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"What Are You, People? On [State-Licensed Medical Marijuana]?" – The Hazy Intersection of State Medical Marijuana Laws, Federal Authorities and Employer Drug Free Workplace and Testing Policies

In the recent case *Emerald Steel Fabricators v. Bureau of Labor and Industries*, the Oregon Supreme Court overturned lower state court decisions and held that Oregon employers are not required to accommodate their employees' use of medical marijuana. In addition to giving rise to articles inevitably laden with references to 1980's films and bad puns,[1] the recent decision highlights the growing tension between and among state and federal anti-discrimination, accommodation, and criminal drug use and possession laws and employers' drug free workplace and testing policies.

Given the ever-present "legalization" movement and evolving nature of ADA litigation and claims brought under similar state laws, it is anticipated that more cases of this type will be litigated in the coming years, as states – and employers with operations in multiple jurisdictions – grapple with the often conflicting intents and principles of workplace accommodation, federal and state criminal drug laws and theories of individual privacy and federalism.

Oregon Passes The Dutchie On The Left Hand Side

In November 1998, the state of Oregon joined a growing number of states to pass a law protecting authorized medical marijuana users and growers from state criminal prosecution for production, possession or delivery of a controlled substance. Today, Oregon is one of fourteen states with medical marijuana laws – the others being Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Rhode Island, Vermont, and Washington.

The employee in *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries* was a temporary worker that the company was considering for permanent employment. The employee was aware that he would have to pass a drug test as a condition of permanent employment and disclosed to the company that he used marijuana for medical purposes consistent with the Oregon Medical Marijuana Act. The company inquired whether other medications had alleviated the employee's symptoms, and he replied that they were not as effective as marijuana. The company and employee had no further discussions regarding alternative treatments for his condition, and the employee was fired one week after his initial disclosure. He subsequently filed a complaint with the Bureau of Labor and Industries and began the state administrative process.

Ultimately, an administrative law judge concluded that the Oregon anti-discrimination laws were violated because the employer refused to participate in a "meaningful interactive process" to accommodate the employee's disability. The Court of Appeals, the intermediate appellate court in Oregon, affirmed the ALJ's decision finding the termination unlawful.

Federal Preemption Harshes Oregon's Mellow

In its decision upholding the termination of the employee, the Oregon Supreme Court held that Emerald Steel was not required to engage in a "meaningful interactive process" because it was excused from any obligations regarding medical marijuana use under Oregon anti-discrimination laws. Examining the language of the Oregon Medical Marijuana Act, Oregon anti-discrimination laws, the Americans with Disabilities Act and the federal Controlled Substances Act, the court concluded that using medical marijuana is an "illegal use of drugs" under both Oregon and federal law.

The court held that, while the employee's use of medical marijuana was an "authorized use" under state law, federal law preempts the section of Oregon law allowing such use. Specifically, the court stated that the Oregon Medical Marijuana Act "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," in this case the Controlled Substances Act, and leaves the Oregon law "without effect." With regard to the state statute's provision regarding use under the supervision of a licensed health care professional, the court similarly found that, because marijuana is a Schedule I drug under the Controlled Substances Act, it may not be lawfully prescribed for medical purposes.

The Future Of Medical Marijuana – Up In Smoke?

Only two other state supreme courts have analyzed similar accommodation issues and only one other

intermediate appellate court has done so. Although for varying reasons, all three decisions have come down on the side of the employer, holding that there is no violation for failing to accommodate an employee's medical use of marijuana.

However, it is highly likely that the legal wrangling around medical marijuana and the workplace is far from over. Because of the technical preemption analysis that some courts have relied upon, divergent precedents can be expected to emerge on a state by state basis, particularly given states' differing views of individual privacy rights and the underlying issues of federalism and the permissible reach of Congressional authority. In this regard, the Department of Justice's October 2009 memorandum indicating that federal resources in states with medical marijuana laws should not be focused on individuals who are "in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana," only adds to the potential for confusion and individual claims of workplace discrimination.

At a minimum, employers with drug free workplace and/or testing policies that span multiple jurisdictions will need to remain aware of the changing status of this area of the law and may need to adjust their policies to address unique issues as they develop in each individual state.

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[1] The authors would like to thank and apologize to Cameron Crowe (*Fast Times at Ridgemont High*, 1982), Musical Youth (*Pass the Dutchie*, 1982), and Tommy Chong & Cheech Marin (*Up in Smoke*, 1978). In the authors' defense, Ms. Petaja would like to note that she was still in diapers as of 1982 and Mr. Warner maintains that he did not inhale.

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