied unemployment benefits, the employer's conduct is not at issue, but rather, the denial involves state action. (Braska pg. 13)

The Court also remarked: "Other than testing positive for marijuana, there was no misconduct that led to any claimant being discharged." (Braska pg. 13)

Because Mr. Braska, Ms. Kemp, and Mr. Kudzia were not guilty of any misconduct, in that they were terminated only because they tested positive for marijuana, the denial of unemployment benefits for simply testing positive for marijuana would constitute a penalty imposed for their medical use of marijuana contrary to the MMMA. The Court concluded: "Because the MMMA preempts the MESA, the circuit courts did not err in reversing the MCAC's rulings that claimants were not entitled unemployment compensation benefits."

If it had been established at an unemployment hearing that Mr. Braska, Ms. Kemp, or Mr. Kudzia had ingested marijuana at work or were under the influence of marijuana on the job, it is very likely that the outcome would have been different because the MMMA provides that employers are not required "to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana." [MCL 333.26427(c)(2)] The MMMA also states that it is not intended to permit any person to: "Undertake a task under the influence of marihuana, when doing so would constitute negligence or professional malpractice." [MCL 333.26427(b)(1)]

In short, while an employer can terminate an employee who violates a drug-free workplace policy by testing positive on a nondiscriminatory drug test, that termination does not mean that the employee is ineligible for unemployment benefits, if the positive drug test is the only reason for the termination. While it may be difficult to establish that an employee used or possessed marijuana on the job or to prove that someone was under the influence of marijuana at work, such evidence will be helpful if an employer wishes to avoid paying benefits to a terminated employee with a valid medical marijuana registry card.

If you have any questions about these or other employment matters, please contact Donald L. Knapp, Jr. at (248) 380-0000, ext. 3213 or dknapp@fb-firm.com .