

## Medical marijuana caregiver's age claim goes up in smoke

Employee failed to show employer's stated reason for firing was pretext

By A. Michael Weber, Esq.

A federal court in Michigan ruled that a licensed medical marijuana caregiver and employee at the Flint, Mich., Outback Steakhouse cannot present her case to a jury because she did not have evidence that the restaurant's stated reason for her termination — drug activity — was pretext for age discrimination. *Henry v. Outback Steakhouse of Florida, LLC*, No. 15-cv-10755, 2017 WL 1382292 (E.D. Mich. Apr. 18, 2017).

Bobbie Henry worked at Outback Steakhouse for approximately 17 years before she was terminated in 2014. During the course of an investigation into the suspected drug activity of several other employees, the restaurant discovered that Henry, who is licensed in Michigan as a "medical marijuana caregiver" had sold medical marijuana to a coworker on the restaurant premises. When confronted by management, she admitted to selling marijuana to one of her coworkers, who was also a patient, but insisted that she never possessed or sold the drugs on restaurant property. She later admitted at deposition that she sold the marijuana to the patient-coworker in the restaurant parking lot. She and five other employees were terminated for "distributing drugs to coworkers" and/or suspicious activity.

Although the five other terminated employees were younger than Henry, she brought suit alleging that her own termination was motivated by age. She supported the claim largely through comments by one member of management who referred to her, in jest, as an "old timer, old lady" and "grandma." She also alleged that the restaurant did not enforce the "slip-resistant" shoe requirement on younger employees, and gave coveted Friday and Saturday night bartending shifts to female employees in their early 20s.


## Michigan medical marijuana laws do not supercede federal drug laws

In *Henry v. Outback Steakhouse*, the restaurant chain maintained a drug policy and the handbook clearly stated that, "The illegal use, sale, or possession of narcotics, drugs, or controlled substances while on the job or on company property is strictly prohibited and is a dischargeable offense."

Though the employee — who alleged that she was actually terminated because of her age — had a Michigan medical marijuana card and was a licensed medical marijuana caregiver in the state, federal law does not protect her in this case. Pursuant to the federal Controlled Substances Act, state medical marijuana laws do not, and cannot, supercede federal laws that criminalise the possession of marijuana.

Despite the former employee's assertions that her sales to a patient cannot be a basis for the termination, the court said that the Michigan Medical Marijuana Act does not impose restrictions on private employers or provide protection against disciplinary actions by an employer.

Of note for Michigan employers is that employees who test positive for marijuana are not disqualified from receiving unemployment benefits if they hold a valid medical marijuana card in the state. Claimants may be disqualified, however, if marijuana was ingested at the workplace, or if the employee's use of medical marijuana put the safety of persons or property at risk.

Nevertheless, the court found that this evidence did not support a finding that the legitimate reason for firing the employee was a pretext for age discrimination.

The court's decision relied heavily on the fact that a number of employees had accused Henry of selling drugs on the premises. When confronted, rather than denying that she sold drugs, she noted that she had a license to sell medical marijuana and admitted to selling marijuana to at least one coworker. Although she denied making the transaction on premises, a number of other employees said otherwise, and Henry ultimately admitted during litigation that she sell marijuana to a coworker in the restaurant's parking lot.

The court was not convinced that the inconsistencies between what the coworkers reported and what Ms. Henry said constituted grounds for a finding of pretext, as plaintiff argued. Further, the alleged ageist comments, the court determined, did not appear to be related to the individual's process of deciding to terminate Henry.

Henry also argued that company policy only prohibited the "illegal" sale of drugs, and that she was licensed to sell medical marijuana in Michigan. The judge quickly dismissed this argument, noting that the sale was still illegal under federal law, which the Michigan statute did not affect.

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