EMPLOYMENT & HUMAN RESOURCES newsletter

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CLEARING THE HAZE AROUND MEDICAL CANNABIS

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In the 2014 legislative session, Minnesota passed Chapter 311, which governs the use of medical cannabis. Doctors, patients, and dispensaries are now prescribing, using, and selling medical cannabis in Minnesota, and many employers have questions.

First, a few basics to get out of the way: Recreational use of cannabis products, and smoking of marijuana for any reason (even medicinal purposes), are still prohibited under Minnesota Law. "Medical cannabis" may only be used in liquid, pill, or vaporized form—it may not be smoked. A joint is not medical cannabis. Further, possession, sale, and use of marijuana in any form (including medical cannabis) and for any purpose are still a crime under federal law.

For patients seeking to use medical cannabis, there are many considerations. Since we are focused on employers here, we'll be brief: A patient must be on the State's medical cannabis registry and can only be on the registry if diagnosed with one of nine qualifying medical conditions. Most of these conditions are severe. Most employees on the registry will already have received an employer's attention due to the need for medical leave and/or workplace accommodations. It will be the rare case that a healthy-appearing employee with no other workplace issue is going to be on the registry—but it will happen.

For employers, there are some important considerations. First and foremost, Minnesota employers can't discriminate based on registration, and (with some exceptions below) can't discriminate based on a positive drug test by an employee who is on the registry.

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If an employee tests positive, he may protect himself from discrimination by verifying that he is on the registry. Verification of enrollment falls on the employee. The employee logs on to the registry online and prints a "registry verification" which the employee then provides to the employer. Currently, there is no means for the employer to interact directly with the registry.

The most important exception to this protection is that employers may discriminate if required by some law, regulation, or licensing requirement of the federal government. These would include any profession where drug testing and drug abstinence are federally mandated. Also excepted is discrimination if required to preserve a federal monetary benefit. One common federal law and associated monetary benefit which will cover many employers is the Federal Drug-Free Workplace Act of 1988. This act does not require testing but requires a "zero-tolerance" policy for federal contractors. Such Minnesota employers could discriminate against registered medical cannabis users if they did so in compliance with their "zero-tolerance" policy.

Also, the Minnesota medical cannabis act does not prohibit employers from discriminating against employees (even if they are on the registry) for use, possession, or impairment by medical cannabis in the place of employment or during work hours. In this context, it is important to understand that the mere presence of cannabis-related chemicals in the employee's test sample does not mean impairment.

So, how should employers deal with medical cannabis? In short, treat medical cannabis as you would any other prescription narcotic. For any narcotic, you should not be testing for it unless there is some bona fide, job-related reason for doing so. If you require employees to disclose that they are on prescription narcotics, then do the same for medical cannabis; if not, don't.

One of the challenges will be that many registrants will have work restrictions stemming from their underlying diagnosis. This is one of many areas of employment law where the same rule of thumb applies: Focus on outcomes, not inputs. If you have a known registrant who is underperforming, and you suspect he is intoxicated at work, discipline for what you know you can prove. Because a registered medical cannabis patient will test positive regardless of present intoxication, testing isn't going to be much help. So focus on performance. Counsel or discipline on the poor performance. It is then incumbent on the employee to provide an excuse for his output.

Finally, remember that under most employment discrimination laws, the reason why you are taking an employment action is what matters. If you need to discipline or terminate, you need to do so for a legal reason. Registration, and a positive test of a registrant, are now added to the list of illegal reasons.

EMPLOYMENT LAW CONFERENCE

TOPICS TO INCLUDE:

- How to conduct the termination of a problem employee
- Legislative, Rule Making and Case Law Update
- The potential downfall of hiring temporary workers: co-employee relationships and liability
- FMLA and Minnesota Parental Leave Act

This is a complimentary seminar but all participants must register in advance. Please register by NOVEMBER 10, 2015.

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Employment Law Conference
Thursday, November 19, 2015

Hutchinson Event Center
1005 Highway 15 South
Hutchinson, MN 55350

11:30 a.m. Registration
12:00 p.m. Buffet Lunch
12:30 p.m.–3:30 p.m. Seminar

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THE FIFTH CIRCUIT'S ADOPTION OF THE "KNEW OR SHOULD HAVE KNOWN" STANDARD OF LIABILITY FOR JOINT EMPLOYERS UNDER TITLE VII

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The Fifth Circuit Court of Appeals became the most recent court to grapple with liability for "joint employers" of temporary workers for violations of Title VII in the recent decision of *Burton v. Freescale Semiconductor, Inc.,* No. 14-50944, 2015 WL 4742174 (5th Cir. Aug. 10, 2015).[1] The case involved, in part, a claimed violation of the Americans with Disabilities Act by a staffing firm and one of its clients, and reversed a decision of the district court permitting the claim to move forward.

In doing so, the Fifth Circuit recognized that liability for a joint employer, based on the acts of its counterpart, may exist not only if the joint employer takes part in the discriminatory acts, but also if it knew or should have known of them and failed to take corrective measures. By taking this position, the Fifth Circuit became the first federal appellate court to adopt this theory of liability from the Equal Opportunity Employment Commission ("EEOC").

The Facts

The Plaintiff, Nicole Burton, was an employee of Manpower of Texas, L.P., Manpower, Inc., and Transpersonnel, Inc. (collectively, "Manpower"), a temporary employment agency. She was placed by Manpower at Freescale Semiconductor, Inc. ("Freescale"), a microchip manufacturer, in 2009. While in that placement she made two trips to the emergency room in 2011 for issues with her heart. She applied for workers' compensation benefits, claiming that chemicals used in the plant caused that condition. Burton was terminated about two weeks later, but kept on for another month while a replacement was trained to take her position.

In the meantime, Manpower requested reasons for termination. Upon receiving the evidence of supposed reasons for termination (unauthorized use of the Internet being the "final straw"), Manpower believed that termination would be legally problematic. It therefore "recommended against termination based on the paltry documentation and the recency of Burton's workers' compensation claim, but Freescale insisted." Manpower therefore terminated Burton, claiming the reasons for termination were four discrete incidents, two of which occurred following termination, but before training of Burton's replacement was complete.

Legal Proceedings

Following termination, Burton filed a claim with the EEOC claiming, in part, a violation of the ADA. She then sued each company on the same basis. Before the district court, Manpower and Burton each moved for summary judgment on various grounds, and the district court granted their motions. Burton then appealed to the Fifth Circuit.

The Fifth Circuit's opinion is extensive, and fully considers the evidence in the case under the burden-shifting analysis of *McDonnell Douglas.* Ultimately, it concluded that, based on the facts of the case, questions of fact should have prevented the entry of summary judgment, and trial was necessary.

For our purposes, however, that was not the most interesting part of the decision. Rather, the most important issue determined by the Fifth Circuit was the basis upon which Manpower might be held liable to Burton. First, the court determined that Freescale may be a "joint employer" of Burton using the hybrid economic realties/common law control test. Since Freescale demonstrated the ability to have Burton terminated, controlled her day-to-day activity, supervised her, completed performance reviews, and the like, the court determined that Freescale was a joint employer.

Next, it considered the liability of Manpower for Burton's termination. In so doing, it relied upon EEOC, No. 915.002, Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms ("EEOC No. 915.002"). EEOC 915.002 states as follows:

> The [staffing] firm is liable if it participates in the client's discrimination. For example, if the firm honors its client's request to remove a worker from a job assignment for a discriminatory reason and replace him or her with an individual outside the worker's protected class, the firm is liable for the discriminatory discharge. The firm also is liable if it knew or should have known about the client's discrimination and failed to undertake prompt corrective measures within its control.

Based on this language, the Court created the following rule of law: "A staffing agency is liable for the discriminatory conduct of its joint-employer client if it participates in the discrimination, *or if it knows or should have known of the client's discrimination but fails to take corrective measures within its control."* The Court concluded, based on Manpower's active participation in the termination, that it could potentially be held liable for participating in the discrimination.

Discussion

Ultimately, by deciding the case on the grounds that Manpower may be liable for its own participation in discriminatory conduct, the Fifth Circuit's decision is in accord with many previous decisions of courts around the country. The potentially groundbreaking portion of the decision, then, is the citation of EEOC 915.002 for the proposition that knowing of a violation but failing to take action may result in liability for a staffing firm. That has long been the EEOC's position, and a few district courts have followed that guidance.

This is the first time, however, that a circuit court of appeals has adopted the EEOC's guidance. Such courts carry significant legal weight in that their decisions control the actions of district courts throughout multiple states, and offer heavily persuasive guidance to sister circuits. Thus, even though the Fifth Circuit's decision was made on more conservative and safe legal turf, the decision appears to have established a more firm foothold for the EEOC's position on joint employer liability under the "knew or should have known" standard.

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[1] *The Fifth Circuit is one of 11 intermediate federal appellate courts. Its jurisdiction includes appeals from the federal district courts of Mississippi, Louisiana, and Texas. Minnesota is in the Eighth Circuit.*

TOM BRADY'S "DEFLATEGATE" AND WHAT EMPLOYERS SHOULD LEARN FROM THE SCANDAL

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Star quarterback Tom Brady is well-known for his Super Bowl success and his participation, whether active or passive, in deflating footballs for the Patriots' 2015 AFC Championship game. In May 2015, Brady was suspended without pay for the first four games of the 2015–16 NFL season. The decision was rendered by NFL Commissioner Roger Goodell and, not surprisingly, confirmed by him when he denied Brady's petition to appeal. This severe consequence for Brady came without notice and spawned from the NFL and the National Football League Players Association Collective Bargain Agreement ("CBA"). The issues employers should avoid after the scandal, however, run deeper than whether a pressure gauge lands on 12.5 psi for game-day footballs.

Collective bargaining agreements are agreements entered into by a union and its members' employer. These agreements address employment conditions negotiated for by the employer and the union. But collective bargaining agreements are not present in every employment relationship, so why should employers pay attention to this case? The case highlights key concerns employers should heed when drafting disciplinary policies. Disciplinary policies and procedures should be utilized by every employer across the United States to minimize the likelihood of unnecessary litigation and claims of discrimination for an employer's failure to handle employees equally. This article addresses three key concepts employers should take away from the Deflategate case.

1. Inform Employees of Discipline Procedures

True football fans know the drastic implications not having an essential player on the field can have on a season. Thus, when Theodore V. Wells, Jr.'s investigation concluded that Brady had "general awareness" of the underinflated footballs and NFL Executive Vice President Troy Vincent informed Brady of his suspension, Brady immediately challenged. The first issue addressed was whether the Commissioner had the authority under the CBA to render such a punishment. The NFL and its players, represented by the National Football League Players Association ("NFLPA"), did agree in the CBA that the Commissioner must inform a player in writing of the disciplinary action that will be taken against him for violations of NFL policies, but great confusion arose regarding what policy Brady violated.

Findings surrounding the suspension outlined in the September 3, 2015 decision note that Brady never received the NFL Policy on Integrity of the Game & Enforcement of Competitive Rules, known as the Competitive Integrity Policy—the policy Brady allegedly violated. He did, however, have access to the NFL's Policy on Anabolic Steroids and Related Substances—the policy under which Commissioner Goodell justified Brady's punishment. Knowledge of partially deflated footballs is not the same as testing positive for steroids, and a player would likely not expect the punishment for each to be the same. The United States District Judge Richard M. Berman agreed with this clear question of logic by Commissioner Goodell, and held that Brady did not have adequate notice on this basis and overturned his suspension.

Employers should take note of Judge Berman's decision. To increase the likelihood that employment disciplinary decisions will stand and not be questioned, clear discipline policies should be established and provided to all employees. Be sure to state what actions will not be tolerated and what the punishments will be for violations. Clarity and consistency will diminish an employee's claim that he was punished unfairly or without notice.

2. Provide an Unbiased Appeal Process

If an employee wants to appeal a discipline decision, what options are available to him and would an appeal really be an appeal? This is another question employers should consider following Brady's scandal. Commissioner Goodell initially suspended Brady for his awareness of the deflated footballs. When Brady and the NFLPA sought to appeal the decision, the Commissioner upheld the suspension. Although this is authority afforded to the Commissioner under the CBA and bargained for by the NFLPA and players, it is unlikely that an appeal process where the initial decision maker presides is truly an appeal process at all. In fact, this may heighten an employee's belief that discrimination is afoot.

To avoid this, employers should develop a process where the individual with the final decision making authority is not the same individual who makes the initial determination of what punishment will be rendered. The easiest way to ensure this is to establish two distinct positions that will hear employees' appeals of disciplinary decisions, such as a high-level supervisor and a human resources manager. And if biases are a real concern for the

employer, develop a behavioral committee to hear disciplinary actions and appeals. Employers should note that this will not eliminate all appearances of bias or litigation stemming from alleged discriminatory treatment of employees. However, it nonetheless provides the employer with well-established and followed procedures that it can present as evidence of equal treatment of all employees.

This issue of bias was not expressly addressed in Judge Berman's decision, but given the seemingly limitless authority the Commissioner was given to discipline Brady and the fact that the suspension was overturned only seven days before the season started, it is something the players and NFLPA should reconsider in 2017 when the CBA is renegotiated.

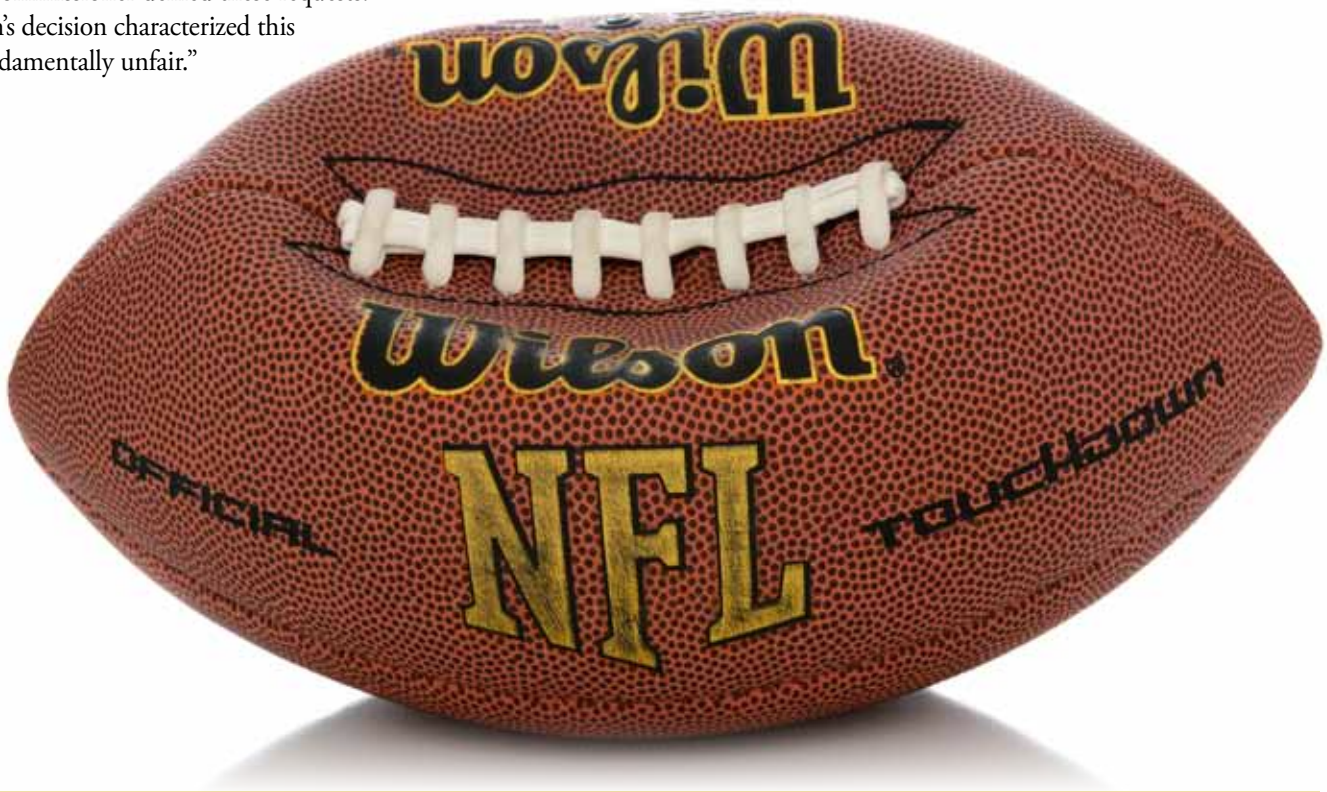
3. Allow Employees Access to Necessary Records

Counsel representing the NFL in the Brady lawsuit highlight the importance of this and how it may coincide with an employee's argument of bias and unfair treatment. Once the footballs used by the Patriots at the 2015 AFC Championship game were discovered to be underinflated, Theodore V. Wells, Jr. conducted an investigation. His investigation formed the basis for the Commissioner's finding of Brady's involvement in the scandal and resulting four-game suspension. Mr. Wells is a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP, counsel for the NFL in its defense of the Commissioner's decision. In NFLPA's attempt to have Brady's suspension vacated, it requested the NFL's history of punishment or lack of punishment impacting players and teams for violations of game-day items and testimony from parties involved with the editing of Wells's report before its release to the public. The Commissioner denied these requests. Judge Berman's decision characterized this denial as "fundamentally unfair."

Disciplined employees may ask employers for many things. This article does not suggest that the employer provide its employees with personnel files or any other information that otherwise should remain confidential. However, to minimize the likelihood that an employer's actions are classified as "unfair," the employer should provide information that shows the employee that disciplinary action was determined by an informed decision maker. Such information should include copies of (1) employment performance records, (2) warnings given to the employee to inform the employee that his or her actions are in violation of an employment policy, (3) contemporaneously kept records noting the occurrence of and circumstances surrounding the employee's misconduct, and (4) the employment policy the employee allegedly violated. Ideally, as discussed above, this should not be the first time the employee sees the policy.

These concepts derived from the Deflategate scandal are easy, cost-effective adjustments all employers can make. But remember, these changes will not eliminate all claims of unfair treatment. The changes will, however, give employers a foundation to stand on when seeking enforcement of the disciplinary actions taken against employees.

The NFL and NFL Players Association Collective Bargaining Agreement may be accessed at the following address: https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf.



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