

# Is a Worker's Failure to Disclose Medical Marijuana Use Grounds for Termination?



Don't expect workers to self-disclose substance abuse if you don't have a disclosure policy.

There are nearly 300,000 legally registered medical marijuana users in Canada, nearly 8% of the population. Firing a worker for being one of those registered users is a form of disability discrimination banned by human rights laws, even if the worker has a safety-sensitive job. What's less clear, however, is whether it's legal to fire a worker for **not telling you** about his/her medical marijuana use. Here are 2 recent cases in which a court had to decide whether concealing medical marijuana use is grounds for termination.

## Concealing Medical Marijuana Use Is Grounds to Terminate

### Situation

A concrete truck driver had to undergo post-incident testing after he got into a traffic accident. The test came back positive for THC, the ingredient in marijuana that causes impairment. Only then did he admit his use of legal medical marijuana. The driver got fired. The driver claimed he was terminated because he used medical marijuana; the company claimed he was fired for failing to disclose his medical marijuana use as required by the company's drug policy.

### Ruling

The Alberta Human Rights Commission found no evidence of disability discrimination and tossed the driver's complaint.

### Explanation

The Commission found that the employee was fired not for using medical marijuana or testing positive but for failing to disclose. Key factors:

- The driver's job was clearly safety-sensitive;

- The company's drug policy required workers to disclose their use of medical marijuana and stated that accommodations would be made as long as it's legally prescribed, workers don't bring it to the workplace and are fit for duty at all times;
- The driver acknowledged that he received and understood the policy; and
- The driver didn't come forward to disclose his medical marijuana use or give any other indication that he had a physical or mental disability.

Since failure to disclose was the real violation, the actual test results were irrelevant, the Commission concluded.

*Bird v Lafarge Canada Inc.*, 2021 AHRC 50 (CanLII), February 23, 2021

## **Concealing Medical Marijuana Use Is Not Grounds to Terminate**

### **Situation**

A welder who was about to get fired for excessive absenteeism disclosed that he had a problem with alcohol. The company cut him slack by having him sign a last-chance agreement requiring him to successfully complete rehab and undergo random testing. What the welder didn't disclose was that he also used medical marijuana. Since it was legally prescribed, he assumed he could just use the stuff without telling his employer. It wasn't until his medical marijuana gummy caused him to flunk his random test and the company fired him for violating the last-chance agreement that the welder recognized his mistake.

### **Ruling**

The Saskatchewan Labour Relations Board reinstated the welder.

### **Explanation**

While the welder violated the drug policy and last-chance agreements and deserved to be disciplined, the Board said that termination was too harsh. Key factors calling for a reduced penalty:

- Unlike the company in *Lafarge*, the company in this case didn't have a policy requiring workers to disclose their medical marijuana use;
- The welder diligently tried to abide by the last-chance agreement by abstaining from alcohol during the rehab and testing period; and
- Although wrong, the welder's belief that using a marijuana gummy was okay since it was legally prescribed was sincere.

So, the Board decided that the welder should get one more chance to keep his job, provided that he complete return-to-work education provided by the company.

*Nutrien v United Steelworkers, Local 7552*, 2021 CanLII 72192 (SK LA), August 3, 2021

## **Takeaway**

Don't expect employees to self-disclose their substance abuse issues unless you have a written policy requiring them to do so. And make sure that self-

disclosure policy doesn't violate employees' rights to privacy or accommodations under human rights laws.