

## WAS APPLICANT NOT HIRED FOR FAILING DRUG TEST, OR BECAUSE HE WAS HIV POSITIVE?



A job hopeful who applied for a position at a clinic was not hired after failing a drug test. He claims that, since he's HIV positive, the clinic was merely using the failed drug test as a pretext, thereby violating the ADA (Americans with Disabilities Act). The man put in an application at the Beatrice Keller Clinic in Arizona. He then underwent a drug test, as required for all applicants. The drug results came back positive for THC (tetrahydrocannabinol), which might be indicative of marijuana use. The man, however, had a prescription for Marinol, a drug that helps with HIV patients' weight loss or loss of appetite and also contains THC. But because his medical records did not indicate a prescription for Marinol, the clinic refused to hire him. The man took the clinic to court, alleging an ADA violation. In response to a claim of pretext, an employer must show that an "adverse employment decision" – in this instance, the refusal to hire – was based on a legitimate, nondiscriminatory reason. The simple reason of a failed drug test was sufficient enough to satisfy the district court. Once a legitimate reason has been established, or at least asserted, the plaintiff must show that the stated reason is actually a smokescreen for discrimination – and here the man was unsuccessful. He cited a female applicant, but she was not in a similar situation as the plaintiff because she had not failed the drug test. More significantly, she likewise was not hired for the position, which didn't prove any preferential treatment. The man then argued that the clinic deviated from its company policy when his offer of employment was withdrawn before the positive drug test was confirmed. But judges did not see the reputed deviation as being harmful to the plaintiff. The second test corroborated the original positive screen, and the man admitted to using Marinol. The plaintiff further claimed that the clinic was wrong in requiring a prescription to explain the positive results and its quick decision in not hiring him when learning that his medical records did not include a prescription for Marinol. But judges believed that this point concerned "appropriate business judgment" and would not support an argument of pretext. The plaintiff also asserted that the clinic had not provided a reasonable accommodation for his disability. But the man had never asked that his disability be accommodated, and no employer is obligated to accommodate a person when an accommodation hasn't been requested. Judges noted that the man's failure to indicate his prescription for Marinol was not due to his condition. Consequently, the drug testing policy was not discriminatory because it did not inflict a heavier burden on him based on the fact that he was HIV positive. Appellate judges upheld all of the claims dismissed by the district court. Furthermore, judges affirmed the denial of the plaintiff's motion to amend the complaint and scheduling order. He had not filed a proper motion to amend until months past the deadline and close of discovery, so the courts decreed that he was "not reasonably diligent" and did not have "good cause" for the amendments that he proposed.