

# Okla. Marijuana Ruling Underscores Broad Worker Projections

By **Ellen Adams and Scott Kiplinger** (December 3, 2019, 3:56 PM EST)

The Oklahoma Court of Civil Appeals recently ruled in *Rose v. Berry Plastics Corp.* that a post-accident drug test confirming an employee's use of marijuana did not prove he was intoxicated at the time of the accident.[1] While the decision addresses when marijuana use voids workers' compensation coverage, it also highlights the challenges employers could face when relying on drug tests to show a medical marijuana licensee was under the influence while working.

Rose worked for Berry Plastics as a machine operator. While trying to clear an obstruction from a jammed machine by hand, a coworker triggered the "guillotine" machine, crushing Rose's hand and wrist. After Rose's post-accident drug test revealed the presence of marijuana, he admitted smoking marijuana the night before. He denied, however, being impaired at the time of the accident, which occurred approximately 10 hours after he had smoked the marijuana.

Rose's claim for benefits was denied by his employer, as smoking marijuana violated both company policy and Oklahoma workers' compensation law. An administrative law judge awarded benefits to Rose because the employer offered no evidence that Rose was intoxicated at the time of the accident. The Workers' Compensation Commission reversed the ALJ's decision, explaining the failed drug test served as a rebuttable presumption of intoxication and Rose failed to provide sufficient evidence to overcome that presumption.

The appellate court reversed, rejecting the commission's assessment of the facts and its underlying inference that marijuana in Rose's bloodstream inevitably meant he was intoxicated. The court explained that Rose overcame the presumption of intoxication by showing he woke up at 6 a.m., drove 45 minutes to work, operated the machine without incident for the first two hours of his shift, showed no signs of intoxication to his coworkers and the employer offered no evidence of intoxication at the time of the accident.

The case did not address whether Rose consumed marijuana for medical or recreational purposes, but it does serve as a warning for employers seeking to determine whether a medical marijuana licensee was working under the influence of medical marijuana.

The Oklahoma Medical Marijuana and Patient Protection Act allows an employer to discipline or discharge a medical marijuana licensee who "consumes or is under the influence of medical marijuana or medical marijuana product while at the place of employment or during the fulfillment of employment obligations." [2] The *Rose* case suggests that a positive drug test does not necessarily prove an employee has consumed or was under the influence while working.

A recent survey found that approximately 43% of job applicants are drug tested, and 30% of current employees are drug tested either routinely or for cause. However, the laws



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governing when an employer may drug test an employee vary widely from state to state. For instance, employers in Oklahoma may only drug test an employee for cause if the employer can articulate a reasonable suspicion of illegal drug use at work.

Common examples include a report of intoxication from a coworker, negative performance patterns, and excessive absenteeism or tardiness. Texas employers, however, face no state law restrictions on drug testing employees, and Texas employers are free to conduct drug tests so long as they do not run afoul of federal law.

In the wake of the Rose decision, employers should revisit and update their policies to comply with their respective state laws regarding drug testing. Consider, for example, a scenario in which an employee voluntarily reveals to a coworker that they smoked marijuana at some point before they reported to work. If that coworker discloses this admission to their supervisor, the supervisor must then quickly balance their right to drug test the employee under state and applicable federal law, and their broad responsibility at common law to provide a safe workplace for employees, customer and the public at large.

Furthermore, even if the test results indicate prior drug use, employers must determine whether that positive test is proof of intoxication. The Rose opinion highlights the difficulties in making this final determination. Given the lack of methods to test for marijuana intoxication, employers must be diligent in documenting factors other than a positive drug test in taking adverse action for an employee's use of marijuana.

The final challenge facing employers is whether state law protects an employee's use of marijuana for medical purposes. Oklahoma recently passed legislation granting broad protection to employees who legally consume medical marijuana so long as the employee is not safety sensitive. Employers in the state are therefore prohibited from taking any adverse action related to an employee's use of medical marijuana outside the workplace. However, only a handful of states have enacted similarly broad protections for employees.

The U.S. Court of Appeals for the Sixth Circuit, for example, determined that Michigan's medical marijuana laws do not regulate private employers. The court upheld a decision permitting an employer to fire an employee following a positive test for marijuana, even though that employee displayed no further signs of impairment in the workplace.

While Colorado has driven much of the national trend permitting medical and recreational marijuana, the state's constitution still indicates that the marijuana laws shall not affect the ability of employers to restrict the use of marijuana by employees. Therefore, while Oklahoma only recently permitted the use of medical marijuana, employees within the state receive far greater legal protection than employees in other states, including Colorado, Nevada and Washington.

The laws regulating the use of marijuana have shifted dramatically over the past decade and continue to evolve rapidly. The laws vary among the states, however marijuana remains federally illegal. The Rose case serves as the latest instance of employers struggling to grapple with the challenges of providing a safe workplace while being mindful of the employee protections established under the Medical Marijuana and Patient Protection Act.

In the aftermath of the decision, employers should train supervisors and managers to identify and document all signs of impairment. Absent additional evidence beyond the positive test alone, an employer who takes adverse action against a medical marijuana licensee may face risk of liability, depending on a variety of factors.

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[1] [Rose v. Berry Plastics Corp.](#) , 2019 OK CIV APP 55, 2018 WL 9869754.

[2] 63 O.S. § 427.8(H)(2)(b).