DOCKET NO.: UWY-CV21-6059734-S	:	SUPERIOR COURT
RYAN MORAN	:	J. D. OF WATERBURY
VS.	:	AT WATERBURY
AGC ACQUISITION, LLC D/B/A GAR KENYON AEROSPACE & DEFENSE	:	NOVEMBER 6, 2023

MEMORANDUM OF DECISION RE: MOTION FOR SUMMARY JUDGMENT #106.00

The defendant, AGC Acquisition, LLC D/B/A Gar Kenyon Aerospace & Defense ("defendant"), filed a February 27, 2023 motion for summary judgment with supporting memorandum of law (#106.00 and #107.00, respectively). The defendant asserts, that as a matter of law, it did not violate General Statutes § 21a-408p (b)(3) because § 21a-408p (b) contains a plain, clear and unambiguous prerequisite exception for actions required by federal mandates. Further, the defendant claims any state statute covering drug testing of aviation personnel performing safety-sensitive functions is preempted by the Federal Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. § 31306, et seq., ("FOTETA") and its supporting regulations. The plaintiff, Ryan Moran ("plaintiff"), filed a June 13, 2023 objection to motion for summary judgment with supporting memorandum of law (#111.00), countering that the defendant terminated plaintiff's employment in violation of General Statutes § 21a-408p — the palliative use of marijuana statute entitled "Treatment of Student, Tenant or Employee Due to Status as Qualifying Patient or Primary Caregiver." The plaintiff asserts that there are genuine issues of material fact for the jury to decide, and summary judgment must be denied.

BACKGROUND

According to the defendant, AGC Acquisition LLC and Gar Kenyon Aerospace & Defense are sister divisions located in the same facility in Meriden, Connecticut. Both divisions have been

involved in the manufacture of aerospace products for the OEM ("Original Equipment Manufacturing") and MRO ("Maintenance and Repair Operations") and provide complex parts, components and assemblies to military and commercial enterprises across a global market for aerospace components. At all times relevant to the complaint, the defendant was a holder of Federal Aviation Administration (FAA) certificates that were required of those performing this work. Under those certificates, the defendant is mandated to follow all applicable FAA regulations that establish drug and alcohol prohibitions, and require testing. Any functions or positions in the defendant involved in working on MRO products were subject to drug-free requirements and drug testing under the FAA guidelines. The positions that were subject to these requirements were assembler testers, inspectors, quality supervision, quality technicians, rubber molders, CNC machine operator, and welders. Depending on processes, availability and scheduling requirements, and/or particular orders, individuals would be moved between the divisions with some frequency.

The defendant states that in late 2018, because of an anticipated vacancy, the defendant advertised to fill a second shift Gar Kenyon CNC operator position, which was subject to the drug prohibitions and drug-testing requirements under the FAA guidelines. It was determined that this position would continue to be subject to the FAA requirements, since it was anticipated that the employee hired would be the only CNC machine operator in either division available on second shift to work on MRO products. In December 2018, the plaintiff applied for the CNC operator position. He was interviewed by the Director of Human Resources, Jim Dempsey, and then jointly by the VP of Operations Mike Gumprecht; the Unit Business Manager, Christopher Busa; and a CNC programmer, Gary Goen. In both interviews, as is required by 14 CFR 120.109 (a) (5), Mr. Moran was specifically informed that the position was subject to the FAA drug prohibitions and

testing requirements, which included marijuana. In all three interviews with the defendant's management, the plaintiff indicated that would not be a problem. At no time in these interviews did he raise the issue of a medical marijuana card. On December 17, 2018, the Company sent the plaintiff a job offer letter to the plaintiff which clearly indicated that the offer of employment was conditional upon successfully completing a reference check, a physical examination, and a drug test. After being informed by their third party drug testing administrator that the plaintiff had tested positive for marijuana, the defendant informed him on December 27, 2018 that he had not successfully completed the drug test and as a result, the company was withdrawing its job offer. According to the defendant, the plaintiff, after being informed of such fact, stated that he had a medical marijuana card. He was informed that, under federal statutes and FAA drug testing guidelines, he could not be hired for the FAA governed position after testing positive for marijuana regardless of whether he had a "medical marijuana" card.

APPLICABLE STATUTES AND FEDERAL REGUATIONS

Federal regulation 14 CFR § 120.121 Preemption, which reads: "14 CFR § 120.121 Preemption. (a) The issuance of 14 CFR parts 65, 91, 121, and 135 by the FAA preempts any State or local law, rule, regulation, order, or standard covering the subject matter of 14 CFR parts 65, 91, 121 and 135, including but not limited to, drug testing of aviation personnel performing safety-sensitive functions."

Federal Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. § 31306, et seq., ("FOTETA") and its supporting regulations 49 CFR part 40 and 14 CFR part 120.

"14 CFR § 120.121 Preemption. (a) The issuance of 14 CFR parts 65, 91, 121, and 135 by the FAA preempts any State or local law, rule, regulation, order, or standard covering the subject

matter of 14 CFR parts 65, 91, 121, and 135, including but not limited to, drug testing of aviation personnel performing safety-sensitive functions."

General Statute § 21a-408p(b) states in part: "Unless required by federal law or required to obtain federal funding: . . . (3) No employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient or primary caregiver under sections 21a-408 to 21a-408n, inclusive . . . ."

"14 CFR § 120.121 Preemption. (a) The issuance of 14 CFR parts 65, 91, 121, and 135 by the FAA preempts any State or local law, rule, regulation, order, or standard covering the subject matter of 14 CFR parts 65, 91, 121, and 135, including but not limited to, drug testing of aviation personnel performing safety-sensitive functions."

14 CFR § 120.105 states in pertinent part: "Each employee . . . who performs a safety-sensitive function listed in this section directly . . . for an employer as defined in this subpart must be subject to drug testing under a drug testing program implemented in accordance with this subpart. . . . the safety-sensitive functions are:

(a) Flight crewmember duties.
(b) Flight attendant duties.
(c) Flight instruction duties.
(d) Aircraft dispatcher duties.
(e) Aircraft maintenance and preventive maintenance duties.
(f) Ground security coordinator duties.
(g) Aviation screening duties.
(h) Air traffic control duties.
(i) Operations control specialist duties."

14 CFR § 120.109 states in pertinent part: "Each employer shall conduct the types of testing described in this section in accordance with the procedures set forth in this subpart . . . . (a) Pre-employment drug testing.

(1) No employer may hire any individual for a safety-sensitive function listed in § 120.105 unless the employer first conducts a pre-employment test and receives a verified negative drug test result for that individual."

DEFENDANT'S POSITION

The defendant is a FAA certified Air Agency Repair Station. The second shift Gar Kenyon CNC job at issue was covered by the FAA testing requirements. Federal law and the FAA regulations prohibit the defendant from placing anyone who has tested positive for marijuana in such job, regardless of any state issued medical marijuana card. It is the defendant's position that General Statutes § 21a-408p (b)(3), which the plaintiff claims has been violated, specifically excludes FAA governed positions from its prohibition against refusing to hire or discharging employees who would otherwise be protected by the statute. If the state statute did not exclude this situation from coverage, it would be preempted by the FOTETA of 1991, 49 U.S.C. § 31306, et seq., and its supporting regulations, 49 CFR part 40 and 14 CFR part 120, which are controlling.

Some of the undisputed material facts necessary for resolution of this matter are contained in the pleadings. In late 2018, the defendant advertised a position for a second shift Gar Kenyan CNC operator, and the plaintiff applied for the position. On December 17, 2018, the plaintiff was given a job offer contingent upon, among other things, a successful negative drug test. The plaintiff underwent a drug screening and the report came back positive for marijuana. Based upon the positive marijuana test, the Company rescinded the job offer. The plaintiff stated that he had a medical marijuana card. The defendant has never seen proof of the medical marijuana card, but will assume for purposes of this motion he has one.

The other material facts not contained in the pleadings but irrefutably substantiated by the attached documents and affidavits, according to the defendant are as follows. The defendant is involved in the manufacture of aerospace products for both the OEM and MRO, and provides complex aerospace components, and parts for military and commercial enterprises. The Company is required by law, and did in fact obtain, Federal Aviation Administration ("FAA") Certificates designating the defendant as an "Air Agency" empowered to operate an FAA approved "Repair Station." The holders of such Certificates are required by law to follow the FAA mandated controlled substance and alcohol regulations, which not only require, inter alia, preemployment drug testing and random drug testing, but also prohibit using any individual who has a verified positive drug test or prohibited drugs in his system from performing any work under these certificates. The Second Shift Gar Kenyon CNC Operator position was subject to the FAA Drug Free and Drug Testing Requirements. Marijuana is a prohibited drug under the FAA regulations, regardless of whether the person has a state-issued medical marijuana card.

More than 30 years ago, Congress, in an effort to protect public safety in transportation, passed extensive legislation regarding drug testing and prohibitions in land transportation and aviation. This legislation, the FOTETA of 1991, 49 U.S.C. § 31306, et seq., is administered by the Department of Transportation ("DOT") and the FAA, each of which require adherence to its regulations set forth in 49 CFR part 40 and 14 CFR part 120. As a Certificate holder, the defendant is mandated to follow all the applicable regulations regarding drug and alcohol testing, and prohibitions. A review of the applicable regulations establishes that under FAA regulations, the second shift Gar Kenyon CNC operator position is subject to the agency's drug prohibition and testing requirements, as marijuana is a prohibited drug under the FAA regulations regardless of

whether the plaintiff has a state-issued medical marijuana card; and once the plaintiff failed his preemployment FAA mandated drug test, the Certificate holder, the defendant, was required by law not to use or employ the plaintiff in the second shift Gar Kenyon CNC operator position. According to the defendant, C.F.R. §120-105 § 120.105 identities the employees performing safety-sensitive functions who must be tested, and the CNC Machinist position is a safety-sensitive position.

The federal regulations are quite specific concerning Certificate holders' responsibilities with respect to someone testing positive for a prohibited substance performing work in a designated safety sensitive position. See 14 CFR § 120.33 Use of Prohibited Drugs. The defendant as an FAA Certificate holder, is required to follow all the FAA regulations regarding drug prohibition and testing. The second shift Gar Kenyon CNC operator position was a position covered by the FAA regulations regarding drug prohibition and testing. Marijuana is a prohibited drug under the FAA regulations and once the plaintiff tested positive for marijuana on his FAA required drug test, the defendant was prohibited under those regulations from employing the plaintiff as the Second Shift Gar Kenyon CNC Operator.

The crux of the plaintiff's case is laid out in paragraphs 21 and 22 of the complaint which read: "21. CGS 21a - 408p (b)(3) prohibits an employer from discriminating against an individual by refusing to hire, discharging, penalizing or threatening an employee based on their status as a qualified patient under the statute. By failing to hire plaintiff because he is a qualified patient, both erroneous and misleading, as they ignore a crucially important prerequisite exception to this section with respect to federal mandates. The General Statute § 21a-408p (b) actually reads, in relevant part: "Unless required by federal law or required to obtain federal funding: . . . (3) No

employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient or primary caregiver under sections 21a-408 to 21a-408n, inclusive . . . ." The statutory exception for actions that were required by federal law is plain, clear and unambiguous. It is specifically meant to apply to the very situation at issue here. It is the defendant's position that application of the statutorily mandated plain meaning rule to interpret the applicable language of § 21a - 408p (b)(3) inevitably and irrefutably leads to the conclusion that the defendant, mandated by federal law to follow specific DOT/FAA guidelines, did not violate the § 21 a - 408p (b)(3) as a matter of law. Based upon the unequivocal language in the statute itself, the defendant did not violate General Statutes § 21 a - 408p (b)(3) and the defendant is entitled to judgement. However, it is also the position of the defendant that even absent that language, the statute would be preempted by federal law.

In *Pond* v. *Town of North Branford*, 2011 WL 3278577, the plaintiff, who was subject to DOT drug testing requirements, filed a complaint against the defendant, alleging that the Town failed to accommodate his disability in violation of the Connecticut Fair Employment Practices Act, General Statutes §§ 46a-60, et seq. ("CFEPA") when the Town refused to allow requested drug testing accommodations beyond what was provided under DOT regulations. The Town filed a motion to strike the complaint on the ground that the plaintiff's CFEPA claim is preempted by the FOTETA of 1991, 49 U.S.C. § 31306, et seq., and its supporting regulations. In the decision the court delineates the three circumstances under which federal law will pre-empt state law. "Constitutional jurisprudence recognizes that the laws and regulations of a state may be preempted by federal laws or regulations in three circumstances: First, Congress can define explicitly the extent to which its enactments pre-empt state law . . . Pre-emption fundamentally is a question of

congressional intent . . . and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one. Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively . . . Finally, state law is pre-empted to the extent that it actually conflicts with federal law. (Citations omitted; internal quotation marks omitted.) *Papic* v. *Burke*, 113 Conn. App. 198, 205-06, 965 A.2d 633 (2009)." Id *5. The court concluded that "Accordingly, to the extent that CFEPA requires an employer to provide reasonable accommodations for a disability beyond that which FOTETA and its regulations already provide for, FOTETA and its regulations preempt CFEP A." Id. *10.

The defendant claims that all three circumstances are present and additionally that the congressional intent for preemption in this area was explicitly and specifically communicated through the federal regulations, which read: "14 CFR § 120.121 Preemption. (a) The issuance of 14 CFR parts 65, 91, 121, and 135 by the FAA preempts any State or local law, rule, regulation, order, or standard covering the subject matter of 14 CFR parts 65, 91, 121, and 135, including but not limited to, drug testing of aviation personnel performing safety-sensitive functions." The court notes in *Pond* that "State laws can be pre-empted by federal regulations as well as by federal statutes and the same [interpretive] principles apply." *Pond* *6. Not only is the defendant entitled to summary judgment on the basis of the clear language of General Statutes § 21a- 408p (b)(3) but further would be entitled to summary judgment because the entire section of the state statute is preempted by the FOTETA of 1991, 49 U.S.C. § 31306, et seq., and its supporting regulations, 49 CFR part 40 and 14 CFR part 120.

The uncontradicted facts are as follows. The defendant is a FAA certified Air Agency Repair Station, and the second shift Gar Kenyon CNC job at issue was a position covered by the FAA mandated drug prohibition and testing requirements. The plaintiff tested positive for marijuana, and federal statutes and the FAA regulations prohibit the defendant from placing in safety-sensitive position anyone who has tested positive for marijuana, regardless of any state issued medical marijuana card. Based on these undisputed facts, the defendant did not violate General Statutes § 21 a - 408p (b)(3) because § 21 a - 408p (b) contains a plain, clear and unambiguous prerequisite exception for actions required by federal mandates and further the entire section of the state statute is preempted by the Federal Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. § 31306, et seq., and its supporting regulations. The defendant requests the court to grant its motion for summary judgement as a matter of law.

PLAINTIFF'S POSITION

The defendant terminated plaintiff's employment in violation of General Statutes § 21a-408p — the Palliative Use of Marijuana Statute, entitled "Treatment of Student, Tenant or Employee Due to Status as Qualifying Patient or Primary Caregiver." The defendant hired the plaintiff for the job position called Second Shift CNC Machine Operator. The primary duties of the job, according to the job-offer letter, consisted of "the machining and fabrication of detailed parts and components for a variety of mechanical valve products. The job offer letter did not identify the position as an FAA safety sensitive position. The defendant's written job description summarizes the job: "[s]ets up and operates conventional, special purpose, and numerical control (NC) machines and machining centers to fabricate metallic and nonmetallic parts by performing the following duties." The written job description makes no mention of the position being safety

sensitive. The Second Shift CNC Machine Operator position involves OEM, but did not involve aircraft maintenance. The job offer letter and the written job description make no mention of MRO. According to the plaintiff, the defendant interviewed the plaintiff for the job, and during the interview, the defendant did not inform plaintiff that his position would involve MRO work, nor did the defendant inform the plaintiff that the job position was safety sensitive within the meaning of the FAA regulaitons. During the interview, the defendant did not notify plaintiff that the position was subjected to the "FAA testing guidelines." At no time prior to rescinding the job offer did the defendant tell the plaintiff that his job was an FAA safety-sensitive position. At no time prior to rescinding the job offer did defendant tell plaintiff it intended to use him in AGC operations.

The plaintiff directs the court that "[S]ummary judgment procedure is particularly inappropriate where the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions." (Internal quotation marks omitted.) *Suarez* v. *Dickmont Plastics Corp.*, 229 Conn. 99, 111, 639 A.2d 507 (1994). See also *Picataggio* v. *Romeo*, 36 Conn. App. 791, 794, 654 A.2d 382 (1995) ("[a] question of intention raises an issue of material fact, which cannot be decided on a motion for summary judgment").

The documents (job offer letter, written job description) make no mention of the CNC job falling under the regulatory purview of the FAA. None of the defendant's documents support defendant's claim that the CNC job position was an MRO job or a safety-sensitive job as that term is defined under the FAA regulations. The defendant's claim that the position was a FAA safety sensitive position is entirely based upon after-the-fact affidavit testimony created in the context of defending a legal claim. At no time during the hiring process did defendant orally notify the plaintiff that he was applying for or being offered as an FAA safety-sensitive job. The plaintiff

was not told that he would be performing MRO work nor was he told that he would be doing work for the AGC operations. He was not told any of these things because the job he was hired to do was not an FAA safety-sensitive position. According to the plaintiff, under C.F.R. § 120-105 § 120.105, which identities the employees performing safety-sensitive functions who must be tested, and the CNC Machinist position offered to the plaintiff was not one of these safety-sensitive position.

The plaintiff asserts that the position offered to him did not fall under any of the categories identified in the federal regulation. The job offer letter does not identify any of the FAA safety-sensitive jobs, nor does it mention the term "FAA." The written job description makes no mention of the FAA and fails to identify any of the FAA safety-sensitive jobs. The defendant took the time and the effort and put in the effort create the written job description and compose the job offer letter. Telling is the documents silence on the job being an FAA safety-sensitive position. Without supporting contemporaneous documents, the defendant relies upon its employees' affidavit statements where they all claim that plaintiff was orally notified that the job was a FAA safety-sensitive position. The defendant did not verbally notify the plaintiff that he was applying for and was being hired for a FAA safety-sensitive job position, not did the defendant verbally notify the plaintiff that the position involved MRO work. The defendant did not verbally tell the plaintiff that he was subjected to the "FAA testing guidelines." The job did not fall under the FAA safety-sensitive regulatory framework; therefore, summary judgment should be denied.

Under Connecticut law, employees and job applicants who legally use medical marijuana generally cannot be subject to employment discrimination on that basis. Connecticut General Statutes § 21a-408p, which is part of the Palliative Use of Marijuana Act ("PUMA"), states: "No

employer may refuse to hire a person or may discharge, penalize[,] or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient or primary caregiver" under the PUMA. The plaintiff was a qualifying patient under PUMA, and the defendant does not argue otherwise. The defendant has the initial burden of negating the claim as framed in the complaint. It is undisputed that defendant rescinded the job offer because of the positive drug test for marijuana. The whole point of PUMA is to bar employers from firing or refusing to hire an employee who uses medical marijuana in compliance with the requirements of Connecticut law. This defendant violated the law when it rescinded plaintiff's job offer and refused to hire him despite plaintiff having a medical marijuana card within the meaning of PUMA. For the foregoing reasons, defendant's motion for summary judgment should be denied.

DEFENDANT'S POSITION RE: AT WILL EMPLOYMENT

On the record are the following undisputed material facts:

"The Defendant is involved in both OEM (Original Equipment Manufacturing) and MRO (Maintenance and Repair Operations) for military and commercial aerospace enterprises. (See Exhibits 1, 2 and 3.)

Since 2001 the Defendant has had a Federal Aviation Administration (FAA) Certificate designating the Company as an "Air Agency" empowered to operate an FAA approved "Repair Station" (See Exhibit 5 and 4) as mandated by the Federal Omnibus Transportation Employees Testing Act of 1991, 49 U.S.C. § 31306, et seq., (FOTETA).

As a Certificate Holder, the Defendant is required to follow the FAA controlled substance and alcohol regulations, which not only require preemployment and random drug testing, but also prohibit using any individual who has a verified positive drug test from performing any work. (See Exhibits 1, 2 and 3 and 14 CFR § 120.33.)

Marijuana is a prohibited drug under the FAA regulations regardless of whether the person has a state issued medical marijuana card. (See Exhibit 7 and 49 CFR § 40.3.)

The Second Shift Gar Kenyon CNC Operator position was subject to the FAA Drug Free and Drug Testing Requirements. (See Exhibits 1, 2 and 3 and 14 CFR 120.105 (e).)

Plaintiff, on December 17, was given a job offer contingent upon, among other things, a successful negative drug test. (See Exhibit 6.)

Plaintiff underwent a drug screening and the report came back positive for marijuana. (See Exhibit 1.)"

Based upon the positive marijuana test, the defendant rescinded the job offer. (See Exhibit 1.) Despite these undisputed facts, and three affidavits describing two separate meetings where the issue of FAA drug testing was discussed with the plaintiff (See Exhibits 1, 2 & 3), he claimed in his affidavit that he never was informed that the position was subject to the FAA drug regulations. (See Exhibit 3 attached to Plaintiffs Objection to Defendant's Motion for Summary Judgment.) This discrepancy is only relevant to the motion for summary judgment if this issue of whether he was specifically told is a material fact. The defendant contends that it is not. Our Supreme Court has opined that a "material fact has been defined adequately and simply as a fact which will make a difference in the result of the case." *Catz* v. *Rubenstein*, 201 Conn. 39, 48, 913 A.2d 98 (1986). It is the position of the defendant that whether the plaintiff was told about the FAA requirements makes no difference in the result of the case. For the reasons articulated below, this issue is not a material fact.

In a declaratory judgment ruling in a case very much on point, *MN Airlines, Inc.* v. *Levander*, 2015 WL 5092495 the U.S. District Court in Minnesota, held that the Omnibus Transportation Employee Testing Act of 1991 preempted the Minnesota Drug and Alcohol Testing in the Workplace Act ("MDATWA"). In deciding the matter, the court opined a concise, but thorough, summary of federal preemption law. The court stated that "Under the Constitution's supremacy clause, a federal law may preempt a state statute in several ways. *English* v. *Gen. Elec. Co.*, 496 U.S. 72, 78, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990). Two types of federal preemption

are relevant here: conflict preemption and field preemption. Conflict preemption requires the preemption of a state's law 'to the extent that it actually conflicts with federal law.' Id. at 79. Thus, a state law is preempted 'where it is impossible for a private party to comply with both state and federal requirements.' Id. Field preemption exists when a state law 'regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.'" Id. *1.

In the instant case, "conflict preemption" and "field preemption" preclude the plaintiff from pursuing this matter under state statute. The plaintiff's position is that General Statutes § 21a-408p (b)(3) requires the defendant hire him to work as a second shift CNC operator despite the fact he tested positive for marijuana. FAA regulations (14 CFR § 120.33) specifically prohibit the defendant from employing the plaintiff in any safety sensitive function because of his verified positive marijuana drug test. Clearly, it would be impossible for the defendant to comply with both the state and the federal requirements, and therefore, "conflict preemption" requires the preemption of the state law.

In the present case, the argument for "field preemption" is equally compelling. "Preemption fundamentally is a question of congressional intent . . . and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." *Papic* v. *Burke*, 113 Conn. App. 198, 205-06, 965 A.2d 633 (2009). It does not get much easier than in the instant case. The congressional intent for preemption in this area was explicitly and specifically communicated through federal regulation 14 CFR § 120.121 Preemption, which reads:

> "14 CFR § 120.121 Preemption. (a) The issuance of 14 CFR parts 65, 91, 121, and 135 by the FAA preempts any State or local law, rule, regulation, order, or standard covering the subject matter of 14 CFR parts 65, 91, 121, and 135, including but not limited to,

> drug testing of aviation personnel performing safety-sensitive functions. (Emphasis added.)"

As the U.S. District Court stated in *MN Airlines, Inc.*, "The regulations promulgated under OTETA 'preempt any State or local law, rule, regulation, order, or standard covering the subject matter' of those regulations, 'including, but not limited to, drug testing of aviation personnel performing safety-sensitive functions.' 14 C.F.R. § 120.121(a) (emphasis added). Rarely is the intent of a law so clear: states may not regulate the drug testing of aviation personnel performing safety-sensitive functions. The MDATWA purports to do just that, by precluding airlines from terminating the employment of such personnel for an initial positive drug test. As such, it is preempted." Id. *2. The plaintiff is claiming a violation of General Statues § 21a-408p (b)(3), which is clearly preempted by federal law with respect to "drug testing of aviation personnel performing safety sensitive functions." The case should be dismissed on that basis. Whether the plaintiff was specifically told that the second shift CNC operator position was subject to FAA testing, has no impact on the federal preemption that removes the defendant from coverage under the state statute.

The defendant is an FAA Certificate Holder who must follow all the specific FAA requirements regarding drug prohibition and testing. The plaintiff tested positive for marijuana. Federal regulation 14 CFR § 120.33 Use of Prohibited Drugs strictly prohibits Certificate Holders from employing anyone in a safety sensitive function who has tested positive for marijuana. The plaintiff contends that not hiring him is in violation of state law because of his medical marijuana card. This is the dispute before the court. Whether he was told about the FAA requirements as the defendant contends, or not told about the FAA requirements as the Plaintiff claims, does not alter

this dispute in any manner. His being told, or not told, does not change the fact that once he tested positive for marijuana, the defendant was prohibited by federal law from employing him as the Second Shift Gar Kenyon CNC Operator. Under either scenario the exact same issue is before the court, and must be resolved in favor of the defendant.

The triggering event for this lawsuit is the defendant's rescinding of the job offer. Whether the plaintiff was told about the FAA requirements did not impact the job offer being rescinded. His job offer was rescinded solely because he failed the pre-employment drug test. Mr. Moran had clear notice that if he failed the pre-employment drug test, the job offer would be rescinded. His job offer letter (Exhibit 6) clearly states: "The terms of this offer of employment are as follows and are *conditional upon successfully completing* a pre-employment reference check, post offer physical and *drug test*. (Emphasis added in original.)

The plaintiff had fair and adequate notice of the drug testing requirement. By testing positive for marijuana he simply failed to meet the defendant's federally mandated standards for the CNC Operator position. Even if not preempted, General Statues § 21a-408p (b) (3) was not violated because this situation is squarely within crucially important prerequisite exception to this section which reads, "(b) Unless required by federal law or required to obtain federal funding:." In addition to the job offer letter (Exhibit 6), having clear, unambiguous language that the offer was conditional upon successfully completing the drug test, it also had very clear and specific language regarding the nature of the employment being offered. In relevant part, it states: ". . . this letter is not intended to be interpreted as a contract of any kind or nature, and is not a guarantee of continued employment. AGC is an at-will employer and there is no specific length of guaranteed of employment." "At will" employment has significant meaning in Connecticut. "At-will

employment grants both parties, the employee and the employer, the right to terminate the employment relationship at any time for any reason or for no reason without fear of legal liability. *Thibodeau* v. *Design Group One Architects, LLC*, 260 Conn. 691, 697-698, 802 A.2d 731 (2002). In *Petitle* v. *DSL.net, Inc.*, 102 Conn. App. 363, 371, 925 A.2d 457 (2007), the Appellate Court in upholding a defendant's motion for summary judgement ruled that this broad employer "at-will" discretion to terminate employment also extended to the job offer: ". . . in light of our case law, we conclude that logic dictates that no distinction should be drawn between the offer of employment and the actual act of employment when the employment relationship is at will. We hold, therefore, that the employment at will doctrine extends to offers of at-will employment." The defendant contends that if its "at-will" employment status, gives it the right to terminate the job offer for any reason, good or bad, or even for no reason, then it surely should shield a defendant from liability when it was simply following federal mandates as required by its FAA certifications.

The defendant cannot be guilty of violating a state statute specifically, General Statues § 21a-408p (b) (3), which with respect to the "drug testing of aviation personnel performing safety-sensitive functions" at issue here, is clearly pre-empted by the Federal Omnibus Transportation Employees Testing Act of 1991, 49 U.S.C. § 31306, et seq. What the plaintiff was or wasn't told has no impact whatsoever on the federal preemption of the state statute. Likewise, the plaintiff being told or not being told about the FAA requirements would make no difference in the result of the case, since, regardless of what he was told, once he tested positive for marijuana, federal law strictly prohibited the defendant from employing him in a safety sensitive position. The defendant again requests the court to grant its motion for summary judgement as a matter of law.

PLAINTIFF'S POSITION RE: AT WILL EMPLOYMENT

The PUMA statute § 21a-408p states: "No employer may refuse to hire a person or may discharge, penalize[,] or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient or primary caregiver" under the PUMA. PUMA does not distinguish between employees or job positions that are "at will"; governed by a collective bargaining agreement; or governed by contract. PUMA protects all employees and all applicants of employment from adverse employment actions caused by their status as a qualifying patient.

The contents of the complete job offer letter confirms that the job the plaintiff was to do was not FAA safety-sensitive. The job offer makes no mention of the job being FAA safety-sensitive or that the work included MRO. The contemporaneous documents (job offer letter, written job description) make no mention of the CNC job falling under the regulatory purview of the FAA or that the job involved MRO work. An employer's written job description is considered evidence of the essential functions and qualifications of the particular job. *Jarvela* v. *Crete Carrier Corp.*, 776 F.3d 822, 830 (11th Cir. 2011); *Curry* v. *Allan S. Goodman*, 286 Conn. 390, n.16, 944 A.2d 925 (2008). The employer is not going to put in the time and effort of creating a detailed multi-page written job description and leave out and essential function or essential qualification.

The verbal communications during the hiring process involved no mention of the job being FAA safety-sensitive or of the job involved MRO work because the job the plaintiff was to do was not FAA safety-sensitive or involving MRO work. An employer is not going to expend time and effort during the hiring process on applicants that it knows to be unqualified for the job. This is why hiring employers disclose the qualifications up front during the hiring process. The defendant did not disclose to plaintiff that the job was FAA safety-sensitive or involved MRO work because

the CNC job he was hired to do was not FAA safety-sensitive and did not involve MRO work. At a minimum, there is a genuine issue of material fact as to the qualifications of the job.

LEGAL STANDARD

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried. . . . However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary judgment." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534-35, 51 A.3d 367 (2012). When determining whether a genuine issue of material fact exists, the evidence must be viewed in the light most favorable to the non-moving party. *Brooks* v. *Sweeney*, 299 Conn. 196, 210, 9 A.3d 347 (2010); *LaFlamme* v. *Dallessio*, 261 Conn. 247, 250, 802 A.2d 63 (2002). The test is whether the moving party would be entitled to a directed verdict on the same facts. *Weber* v. *U.S. Sterling Securities*, 282 Conn. 722, 728, 924 A.2d 816 (2007); *Dugan* v. *Mobile Medical Testing Service*, 265 Conn. 791, 815, 830 A.2d 752 (2003).

"[T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist." (Citation omitted; internal quotation marks omitted.) *Barasso* v. *Rear Still Hill Road, LLC*, 81 Conn. App. 798, 803, 842 A.2d 1134 (2004). "On a motion for summary judgment, the court is not to make credibility determinations or weigh conflicting evidence in

deciding the motion for summary judgment . . . If the parties present conflicting evidence, it should be submitted to the fact finder." (Citations omitted.) *Papa* v. *Schroeder*, Superior Court, judicial district of Hartford, Docket No. CV–14–6052720–S (March 1, 2016, *Peck, J.*); see also *Martin* v. *Westport*, 108 Conn. App. 710, 728, 950 A.2d 19 (2008) (affirming trial court's granting of motion for summary judgment, reasoning that court may review, but not weigh, evidence).

"Summary judgment should be denied where the affidavits of the moving party do not affirmatively show that there is no genuine issue of fact as to all of the relevant issues of the case." (Internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, supra, 310 Conn. 304, 320, 77 A.3d 726 (2013). "Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court . . . ." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015). "Accordingly, the rule that the party opposing summary judgment must provide evidentiary support for its opposition applies only when the moving party has first made out a prima facie case for summary judgment. . . . [I]f the party moving for summary judgment fails to show that there are no genuine issues of material fact, the nonmoving party may rest on mere allegations or denials contained in his pleadings . . . ." (Citation omitted; internal quotation marks omitted.) *Romprey* at 320-21.

"Although the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion . . . a party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . A

party opposing a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Internal quotation marks omitted.) *Escourse* v. *100 Taylor Avenue, LLC*, 150 Conn. App. 819, 829-30, 92 A.3d 1025 (2014). "In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact . . . but rather to determine whether any such issues exist." (Internal quotation marks omitted; emphasis added.) *RMS Residential Properties, LLC* v. *Miller*, 303 Conn. 224, 233, 32 A.3d 307 (2011), overruled on other grounds by *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 325 n.18, 71 A.3d 492 (2013).

LEGAL ANALYSIS

At-Will Employment, Offers of At-Will Employment

The Appellate Court case of *Petitte* v. *DSL.NET, INC.*, 102 Conn. App. 363, 925 A.2d 457 (2007) provides guidance. The facts provide a rational basis for comparison to the matter here. The *Petitte* action arose after the defendant extended an offer for an at-will employment position to the plaintiff but the defendant changed its position and rescinded its offer, prior to the plaintiff's commencing employment with the defendant, but after he had left his former employment. On December 8, 2003, Ray Allieri, the defendant's senior vice-president, called the plaintiff and offered him a sales position. Allieri stated that the defendant would send the plaintiff an offer of employment letter and told him that his start date would be December 15, 2003. At the time, the plaintiff was employed by another company, as a district sales manager. The plaintiff informed the company that he was resigning in order to work for the defendant, following his conversation with Allieri but before he received the offer letter. On December 10, 2003, the plaintiff went to the

defendant's business and obtained the letter. The letter offered the plaintiff employment as the defendant's regional sales manager beginning December 15, 2003, and provided that the offer was contingent on "[the] plaintiff's understanding that the letter was not a guarantee of employment for any specified length of time by either party. While it is our hope that you will have a long and fruitful career with [the defendant], your employment will be 'at-will,' which means that either you or the company can terminate your employment at any time for any reason, with or without cause." Id. at 365. The plaintiff signed the letter, returned it to the defendant, and the defendant asked the plaintiff for a list of employment references, which the plaintiff provided. The defendant had not requested any references prior to issuing the letter.

On December 15, 2003, the plaintiff reported to the defendant's business to begin work. The plaintiff met with Allieri, who indicated that some of the defendant's employees had some concerns about hiring him. Allieri asked the plaintiff for additional employment references, and suggested that he return home and that Allieri would contact him there later. Allieri informed the plaintiff that evening that the defendant could not employ him. On December 18, 2003, the plaintiff received a letter rescinding the December 10, 2003 letter on the basis of the information that the defendant received from the plaintiff's references. The plaintiff attempted to return to his former employment but was unsuccessful.

The Appellate Court began its analysis. "We consider, as a matter of first impression in Connecticut, whether the employment at will doctrine extends to offers for at-will employment. Because we agree with the court that the employment at will doctrine applies to all aspects of the employment relationship and is not conditioned on the prospective employee actually commencing employment, we are not persuaded by this claim. It is well established that "[i]n Connecticut, an

employer and employee have an at-will employment relationship in the absence of a contract to the contrary. Employment at will grants both parties the right to terminate the relationship for any reason, or no reason, at any time without fear of legal liability. (Internal quotation marks omitted.) *Thibodeau* v. *Design Group One Architects, LLC*, 260 Conn. 691, 697–98, 802 A.2d 731 (2002)." *Petitte* at 367. The Appellate Court then quoted the trial court.

"In rendering summary judgment in favor of the defendant on the plaintiff's contract claim, the court referenced *Thibodeau* and stated: [The defendant] had the right to terminate its employment relationship with the plaintiff for any reason, or no reason, at any time. . . . It is hard to imagine a broader description of an employer's rights. An employment relationship with [the defendant] arguably started when the plaintiff signed and returned the December 10, 2003 offer letter. Clearly, on December 15, 2003, there was some kind of employment relationship that caused the [plaintiff] to report . . . to begin work. The point, however, is not the precise time when an employment relationship began or the exact contours of that relationship, but rather that [the defendant's] rights are not conditioned on the relationship reaching any particular point. The fact that [the defendant] exercised its rights before the plaintiff actually started work is not material. The only material fact is the at-will nature of the employment relationship. . . . In practical terms, this rule makes sense. An employer who changes its mind about a prospective employee should not be required to allow the person to actually commence duties before ending the relationship. In a situation like the present one, commencement of duties customarily involves access to confidential information and the beginning of an agency relationship. The law does not require employers to undertake such burdens for an unwanted at-will employee." *Petitte* at 367-68.

The Appellate Court noted that "we must determine whether, as a matter of law, the employment at will doctrine operates to shield employers from liability for terminating an employment relationship after making an offer but before the prospective employee commences work. As stated previously, this issue is one of first impression in Connecticut. Thus, we look for guidance to courts from other jurisdictions that have considered it." *Petitte* at 367-68. After reviewing cases from other jurisdictions, the Appellate Court found that "logic dictates that no distinction should be drawn between the offer of employment and the actual act of employment when the employment relationship is at will. We hold, therefore, that the employment at will doctrine extends to offers of at-will employment. We believe this clarification of the law serves to put employees on notice of the risk they take when leaving existing employment for another one. An individual leaving the employ of one entity for an at-will position with another should understand that he has no guarantee that he will be permitted to commence employment. Given our legal conclusion and the undisputed facts in the present case that the November 10, 2003 letter explicitly stated that the plaintiff's employment was terminable at will and that the plaintiff understood the terms of his employment, the court properly rendered summary judgment in favor of the defendant . . . ." Id. at 371.

Our Appellate Court's decision has been carried over in the U.S. District Court in *Pavia* v. *Severn Trent Services, Inc.*, 2015 WL 477180. The facts are simple. On August 14, 2013, the defendant extended to the plaintiff an offer of employment, that was contingent on the plaintiff's successful completion of pre-employment screening requirements, and the plaintiff completed the screening requirements. Relying on the defendant's promise of employment, the plaintiff did not

seek employment elsewhere. However, on December 27, 2013, the defendant rescinded its offer of employment based on its contention that the plaintiff failed the drug screening test.

The court noted that "'In Connecticut, an employer and employee have an at-will employment relationship in the absence of a contract to the contrary. Employment at will grants both parties the right to terminate the relationship for any reason, or no reason, at any time without fear of legal liability.' *Thibodeau* v. *Design Grp. One Architects, LLC,* 260 Conn. 691, 697-98 (2002). '[N]o distinction [is] drawn between the offer of employment and the actual act of employment when the employment relationship is at will.' *Petitte* v. *DSL.net, Inc.,* 102 Conn. App. 363, 371 (Conn.App.Ct.2007). "[T]herefore, . . . the employment at will doctrine extends to offers of at-will employment.' Id." (Internal quotations omitted). *Pavia*, *2.

The court opined that "Here, the plaintiff alleges that the defendant extended an offer of employment on August 14, 2013. The plaintiff also alleges that on December 27, 2013, the defendant rescinded its offer of employment based on its contention that the plaintiff failed a drug screening test. The plaintiff has not alleged the existence of a contract that would supersede his at-will offer of employment from the defendant. In fact, the defendant's August 14, 200[1]3 letter of offer of employment, which is attached to the Complaint, states: 'This offer is, of course, not an employment contract. . . . Severn Trent Services is an at-will employer. As an employee you may resign at any time. Similarly, Severn Trent may terminate the employment relationship at any time, with or without cause or notice.' (Compl., Exhibit A, Doc. No. 1.) Therefore, under Connecticut law, in the absence of a contract to the contrary, the defendant was able to rescind its offer of employment, and the plaintiff's First Cause of Action fails to state a claim upon which relief can be granted." *Pavia*, *2.

There is no doubt that this was an at-will employment relationship under normal circumstances. However, if the applicant is permitted the medical use of marijuana under PUMA, it is not a typical at-will employment situation, and termination for testing positive for marijuana if Puma applied,would give rise to a cause of action, unless the prohibition of marijuana usage was permitted under the exemption provided in General Statutes 21a-408p (b) (3). The inquiry, noted above is not complete, as PUMA casts another issue into the analysis. This court could not find any Connecticut case, at any level, dealing with an at-will employment relationship where the employee uses marijuana under PUMA. There is, however, clear appellate level authority on one aspect of this case. "Section 21a-408p proscribes the termination of a qualifying patient on the basis of the patient's status as such with limited exceptions. *One exception provides that termination on the basis of one's status* as a qualifying patient *is permissible where "required by federal law* or required to obtain federal funding . . . .General Statutes § 21a-408p (b) (3)." (Emphasis added.) *City of Waterbury* v. *Administrator, Unemployment Compensation Act*, 216 Conn. App. 717, fn. 5, 285 A.3d 1176 (2022). The court will examine the matter further, as the at-will employment determination is not sufficient for this court to properly determine the outcome of the motion for summary judgment.

Safety-Sensitive Employee

To have a true at-will employment relationship without limitations, the issue of palliative use of marijuana must not be applicable to this matter. Based on the above, unless an exception applies, it is not an at-will employment relationship. General Statutes § 21a-408p (b) reads, in relevant part: "*Unless required by federal law* or required to obtain federal funding: . . . (3) *No employer may refuse to hire* a person or may discharge, penalize or threaten an employee solely

on the basis of such person's or employee's status as *a qualifying patient* or primary caregiver under sections 21a-408 to 21a-408n, inclusive . . . ." The defendant is accurate that the statutory exception for actions that were required by federal law is clear and unambiguous, and the directive must be followed. The court must determine, if possible under the parties submissions, whether the position the plaintiff sought was "safety-sensitive."

Given the work performed by the defendant through its employees, the defendant is required by law to, and has obtained, Federal Aviation Administration ("FAA") Certificates designating the defendant as an "Air Agency" empowered to operate an FAA-approved "Repair Station." The holders of such Certificates are required by law to follow the FAA-mandated controlled substance and alcohol regulations, which not only require preemployment drug testing and random drug testing, but also prohibit any individual who has a verified positive drug test or prohibited drugs in his system from performing any specified work under these certificates. There has been no evidence provided by the plaintiff to refute the fact that the second shift Gar Kenyon CNC job position at issue was covered by the FAA testing requirements. The defendant asserts that under 14 CFR § 120.105, the position offered to the plaintiff was included in the position categorized in "(e) *Aircraft maintenance and preventive maintenance duties*" in 14 CFR § 120.105. A review of the parties presentations is needed.

In support of the motion for summary judgment, the defendant submitted three affidavits, one from James F. Dempsey Jr.; Director of Human Resources; one from Michael T. Gumprecht, Vice President of Operations; and one from Christopher J. Busa, Business Unit Manager. All three averred in their affidavits that "At all times relevant to the complaint safety sensitive positions working on MRO products within both AGC and Gar Kenyon were subject to drug prohibitions

and testing under the FAA guidelines. With some frequency particular orders and individuals may be moved between the divisions depending on processes and scheduling. The positions subject to the FAA prohibitions and testing are assembler testers, inspectors, quality supervision, quality technicians, rubber molders, *CNC machine operator*, and welders. *In November 2018, the company advertised to fill a position for* a second shift Gar Kenyan *CNC machine operator*. This position was subject to the FAA requirements since it was anticipated that *the employee hired would be the only CNC machine operator available on second shift to work on MRO products.*" (Emphasis added.)

Michael T. Gumprecht and Christopher J. Busa stated in their affidavits that "As a matter of practice, we always assure that we inform applicants of this since it would be counterproductive to hire an employee, to spend the time training them, and then to lose them because they fail the FAA required drug testing. In this specific case it was related to Moran it was our intent to use him on CNC operations in both AGC and Gar Kenyon when required and noted this was a common practice to move individuals between organizations to address peaks and lows in the manufacturing processes. At no time during this discussion of drug testing did Moran inform us that he had a medical marijuana card. Moran related during the interview the drug testing would not be a problem." James F. Dempsey Jr. was slightly less assertive and stated "As a matter of practice, we always assure that we inform applicants of this since it would be counterproductive to hire an employee, to spend the time training them and then to lose them because they fail the FAA required drug testing. At no time during this discussion of drug testing did Mr. Moran inform me that he had a medical marijuana card. In fact, Moran related during the interview the drug testing would not be a problem." Both parties, to their credit, spent significant time on this issue of whether the

position required FAA drug testing, and whether the plaintiff was informed that the position was "safety sensitive." The true crux of the issue is whether the position was a safety-sensitive position, not whether the plaintiff was informed.

The three affidavits from the defendant's affiants, James F. Dempsey Jr., Michael T. Gumprecht and Christopher J. Busa, combined with the December 17, 2018 job offer letter informing the plaintiff that "the offer of employment" was "conditional upon successfully completing a . . . drug test," without question established that the position offered to the plaintiff was a safety-sensitive position requiring drug-testing compliance. The burden then shifted to the plaintiff, and "Although the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion . . . *a party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment.* . . . A party opposing a motion for summary judgment *must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue*." (Emphasis added.) *Escourse* at 829-30. The plaintiff counters with arguments in his objection to the motion for summary judgment. Argument by counsel, no matter how well crafted, and averments in plaintiff's affidavit, without independent evidence to support the assertions, do not equate to evidence sufficient to substantiate a claim that there is a genuine issue of material fact once the defendant establishes that there is none. The affidavit from the plaintiff is simply his disagreement with the affidavits of the defendant's management employees. The plaintiff is questioning the veracity of the assertions made by the defendant's three affiants. Questioning alone, without more, does not amount to meeting the *Escourse* standard recited above and below, as the plaintiff has not demonstrated any evidence that the job is not a safety-sensitive

position. The plaintiff asserts that he was never told that it was a safety-sensitive position. Not being told that the position is safety-sensitive, even if accurate, doesn't make it untrue that the position is safety-sensitive. It in no way constitutes evidence that the position was not a safety-sensitive position, even if it was inaccurately described without "safety-sensitive" warning in the posted position description. Our Supreme Court, in *Curry* v. *Allan S. Goodman*, 286 Conn. 390, n.16, 944 A.2d 925 (2008), indicated that "We recognize that strong consideration should be accorded to the interpretation of the employer in determining the essential functions of the job."

The plaintiff supplies his affidavit to counter the motion for summary judgment by making the following assertions, which will be examined individually. The following averments in the affidavit of the plaintiff, and the arguments that the plaintiff makes in his objection to the motion for summary judgment, both say the following, verbatim: "During the interview, defendant did not inform me that his position would involve MRO work." Taking the assertion to be true, the claim that he was not told that the position involved MRO work does not equate with being told by the defendant that "the position does not involve MRO work." The plaintiff states that "During the interview, defendant did not inform me that position was safety sensitive within the meaning of the FAA." Taking the assertion to be true, the claim that he was not told that the position involves safety-sensitive work does not equate with being told by the defendant that "the position does not involve safety-sensitive work." The plaintiff also claims in his affidavit that "During the interview, defendant did not notify me that the job position was subjected to the 'FAA testing guidelines.'" Taking the assertion to be true, the claim that he was not told that the position was subjected to FAA testing guidelines does not equate with being told by the defendant that "the position is not subjected to FAA testing guidelines." The plaintiff then asserts in his affidavit that "At no time

prior to rescinding the job offer, did defendant tell me that my job was an FAA safety-sensitive position." Taking the assertion to be true, the claim that he was not told prior to the defendant rescinding the job offer that his job was an FAA safety-sensitive position, does not equate with being told by the defendant that "I was told prior to the defendant rescinding the job offer that my job was not an FAA safety-sensitive position." The plaintiff next claims that "At no time prior to rescinding the job offer did defendant tell me that it intended to use me in AGC operation." Taking the assertion to be true, the claim that he was not told prior to the defendant rescinding the job offer that it intended on using the plaintiff in AGC operations, does not equate with being told by the defendant that "I was told prior to the defendant rescinding the job offer that it did not intend to use me in AGC operation." Continuing, the plaintiff asserts that "At no time prior to rescinding my job offer had defendant informed me that my job was subjected to the FAA Mandated Substance and Alcohol regulations." Taking the assertion to be true, the claim that at no time prior to rescinding my job offer had the defendant informed me that my job was subjected to the FAA Mandated Substance and Alcohol regulations, does not equate with being told by the defendant "I was told prior to the defendant rescinding my job offer that my job was not subjected to the FAA Mandated Substance and Alcohol regulations." The plaintiff's averments are further refuted by the December 17, 2018 pre-employment letter, which clearly stated that "*The* terms of this *offer of employment are* as follow and *are conditional upon successfully completing* a pre-employment reference check, post offer physical and *drug test*." The job offer counters the allegations of the plaintiff. This will be further explored by the court below.

The plaintiff concludes in his objection that the "Job was a not a safety-sensitive position" based only on the above. All of the plaintiff's assertions when combined, failed to demonstrate

that there is a genuine issue of material fact regarding whether the position is safety-sensitive. The crux of the plaintiff's argument is, that since he was not told that it was a safety-sensitive position, the testing requirements, etc., then, ipso facto, it is not a safety-sensitive position requiring a negative drug test. The plaintiff's conclusion is not reached through evidence that the plaintiff has presented to the court that the job was not in fact safety-sensitive, but based on an "illogical" extrapolation and pure speculation that since he was not told that it was a safety-sensitive position, then it must not be a safety-sensitive position. As the defendant has demonstrated that there is no genuine issue of material fact that the job was in fact a safety-sensitive position, the plaintiff's argument to counter that finding, without evidence, falls sort of rebutting the defendant position.

The legal standard is clear and is worth repeating. "Summary judgment should be denied where the affidavits of the moving party do not affirmatively show that there is no genuine issue of fact as to all of the relevant issues of the case." (Internal quotation marks omitted.) *Romprey* at 320. "Once the moving party has met its burden, however, *the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough,* however, *for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court . . . .*' (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015). 'Accordingly, the rule that the party opposing summary judgment must provide evidentiary support for its opposition applies only when the moving party has first made out a prima facie case for summary judgment. . . . [I]f the party moving for summary judgment fails to show that there are no genuine issues of material fact,

the nonmoving party may rest on mere allegations or denials contained in his pleadings . . . .'" (Citation omitted; emphasis added; internal quotation marks omitted.) *Romprey* at 320-21.

"*Although the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion . . . a party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . A party opposing a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue.*" (Internal quotation marks omitted; emphasis added.) *Escourse* v. *100 Taylor Avenue, LLC*, 150 Conn. App. 819, 829-30, 92 A.3d 1025 (2014). "In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact . . . but rather to determine whether any such issues exist." (Internal quotation marks omitted; emphasis added.) *RMS Residential Properties, LLC* v. *Miller*, 303 Conn. 224, 233, 32 A.3d 307 (2011), overruled on other grounds by *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 325 n.18, 71 A.3d 492 (2013).

As stated above, with the three affidavits from the defendant, the burden then shifts to the plaintiff to demonstrate that there is a genuine issue of material fact as to whether the position was safety-sensitive, and "*A party opposing a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue.*" (Emphasis added.) *Escourse* 829-30. The plaintiff is unsuccessful in substantiating his burden to refute that finding, despite his Herculean efforts. With the defendant having successfully demonstrated that there is no genuine issue of material fact that the position offered the plaintiff was a safety-sensitive position under FAA certificate holder

companies and subject to FAA mandated substance and alcohol regulations, the next issue is whether the federal regulations exempt Connecticut's PUMA users from General Statutes § 21a-408p requirements.

General Statutes § 21a-408p Exemptions

General Statutes § 21a-408p states in pertinent parts:

> "(b) *Unless required by federal law* or required to obtain federal funding: . . . .
>
> (3) *No employer may refuse to hire a person* . . . on the basis of such person's or employee's status as a qualifying patient . . . .
>
> (c) *Nothing* in this *section shall be construed to permit the palliative use of marijuana in violation of subsection (b)* of section 21a-408a." (Emphasis added.)

It is clear that the Connecticut legislature understood and acknowledged that the palliative use of marijuana would be conflicting with certain federal statutes and when required by such Federal statutes, § 21a-408p would be exempted, bowing to Federal prohibition in certain areas. As noted above, "Section 21a-408p proscribes the termination of a qualifying patient on the basis of the patient's status as such with limited exceptions. *One exception provides that termination on the basis of one's status* as a qualifying patient *is permissible where 'required by federal law* or required to obtain federal funding . . . . General Statutes § 21a-408p (b) (3).'" (Emphasis added.) *City of Waterbury* v. *Administrator, Unemployment Compensation Act*, 216 Conn. App. 717, fn. 5, 285 A.3d 1176 (2022).

One area is FAA requirements and safety-sensitive positions. 14 CFR § 120.105 states in pertinent part: "Each employee . . . who performs a safety-sensitive function listed in this section . . . for an employer as defined in this subpart must be subject to drug testing under a drug testing program implemented in accordance with this subpart. . . the safety-sensitive functions are:

(a) Flight crewmember duties.
(b) Flight attendant duties.
(c) Flight instruction duties.
(d) Aircraft dispatcher duties.
(e) *Aircraft maintenance and preventive maintenance duties.*
(f) Ground security coordinator duties.
(g) Aviation screening duties.
(h) Air traffic control duties.
(i) Operations control specialist duties." (Emphasis added.)

14 CFR § 120.109 states in pertinent part: "Each employer shall conduct the types of testing described in this section in accordance with the procedures set forth in this subpart . . . .

(a) *Pre-employment drug testing.*

(1) *No employer may hire* any individual for a safety-sensitive function listed in § 120.105 *unless* the *employer* first *conducts a pre-employment test and receives a verified negative drug test result for that individual.*" (Emphasis added.)

Is the defendant such an employer as contemplated in 14 CFR § 120.105? The defendant provided to the court confirmation that it is required to comply with drug testing as required by 14 CFR § 120.105. According to the defendant, more than thirty years ago, Congress, in an effort to protect public safety in transportation, passed extensive legislation regarding drug testing and prohibitions in land transportation and aviation. This legislation, the Federal Omnibus Transportation Employees Testing Act of 1991, 49 U.S.C. § 31306, et seq., ("FOTETA"), is administered by the Department of Transportation ("DOT") and the Federal Aviation Administration ("FAA"), each of which requires adherence to its regulations set forth in 49 CFR part 40 and 14 CFR part 120. Pursuant to the Act and applicable regulations, the Company obtained FAA certification as an "Air Agency" empowered to operate FAA approved "Repair Station." The defendant produced several Certificates, and as a Certificate holder, the defendant is mandated to follow all the applicable regulations regarding drug and alcohol testing and prohibitions. The

plaintiff did not contest any of the defendant's submission in this area. As such, under 14 CFR § 120.109, the defendant was required to conduct "(a) Pre-employment drug testing" of the plaintiff which was done by the defendant, and the plaintiff was required to provide a verified negative drug test, which he did not do. The defendant notified the plaintiff in the December 17, 2018 pre-employment letter addressed to the plaintiff, that he was required to take, and pass, the drug testing, which he submitted to, but did not pass. This court has previously determined that the position was safety-sensitive one. Both federal law and the FAA regulations prohibit the defendant from placing anyone who has tested positive for marijuana in a safety-sensitive position regardless of any state issued medical marijuana card.

Pre-Employment Letter

The December 17, 2018 letter from GARKENYON Aerospace and Defense to the plaintiff, on page two states, "This letter is an offer of employment in which guidelines have been established for the purpose of clarifying general responsibilities. As a result, this letter is not intended to be interpreted as a contract of any kind or nature, and is not a guarantee of continued employment. AGC is an at-will employer and there is no specific length of guaranteed of employment." Telling is the similarity between the offer letter provided to the plaintiff in the present case and the offer letter provided to the plaintiff in *Petitte*. It cannot be credibly argued that the plaintiff, when confronted with the December 17, 2018 offer did not fully understand that the offer was no guarantee of any employment. Combining the caveat above with the second paragraph of the first page of the December 17, 2018 letter - which states, "*The terms of this offer of employment are* as follow and *are conditional upon successfully completing* a pre-employment

reference check, post offer physical and *drug test*" - clearly supports the defendant's position. (Emphasis added.)

Material Fact

The plaintiff asserts that "not being told of the position being safety-sensitive or of the drug testing requirement" is important and should ultimately result in the motion for summary judgment being denied. The defendant contends that this discrepancy is only relevant to the motion for summary judgment if the issue of whether he was specifically told is a material fact. The defendant contends that it is not, and this court agrees with the defendant. Our Supreme Court has opined that a "material fact has been defined adequately and simply as a fact which will make a difference in the result of the case." *Catz* v. *Rubenstein*, 201 Conn. 39, 48, 913 A.2d 98 (1986). It is the position of the defendant that whether the plaintiff was told about the FAA requirements makes no difference in the result of the case, and this issue is not a material fact.

Reality is reality, regardless of whether one agrees. This court has found that there is no genuine issue of material fact that the position offered was a safety-sensitive position. The issue is, assuming arguendo that the plaintiff was not told the position was safety-sensitive, whether it creates a cause of action for the plaintiff. This court finds that it does not. Whether the plaintiff was told about the position being safety-sensitive, or not, federal regulations nonetheless preclude the defendant from hiring the plaintiff for a safety-sensitive position even though he is a user of medical marijuana under PUMA. Even if the defendant found the plaintiff to be the best position candidate that it ever interviewed and desperately wanted to hire the plaintiff, this was absolutely not permitted for a safety-sensitive position. The plaintiff cannot recover damages for not being

hired in a position for which he was ineligible, and to which the employer was precluded from hiring under federal law.

It is interesting to note that the defendant affidavits from Dempsey, Gumprecht and Busa all aver to the same basic proposition regarding whether the position was safety-sensitive. Dempsey states in his affidavit:

> "15. As a matter of practice, we always assure that we inform applicants of this since it would be counterproductive to hire an employee, to spend the time training them and then to lose them because they fail the FAA required drug testing.
>
> 16. At no time during this discussion of drug testing did Mr. Moran inform me that he had a medical marijuana card. In fact, Moran related during the interview the drug testing would not be a problem."

Gumprecht states in his affidavit and Busa states in his affidavit in paragraphs 15-16, and 16-17 respectively:

> "As a matter of practice, I always assure that we inform applicants of this since it would be counterproductive to hire an employee, to spend the time training them, and then to lose them because they fail the FAA required drug testing. In this specific case I related to Moran it was our intent to use him on CNC operations in both AGC and Gar Kenyon when required and noted this was a common practice to move individuals between organizations to address peaks and lows in the manufacturing processes.
>
> At no time during this discussion of drug testing did Mr. Moran inform me that he had a medical marijuana card. Moran related during the interview the drug testing would not be a problem."

The plaintiff asserts in his reply brief that "The employer is not going to take the time and effort creating a detailed multi-page written job description and leave out an essential function or essential qualification. The verbal communications during the hiring process involved no mentioning of the job being FAA safety-sensitive or that the job involved MRO work because the

job defendant hired plaintiff to do was not FAA safety-sensitive or involving MRO work. An employer is not going to expend time and effort during the hiring process with applicants that it knows to be unqualified for the job. This is why hiring employers disclose the qualifications up front - during the hiring process. Defendant did not disclose to plaintiff that the job was FAA safety-sensitive or involved MRO work because the CNC job he was hired to do was not FAA safety-sensitive and did not involve MRO work." The plaintiff's position confirms what the defendant claims - that it would make no sense not to discuss the safety-sensitive position and drug testing requirement with job applicants such as the plaintiff, without clearly informing the plaintiff of the position requirements. The offer letter explained the requirement of successful drug testing. The plaintiff made no attempt to contact the defendant immediately upon receipt of the offer letter and protest the terms. No indication that the plaintiff called and inquired, "Why do I need to pass a drug test, I told you I had a medical marijuana card?'

While the above is not dispositive of the motion, it does lend strength to the defendant's assertion that the plaintiff was fully apprised of the drug testing requirement when interviewed, as is supported by the unambiguous offer letter that states, "*The terms* of this *offer of employment are* as follows and are *conditional upon successfully completing a pre-employment* reference check, post offer physical and *drug test.*" (Emphasis added.)

This court concludes by the analysis above that there is no genuine issue of material fact that the plaintiff was fully apprised of the safety-sensitive position and drug testing requirement, and even if not so apprised, it does not change the outcome of the motion for summary judgment. The position offered to the plaintiff was a safety-sensitive position that required successful negative drug testing for marijuana, and the plaintiff failed the drug testing. Either way, federal

regulations absolutely prohibited the plaintiff, with a positive drug test for marijuana from being hired for a safety-sensitive position, and the exemption found in General Statutes § 21a-408p (b) (3) permits the defendant to refuse to hire an applicant for a safety-sensitive position who tests positive for marijuana. With the position requirement and the failed drug test, the plaintiff has no cause of action, as the defendant was precluded from hiring the plaintiff, regardless of whether it wanted to hire him. The motion for summary judgment must be granted.

CONCLUSION

Based on the case law above, and legal reasoning contained therein, the defendant has demonstrated that there is no genuine issue of material fact and is entitled to summary judgment. Therefore, the defendant's motion for summary judgment is hereby GRANTED and the plaintiffs' objection to the motion for summary judgment is hereby OVERRULED.

BY THE COURT,

D'ANDREA, Robert A., Judge
Juris #439597

A JDNO was sent on November 6, 2023 notifying all counsel of record of the availability of this Memorandum of decision in the electronic file and Sent by electronic Means to RSD. By the Clerk
Matthew Stevens II