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AUGUST 2006

An employer's failure to adopt and disseminate a detailed drug testing policy means victory for an admitted drug user pursuing a wrongful discharge claim.

## Midwest Edition

A Littler Mendelson Midwest-specific Newsletter

### Positive Drug Test No Bar to Wrongful Discharge Suit, Court Rules

By Nancy N. Delogu

Earlier this month, the Iowa Supreme Court reinvigorated the wrongful discharge lawsuit of an employee who lost her job after concededly testing positive for marijuana. Her winning argument? Her employer failed to follow Iowa law by ensuring that she received a copy of a compliant employee drug testing policy before she was tested. The case is *McVey v. National Organization Service, Inc.*, No. 04-1769 (Iowa August 11, 2006).

#### Factual Background

Most of the facts before the court were undisputed. Plaintiff Jeri Rae McVey reported for work on July 9, 2003, and was subjected to a random drug test. The laboratory reported the results as positive. Ms. McVey was notified of the results and of her termination from employment during a telephone call, and she did not return to work. A few months later, however, she filed suit against her employer, National Organization Service, Inc. (NOS), alleging that it had failed to follow Iowa's detailed state employee drug testing statute. She sought damages for wrongful termination as well as reinstatement to her former position, remedies which are authorized by the drug-testing law. (See Iowa Code Section 730.5).

Before the case reached the Iowa Supreme Court, the trial court dismissed the plaintiff's claim after NOS moved for summary judgment. In its motion, the company argued that it had complied with the state's drug testing law, and that Ms. McVey had received a copy of its drug testing policy, as well as a copy of a policy statement in which NOS conveyed its obligation and intent to comply with the federal Drug Free Workplace Act. Ms. McVey agreed that she had received the Drug-Free

Workplace Act notice, but denied receiving a copy of NOS's employee drug-testing policy. In addition, she argued, the written policy then provided was not adequate to meet Iowa's statutory requirements.

#### Iowa Supreme Court's Ruling

On appeal, NOS argued that McVey's employment was at will, and that she could not bring an action for wrongful discharge in violation of public policy, given that public policy does not encourage the employment of drug abusers. Rejecting this argument, the Iowa Supreme Court noted that it has already ruled that an employee may be discharged from employment for violating the employer's drug testing program *only* if the drug testing program is being carried out in compliance with the drug-testing statute. In this case, the court noted, Iowa's public policy is expressed in the state's drug-testing statute.

Instead, the court agreed with the plaintiff that "the requirement that the employer adopt an employee drug-testing policy and deliver it to each employee is a necessary step in invoking the statutory authorization for [employee drug] testing." Significantly, the Supreme Court also noted that even if Ms. McVey had received a copy of NOS's drug testing policy, the policy submitted to the court in support of its arguments did not meet the detailed requirements of the Iowa law. In particular, the policy did not set forth uniform requirements for what disciplinary or rehabilitation actions NOS would take against an employee or prospective employee upon receipt of a confirmed positive drug test, an element the court deemed "essential"

to a valid policy.

## Effect on Employer Drug Testing Procedures and Policies

Employers with multi-state operations (and, of course, those with operations in Iowa) should view this case as a cautionary example of what may happen if drug and alcohol testing programs fail to comply with state and local requirements. Iowa is not the only state with detailed testing requirements, and not the only jurisdiction that requires employers to disseminate detailed drug and alcohol policies to employees (and in some cases, to applicants). For example, statutes or judicial rulings in California, Boulder, Colorado, Hawaii, Maine, Maryland, Massachusetts, Minnesota, Montana, New Jersey, Oklahoma, Puerto Rico, Vermont, and West Virginia as well as Iowa require or advise employers that they must distribute a detailed written drug testing policy in advance of testing. An even greater number of states require employers to grant tested employees access to test records and results upon request.

### Employer Action Steps:

- Employers should ensure that drug testing policies comply with relevant state and local laws, which predominate in regulating drug testing. Do not assume that a policy that complies with U.S. Department of Transportation regulations for *nonregulated* employees will satisfy all state laws.
- Periodically review drug and alcohol policies to ensure they are fully compliant with the laws of the jurisdictions in which you have operations. If the employer has adopted a multi-state “corporate” policy, ensure that those in charge of administering it are trained to apply the policy consistent with local laws, particularly in locations that impose requirements that differ from or add to the corporate policy.
- If you have any questions about drug testing requirements in your area, you may contact your Littler attorney for assistance.

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