Canadian HR Reporter
THE NATIONAL JOURNAL OF HUMAN RESOURCE MANAGEMENT www.hrreporter.com
REPRINT

Employers aren't hamstrung when it comes to marijuana at work

Recent decision upheld termination of worker after one-time breach of drug policy

The legalization of marijuana made news again recently when Ontario announced its plans with respect to how the legal sale of marijuana will be practically rolled out.

Lisa Stam
Guest Commentary

Basically, the Liquor Control Board of Ontario (LCBO) will run 150 retail outlets selling marijuana, and the drug will also be available to purchase online. Mom and pop marijuana dispensaries, which have always been illegal, will continue to be illegal.

But it seems like there are a lot more than 150 of these illegal dispensaries, and it is hard to imagine 150 government-run stores will be able to meet the clear market demand. Concerns have been raised that the black market will continue to flourish, even once these new legal stores open.

Ontario also announced that, for now, the legal use of recreational cannabis will be confined to private residences. Similar to alcohol, it will not be allowed in public places or workplaces.

As a result, workplace policies may need to be updated based on the changes to the law.

While drug laws in this country seem to be softening, a decision from the Supreme Court of Canada this June seems to have given drug policies more teeth.

In *Stewart v. Elk Valley Coal Corp.*, the Alberta court upheld the termination of an employee for a one-time breach of the employer drug and alcohol policy. In the past, a one-time breach rarely justified with-cause termination.

The policy in question required employees to disclose any addictions prior to the occurrence of a drug- or alcohol-related incident. The policy specified that those who did disclose would be supported with treatment, and those who did not disclose, but subsequently tested positive for drugs or alcohol, could be terminated.

In this case, the employee, Ian Stewart, held a safety-sensitive coal mining position, did not disclose his addiction, was involved in a workplace accident and subsequently tested positive for cocaine.

During the investigation following the accident, Stewart disclosed that he thought he was addicted to cocaine. Elk Valley terminated Stewart's employment, in accordance with the terms of its policy.

Stewart brought a human rights complaint on the grounds he was terminated for his addiction, constituting discrimination on the basis of disability under the Alberta Human Rights Act.

The Alberta Human Rights Tribunal held that Stewart was terminated for breaching the company policy, and not because of his addiction, and in the alternative, that discrimination was permissible where there was a bona fide occupational requirement.

Stewart argued that part of his addiction was a denial of his addiction, and therefore it was his addiction that prevented him from complying with the policy with respect to disclosing his addiction.

On this point, the tribunal stated, and the Supreme Court agreed, that while he may have been in denial about his addiction, Stewart knew he should not take drugs before working and had the ability to decide whether or not to do so, as well as the ability to disclose his drug use to his employer (and comply with the policy). Denial about his addiction was thus deemed irrelevant.

The tribunal reached the decision there was no prima facie discrimination and the mere presence of an addiction does not establish prima facie discrimination.

Stewart appealed to the Court of Queen's Bench and to the Alberta Court of Appeal, and both courts dismissed the appeal.

The Supreme Court also upheld the tribunal's decision in an eight-to-one split.

In many cases, where there is an addiction-related issue in the facts with respect to a termination, employers may have felt hamstrung.

This case indicates that where the policy is clear, and where the employee has the capacity to comply with the terms of the policy (addicted or not), a termination can be justified.

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