

Can Employer Remove Medical Marijuana User from Safety Sensitive Position?



SITUATION

A municipal worker who operates heavy machinery suffers from a degenerative neck disease related to arthritis. He has a medical marijuana permit allowing him to consume a large dose of marijuana to treat his pain. He informs his supervisors of his condition and his permit, and explains that he only uses a very small amount of marijuana each night to manage his pain. The supervisors allow him to continue in his safety sensitive job for a year. But when others in the workplace find out about the worker's marijuana permit, the employer removes him from that position and accommodates him with a different job while investigating his marijuana use. During a nine-month investigation, the employer doesn't find any evidence that the worker was ever impaired on the job or performed his work poorly. However, deciding that the worker has a dependency on marijuana, the employer tells him he can't return to his safety sensitive position unless he enters a drug abuse treatment program. He complains that his new position involves heavy lifting and, in fact, aggravates his degenerative neck ailment.

QUESTION

Can the employer bar the worker from returning to his safety sensitive job'

- A. Yes, because the worker failed to satisfy a bona fide occupational requirement of his job.
- B. Yes, because it provided appropriate accommodations for his disability.
- C. No, because there's no evidence he was impaired on the job or had work performance issues.
- D. No, because it's disability discrimination based on addiction.

ANSWER

C. The employer found no evidence that the worker was ever impaired while on the job or had any performance issues and therefore it has no grounds to keep the worker from his prior safety sensitive position.

EXPLANATION

This scenario is based on an Alberta labour arbitration decision, which ruled that a local roads department improperly removed a worker from a safety sensitive position operating heavy machinery because it claimed he had a drug dependency. Yes, the worker had acknowledged using medical marijuana to treat pain from a degenerative nerve disease. But the arbitration board determined that there was no evidence he'd been impaired while working or that his legal marijuana use had affected his job performance. Therefore, the board said the employer had 'fundamentally created the 'dependency' issue' and failed to provide any expert testimony to support it. Thus, the board directed the employer to reinstate the worker to his prior safety sensitive position.

WHY THE WRONG ANSWERS ARE WRONG

A is wrong because there's no evidence that the worker can't perform the requirements of his safety sensitive position. A bona fide occupational requirement is a skill, ability or capacity needed to adequately perform a job function. If a worker can't satisfy such requirements, an employer can assert that failure as a non-discriminatory reason for taking adverse employment action against him, such as by reassigning him to a different position. In this case, the employer failed to prove that there were job requirements that the worker couldn't satisfy. In fact, during the year he worked in his safety sensitive job after advising supervisors of his medical marijuana permit, no issues were raised regarding his performance. Therefore, his medical marijuana use wasn't shown to cause any change in his ability to satisfy the bona fide occupational requirements of his safety sensitive job.

B is wrong because there's no evidence that the worker is, in fact, disabled. When a worker has a medical condition that impacts his ability to do his job, an employer has a duty to accommodate that worker's disability, such as by assigning him to a more appropriate position. Here, the worker has a degenerative neck ailment. But that condition didn't prevent him from operating heavy machinery. He also didn't request an accommodation due to this condition. The employer unilaterally decided to move him to a different job not because of his neck condition but due to concerns about his use of medical marijuana to treat the pain from that condition. And this 'accommodation' actually aggravated his neck ailment.

D is wrong because although it would be discriminatory to take adverse employment action against an employee on the basis of a drug addiction, there's no evidence this worker was addicted to marijuana. Drug addiction is a disability and thus an employer would have to accommodate an addicted worker to the point of undue hardship. And because impairment by drugs or alcohol is especially dangerous when the worker has a safety sensitive job, an employer would be justified in reassigning an addicted worker in such a job. But there's no evidence here that this worker was addicted to marijuana, which he had a permit to use legally for medical purposes. For example, he only used the marijuana in small amounts at home at night and was never impaired on the job. And while using medical marijuana to treat his neck condition, he was able to

perform his safety sensitive position. In short, the employer alleged that the worker has an addiction disability requiring accommodation without any evidence to support that claim and in contradiction to evidence demonstrating he wasn't addicted and *could* perform his safety sensitive job.

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Calgary (City) v. Canadian Union of Public Employees (CUPE 37), [2015] CanLII 61756 (AB GAA), Aug. 5, 2015