Employment Law Daily

Wolters Kluwer

STRATEGIC PERSPECTIVES—Smoky Lines: Whether to accommodate employees' use of medicinal marijuana may now depend on state law

By Lindsey A. White, Esq. and Shelby Skeabeck, Esq., and Jeremy Himmelstein, J.D.
(Anticipated May 2018)

The interplay between federal law—which bans marijuana for any purpose—and state law, which increasingly permits marijuana to be used for medicinal purposes, is presenting a challenging legal landscape for employers. Following a handful of recent court decisions, the general advice that employers could flatly prohibit marijuana use and did not have to provide accommodations has gone up in smoke.

A. Federal law

1. *The Controlled Substances Act makes marijuana a Schedule I controlled substance*

Pursuant to the Controlled Substances Act (CSA), 21 U.S.C. § 812(b)(1)(c) (2012), marijuana is a Schedule I controlled substance. That means that the federal government has found marijuana "has no currently accepted medical use in treatment."

Despite marijuana's inclusion as a Schedule I drug, the Obama Administration's Department of Justice issued guidance regarding marijuana enforcement, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) (aka the "Cole memo"). With respect to medical marijuana, this guidance states that:

> [T]he Department advised that it likely was not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers.

Although the Trump Administration has expressed an interest in increasing prosecution of federal laws prohibiting marijuana, President Trump has publicly distinguished between medicinal marijuana and other uses. *See e.g.*, http://www.cnn.com/2017/02/23/politics/white-house-marijuana-donald-trump-pot/index.html. The Cole memo, as of the date of publication, has not been rescinded.

2. *DOT regulations*

U.S. Department of Transportation (DOT) regulations require employers in the trucking, aviation, maritime, railroad, transit, and pipeline industries to collect and test "safety-sensitive"

employees' urine samples for the presence of cocaine, opiates, amphetamines, phencyclidine, and of specific relevance here, marijuana (49 C.F.R. § 40.3, 40.11). Under 49 C.F.R. § 382.107, the regulations apply to employers with drivers that drive motor vehicles that are 26,001 pounds or more, transport 16 or more passengers, or transport hazardous materials.

Safety-sensitive employees may be subject to pre-employment, reasonable suspicion/for cause, random, return-to-duty, follow-up, and post-accident drug testing. U.S. Department of Transportation, et al., *What Employers Need to Know About DOT Drug & Alcohol Testing* (April 2014). If an employee tests positive for marijuana, the employer must "immediately remove the employee involved from performing safety-sensitive functions." The employee is not permitted to return until she is (1) evaluated by a substance abuse professional; (2) successfully completes education or counseling sessions prescribed by the substance abuse professional; and (3) tests negative on a return-to-duty drug test.

The DOT regulations do not allow employees to use marijuana when off-duty. In fact, the rules do "not prohibit an employer from notifying a driver of his/her selection for a random controlled substances test while the driver is in an off-duty status." Federal Motor Carrier Safety Administration, *Guidance For § 382.305: Random testing*.

Thus, to comply with federal law, DOT-covered employers must follow certain steps for employees who test positive for marijuana, even if the marijuana was legally prescribed under state law and used outside the workplace.

3. *The Drug Free Workplace Act*

The Drug-Free Workplace Act of 1988 (DFWA) requires employers with any grant or single government contract—that is valued at $100,000 or more and does not involve the acquisition of commercial goods via a procurement contract or purchase order—to provide a drug-free workplace, where use and possession of controlled substances is prohibited. 41 U.S.C. § 8102(1) (referencing 41 U.S.C. §§ 103, 134). All individuals with grants or contracts from any federal agency are covered by the Act, regardless of the dollar amount. 41 U.S.C. § 8103(a)(1). Because marijuana is included as a Schedule I drug, all employers subject to the DFWA must, by federal law, maintain marijuana-free workplaces.

The DFWA requires employers to, among other things, (1) establish a drug-free awareness program that educates and makes employees aware of the dangers of drug abuse in the workplace; (2) issue a written policy statement to employees informing them that distributing, possessing, or using controlled substances in the workplace is prohibited; (3) take appropriate disciplinary actions against all employees convicted of workplace drug offenses, and report criminal convictions of employees for drug-related activity in the workplace to the federal contracting agency within ten days after receiving notice of such convictions; and (4) make a continuous and good faith effort to maintain drug-free workplaces.

Notably, as to the third requirement, the DFWA pertains only to convictions, meaning that employers are not obligated to report use or abuse of a controlled substance with a legally

obtained prescription. U.S. Department of Labor, *Drug Free Workplace Act of 1988 Frequently Asked Questions*.

4. *Americans with Disabilities Act*

i. Statutory language

The Americans with Disabilities Act (ADA) itself explicitly excludes illegal drug use from the definition of a qualified individual with a disability. 42 U.S.C. § 12114(a) ("For purposes of this subchapter, a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use."). The ADA, however, is silent as to whether current use of marijuana can be a reasonable accommodation for some other disability (other than drug addiction).

The ADA defines the illegal use of drugs as:

> [t]he use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

42 U.S.C. § 12111(6)(a). The ADA further defines the term "drug" as "a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812]." *Id*. § 12111(6)(b).

ii. Equal Employment Opportunity Commission's position

The Equal Employment Opportunity Commission (EEOC) has not issued guidance regarding whether medical marijuana can be a reasonable accommodation under the ADA.

However, one lone case, in which the EEOC filed suit as Plaintiff, provides a bit of insight. In *EEOC v. The Pines of Clarkston*, 2:13-cv-14076-GCS-MKM (E.D. Mich., April 29, 2015), the EEOC alleged The Pines violated the ADA when it terminated Ms. Holden because her drug test on her second day of work revealed marijuana use. Following the positive drug test, Ms. Holden revealed to The Pines that she used medicinal marijuana to treat her epilepsy. The next day, Ms. Holden met with two of The Pines' owners and explained that she used medical marijuana for her epilepsy.

The EEOC did not bring a failure to accommodate claim, but instead claimed that The Pines terminated her upon learning about her disability.

It was undisputed that Ms. Holden was asked about how frequent her seizures were. Moreover, undisputed interview notes stated that a Pines official recommended that the company "[n]ot hire her for medical issues … didn't feel she could handle the stress." Deposition testimony further revealed that company officials decided not to continue Ms. Holden's employment based on her "dishonesty" in not revealing a medication. Finally, The Pines did not have a zero-tolerance policy for marijuana, nor did it assert Ms. Holden was discharged for violating this policy.

The court denied summary judgment. In so holding, the court found the shifting rationales could be evidence of pretext.

Thus, although illegal drug use is not a covered disability under the ADA, medical marijuana users may be protected by the ADA if the employee or applicant is discriminated against based on his or her underlying disability and not the marijuana use.

As a federal agency, the EEOC may be hamstrung by the CSA from finding cause or litigating violations of the ADA where the employer takes action based on a failed drug test, even when the individual is using medical marijuana under a physician's care. *EEOC v. The Pines* shows that the Commission may make exceptions where the employer asserts illegal marijuana use as a reason for an employment action, but where evidence suggests the real reason was the disability itself.

B. State survey

As of the date of this article, 29 states, as well as the District of Columbia, have legalized marijuana for medical purposes.

1. *Accommodation obligations under the jurisdictions legalizing medical marijuana*

With respect to the requirement to provide accommodations to medical marijuana users, these 30 jurisdictions essentially fall into four categories: (1) the one jurisdiction that explicitly requires an employer to attempt to make reasonable accommodations of medical marijuana use; (2) jurisdictions where the marijuana statute is silent on employer accommodation obligations but permit the employer to prohibit marijuana use at the worksite; (3) jurisdictions where an employer is expressly not required to accommodate the use of marijuana in the workplace; and (4) the one jurisdiction that is silent on accommodation obligations and an employer's ability to prohibit marijuana use at the worksite.

Accommodations specifically required. Nevada is the lone state in the first camp. The Nevada law requires an employer to attempt to make reasonable accommodations for the medical needs of an employee who uses medical marijuana if the employee holds a valid "registry identification card." This requirement applies if the reasonable accommodation would not pose a threat of harm or danger to persons or property or impose an undue hardship or prohibit the employee from fulfilling any and all of the employee's job responsibilities.

Silence on accommodations. In the second group are those statutes that are silent on "accommodation" obligations but allow employers to prohibit the use of marijuana in the workplace and/or allow employers to prohibit employees being under the influence at work: Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Minnesota, New Mexico, New York (which does not specifically address accommodations, but does state that being a "certified patient" is the same as having a "disability" under New York's employment discrimination law), North Dakota, and Vermont. Under Illinois law, a private business may prohibit individuals from using marijuana on their premises.

Accommodations specifically not required during work hours. The third group is comprised of those jurisdictions where the law expressly sets forth that an employer is not required to "accommodate" the use or ingestion of marijuana *during work hours or on work premises*: Alaska, California, Colorado, Florida, Maine, Massachusetts, Michigan, Montana, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, and West Virginia.

The second and third groups are somewhat similar in that they both allow employers to prohibit use of marijuana at the worksite, but the statutes in the jurisdictions listed in the second group do not provide any context on employer "accommodation" obligations.

Silence. Maryland is in the fourth group. Its marijuana law neither addresses employer accommodation requirements nor discusses the employer's ability to prohibit use at the worksite.

Reference to federal law. Another sub-category of jurisdictions (Arizona, Arkansas, Delaware, Illinois, Maine, Massachusetts, Minnesota, New York, Ohio, Pennsylvania, Washington, and West Virginia) provide a carve-out in the law for employers to be able to make the argument that accommodating medical marijuana use would be an undue hardship because doing so would cause the employer itself to violate federal law. Those statutes typically state that the marijuana law does not require the employer to put a monetary or licensing-related benefit under federal law or regulations at risk.

2. *The ability for plaintiffs to assert a private right of action for discrimination resides in the language of the marijuana statute*

Whether or not medical marijuana users can bring a discrimination claim (either under a state's medical marijuana statute or under a state fair employment practices act) boils down to the extent the state marijuana law provides protections to users of medical marijuana and whether a private right of action exists, or could exist, under the marijuana law or the state fair employment practices act. There have been cases where plaintiffs have challenged terminations for failing a drug test pursuant to a state's lawful off duty statute, but that line of argument is outside the scope of this article. *See, e.g.*, *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015).

In some jurisdictions, including Arizona, Delaware, Illinois, Maine, Minnesota, New York, Pennsylvania, Rhode Island, and West Virginia, the state marijuana law expressly prohibits employers from discriminating against a person in hiring, termination, or any other term or condition of employment (which could include accommodations) based upon the individual's status as a medical marijuana patient. Arizona, Delaware, and Minnesota go as far to prohibit discrimination on the basis of a drug test that reveals marijuana use by an employee authorized to use medical marijuana by the state law. In other jurisdictions, medical marijuana patients can be protected from adverse employment actions based on an implied right of action from language in the marijuana statute that prohibits the "denial of any right or privilege."

On the other end of the spectrum are those jurisdictions (Florida and Montana) that spell out in the marijuana statute that a private suit is *not* available.

C. State law cases analyzing the impact of state marijuana laws and federal laws on the workplace

1. *Massachusetts Supreme Judicial Court holds that employers have an obligation under state law to engage in the interactive process with employees who use medical marijuana outside the workplace*

In 2012, Massachusetts voters approved a bill permitting medical marijuana. The stated purpose of the law was "that there should be no punishment under state law for qualifying patients … for the medical use of marijuana." St. 2012, c. 369, § 1. A qualifying patient is one who has been diagnosed by a licensed physician as having a debilitating medical condition. In addition to prohibiting criminal penalties for possession or use of medicinal marijuana, the statute provides that "[a]ny person meeting the requirements under this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions." *Id*. § 4.

In late summer 2014, Plaintiff Cristina Barbuto was offered and accepted a position with defendant Advantage Sales and Marketing (ASM). Shortly thereafter, Ms. Barbuto was informed she must take a drug test. She informed her future supervisor that she would test positive for marijuana, which she took under her physician's care for Crohn's disease and irritable bowel syndrome. Ms. Barbuto allegedly informed her supervisor that she did not use marijuana every day, did not use marijuana at work, and would not consume marijuana before work. Her supervisor informed Ms. Barbuto that the medicinal use of marijuana "should not be a problem," but he would explore it further. He called her later that day and confirmed her medicinal marijuana use was not problematic.

Accordingly, Ms. Barbuto provided a urine sample on September 5, 2014. On September 11, 2014, she attended training, was given a uniform, and assigned a work location. She completed her first day of work the following day, and did not come to work intoxicated or use marijuana on-site.

As expected, Ms. Barbuto failed her drug test. On the evening of September 12, the Human Resources representative informed Ms. Barbuto that she was discharged for testing positive for marijuana, allegedly stating that ASM did not care if she used marijuana to treat her medical condition because "we follow federal law, not state law."

The Massachusetts Supreme Judicial Court ruled that Ms. Barbuto could pursue claims against ASM on the basis of "handicap" discrimination under state law because of her medical marijuana use. *Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37 (Mass. 2017). The court found authority for Ms. Barbuto to assert a claim within the medical marijuana statute, which forbids denial of any right or privilege on the basis of medical marijuana use. Noting that employees or applicants with disabilities have a statutory right or privilege to a reasonable accommodation, the court found the employee would be denied this right or privilege to an accommodation solely based on medicinal marijuana use.

The court's analysis then shifted to whether medical marijuana use presents an undue burden to the employer. The employer argued that medical marijuana use is not a reasonable accommodation because marijuana is illegal under federal law. The court, however, noted that to find the requested accommodation of allowing continued employment despite failing the drug test to be unreasonable *per se* based on federal law "would not be respectful of the recognition of

Massachusetts voters, shared by the legislatures or voters in the vast majority of States, that marijuana has an accepted medical use for some patients" suffering from a variety of disabilities.

The court recognized that an employer might be able to establish undue hardship, if it could prove that the use of marijuana by an employee would violate an employer's contractual or statutory obligation and thereby jeopardize the company's ability to perform its business. Specifically, the court referenced the fact that transportation employers are subject to DOT regulations that prohibit any DOT-covered safety-sensitive employee from using marijuana. The court also recognized that federal government contractors are obligated to comply with the Drug Free Workplace Act. An employer could show a safety risk to the public, the employee, or her fellow employees from the continued use of medical marijuana or from the potential that marijuana use would impair an employee's work performance, the court suggested.

The court also ruled that, even if the use of medical marijuana were an unreasonable accommodation, the employer should have engaged in the interactive process with the individual to ascertain whether another accommodation, such as other medications, could have provided the employee with an effective accommodation.

As to the obvious conflict with federal law, the court noted that "[t]he only person at risk of Federal criminal prosecution of medical marijuana is the employee" and that no liability would attach to the employer by permitting an employee to continue off-site use of medical marijuana.

2. *State court decisions considering the interplay between state medical marijuana laws and the CSA*

While the impact of the CSA was just one of the considerations in the *Barbuto* case, other courts have grappled with the impact of the CSA on discrimination claims.

Rhode Island. In *Callaghan v. Darlington Fabrics Corp.,* No. PC-2014-5680 (R.I. Super. Ct., May 23, 2017), a Rhode Island trial court granted summary judgment to the plaintiff, who was denied hire as a paid intern after her disclosure that she had a medical marijuana card and would therefore fail the employer's drug test. Notably, the employer's policy only prohibited the use of drugs on company property. Plaintiff filed suit both under the Hawkins-Slater Act (which authorizes the use of medical marijuana) and the Rhode Island Civil Rights Act (RICRA).

The court first concluded that the Hawkins-Slater Act, R.I. Gen. Law. §§ 21-28.6-1 *et seq*., created an implied private right of action because of the following language: "[n]o … employer … may refuse to employ … a person solely for his or her status as a cardholder." In addition, the statute states that a qualifying patient cardholder cannot be denied "any right or privilege … for the medical use of marijuana." Accordingly, the court concluded the employer violated the Hawkins-Slater Act by denying Plaintiff employment based on her use of medical of marijuana.

The Hawkins-Slater Act contains a provision that states "[n]othing in this chapter shall be construed to require … [a]n employer to accommodate the medical use of marijuana in any workplace." The court concluded that "the General Assembly contemplated that the statute would, in some way, require employers to accommodate the medical use of marijuana *outside* the workplace."

As for the employer's argument that it refused to hire the plaintiff based on her inability to pass a drug test, not her disability, the court found it was not possible to distinguish the use of medical marijuana from the underlying disability.

Finally, the court considered and rejected a preemption argument, finding that it was "not physically impossible" to comply with both. Rather, the court concluded that because marijuana need not enter the workplace, what employees do during non-work hours does not impose any responsibility on the employer. Thus, employers do not violate the CSA (which governs the illegal manufacture, sale, distribution, and possession) by employing someone who uses medical marijuana off premises. The employer has appealed the ruling.

Connecticut. Following the *Callaghan* case, the U.S. District Court for the District of Connecticut held in [*Noffsinger v. SSC Niantic Operating Co. LLC,*]() No. 3:16-cv-01938 (D. Conn., August 8, 2017) that federal law does not preempt Connecticut's Palliative Use of Marijuana Act (PUMA), largely because PUMA specifically prohibits employers from discriminating against qualifying patients. In *Noffsinger*, the employer nursing facility rescinded the plaintiff's offer of employment after she tested positive for synthetic cannabis, which doctors prescribed to help treat her post-traumatic stress disorder. The plaintiff filed a complaint, alleging, among other things, that the employer violated PUMA's anti-discrimination provision. The employer moved to dismiss, arguing that PUMA's anti-discrimination provision is preempted by the CSA, the ADA, and the Food, Drug, and Cosmetic Act (FDCA).

PUMA contains language prohibiting discrimination, including employment discrimination, against individuals for using medical marijuana. Specifically, the statute states that "[n]o 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." Conn. Gen. Stat. § 21a-408p(b)(3). The court rejected the employer's argument that the CSA preempts this provision because the CSA neither prohibits employers from employing individuals that use illegal drugs nor regulates the employment relationship at all.

The court also denied the employer's other preemption arguments, concluding that since the ADA only regulates drug use *at the workplace*, permitting an employee to use medical marijuana *outside the workplace* does not create a conflict "that would justify preemption." Similarly, the FDCA argument was disregarded by the court because the FDCA does not regulate employment.

Courts in other jurisdictions, however, have found in favor of employers on the issue of the CSA affecting how state marijuana laws impact the workplace. In *Emerald Steel Fabricators, Inc., v. Bureau of Labor and Industries*, 230 P.3d 518 (Or. 2010), the court found that the employer was not required to accommodate the employee's use of medical marijuana under the state's disability discrimination statute, because marijuana is an illegal drug under federal law. In *Garcia v. Tractor Supply Co.,* 154 F. Supp. 3d 1225, 1230 (D.N.M. 2016), the court held that to "affirmatively require" the employer to accommodate the employee's illegal drug use would mandate the employer to permit the very conduct the CSA proscribes. It is important to note that the Oregon and New Mexico statutes do not contain "discrimination" language like the marijuana laws in Massachusetts, Rhode Island, and Connecticut.

For the states that do have these anti-discrimination provisions, precedent is starting to build toward the proposition that the CSA, or any other federal law, does not preempt the provisions when medical marijuana is used outside the workplace.

Conclusion

Until recently, courts addressing the issue of medical marijuana users in the workplace had consistently held that, because marijuana use is illegal under federal law, employers were not required to permit the use, even outside the workplace and outside of work hours, of medical marijuana as a reasonable accommodation. Indeed, it would not be considered a "reasonable accommodation" under ADA, given its inclusion as a Schedule I drug.

However, these recent rulings provide a new and strikingly different approach that may warrant the attention of employers in states where the medical marijuana law contains a discrimination prohibition. Employers will need to pay close attention to both the language of the particular state statute at issue, as well as how courts in those states where they have operations react to this issue. Employers should always bear in mind that unless the employer is subject to federal laws or regulations such as the DOT regulations, nothing prevents them from permitting exceptions to workplace policies that preclude hire or employment of individuals who test positive for marijuana.

Attorneys: Lindsey A. White and Shelby Skeabeck (Shawe Rosenthal)

MainStory: IndustryNewsTrends StateLegislation StateLawClaims Privacy DisabilityDiscrimination Discharge IndividualRights

© 2017 CCH Incorporated and its affiliates and licensors. All rights reserved.