Employers are not required to accommodate medical marijuana use in California

By Martin K. Deniston and Diana M. Estrada

In what will likely be a very controversial decision in Ross v. Ragingwire Telecommunications, Inc., the California Supreme Court recently ruled that employers are not required to accommodate medical marijuana use. The court affirmed a decision of the California Court of Appeal, which ruled that nothing in the text or history of the Compassionate Use Act suggests the voters of California intended the measure to address the respective rights and duties of employers and employees. Under California law, an employer may require pre-employment drug tests and take illegal drug use into consideration in making employment decisions. (Loder v. City of Glendale (1997) 14 Cal.4th 846, 882-883.)

The plaintiff in Ross v. Ragingwire Telecommunications, Inc., whose physician recommended he use marijuana to treat chronic pain from strain and muscle spasms in his back, which he sustained while serving in the U.S. Air Force, was fired when a pre-employment drug test required of new employees revealed his marijuana use. He filed a lawsuit asserting, among other things, that he was discriminated against based upon his disability in that his employer would not accommodate his medical marijuana use, and that he was wrongfully terminated in violation of public policy.

The employer defendant filed a demurrer to his complaint for his failure to state a cause of action on these claims. The lower courts held the plaintiff could not, on that basis, state a cause of action against his employer for disability-based discrimination under the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.; see id., § 12940, subd. (a); hereafter the FEHA) or for wrongful termination in violation of public policy (see, e.g., Stevenson v. Superior Court (1997) 16 Cal.4th 880, 887; Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167, 170, 176-178). The California Supreme Court affirmed.

Although the plaintiff met the requirements of being disabled under the FEHA, the court noted that the plaintiff’s argument that his employer should offer an accommodation for his use of medical marijuana at home, requiring the company defendant to waive its policy requiring negative drug tests of new employees, lacked merit because the Compassionate Use Act did not give marijuana the same status as any legal prescription drug. The Compassionate Use Act of 1996 (Health & Saf. Code, § 11362.5, added by initiative, Prop. 215, as approved by voters, Gen. Elec. (Nov. 5, 1996)) gives a person who uses marijuana for medical purposes on a physician’s recommendation a defense to certain state criminal charges involving the drug, including possession (Health & Saf. Code, § 11357; see id., § 11362.5, subd. (d)). Federal law, however, continues to prohibit the drug’s possession, even by medical users. (21 U.S.C. §§ 812, 844(a); see Gonzales v. Raich (2005) 545 U.S. 1, 26-29; United States v. Oakland Cannabis Buyers’ Cooperative (2001) 532 U.S. 483, 491-495.)

In affirming the lower courts’ decisions, the California Supreme Court noted that the operative provisions of the Compassionate Use Act (Health & Saf. Code, § 11362.5) do not speak to employment law. Specifically the court reasoned that:

“[a]lthough California’s voters had no power to change federal law, certainly they were free to disagree with Congress’s assessment of marijuana, and they also were free to view the possibility of beneficial medical use as a sufficient basis for exempting from criminal liability under state law patients whose physicians recommend the drug. The logic of this position, however, did not compel the voters to take the additional step of requiring employers to accommodate marijuana use by their employees. The voters were entitled to change the criminal law without also speaking to employment law.”
The court thus concluded that “an employer’s refusal to accommodate an employee’s use of marijuana does not affect, let alone eviscerate, the immunity to criminal liability provided in the act.”

The court also rejected the plaintiff’s argument that Health and Safety Code section 11362.785, subdivision (a) (added by Stats. 2003, ch. 875, § 2), requires employers to accommodate employees’ use of medical marijuana at home. Specifically, the court stated that “we do not believe that Health and Safety Code section 11362.785, subdivision (a), can reasonably be understood as adopting such a requirement silently and without debate.” Thus, the court concluded that the plaintiff could not state a cause of action under FEHA based on the defendant’s refusal to accommodate his use of marijuana at home.

Reiterating the fact that the Compassionate Use Act (Health & Saf. Code, § 11362.5) simply does not speak to employment law and that nothing in the act’s text or history indicates the voters intended to articulate any policy concerning marijuana in the employment context, let alone a fundamental public policy requiring employers to accommodate marijuana use by employees, the court rejected the plaintiff’s wrongful termination in violation of public policy cause of action based on his claim that the defendant violated a fundamental public policy supported by the Compassionate Use Act, the FEHA (Gov. Code, § 12900 et seq.), and the privacy clause of the California Constitution (Cal. Const., art. I, § 1).

The Compassionate Use Act simply did not put the defendant on notice that employers would be required under the FEHA to accommodate the use of marijuana. Thus, plaintiff may not rely upon the Compassionate Use Act as a basis for his wrongful termination in violation of public policy claim.

The plaintiff’s argument based on privacy to support his wrongful termination claim was also rejected because the case law upon which he relied dealt with a patient’s right to refuse medical treatment and the defendant’s decision not to accommodate plaintiff did not implicate such a right. The court further rejected the plaintiff’s argument with respect to medical self-determination because the defendant in this case did not prevent the plaintiff from having access to marijuana. The court stated that, “To assert that defendant’s refusal to employ plaintiff affects his access to marijuana is merely to restate the argument that the Compassionate Use Act (Health & Saf. Code, § 11362.5) gives plaintiff a right to use marijuana free of hindrance or inconvenience, enforceable against third parties. That argument we have already rejected.” Thus, the court affirmed the lower courts’ rulings that the plaintiff could not state a cause of action for wrongful termination in violation of public policy.

While this decision provides a level of protection to employers, there has been an outcry for the California legislature to change this law and we expect that legislation will be introduced to protect California employees from being terminated from their jobs if they use medical marijuana. We will follow such developments closely and provide an update if and when such legislation is passed.

To view the Supreme Court of California opinion regarding this decision, please click here.

This communication is for general guidance only and does not contain definitive legal advice.
Contact us at employment@wilsonelser.com.
© 2008 Wilson Elser Moskowitz Edelman & Dicker LLP. All rights reserved.