

If Christian's employment ended sooner, he would be responsible for any balance due on the advance. No credit would be given if his employment ended within three months of completing training, requiring him to repay the full advance to Worldwide.

### Encountering turbulence

Christian completed flight training but resigned two months later. Worldwide reminded him of his obligation to repay the advance, but he didn't repay it. Instead, he responded to Worldwide by saying he had been constructively discharged when it "forced him to fly a Gulfstream G4 notwithstanding its unairworthy status."

Worldwide sued Christian for breach of contract based on his failure to repay the advance. He counterclaimed, asserting Worldwide breached the implied covenant of good faith and fair dealing by requiring him to fly an unsafe aircraft, which "compelled" him to resign.

At Worldwide's request, the Maricopa County Superior Court entered summary judgment (dismissal without a trial) in Worldwide's favor on its breach of contract claim. It also dismissed Christian's claim on the grounds that his claim was superseded by the AEPA, and he failed to establish the preconditions to assert constructive discharge. He appealed to the Arizona Court of Appeals.

### Confronting headwinds

Wrongful termination and constructive discharge claims are governed exclusively by the AEPA, which supersedes many Arizona common law claims. Christian's counterclaim was a constructive discharge claim (in substance) because his common law counterclaim was based on circumstances related to his separation. Accordingly, the appeals court analyzed the viability of his claim against the requirements of the AEPA.

The appeals affirmed the dismissal of Christian's counterclaim, noting that he failed to establish the precondition for bringing a constructive discharge claim. Because he didn't provide a written notice to Worldwide, he could save his claim only if he could show Worldwide's conduct was so egregious (e.g., forcing him to break the law or be fired) that he could resign without notice.

While Christian claimed Worldwide failed to provide him with airworthy aircraft, his claim was contradicted by a report from Worldwide that its aircraft complied with all federal regulations governing such situation. Accordingly, the Arizona Court of Appeals affirmed the dismissal of his claim against Worldwide.

### Final descent

This isn't the first pushback Worldwide has seen from former employees seeking to avoid their obligation to repay the advance for flight training. Fortunately for Worldwide, this lawsuit came in for a safe landing, unlike the crash and burn outcome in previous litigation. Perhaps

Worldwide needs to confront the conditions causing pilots to prematurely end their employment, resulting in a repayment obligation regarding the advance.

In any event, this lawsuit serves as a good reminder that the AEPA provides employers with safe harbor provision against constructive discharge claims, so long as employers post a constructive discharge notice advising employees of their rights under the statute. Doing so requires employees to satisfy the preconditions of providing the employer with 15 days' written notice of the objectively difficult or unpleasant working conditions and allowing the employer time to correct these conditions. Failure to satisfy this notice requirement dooms a constructive discharge claim unless the employee can demonstrate outrageous conduct by the employer.

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#### DRUG TESTING

## Marijuana cardholder fired after positive drug test loses wrongful termination claim

AK AZ HI NV OR WA

by Jodi R. Bohr, Tiffany & Bosco, P.A.

*Since voters passed the Arizona Medical Marijuana Act (AMMA) by ballot initiative in 2010, employers have received very little court guidance regarding what constitutes discrimination or retaliation under the Act. With limited exceptions, the AMMA prohibits employers from discriminating against a registered cardholder for testing positive for marijuana components or metabolites. It doesn't prohibit employers from taking adverse employment actions against a registered cardholder if that person used, possessed, or was impaired by marijuana on the jobsite or during working hours.*

*Since 2010, employers have struggled with proper action following an employee-cardholder's positive drug test. How does an employer avoid liability for wrongful termination when firing an employee-cardholder following a positive drug test?*

### Prelude to litigation

United Parcel Services (UPS) employee James Terry acted strangely during a sales meeting. Many of his direct reports informed UPS they observed his heavy eyelids and red eyes, saying he lost his train of thought, slurred his speech, and had hallucinations (e.g., he saw "a scorpion climbing up the wall"), among other things.

After receiving these reports, UPS directed Terry to undergo a drug test. He complied but failed to tell UPS he had a medical marijuana card under the AMMA or that he had a prescription for Adderall. His sample tested positive for carboxy-THC (a marijuana metabolite that doesn't measure impairment) and amphetamine. UPS ended his employment.

Terry sued UPS alleging, among other things, he was fired in violation of Arizona's Employment Protection Act (AEPA). The Maricopa County Superior Court ruled in UPS's favor, and Terry appealed to the Arizona Court of Appeals.

### Wrongful termination

The AEPA provides that, subject to three exceptions, "the employment relationship is severable at the pleasure of either the employee or the employer." The three exceptions, which constitute wrongful termination, are when an employee is fired:

- "In breach of an employment contract";
- In violation of an Arizona statute; or
- In retaliation for exercising specified rights.

Terry alleged he was fired in violation of the AMMA (an Arizona statute).

The AMMA prohibits an employer from firing an employee-cardholder based on a "positive drug test for marijuana or components or metabolites" unless the employee "used, possessed or was impaired by marijuana" at work. It also provides a cardholder shall not be considered impaired solely because of a positive drug test. But an employer is permitted to fire an employee-cardholder for "working while under the influence of marijuana."

UPS asserted Terry wasn't fired "solely" because of a positive drug test. Rather, it had observed behaviors at work indicating impairment. The Arizona Court of Appeals noted that because his observable behaviors provided a basis for his termination, his firing didn't violate the AMMA's public policy. In doing so, the court ruled in favor of UPS.

In issuing its opinion, the court noted that the AMMA requires employees seeking its protection to timely invoke the protection. As noted above, Terry didn't disclose his cardholder status or his recent use of marijuana until after he tested positive. The court noted that by waiting to invoke the AMMA until after the positive test results, he failed to timely invoke its immunities to claim he couldn't be fired. It's unclear whether the decision would have been different had he timely disclosed his cardholder status.

### Takeaway

The important takeaway from this case is that UPS prevailed because it documented observable signs of impairment before Terry took the drug test. HR personnel and managers should be trained and on the lookout for

signs of impairment so a termination decision won't be based solely on a positive drug test. Those signs should be documented before or contemporaneously with being sent to take a drug test.

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#### LABOR LAW

## NLRB announces new employee-friendly joint-employer test

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by Gary S. Fealk, Bodman PLC

*On October 26, 2023, the National Labor Relations Board (NLRB) issued a final rule addressing the standard for determining joint-employer status under the National Labor Relations Act (NLRA). The new standard will make it more likely one entity can be held liable for unfair labor practices of another entity when some element of employment interrelation exists.*

### Out with the old rule

In 2020, the NLRB issued a rule stating that to be considered a joint employer, a company must exercise "actual and substantial direct and immediate control" over another employer's employees' essential terms of employment.

Terms and conditions of employment under the 2020 rule were defined as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. The rule also required that the company must exercise control over the terms and conditions in such a way that it "meaningfully affects matters relating to the employment relationship with those employees."

### In with the new

The 2023 final rule announces a new standard and rescinds the old one. Under the new rule an entity may be considered a joint employer of a group of employees if each entity has an employment relationship with the employees and they share or codetermine one or more of the employees' essential terms and conditions of employment. It defines terms and conditions exclusively as:

- Wages, benefits, and other compensation;
- Hours of work and scheduling;
- Assignment of duties to be performed;