

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION

JOSEPH CLARK

v.

J.R.K. ENTERPRISES, INC. and
SHANNON SNARE

CI-20-07268

ENTERED AND FILED
2023 JAN 10 AM 10:17
PROTHONOTARY'S OFFICE
LANCASTER, PA

ORDER

AND NOW, this 9th day of January, 2023, upon consideration of

Defendants J.R.K. Enterprises, Inc. and Shannon Snare's "Motion for Reconsideration of Defendants' Motion for Summary Judgment" and Plaintiff Joseph Clark's response thereto, and after hearing oral argument:

IT IS HEREBY ORDERED that Summary Judgment is **GRANTED** in Defendants' favor and that Plaintiff's First Amended Complaint is **DISMISSED WITH PREJUDICE**.

BY THE COURT:


JEFFERY D. WRIGHT
JUDGE



ATTEST: *Lamin Barrow*

Copies to: Steven Auerback, Esq.
Christopher D. Mandracchia, Esq.
Alexander Nemiroff, Esq.

NOTICE OF ENTRY OF ORDER OR DECREE
PURSUANT TO PA. R.C.P. NO. 236
NOTIFICATION - THE ATTACHED DOCUMENT
HAS BEEN FILED IN THIS CASE
PROTHONOTARY OF LANCASTER CO., PA
DATE: *01/12/2023*

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION

JOSEPH CLARK

v.

J.R.K. ENTERPRISES, INC. and
SHANNON SNARE

CI-20-07268

OPINION

BY: WRIGHT, J.

January, 9, 2023

The facts of this case are simple and, for the most part, undisputed. At all times relevant to the above-captioned matter, Plaintiff Joseph Clark (“Mr. Clark”) worked as a roadside flagger for J.R.K. Enterprises, Inc. (“J.R.K.”). Mr. Clark emailed J.R.K.’s owner, Defendant Shannon Snare (“Ms. Snare”), to tell her that he is a medical marijuana cardholder, that he uses medical marijuana to treat anxiety, and that, consequently, he always has marijuana in his system. Ms. Snare determined that because of the safety risks associated with flagging, Mr. Clark could no longer work for J.R.K. unless he stopped using medical marijuana.

Although largely unexamined by Pennsylvania Courts, the law that applies to this case is also straightforward. The Pennsylvania Medical Marijuana Act (“MMA”)¹ includes a “Safety Exception” that allows an employer to prohibit an employee from performing tasks or duties that the employer determines are life-threatening or which could result in a public health risk while “under the influence” of medical marijuana.

¹ Act of April 17, 2016, P.L. 84, 35 P.S. § 10231.101, et seq.

On December 23, 2021, J.R.K. and Ms. Snare moved for Summary Judgment. After briefing and oral argument, I denied the Motion because one issue appeared to be in dispute: whether Mr. Clark's admission that he always has marijuana in his system constitutes being "under the influence" within the meaning of the MMA's Safety Exception, which does not define the term. However, in the months following my denial of J.R.K. and Ms. Snare's Motion, the Pennsylvania Superior Court issued two decisions that eclipse any doubt regarding the proper interpretation of "under the influence" as applied to the facts of this case. Accordingly, for the reasons set forth below, I will grant Defendants' Motion for Reconsideration and will enter Summary Judgment in Defendants' favor.

BACKGROUND

The following facts are undisputed. J.R.K. is a for-profit corporation engaged in multi-county traffic flagging services throughout Pennsylvania. (Am. Compl., June 17, 2020, at ¶ 11; Defs' Answer to Am. Compl., June 23, 2021, at ¶ 11). Ms. Snare is J.R.K.'s president, EEP and acting officer, sole shareholder, and controlling member of J.R.K. (Id. at ¶ 12) At all times relevant to this action, Mr. Clark was J.R.K.'s employee and worked as a flagger. (Id. ¶ 17). His job duties included directing traffic on construction projects while the construction crew worked. (Defs' Mot. for Summ. J., Dec. 23, 2021, Ex. C at 44:11–18). When he was on the job, Mr. Clark was required to wear personal protective equipment including a hat, safety vest, and glasses. (Id. at 42:18–43:16). Mr. Clark acknowledged that sensory alertness is required for flaggers and that his life and the lives of the construction workers and the nearby drivers were "on the line" every day when he went to work. (Id. at 51:8–13; 52:6–20).

In May of 2020, Mr. Clark was diagnosed with an anxiety disorder. (Am. Compl., June 17, 2020, at ¶ 19; Defs' Mot. for Summ. J., Ex. C, at 45:25–46:2; 67:8–15; 72:24–73:3). Subsequently, he applied online through Cannabis Care Center and, after consulting with a doctor, was approved for a Pennsylvania Department of Health medical marijuana identification card. (Am. Compl., June 17, 2020, at ¶¶ 20–21; Defs' Mot. for Summ. J., Ex. C, at 70:10–73:25).

On August 17, 2020, Mr. Clark emailed Ms. Snare the following message:

I was wondering what is our policy on prescription medication. I asking [sic] in particular to medical marijuana because I am a medical marijuana patient.

The other week here, on a different section of the job. The [sic] entire crew was sent out for urines (minus) our flagger.

I don't use or take any medication to work. I will however always have thc in my system. Even the cbd I take has it in it. I just don't know what our policy is on it and what would happen if I was sent out for a urine.

I just don't want to anyone [sic] to be caught off guard with this.

Respectfully,
Joseph E. Clark Jr

(Am. Compl., June 17, 2020, at ¶¶ 23–25, Ex. 1; Defs' Answer to Am. Compl., June 23, 2021, at ¶¶ 23–25). Later that same day, Ms. Snare responded to the email, explaining that she was asking her attorney about Mr. Clark's question and that she would get back to him. (Id.)

The next day, Ms. Snare sent the following message to Mr. Clark:

Joe,

My attorney just got back to me. Unfortunately, we cannot allow you to flag for us, until you quit using the marijuana. Per federal regulations it is still not allowed on the job. It is now a public safety issue.

If you wish to continue flagging for us, you will have to pass a drug test.

Ken will have somebody replace you for tomorrow. I am sorry, but we have to follow the regulations.

Please let me know that you get this email, and what you plan to do.

Thank you,
Shannon Snare

(Id.) Mr. Clark responded: “Ok thanks for your time and concern in this matter. I do not use marijuana on the job at all. I do however use it to treat a medical condition. I will not be giving up a prescriptions [sic].” (Id.)

Ms. Snare sent the following message in reply:

Joe,

I appreciate you contacting me and your honesty. I also respect the years and hard work you have put in for us. I believe you when you say you do not use it on the job. However, you will not be able to continue to work for us while using marijuana, even though it is prescription.

I am sorry but as of now, you no longer work for us. If you change your mind, please let me know.

Thank you,
Shannon Snare

(Id.) After receiving this message from Ms. Snare, Mr. Clark did not return to work.

(Defs’ Mot. for Summ. J., Dec. 23, 2021, Ex. C, at 91:19–92:23).

On October 26, 2020, Mr. Clark filed the instant action against J.R.K. and Ms. Snare, alleging Wrongful Termination under the MMA and seeking damages, punitive damages, and declaratory and injunctive relief. On December 23, 2021, J.R.K. and Ms. Snare filed a Motion for Summary Judgment. On January 25, 2022, Mr. Clark filed a

Motion for Partial Summary Judgment. Following briefing and oral argument, I denied both Motions on April 27, 2022.

On August 31, 2022, J.R.K. and Ms. Snare filed a Motion for Reconsideration of their Motion for Summary Judgment. Mr. Clark filed an oppositional brief on September 1, 2022. On November 21, 2022, I heard oral argument on J.R.K. and Ms. Snare's Motion for Reconsideration. The matter is now ripe for review.

DISCUSSION

The MMA was enacted in 2016 as a “temporary measure” to “provide a program of access to medical marijuana which balances the need of patients to have access to the latest medical treatments with the need to promote patient safety.” 35 P.S. § 10231.102(3)(i). The MMA authorizes patients who hold validly issued “identification cards” to obtain and use medical marijuana pursuant to the guidelines set forth in the Act. 35 P.S. § 10231.501(a).

The Commonwealth Court has observed that “among the number of provisions in the MMA, most apply to the licensing and regulation of growers, manufacturers, researchers and dispensaries.” HACC v. Pennsylvania Human Relations Commission, 245 A.3d 283, 288 (Pa. Commw. Ct. 2020). Although “[m]inimal attention is given to employees,” HACC, 245 A.3d at 288, the MMA does include safeguards for employees who are medical marijuana cardholders (“Patient-Employee(s)”—and for their employers.

The MMA clearly prohibits employment-based discrimination on the basis of a Patient-Employee's status as a medical marijuana cardholder:

No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an

employee's compensation, terms, conditions, locations or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana.

35 P.S. § 10231.2103(b). However, the MMA also provides:

Nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment. This act shall in no way limit an employer's ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position.

35 P.S. § 10231.2103(b).

Further, the MMA sets forth a "Safety Exception" that protects employers in safety-sensitive industries who prohibit Patient-Employees from working under the influence of medical marijuana. The MMA states:

A patient may be prohibited by an employer from performing any task which the employer deems life-threatening, to either the employee or any of the employees of the employer, while under the influence of medical marijuana. The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient.

A patient may be prohibited by an employer from performing any duty which could result in a public health or safety risk while under the influence of medical marijuana. The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient.

35 P.S. § 10231.510(3), (4).

In Defendants' Motion for Summary Judgment, J.R.K. and Ms. Snare argue, *inter alia*, that this statutory Safety Exception entitles them to judgment as a matter of law on Mr. Clark's Wrongful Discharge claim brought under the MMA. When I originally denied J.R.K. and Ms. Snare's for Motion for Summary Judgment, I did so not because I

determined that the Safety Exception was inapplicable. Instead, I determined that there was a genuine dispute of fact regarding whether Mr. Clark's admission that he would always have marijuana in his system constitutes being "under the influence" within the meaning of the MMA's Safety Exception.

The MMA does not define "under the influence" and Pennsylvania courts have not directly examined the issue.² Further, Mr. Clark was not drug tested in relation to his termination such that no evidence exists regarding the actual level or amount of marijuana that Mr. Clark "always" has in his system. Thus, when I denied Defendants' Motion, I contemplated that, at trial, both parties would present testimony and evidence to forge a technical or scientific definition of whether Mr. Clark's general admission that he always has marijuana in his system constitutes being "under the influence."

In the instant Motion for Reconsideration, J.R.K. and Ms. Snare argue that following my April 27th denial of Summary Judgment, the Pennsylvania Superior Court issued two decisions that sufficiently clarify the meaning of "under the influence" as applied to the facts of this case. Accordingly, J.R.K. and Ms. Snare argue that there is no longer a dispute of material fact and that Summary Judgment in Defendants' favor is

² There are two cases from the Commonwealth Court that acknowledge the MMA's Safety Exception, however neither case controls the outcome of this case. Although not directly relevant to the case, the Court in HACC, *supra*, touched on the Safety Exception. The Court noted in dicta that if the claimant nursing student had been an employee, the defending institution "would apparently not be required to provide an accommodation" for her request to use medical marijuana because nursing "implicates a potential public health or safety risk." HACC, 245 A.3d at 292. In Jack Lehr Electric v. Unemployment Comp. Bd. of Review, the Commonwealth Court quoted an excerpt from the Unemployment Compensation Review Board's determination in which the Board noted that the Safety Exception did not impact the entitlement to benefits of a warehouse employee (a medical marijuana cardholder) discharged after testing positive for marijuana because the employer had presented no evidence of the exception's applicability. 255 A.3d 712, 717 (Pa. Commw. Ct. 2021).

appropriate.

For the reasons that follow, recent developments in Pennsylvania case law entitle J.R.K. and Ms. Snare to reconsideration of their Motion for Summary Judgment. Further, in light this newly-decided case law, there is no remaining dispute of fact and J.R.K. and Ms. Share are entitled to judgment as a matter of law.

I. Motion for Reconsideration

J.R.K. and Ms. Snare argue that the following newly decided cases resolve any dispute regarding whether Mr. Clark's admission that he will always have marijuana in his system constitutes being "under the influence" for purposes of the MMA's Safety Exception: Commonwealth v. Dabney, 274 A.3d 1283 (Pa. Super. 2022) and Commonwealth v. Haney, No. 510 WDA 2021, 2022 WL 2311239 (Pa. Super. June 28, 2022). Because these cases were decided after I issued my decision to deny summary judgment, J.R.K. and Ms. Snare argue that they are entitled to reconsideration of their Motion.

Reconsideration of a motion is appropriate when a newly decided case has changed, altered, or extended the law upon which the motion was decided. Harry v. McNay, 17 Pa. D. & C. 4th 158, 160, 1992 WL 563422 at *2 (Greene Co. Ct. of Comm. Pl. 1996) (citing Vincent v. Fuller, 582 A.2d 1367, rev'd in part on other grounds, 616 A.2d 969 (Pa. 1992)); Harrity v. Med. Coll. of Penn. Hosp., 653 A.2d 5, 8–9 (Pa. Super. 1994) (discussing the standard for examining a motion for reconsideration filed on the basis of new case law); Shapiro v. Albert Einstein Med. Ctr., 71 Pa. D & C. 4th 272, 2005 WL 1801991 (Phila. Co. Ct of Common. Pl. 2005). To explain why reconsideration of J.R.K. and Ms. Snare's Motion for Summary Judgment is warranted, I

the MMA, the Controlled Substance, Drug, Device and Cosmetic Act (CSA),⁴ and marijuana-related⁵ driving under the influence (DUI) laws. It was clear that, notwithstanding the MMA, all marijuana—including medical marijuana—remains a Schedule I controlled substance under the CSA. See Commonwealth v. Jezzi, 208 A.3d 1105, 1115 (Pa. Super. 2019). It was also clear that in a prosecution for driving under the influence of marijuana, the MMA does not create an affirmative defense or require the Commonwealth to prove that the marijuana in a defendant’s blood at the time of driving was not medical marijuana. See Commonwealth v. Wagner, No. 491 WDA 2021, 2022 WL 1016638 at *7 (Pa. Super. Apr. 5, 2022) (unpublished); Commonwealth v. Stone, 273 A.3d 1163, 1172–73 (Pa. Super. 2022).

However, when I denied Defendants’ Motion for Summary Judgment, the Superior Court had not directly addressed whether a medical marijuana cardholder who claims to have consumed only medical marijuana prior to operating a vehicle can be found guilty of driving under the influence.⁶ On May 5, 2022, after I denied J.R.K. and

⁴ 35 P.S. § 780-101–780-144.

⁵ 75 Pa.C.S. § 3802(d)(1)(i),(iii).

⁶ In both Wagner and Stone, *supra*, the Superior Court addressed interlocutory questions and expressly refrained to rule on the merits of this question. In Wagner, the Court certainly intimated its position on the issue, noting that the “CSA and Motor Vehicle Code still render illegal for a person to drive a motor vehicle with marijuana or its metabolites in their blood,” but explicitly limited its decision to the interlocutory question at hand. See Wagner, No. 491 WDA 2021, 2022 WL 1016638 at *8 n.9. In Commonwealth v. Stone, the Superior Court again addressed an interlocutory appeal based on a trial court’s proposed jury charge in a case involving marijuana-related DUI charges. The Stone Court rejected the trial court’s plan to instruct the jury that medical marijuana is not a Schedule I controlled substance and that to convict the defendant, the Commonwealth must prove beyond a reasonable doubt that the defendant drove with non-medical marijuana in his system. Stone, 273 A.3d at 1172–73. The Court clarified that marijuana’s Schedule I designation includes all marijuana—even medical marijuana. Id. at 1172. However, like the Wagner Court, the Stone Court refrained from reaching the merits of the underlying action. The Court specifically rejected the

Ms. Snare's Motion, the Superior Court broached the issue in Commonwealth v. Dabney, 274 A.3d 1283 (Pa. Super. 2022). The defendant in Dabney was charged with various marijuana-related DUI offenses.⁷ At the time of the stop, the arresting State Trooper smelled a strong odor of marijuana coming from the car, noticed "flakes of suspected marijuana around the console and front passenger seat," and found "three individually packaged clear plastic bags containing suspected marijuana in the vehicle." Id. at 1286. The defendant provided the State Trooper with his medical marijuana card. Id. The defendant was nonetheless transported to a hospital for a blood test, which revealed that he had "active marijuana compounds and metabolites" in his system. Id.

On appeal, the defendant argued that his valid prescription for medical marijuana should have prevented prosecution on the DUI charges that he faced. Id. at 1287. The Superior Court disagreed, reaffirming that the MMA was not intended to change the CSA's classification of marijuana—medical or otherwise—as a Schedule I controlled substance. Id. at 1291. The Dabney Court emphasized that there is no conflict between the MMA and the Motor Vehicle Code; the MMA does not exempt a driver with a medical marijuana card from the general prohibition against driving or operating a vehicle with any amount of marijuana or its metabolites in the driver's system. Id. To support this conclusion, the Dabney Court reasoned that while the MMA permits the growth, processing, manufacture, acquisition, transportation, sale, dispensing, distribution, possession, and consumption of medical marijuana, it does not permit

Commonwealth's request to "determine whether a defendant can be found guilty of DUI under 75 Pa.C.S. § 3802(d)(1) [of the Motor Vehicle Code] if that defendant has any amount of marijuana in his system while driving a motor vehicle, even if that defendant has a medical marijuana card." Id. at 1173.

⁷ The defendant was also charged with violating the MMA. Dabney, 274 A.3d at 1286.

“**driving** with a controlled substance in one’s blood.” Id. at 1291–92 (emphasis in original).

The Superior Court reached the same conclusion in Commonwealth v. Gordon, No. 543 MDA 2021, 2022 WL 2232464 (Pa. Super. June 22, 2022) (unpublished). Here, the Court noted that while Pennsylvania DUI statutes “may lead to harsh consequences for patients with a valid medical marijuana prescription,” the strict prohibitions simply “do not offend the MMA” because the DUI laws simply prohibit **driving** with marijuana or metabolites in the driver’s blood, not the mere usage of medical marijuana. Id. at *5.

The Court emphasized this idea again in Commonwealth v. Haney, a case with facts strikingly similar to the instant matter. In Haney, the defendant was pulled over simply for lacking an inspection sticker; he was not exhibiting any signs of impairment as he operated his vehicle. Haney, No. 510 WDA 2021, 2022 WL 2311239, at *1 (Pa. Super. June 28, 2022). However, when he spoke with the State Trooper who initiated the stop, the defendant volunteered the information that he “had a prescription for medical marijuana[,] and that he use[d] it most nights, including the previous one.” Id. Following this admission, the State Trooper noticed that the defendant was “fidgety and nervous,” so she “asked him to lean back and close his eyes,” at which time the Trooper observed the defendant’s eyes “bouncing around.” Id. After his dissatisfactory performance on field sobriety tests, the defendant was transported for a blood draw and was found to have “1.2 nanograms of Delta-9 THC per milliliter of blood” and 5.4 nanograms per milliliter of THC’s inactive metabolite Delta-9 Carboxy-THC. Id.

Notably, the defendant’s conviction was affirmed even though the State Trooper

did not notice the odor of marijuana in the vehicle and the defendant—who had a valid prescription—claimed to have ingested medical marijuana through vaporization at approximately 11:00 or 11:30 the night before he drove. Although there was no intimation that the defendant had used anything other than validly prescribed medical marijuana or that he had used medical marijuana in a way that violated the MMA, the Superior Court reinforced Pennsylvania’s zero-tolerance policy against a driver operating a vehicle with any amount of marijuana or its metabolites in the driver’s system. The Court reiterated that the defendant “was not denied any privilege solely for ‘lawful use of medical marijuana’” because “[d]riving after using medical marijuana, a Schedule I controlled substance, is not included in ‘lawful use of medical marijuana’ under the MMA.” *Id.* at *6 (emphasis supplied).

The pre-Dabney cases laid the groundwork for developing a definition of “under the influence” by establishing that notwithstanding the MMA, all marijuana remains a Schedule I controlled substance and that the MMA does not create an affirmative defense to DUI charges. However, the pre-Dabney cases did not directly examine whether, following the enactment of the MMA, a driver with prescribed marijuana or its metabolites in his system could be convicted of DUI charges. Dabney and its progeny addressed this question head-on and unquestionably altered the law by limiting the MMA’s protections for medical marijuana patients who enter the Commonwealth’s roadways after using medical marijuana—even when the patient’s use wholly complies with the MMA. Consequently, newly decided Pennsylvania law has answered the pivotal question of whether Mr. Clark’s admission that he—a roadway flagger—always has prescribed marijuana in his system constitutes “being under the influence” for

purposes of the MMA's Safety Exception. Reconsideration of J.R.K. and Ms. Snare's Motion for Summary Judgment is, therefore, appropriate.

II. Merits of Defendants' Motion for Summary Judgment

When the relevant pleadings have closed, any party may move for Summary Judgment. Pa. R. Civ. P. 1035.2. Summary Judgment is proper when "the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law." Rausch v. Mike-Mayer, 783 A.2d 815, 821 (Pa. Super. 2001). "A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense and, therefore, there is no issue to be submitted to the jury." McCarthy v. Dan Lepore & Sons Co., 724 A.2d 938, 940 (Pa. Super. 1998) (citing Pa. R. Civ. P. 1035.2). In reviewing the merits of a motion for summary judgment, the court must view the record in the light most favorable to the nonmovant and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Toy v. Metropolitan Life Ins. Co., 928 A.2d 186, 195 (Pa. Super. 2007).

In their Motion for Summary Judgment, J.R.K. and Ms. Snare argue, *inter alia*, that J.R.K. was expressly permitted under the MMA's Safety Exception to prohibit Mr. Clark from using medical marijuana to minimize potential risks to Mr. Clark, his co-employees, and the general traveling public. Defendants argue that there is no dispute as to the facts entitling them to the protections afforded by the MMA's Safety Exception and that, consequently, Mr. Clark cannot make out a wrongful discharge claim under the MMA.

It is undisputed that, as a flagger, Mr. Clark's job duties included directing and controlling traffic on roadways impeded by construction projects while construction crews worked nearby. The nature of the work required Mr. Clark to wear a protective hat, safety vest, and glasses. In his deposition, Mr. Clark admitted that his life and the lives of the construction workers and the nearby drivers were "on the line" every day when he went to work. It is simply uncontroverted that J.R.K. and Ms. Snare deemed flagging while under the influence of marijuana a life-threatening, public safety risk. Moreover, it is clear that Mr. Clark understood the safety-sensitive nature of his work.

Thus, the sole remaining issue for determining whether the MMA's Safety Exception legitimizes Defendants' decision to prohibit Mr. Clark from using medical marijuana while employed as flagger is whether Mr. Clark's admission that he will always have marijuana in his system constitutes being "under the influence." In their Motion for Reconsideration, J.R.K. and Ms. Snare artfully fuse the criminal case law discussed above with the facts of the instant matter and present a poignant argument for why a roadway flagger's admission that he will always have marijuana in his system **must** constitute being "under the influence" under the MMA's "Safety Exception."

Defendants state:

There is no way to logically reconcile [the criminal] Superior Court cases which: (1) uphold that medical marijuana is a Schedule I drug; and (2) confirm the criminalization of medical marijuana in a driver's blood with [Mr. Clark's] claims that he should have been permitted to continue to engage in flagging on public highways with medical marijuana in his blood. In other words, [Mr. Clark] is seeking a result in this case in which Pennsylvania drivers continue to be criminally prosecuted for having marijuana in their blood, but that [Mr. Clark] should be permitted to direct traffic on public highways with marijuana in his blood. This result would be both absurd and unreasonable and was not the intention of the General Assembly when it drafted the MMA.

(Defs' Br. in Supp. of Mot. for Recons., Aug. 31, 2022, at 3).

I agree. Dabney and Haney emphasize that for all the protections that the MMA provides to cardholders, the “lawful use” of medical marijuana does not include **driving** after using medical marijuana. Lawful use of medical marijuana cannot, likewise, include **dressing in safety gear, entering the roadway, and directing drivers through precarious construction zones** after using medical marijuana. Any other conclusion would be utterly irrational. It would be untenable to hold a driver like the defendant Haney—whose blood test results arguably upheld his claim that he used prescribed marijuana only the night before driving—criminally culpable while allowing Mr. Clark to work on the Commonwealth’s roadways after admitting that he uses medical marijuana in the evenings and will always have the drug or its metabolites in his system.

Further, the MMA’s Safety Exception appears to account for the challenges that employers face when seeking to protect their employees and the general public from the dangers associated with performing safety-sensitive duties while under the influence of marijuana. The first subpart of the MMA’s “Prohibitions” section, which contains the at-issue Safety Exception, does not directly deal with employers and employees. Instead, the plain text of the statute makes the first “prohibition” applicable to **all** medical marijuana patients regardless of employment status. The provision bars all patients from operating certain chemicals and high-voltage electricity or other public utility with more than “10 nanograms of active tetrahydrocannabinis per milliliter of blood in serum.” 35 P.S. § 10231.510(1).

In contrast to this generally-applicable “prohibition,” the at-issue Safety Exception

specifically applies only to Patient-Employees and their employers. See 35 P.S. § 10231.510(2), (3). This employment-based prohibition noticeably lacks any specific reference to blood serum concentrations of marijuana and instead allows employers to prohibit Patient-Employees from working in safety-sensitive positions while “under the influence of medical marijuana.” Id. The General Assembly’s clear choice to omit a specific nanogram level that employers may allow or prohibit relieves employers of a practically impossible-to-execute duty.

First, most on-the-job drug testing methods reveal only whether the tested individual has used marijuana—not the concentration of marijuana in the individual’s system or whether the individual is impaired. Drug testing is simply “not a reliable indicator of active impairment from cannabis.”⁸ Second, because of technical and logistical limitations, other on-the-job impairment monitoring techniques are not readily available to enable employers in safety-sensitive industries to ensure that their employees are not impaired on the job.⁹ These serious practical challenges illuminate the necessity of the continued statutory and judicial commitment to defining “under the influence” as “any amount” for drivers operating vehicles on the Commonwealth’s roadway. These challenges also demand a consistent approach for safety-sensitive employees—especially those working on roadways alongside drivers. For these reasons, to construe “under the influence” to mean anything other than having any amount of marijuana in a Patient-Employee’s system would be altogether unreasonable.

The material facts are undisputed: while Mr. Clark was employed as a roadside

⁸ Cannabis and the Workplace. BLOOMBERG LAW (July. 22, 2022), <https://pro.bloomberglaw.com/brief/cannabis-and-the-workplace/>.

⁹ Id.

flagger, he admitted to his employer that he, a medical marijuana cardholder, always has marijuana in his system. Flaggers work in potentially life-threatening conditions performing duties that could clearly result in public health or safety risks if performed under the influence of marijuana.

The law is also clear: Mr. Clark's admission that he will always have marijuana in his system must constitute being under the influence within the meaning of the MMA's Safety Exception. J.R.K. and Ms. Snare's decision to prohibit Mr. Clark from flagging while having medical marijuana in his system is protected by the MMA's Safety Exception and shall not be deemed an adverse employment decision. Therefore, Mr. Clark cannot make out a wrongful discharge claim under the MMA.

CONCLUSION

For the foregoing reasons, in light of newly decided case law, Summary Judgment will be granted in Defendants' favor and Plaintiff's single-count Complaint will be dismissed. An appropriate order shall issue.

will outline the law that existed at the time that I denied Defendants' Motion and will then examine the ways in which Dabney and Haney altered the precedential landscape.

Since the MMA was enacted, no Pennsylvania court has had occasion to examine the meaning of "under the influence" as used in the MMA's "safety exception." However, the Superior Court has had numerous opportunities to examine the MMA's impact on the criminal culpability of medical marijuana cardholders charged with marijuana-related offenses. Although the instant matter is not a criminal case, I find that the jurisprudence analyzing the Commonwealth's zero-tolerance stance toward an individual who drives, operates, or controls a vehicle with any amount of marijuana in his or her system³ is clearly relevant to the case at hand.

Here, the pivotal issue on summary judgment is whether Mr. Clark's admission that he will always have marijuana in his system constitutes being "under the influence." Prior to his termination, Mr. Clark was a flagger who worked on the Commonwealth's roadways and who was directly responsible for ensuring the safety of drivers navigating complex construction sites. Therefore, the case law governing whether the MMA protects a medical marijuana patient who drives with prescribed marijuana or its metabolites in his or her system speaks directly to the proper conceptualization of the term "under the influence" as used in the MMA and as applied to the facts of this case.

At the time that I denied Defendants' Motion for Summary Judgment, the Superior Court had already laid important groundwork regarding the interplay between

³ The relevant portion of the DUI statute provides that an "individual may not drive, operate or be in actual physical control of the movement of a vehicle" when "[t]here is in the individual's blood **any amount** of a . . . Schedule I controlled substance" or a "metabolite" of a Schedule I controlled substance. 75 Pa. C.S. § 3802(d)(1)(i), (iii) (emphasis supplied).