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Employers Should Exercise Caution in Dealing with Medical Marijuana Users

By Joanne Deschenaux

At least 12 states—Alaska, California, Colorado, Hawaii, Maine, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont and Washington—have medical marijuana laws. Even in these states, it is clear that employers do not have to let authorized users smoke marijuana in the workplace. But it is generally unclear whether employers must accommodate workers who smoke medical marijuana off the job.

A recent decision from Oregon's second highest court shows that there are a number of unanswered questions regarding an Oregon employer's obligation to accommodate an employee who is using medical marijuana off-site. Until there are definitive answers to these questions, employers should proceed cautiously, experts advise.

The ruling in the case (*Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, Oregon Ct. App. (June 11, 2008)) let stand an administrative decision that had granted a victory to a medical marijuana user. According to Richard Meneghello, an attorney in Fisher and Phillips' Portland office, although "most would agree that the decision stands on procedural grounds, it would have been easy for the court to give the employer a pass." He added, "My concern is that the Court of Appeals is sympathetic to medical marijuana users."

Michael McClory, an attorney with Bullard Smith Jernstedt Wilson, also in Portland, told *SHRM Online* that, in his opinion, the decision does not represent a change in prior law. As the law in Oregon now stands, he said, an employer would be required to accommodate a properly authorized medical marijuana user as long as the applicant or employee is qualified for the job and as long as the individual's employment does not raise any safety implications. That determination must be made on a case-by-case basis, he emphasized.

Temporary Staffer Used Medical Marijuana

In 2003, temporary worker Anthony Scevers began working as a steel press operator at Emerald Steel Fabricators in Eugene, Ore. The company usually contracted with staffing agencies to evaluate workers for several months before hiring them. Although the company told Scevers that he would need to pass a drug test if he were eventually hired as an employee, it did not provide him with a copy of a drug testing policy while he was a temporary employee, and it did not ensure that he tested clean with the staffing agency.

Unknown to Emerald Steel, Scevers had a medical marijuana card through the Oregon Medical Marijuana Program (OMMP), and he regularly smoked marijuana because of nausea, stomach cramps and vomiting. He never smoked while at work, however, and there is no evidence that he was ever impaired while carrying out his job functions.

After a few months of satisfactory work, Scevers approached his supervisor to tell him about his OMMP card to see whether his drug use would impact his chance of becoming a regular employee. After discussions with the company owner, the supervisor told Scevers that they

would not hire him as a regular employee. Scevers then filed a charge of discrimination with the Oregon Bureau of Labor and Industries (BOLI) alleging that Emerald Steel discriminated against him because of a disability and failed to accommodate him as required by state disability law.

BOLI Sides with Employee

The charge was heard by an administrative law judge in early 2005. Because the state of medical marijuana law was in flux at the time, and the state of the law at the time was more favorable to employees, the employer decided not to introduce evidence to support certain of its defenses at the hearing, Meneghello explained.

However, soon after the hearing, the tide started turning in employers' favor, he added. First the U.S. Supreme Court issued a key decision in June 2005 confirming that marijuana remained an illegal drug under federal law no matter what state laws said (*Gonzalez v. Raich*). The Oregon Supreme Court continued to swing the pendulum back in employers' favor in May, 2006, with a decision upholding an employer's right to terminate an employee who tested positive while at work for medical marijuana (*Washburn v. Columbia Forest Products*).

Despite several attempts by Emerald Steel to re-open the hearing to argue these matters, the agency issued an order in favor of Scevers. Emerald Steel appealed the order to the Oregon Court of Appeals.

Appellate Court Decides on Procedural Grounds

The Court of Appeals rejected Emerald Steel's appeal "in a fairly technical opinion that focused more on procedural issues and the proper method of preserving objections than it did on the underlying issue of medical marijuana," Meneghello observed. In light of the current state of the law, the company wanted to argue that because marijuana is an illegal controlled substance under federal law, employees cannot be protected by state law even for approved medical marijuana use. The company also wanted to argue that state and federal employment laws do not protect illegal drug users, and even though Oregon law may not have prohibited his actions, federal law certainly did.

But the Court of Appeals did not allow the employer to make these arguments. Instead, it pointed out that the company chose not to offer evidence to support these defenses at the time of the administrative hearing and, therefore, the possible legal errors were not preserved for review. For these reasons, it affirmed the decision of the agency and ruled in favor of the employee.

What Does This Mean For Employers?

"Prior to this decision, although not a slam duck that employers would win medical marijuana cases, the cases were in the employers' favor," Meneghello said. "Hopefully, this will be seen as a minor speed bump on the way to an employer victory on this matter."

He advised employers who hire temporary employees to insure that they are drug tested and come back clean. Further, he pointed out, under the state's disability law, even if an employer may be required to accommodate the medical marijuana user's underlying condition (the reason that he or she was prescribed marijuana), the employer is entitled to decide how best to accommodate that employee. "You don't have to defer to the employee," he noted.

"Start the interactive process. You have a disability? How can we accommodate you?" Is there some other way other than allowing the off-site use of marijuana? Maybe the employee would benefit from a revised schedule with more breaks. "Identify another accommodation that would

work,” Meneghello suggested.

McClory agreed that employers faced with employees who use medical marijuana off-site should engage in the interactive process. He continued, “If medical marijuana usage renders an employee unable to perform the essential functions of the job held, and no reasonable accommodation would correct this, the employer will not be required to ignore that.” Also, he said, if medical marijuana usage renders the employee unable to safely perform the job and no reasonable accommodation would eliminate the safety threat, the employer would not be required to allow the employee to remain in that job. The employer would need to explore whether transfer to an open position would be a reasonable accommodation.

“Every situation must be viewed on a case-by-case basis,” McClory noted. “Employers need to go through the interactive process, get information on that employee’s condition, get information on the effect of the treatment and make a decision as to that individual alone. [They] should not have a blanket rule.”

As for the future, Meneghello noted, “This seems to be an area that has been in flux for the last four or five years. It will continue for at least one year. Stay tuned. Try to stay up to date with it. This will probably be addressed in the 2009 legislative session.”

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