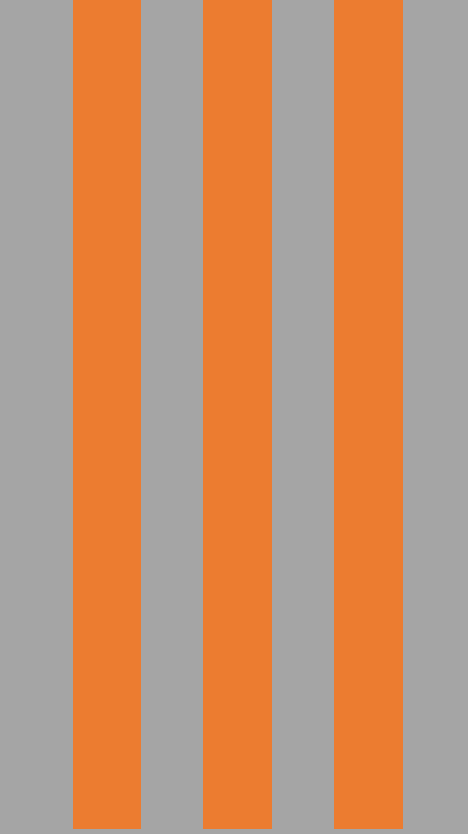
Don’t Get Lost in the Weeds: Navigating Medical Marijuana in the Workplace and Drug-Testing Policies under Arizona Law

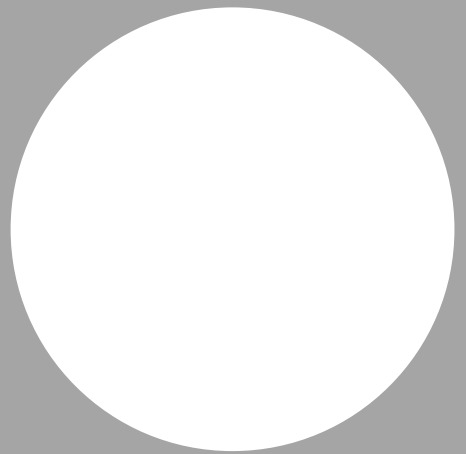
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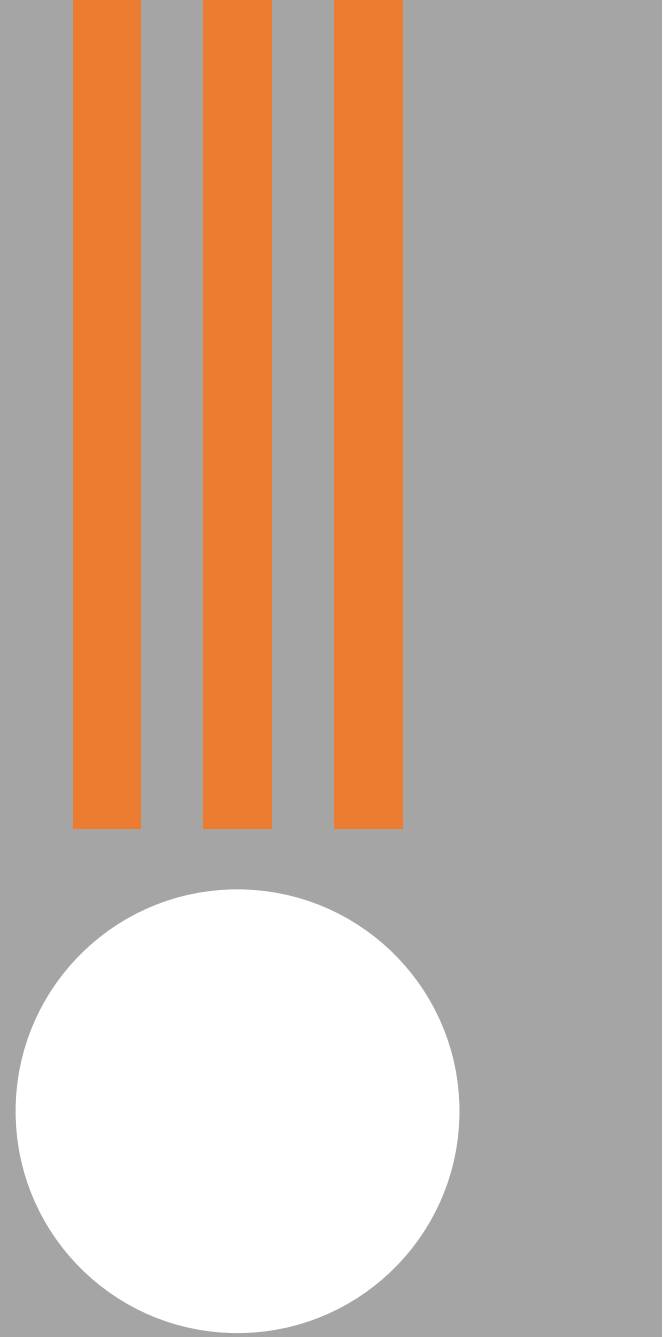


Introductions





Medical Marijuana in the Workplace



Arizona Medical Marijuana Act (AMMA)

In 2010, Arizona voters enacted the AMMA by ballot initiative, Prop. 203.

Approved November 2010 and effective December 2010.

ARS § 36-2801 *et seq.*

- Allows qualifying patients to buy and use marijuana
- ARS § 36-2813: Unless the employer would lose a monetary or licensing-related benefit under federal law, employers are prohibited from discriminating against employees and applicants on the basis of either:
  - A person's status as a cardholder; or
  - A registered qualifying patient's positive drug test for marijuana . . .

  UNLESS the employee used, possessed, or was impaired at the place of employment or during work hours.

Arizona Medical Marijuana Act

ARS § 36-2814(A)(3), (B)

Nothing in the chapter requires an employer to allow the ingestion of marijuana in any workplace, or to allow any employee to work while under the influence of marijuana, EXCEPT THAT a registered qualifying patient shall not be considered to be under the influence of marijuana *solely* because of a positive drug test showing the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment.

Nothing in this chapter prohibits an employer from disciplining an employee for ingesting marijuana in the workplace or working while under the influence of marijuana.

Drug Testing of Employees Act (DTEA)

- ARS § 23-493 *et seq.*
- In response to the AMMA, the Arizona Legislature passes the DTEA in April 2011.
- Allows private employers to conduct drug and alcohol testing of employees.
- But does not *require* drug and alcohol testing.

Drug Testing of Employees Act

- The standards in this law for drug and alcohol testing policies and procedures for private employers are *optional*, not mandatory
- No penalty for noncompliance
- But the company gets protections under the law if you comply

Drug Testing of Employees Act

The DTEA offers private employers in Arizona a shield from liability under certain circumstances in exchange for voluntarily adopting the Act's standards, which are designed to ensure the testing process is fair and accurate.

Protections for employers that comply with the DTEA's standards

ARS § 23-493.06

No cause of action is or may be established for any person against an employer that has established a policy and initiated a testing program in accordance with the DTEA for any of the following types of causes of action:

1. Actions in good faith of the employer based on the results of a positive drug or alcohol test.
2. Failure to test for drugs or alcohol or a specific drug.
3. Failure to test or detect any specific drug or substance, medical condition, disorder, or condition.

Protections for employers that comply with the DTEA's standards

No cause of action is or may be established for any person against an employer that has established a policy and initiated a testing program in accordance with the DTEA for any of the following types of causes of action (continued):

4. Termination or suspension of a substance abuse prevention or testing program or policy.
5. Actions based on the employer's good faith belief that an employee used or possessed a drug while on the employer's premises during the hours of employment.
6. Actions based on the employer's good faith belief that an employee was impaired while working, while on the employer's premises, or during hours of employment.

Protections for employers that comply with the DTEA's standards

No cause of action is or may be established for any person against an employer that has established a policy and initiated a testing program in accordance with the DTEA for any of the following types of causes of action (continued):

7. Actions to exclude an employee from performing a safety-sensitive position, including reassignment, placing employee on leave, based on good faith belief that employee is engaged in the current use of any drug, whether legal or not, whether prescribed or not, if the drug can cause an impairment or lessen job performance.

Protections for employers that comply with the DTEA's standards

The actions of an employer protected by this section include implementing, monitoring or measures to assess, supervise, or control the job performance of the employee, reassignment of an employee to a different position or job duties, or suspension, or termination of employment.

A.R.S. § 23-493.06(B)

“Good faith” belief under the DTEA

“Good faith” - the reasonable reliance on fact without the intent to deceive, without reckless or malicious disregard for the truth. It can be based on:

a. Observed conduct, behavior, or appearance
b. Reliable person
c. Statements
d. Video surveillance
e. Government records
f. Results of a drug or alcohol test
g. Other information reasonably believed to be reliable.

ARS § 23-493(6)

“Safety-Sensitive Position”

ARS § 23-493(9)

Any job designated by an employer as a safety-sensitive position or any job that includes tasks or duties the employer in good faith believes could affect the safety or health of the employee performing the task, or others, including . . .

“Safety-Sensitive”

a. Operating a motor vehicle, other vehicle, equipment, machinery, or power tools

b. Repairing, maintaining, or monitoring the operation of equipment, machinery, kor a manufacturing process, the malfunction or disruption of which could result in injury or property damage.

“Safety-Sensitive”

(continued…)

c. Performing duties on the premises of a customer, supplier, or vendor.

d. Preparing or handling food or medicine.

“Safety-Sensitive”

(continued…)

e. Working in an occupation regulated pursuant to Title 32 of the Arizona Revised Statutes (ARS § 32-101 *et seq.*)

Title 32 governs standards of qualification for various professions and occupations in Arizona, including licensing, regulation, and practice. It is divided into chapters that cover a wide range of professions, such as architects, contractors, doctors, dentists, nurses, pharmacists, lawyers, barbers, CPAs, cosmetology, podiatry, funeral industry professionals, and others.

“Safety-Sensitive”

Be sure to state in your job descriptions and in your drug and alcohol testing policy and procedure which of your positions are “safety-sensitive” positions.

Voter Protection Act

- The Arizona Legislature cannot repeal a voter initiative-enacted law; and
- The Arizona Legislature can only modify the initiative-enacted law by a 3/4ths vote if the change furthers the purpose of the law.

Voter Protection Act – Safety-sensitive positions

Litigants have argued the safety-sensitive exception under the DTEA is unconstitutional arguing that it impermissibly repeals the AMMA, a voter-approved initiative, in violation of the Voter Protection Act.

A U.S. District Court judge issued a *tentative ruling* in Lee v. Albertsons in October 2020 suggesting the exception was unconstitutional under the Voter Protection Act - but the case was settled before a final, binding judgment was entered.

Voter Protection Act – Good faith belief impaired at work

Litigants have also argued that provisions of the DTEA prohibiting causes of action based on the employer's good faith belief that the employee was impaired at work repeals the AMMA.

But in Whitmire v. Wal-Mart, the U.S. District Court for the District of Arizona held that the DTEA and AMMA could be read in harmony with one another.

Pros and Cons in Complying with DTEA standards

Pros: Legal protections against claims

Cons: Lengthy standards with which to comply

Mandatory state or federal drug and alcohol testing programs and the DTEA

An employer who is obligated by state or federal requirements to have a drug and alcohol testing program shall receive the full benefits of this article, even if that program does not conform to all of the provisions of this article, provided the employer complies with the state or federal requirements applicable to the employer's operations.

Drug and Alcohol Testing Policies that Are Compliant with the DTEA

Drug and Alcohol Testing Policies that Are Compliant with the DTEA

ARS § 23-493.04

The written policy shall include:

- Statement of the employer's policy on drug and alcohol use by employees.
- Description of those employees and prospective employees who are subject to testing.
- Circumstances under which drug and alcohol testing may be required.
- Substances as to which testing may be required.
- A description of the testing methods and collection procedures to be used.
- The consequences for refusing to take a drug or alcohol test.
- Adverse employment actions that may be taken based on the test procedure or results.

Drug and Alcohol Testing Policies that Are Compliant with the DTEA

The written policy shall include (continued):

- A statement about the employee's right:
  - To obtain written test results, upon request by the employee.
  - Explain a positive test result, in a confidential setting, upon request by the employee.
- Statement of the employer's policy on confidentiality of test results.

Drug and Alcohol Testing Policies that Are Compliant with the DTEA

Within the terms of the written policy, an employer may require testing for any job-related purpose consistent with business necessity, including:

1. Investigating impairment of an employee
2. Investigating accidents in the workplace.

   - As soon as practicable after an accident

   - Administered to employees who the employer reasonably believes contributed to the accident.
3. Maintenance of safety for employees, customers, clients, or the public at large.

Drug and Alcohol Testing Policies that Are Compliant with the DTEA

Within the terms of the written policy, an employer may require testing for any job-related purpose consistent with business necessity, including (continued):

4. Maintenance of productivity, quality of products or services, or security of property or information.

5. Reasonable suspicion that an employee may be affected by the use of drugs or alcohol and the use may adversely affect job performance or the work environment.

Drug and Alcohol Testing Policies that Are Compliant with the DTEA

- Permits random testing
- All compensated employees must be uniformly included in the testing policy, including officers, directors, and supervisors of the employer.

Drug Testing Procedures that Are Compliant with the DTEA

ARS § 23-493.03

Sample collection and testing must include the following standards:

1. The collection of samples – performed under reasonable and sanitary conditions
2. Sample collections shall be documented and documentation shall include:
   a) Labeling of samples to preclude possibility of misidentification of the person tested in relation to the test result provided
   b) An opportunity for the person to be tested to provide notice of information that may be considered relevant to the test, including identification of current or recent prescription or non-prescription drugs or other relevant medical information.

Drug Testing Procedures that Are Compliant with the DTEA

Sample collection and testing must include the following standards (continued):

3. Sample collection, storage, and transportation to the place of testing shall be performed in a manner reasonably designed to preclude the possibility of sample contamination, adulteration, or misidentification.

4. Sample testing shall comply with scientifically accepted analytical methods and procedures. Drug testing shall be conducted at a laboratory approved or certified by the U.S. Dept. of Health and Human Services, College of American Pathologists, or the Arizona Dept. of Health Services.

Drug Testing Procedures that Are Compliant with the DTEA

- Sample collection and testing must include the following standards (continued):

  5. Drug testing shall include confirmation of any positive drug test results.

  6. Confirmation shall be by use of a different chemical process than was used in the initial drug screen.

  7. Second or confirmatory test shall be a chromatographic technique such as gas chromatography-mass spectrometry or another comparably reliable analytical method.

DTEA Standards – Timing and Cost of Drug and Alcohol Tests

ARS § 23-493.02

To qualify for the benefits of the article:

1. The drug or alcohol test shall occur during, or immediately before or after, a regular work period.
2. Testing is work time for purposes of compensation and benefits
3. Employer shall pay cost of drug and alcohol test required of employees.
4. Employer may, at its discretion, pay for the costs of drug testing prospective employees.
5. Employer shall pay reasonable transportation costs to current employees if the tests are not at the employee's normal work site.

Test results – keep them confidential

- All communications received by an employer relevant to the drug or alcohol test results through employer's program are confidential.
- Cannot be used in evidence or disclosed in discovery except in a proceeding related to a cause of action asserted by an employer or employee
- Can be disclosed to the tested employee or prospective employee
- Can be disclosed to individuals designated by employer to receive results and information re: same, and arbitrator, mediator, court, or governmental agency as authorized by law.

Recreational Marijuana

Smart and Safe Arizona Act

- Voter initiative-enacted law in November 2020, Prop. 207, becoming effective November 2020
- ARS § 36-2850 *et seq.*
- Approving the possession, cultivation, and use of recreational marijuana for adults at least 21 years of age.

- Employers have the right to maintain:
  - A drug-free and alcohol-free workplace; and
  - Workplace policies restricting the use of recreational marijuana by employees.

  Employers can prohibit the use of recreational marijuana off duty.

Smart and Safe Arizona Act

Employers are not required to allow or accommodate the use, consumption, possession, transfer, display, transportation, sale, or cultivation of marijuana by employees.

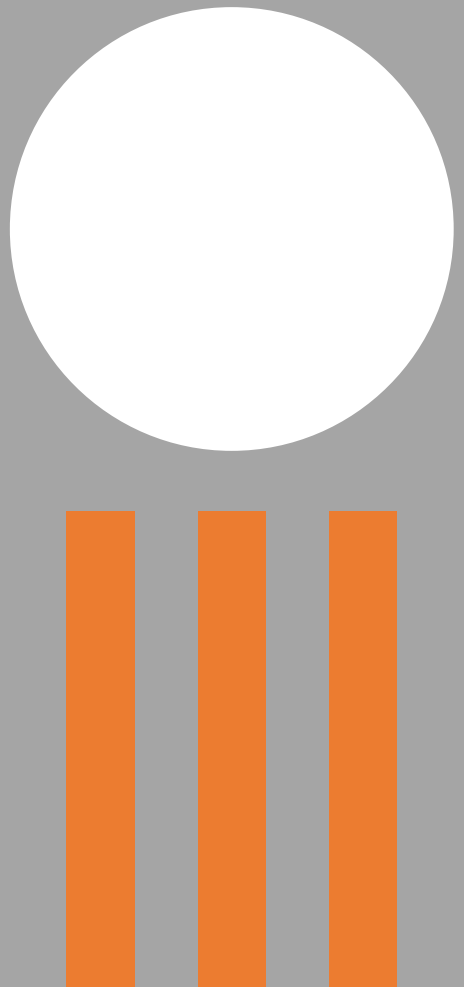
ARS § 36-2851(2)

Smart and Safe Arizona Act

Employers can prohibit or regulate conduct otherwise permitted under the law if it occurs on the employer's property.

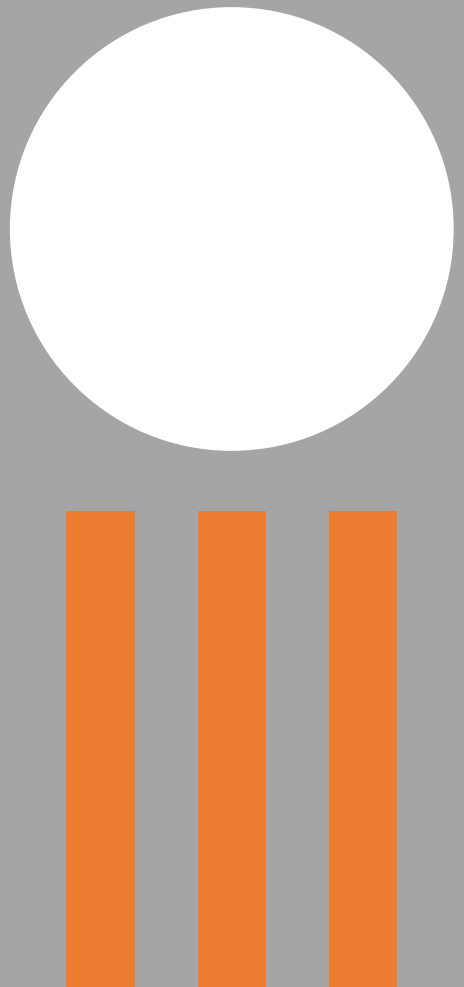
ARS § 36-2851(6)

Recreational marijuana



Let your employees know whether you permit or prohibit use of recreational marijuana off duty, particularly if you conduct random drug and alcohol tests.

Recreational marijuana



If you conduct pre-employment drug and alcohol tests, consider whether to not test for marijuana to widen your pool of eligible candidates, given that recreational marijuana is lawful.

Reasonable Suspicion

Reasonable Suspicion

If you suspect an employee is impaired by drugs or alcohol on the job, document your observations in a fitness-for-duty report or other document.

Have witnesses document their observations.

Your written observations might be Exhibit A in a lawsuit!

Consider a list of symptoms and circling what you see or otherwise writing down what you observe. (See handout.)

Case Studies

Case Study # 1 – Terry v. UPS

FACTS

- Manager was reported to have exhibited signs of impairment
- Tested positive for a non-impairing marijuana metabolite called Carboxy-THC and amphetamine
- Witnesses observed impairment - red eyes, slurred speech, hallucinations, acted abnormally, lost his train of thought, repeated himself frequently throughout the meeting, drooping eyelids
- Company terminated his employment

Case Study # 1 – Terry v. UPS

- Sued for: (1) wrongful termination under the Arizona Employment Protection Act (AEPA) on the basis that the company violated the Arizona Medical Marijuana Act and (2) defamation.
- Alleged he was not impaired at work.

Case Study # 1 – Terry v. UPS

The AZ Court of Appeals held that the manager could not show that his firing violated the AMMA because the company could prove he was impaired on the job -- and thus he was not fired solely because of a positive drug test for marijuana appearing in insufficient quantities to show impairment.

Thus, employer won on the wrongful termination claim.

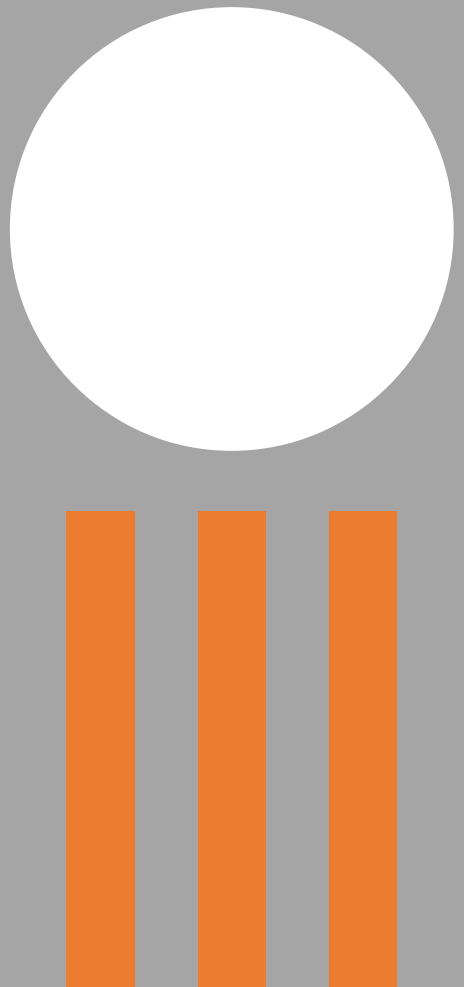
Case Study # 1 – Terry v. UPS

The Court found the employee failed to timely invoke the immunities of the AMMA to claim he could not be fired under that law because he waited until *AFTER* the positive drug test to explain he had a medical marijuana card.

Case Study # 1 – Terry v. UPS

The Court found the employee failed to establish a claim for defamation under the DTEA because the information disclosed was not a false positive test result. ARS § 23-493.08.

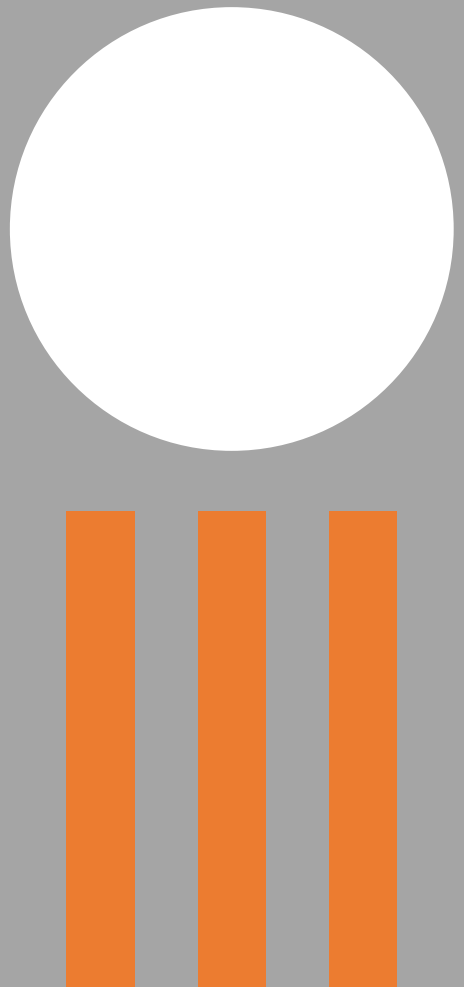
Case Study # 2 – Whitmire v. Wal-Mart



FACTS

- Supervisor of Walmart working in Show Low was injured on the job
- Bag of ice fell on her wrist
- Wal-Mart sent her for a post-accident drug test
- Tested positive for marijuana, but only the inactive metabolites – the test read 1000ng/ml, the highest score the test could read.
- Wal-Mart fired her.

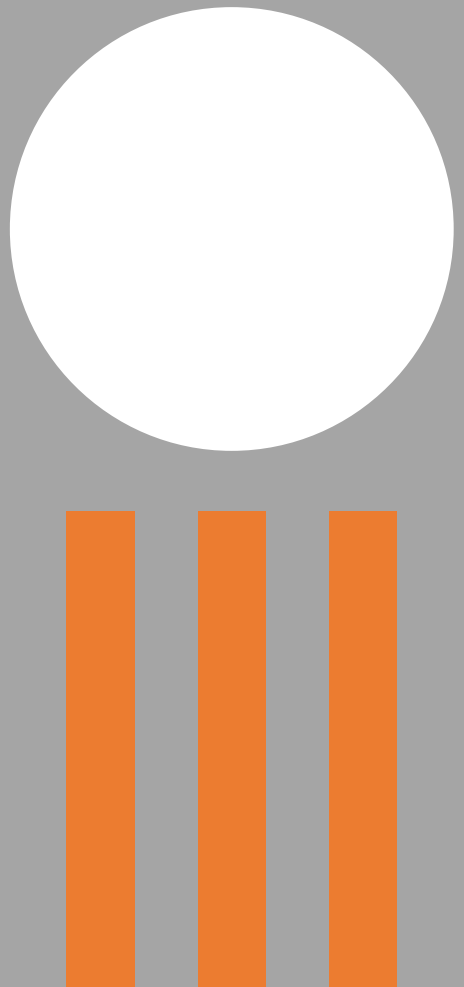
Case Study # 2 – Whitmire v. Wal-mart



FACTS (continued)

- No evidence that Whitmire was impaired on the job.
- Had a valid Arizona medical marijuana card
- Evidence was that Whitmire admitted to smoking at 2 am before going to sleep before her 2 pm shift begun
- Wal-Mart's policy was if you test positive for marijuana you are fired (no exception for medical marijuana)

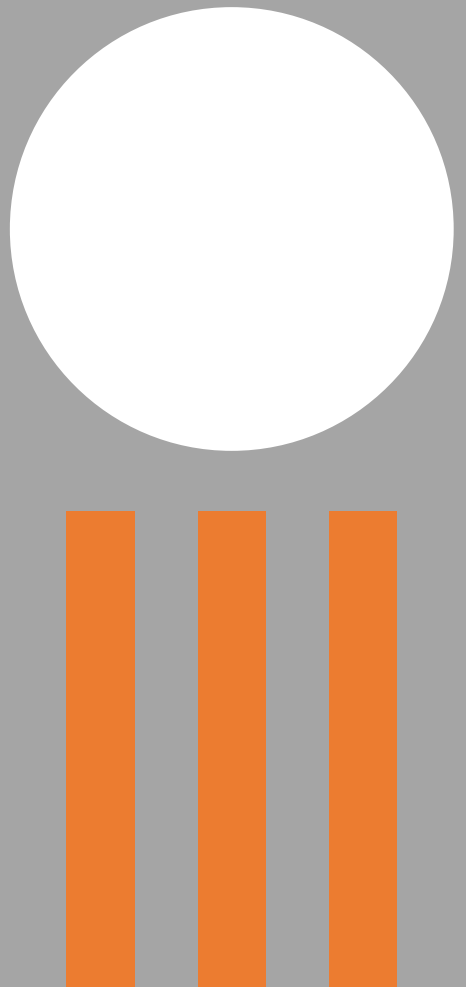
Case Study # 2 – Whitmire v. Wal-Mart



Claims:

1. Discrimination under the AMMA
   a) Wal-Mart claimed Whitmire's claim should be struck down because Wal-Mart's drug and alcohol policy and procedure complied with the DTEA, and thus her claim was precluded
      i. Wal-Mart alleged that it had a reasonable, good faith belief that Whitmire was impaired at work based on her positive drug test
   b) Whitmire claimed the DTEA was unconstitutional for repealing the AMMA
2. That Wal-Mart retaliated against her for filing a workers' compensation claim in violation of the Arizona Employment Protection Act (AEPA)
3. That Wal-Mart discriminated against her on the basis of disability under the "regarded as disabled" prong under the Arizona Civil Rights Act (ACRA)

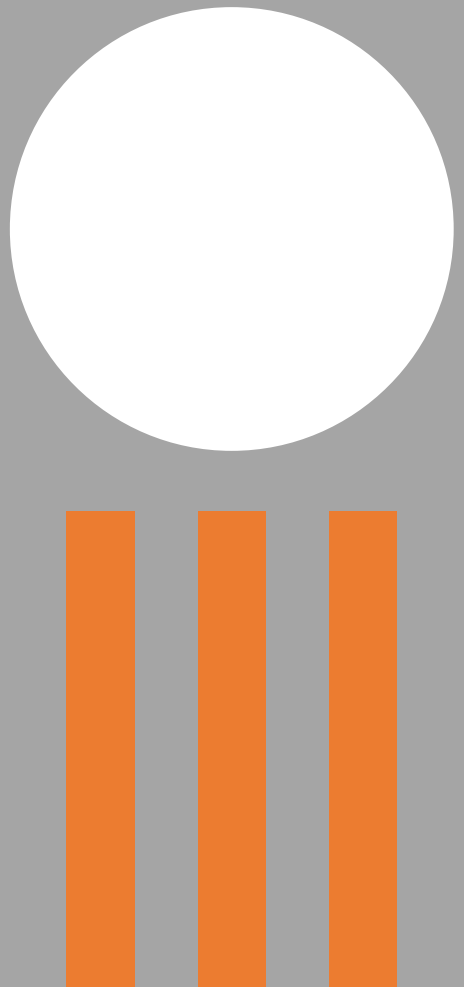
Case Study # 2 – Whitmire v. Wal-Mart



Holdings:

1. Finds there is an implied cause of action under the AMMA.
2. Finds in favor of Whitmire on discrimination claim under the AMMA.
3. Although Wal-Mart's policy and procedure complied with the DTEA, Wal-Mart could not prove that it had a reasonable, good faith belief that Whitmire was impaired at work
   a) No evidence of impairment
   b) No expert witness to provide scientific evidence that her drug test result of 1000ng/ml of inactive metabolites was sufficient to cause impairment
   c) Thus no protection under the DTEA
   d) DTEA was not unconstitutional because could be read in harmony with the AMMA:
      i. Employers can end your employment based on a positive test alone so long as the test results show marijuana levels that are ***sufficient*** to cause impairment.

Case Study # 2 – Whitmire v. Wal-Mart

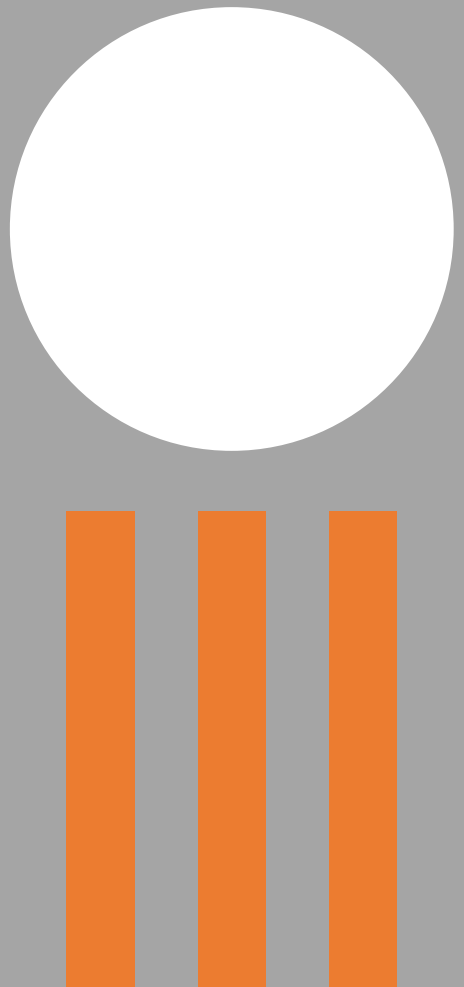


Holdings (continued):

1. Loses on AEPA retaliation claim for filing workers' comp claim under the McDonnell Douglas framework:
   a) Although Whitmire could establish a *prima facie* case that she engaged in protected activity (filing workers' comp claim), she suffered an adverse action (termination), and a causal connection between the two based on temporal proximity -
   b) Whitmire could not prove that Wal-Mart's proffered reason for ending her employment (good faith belief that Whitmire was impaired at work) was pretext, i.e., not the real reason she was fired.

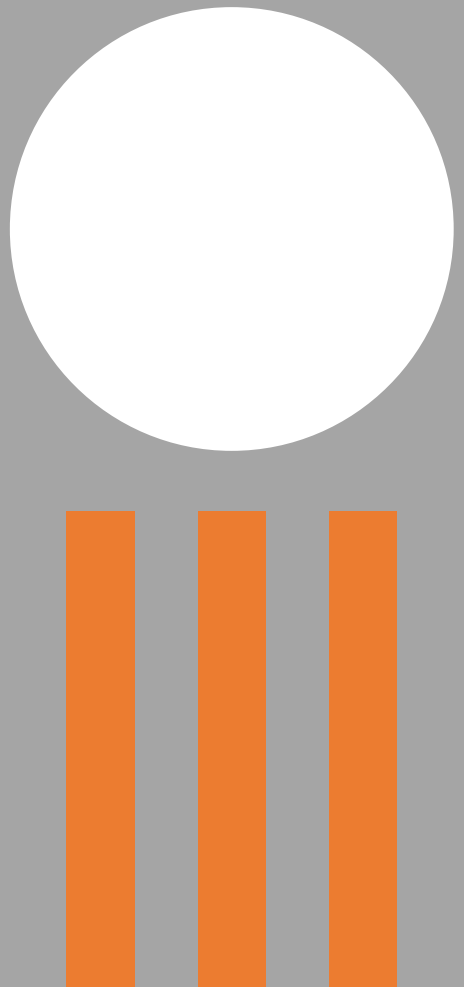
2. Whitmire cannot prove she was regarded as disabled and her ACRA claim fails.

Americans with Disabilities Act



- Substance abuse disorder or alcoholism can rise to the level of a disability under the ADA
- But the employee must be in recovery to be protected under the law.
- Cannot be currently using drugs or alcohol to be entitled to protections under the ADA

Family and Medical Leave Act



- Substance abuse disorder or alcoholism can rise to the level of a serious health condition under the FMLA
- But the employee must be in recovery to be protected under the law.
- Cannot be currently using drugs or alcohol to be entitled to protections under the FMLA

Federal Drug-Free Workplace Act

Under the Act, a drug-free workplace policy is required for:

- Any organization that receives a federal contract of $100,000 or more; and
- Any organization receiving a federal grant of any size.

Federal Drug-Free Workplace Act

Covered employers must:

- Prepare and distribute a formal drug-free workplace policy statement that prohibits the manufacture, use, and distribution of controlled substances in the workplace and consequences
- Establish a drug-free awareness program.
  - Inform employees of the dangers of workplace substance use; review the requirements of the organization's drug-free workplace policy; and offer information about any counseling, rehabilitation, or employee assistance programs (EAPs) that may be available.
- Ensure that all employees understand their personal reporting obligations - an employee must notify the employer within 5 calendar days if he or she is convicted of a criminal drug violation.

Federal Drug-Free Workplace Act

Covered employers must (continued):

- Employer has 10 days to report that a covered employee has been convicted of criminal drug violation.
- Take direct action against an employee convicted of a workplace drug violation. This action may involve imposing a penalty, or requiring the employee to participate in an appropriate rehabilitation or counseling program.
- Failure to comply with the Act may result in a variety of penalties, including suspension or termination of their grants/contracts and being prohibited from applying for future government funding.

Industries in which drug testing is legally required

- Transportation (trucking, aviation, pipelines)
- Security-sensitive industries (national security employees)
- Sports industry



Any Questions?

Thank You



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