

Federal Court in California Greenlights Drug Testing of Job Applicants

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A U.S. District Court recently dismissed the lawsuit of a former employee who claimed disability discrimination after he was terminated for testing positive for marijuana in a pre-employment drug test. *Espindola v. Wismettac Asian Foods, Inc.*, Case 2:20-cv-03702 (C.D. Cal. Apr. 28, 2021). The Court held that an employer can condition an offer of employment on passing a pre-employment drug screening, including a test for marijuana (the recreational use of which has been legal in California since 2018). The Court further held that an employer does not have any obligation to engage in the interactive process before terminating an employee under such circumstances.

Here, the employer contacted the employee to schedule a pre-employment drug screening, which the employer required of all prospective employees after they are offered a position and before starting work. The test was postponed until after employment began at the employee's request. The employee then completed a "personnel information sheet" on which he indicated he was not "disabled," and he signed a drug testing consent form and disclosed for the first time that he had "chronic back pain" and had been "prescribed" marijuana to treat his condition.

Importantly, the employee did not provide any details or documentation to substantiate the nature of his condition or to explain any limitations on his ability to perform his job. The employee forwarded Human Resources his medical marijuana card (which he obtained after he learned of the impending drug test), took the required drug test, and tested positive for marijuana. His employment was then terminated based on the results of the drug test. In response, the employee filed a lawsuit for retaliation and disability discrimination under the California Fair Employment and Housing Act ("FEHA") as well as claims for wrongful termination, failure to accommodate a disability, and failure to engage in the interactive process.

Judge John W. Holcomb granted the employer's summary judgment motion and ruled that the employee failed to establish he suffered from a disability given the lack of detail or documentation submitted to the employer. The Court held that chronic back pain "without more" does not qualify as a disability under FEHA and that "an employer does not have to accept an employee's subjective belief that he is disabled." Regardless, the employer established a legitimate, nondiscriminatory reason for the employee's termination (i.e., the failed drug test), and it was under no obligation to engage in the interactive process before the employee passed the test.

Relying upon *Pilkington Barnes Hind v. Superior Court*, 66 Cal. App. 4th 28 (1998), the Court further concluded that the employee could not rely upon his own delay in submitting to the drug test to argue that he was no longer an applicant at the time of the test, thus giving him greater privacy rights as an employee.

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