



MONTANA ARBITRATION & LABOR RELATIONS CONFERENCE

October 1-3, 2024

Jean Faure & Nate McConnell, “What Doesn’t Fly With Your Supply”

# TOTALLY HYPOTHETICAL SITUATION...

Meet Jeff Lebowski

Goes by "Dude"

Has a 10-year  
career with the City

Member of City  
Weed Dept., Local  
420

Disciplined once 5  
years ago

Likes to bowl....



Mr. Lebowski goes to  
work one day...

Shows up on time

Works his shift for an hour  
with no problems

Runs into his frenemy...





“I saw you driving in to work today smoking pot”

“Your work sweater smells like weed.”

“I’m telling your boss!”

# WHAT IS THE EMPLOYER'S POLICY?

“It is the policy of the Employer to have a safe workplace without the influence of drugs and alcohol. Being under the influence of illegal drugs, including marijuana, is prohibited.”

“Drugs means any illegal drug, any drug that affects on the nervous system, or any controlled substance made illegal under any law.”

“It is the policy of this Employer to enforce a zero-tolerance drug policy.”

“Upon reasonable suspicion, Employer may test an Employee for drugs.”

# What does the law say?

Montana law allows ...

§ 16-12-106, MCA, allows recreational marijuana.

Federal law does not ...

Marijuana defined as a Schedule I drug.

# WHAT DOES § 16-12-108 (4) SAY?

(4) Nothing in this chapter may be construed to:

(a) require an employer to permit or accommodate conduct otherwise allowed by this chapter in any workplace or on the employer's property;

(b) prohibit an employer from disciplining an employee for violation of a workplace drug policy or for working while intoxicated by marijuana or marijuana products;

(c) prevent an employer from declining to hire, discharging, disciplining, or otherwise taking an adverse employment action against an individual with respect to hire, tenure, terms, conditions, or privileges of employment because of the individual's violation of a workplace drug policy or intoxication by marijuana or marijuana products while working;

(d) prohibit an employer from including in any contract a provision prohibiting the use of marijuana for a debilitating medical condition; or

(e) permit a cause of action against an employer for wrongful discharge or discrimination.

# I know my rights, man. They're in the CBA.



“Employer may establish and implement reasonable policies to support its goal of a drug-free work force.”

“Employees are expected to report to work drug and alcohol-free.”

“Employer will not discipline, demote, or discharge any Employee without just cause.”

“Employer shall follow steps of progressive discipline but retains the right to impose discipline at a level appropriate to the seriousness of the offense.”



# Were you listening to the Dude's story?



The Dude gets called out by his frenemy;

He has worked an hour without incident;

Supervisor has only talked to the frenemy.

# WHAT NOW?

Consider the circumstances:

- The Dude was punctual
- Performed work adequately
- Saw Jesus earlier...

ALSO...

- The Dude may not know drug policy or what's in the CBA, BUT
- He knows that recreational MJ is legal in Montana (§16-12-106, MCA)



# The Interview

## Weingarten?

- Private sector employees have right to rep at investigatory interview.<sup>1</sup>
- Public employees have right to rep; derived from statute.<sup>2</sup>
- Employee must request rep.

## Loudermill?

- Public employees have procedural due process rights.
- Requires two elements: notice and opportunity to be heard.<sup>3</sup>



# The Investigation

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Policy: “Upon **reasonable suspicion**, Employer may test an Employee for drugs.”

“Arbitrators are not requiring employers to have evidence supporting a criminal indictment. Nor do they seek evidence beyond a reasonable doubt. They do not even look for a preponderance of the evidence .... All they want to know is that the employer has some rational grounds for testing the employee.”

*Warehouse Distribution Centers*, 90 LA 979  
(Weiss, 1987)



# Beware The Drug Test



Two managers observe employee who smelled of marijuana and had glassy, bloodshot eyes. Managers told employee to submit to drug test. Employee refused, demanding union representation. Managers terminate.

Result: Employer violated *Weingarten* by continuing interview after employee requested union rep. Board held the employer's legitimate need to conduct drug test, but it cannot come at the expense of the reasonable time it takes to secure a union rep. *Manhattan Beer Distributors, LLC*, 362 NLRB 1731 (2015).

Where a drug test is part of a broader investigation, *Weingarten* attaches to an "interview" whose sole purpose is to conduct a drug test. *Safeway Stores*, 303 NLRB 989 (1991).

# The Dude tests positive.



Marijuana testing is anything but reliable to show impairment. “Unlike alcohol, there is currently no reliable test to determine if an individual is currently impaired by THC ... there is no consensus on the level of THC at which an individual is ‘impaired.’” Huggett & Greubel, *Heightened Scrutiny for Medical Marijuana at Work*, 45 ABA J. Lab. & Emp. L., Spring 2017.

Generally speaking, arbitrators require a nexus between off-duty activities and the workplace. Elkouri, 15.3.A.i.

Three-Part Test: Nexus if harm to employer reputation, ability of employee to perform work, and reluctance of co-workers to work with that employee. *W.E. Caldwell Co.*, 28 LA 434 (Kesselman, 1957) .

Colorado marijuana case: off-duty employee use of marijuana must have “some reasonable nexus [to] the conduct and the employee’s job .... Enforcing (federal) criminal law outside the workplace is not the employer’s job.” *King Soopers Inc.*, 131 LA 459 (Sass, 2012).

# Wait a minute there, Dude.

State law allows random testing by employers. Montana public employee case in 2022 upheld the validity of CBA's testing policy but reinstated employee because employer failed to follow progressive discipline.

Firefighter's discipline upheld after testing positive for marijuana. "The Agreement and policies provided a threshold of notice sufficient to prompt an experienced firefighter to clarify the policy before it was too late. The grievant cannot benefit from his own lack of curiosity." [Redacted case name], 2023 LA 522 (Greenbaum).





That's just, like,  
your opinion, man.

The “prior notice” requirement led to overturning of termination after failed drug test since employee not informed of changes to drug policy. *Pacific Offshore Pipeline Co.*, 106 LA 690 (Kaufman, 1996).

Employee using medical marijuana terminated when clothes smelled like marijuana during training session. Reinstated after showing lack of impairment and not a safety hazard during training. *Lane County, Oregon*, 136 LA 585 (Jacobs, 2016).





Adios, pardner.