

Bodman PLC

March 4, 2024

Five Dos and Don'ts for Preserving an Honest Belief Defense

By: Amanda McSween Empey, Associate, Workplace Law Group

In an employment discrimination case, whether an employer is successful in getting a dismissal often depends on whether it can show it had an “honest belief” in a non-discriminatory reason for the employment decision. A new Sixth Circuit Court of Appeals case demonstrates the scrutiny that the factual basis of employers’ decision-making processes may receive.

To demonstrate an honest belief, the employer must show that it made a reasonably informed and considered decision by relying on the particularized facts before it.

In January 2024, the United States Court of Appeals for the Sixth Circuit held in *Fisher v. Airgas* that an employer was *not* shielded from liability under the honest belief doctrine because it failed to meaningfully investigate the underlying facts. The plaintiff utilized a legal hemp product for pain management, so when he was selected for a random drug test, his results came back positive for marijuana. The plaintiff denied using marijuana and requested a retest, explaining that his use of the hemp product might have caused a false positive. The employer agreed to the retest. However, it did not tell the third-party vendor who performed the drug test about the plaintiff’s hemp use or ask whether the hemp use could cause a false-positive. The second drug test was also positive for marijuana, so the employer terminated the plaintiff for violating its drug use policy. The Sixth Circuit held that this was not a reasonably informed and considered decision – and therefore not protected by the honest belief doctrine – because the employer did nothing to investigate the possibility of the false-positive after the plaintiff expressly raised his concern about that specific possibility.

What should employers do to maximize protection under the honest belief doctrine?

1. **Do maintain up-to-date policies and procedures.** As a starting point for all employment-related matters, it is important that both the employer and employee have a clear understanding of the expectations of employment.

2. **Don't make assumptions.** While it may seem like everyone has their own version of “the dog ate my homework,” employers need to listen to the explanation provided by the employee to see if there are any protected reasons for their conduct, especially under the Americans with Disabilities Act or the Family Medical Leave Act.
3. **Do investigate.** Learn from the mistakes in *Fisher* and investigate the employee's version of events. The law does not require that every stone be turned, but it is important to perform a reasonable inquiry into the underlying events that spark an employment action. For straightforward matters like the drug test example, this could be as simple as sending an email to ask about false positives. For allegations of misconduct in the workplace, employers should perform a thorough investigation – either internally or by hiring a third-party to ensure neutrality in the findings.
4. **Don't forget to document the basis for your decision.** Even if it may seem obvious at the time, always document the reason for an employment decision to an employee's personnel file. Draft your investigation notes and conclusions as if someone outside your organization will read them by including first and last names, dates, locations, organizational titles, etc.
5. **Do communicate with the employee.** Once the decision is made, communicate your decision to the employee in writing. Provide a concise reason based on the applicable policies and results of your investigation.

Please contact any member of [Bodman's Workplace Law Group](#) if you need assistance with employment law issues, including advice regarding best practices for avoiding risk in employment decisions. Bodman cannot respond to your questions or receive information from you without establishing an attorney-client relationship and clearing potential conflicts with other clients. Thank you for your patience and understanding.

WORKPLACE LAW GROUP	AARON D. GRAVES Chair 313-392-1075 agraves@bodmanlaw.com	JOHN T. BELOW 248-743-6035 jbelow@bodmanlaw.com	JOHN C. CASHEN Of Counsel 248-743-6077 jcashen@bodmanlaw.com
	MACKENZIE E. CLARK 248-925-1926 mclark@bodmanlaw.com	AMANDA MCSWEEN EMPEY 313-392-1056 aempey@bodmanlaw.com	GARY S. FEALK 248-743-6060 gfealk@bodmanlaw.com
	JOHN DAVID GARDINER 616-205-3123 jgardiner@bodmanlaw.com	MICHELLE L. KOLKMEYER 248-743-6031 mkolkmeyer@bodmanlaw.com	KAREN L. PIPER Of Counsel 248-743-6025 kpiper@bodmanlaw.com
	CAMERON D. RITSEMA 616-205-4358 critsema@bodmanlaw.com	REBECCA C. SEGUIN-SKRABUCHA 248-925-1936 rsequinskrabucha@bodmanlaw.com	MELISSA M. TETREAU 248-743-6078 mtetreau@bodmanlaw.com
	DAVID B. WALTERS 248-743-6052 dwalters@bodmanlaw.com		