Ruling Clears Haze Over Pot, Pre-Employment Drug Tests

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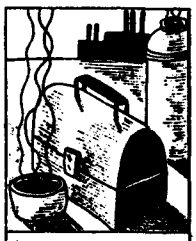
Must a California employer hire an applicant who tests positive on a pre-hire drug test but claims to be using marijuana for medical reasons?

The answer is no, according to a new decision from the 3rd District Court of Appeal. Employers may decline to hire applicants who use marijuana in violation of federal law, even if that use would not be a violation of state criminal law. *Ross v. Ragingwire Telecommunications Inc.*, 2005 DJDAR 10987 (Cal. App. 3rd Dist. Sept. 7, 2005).



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The decision was based on the pleadings (that is, facts in the case were taken only from the plaintiff's complaint itself), not from any evidentiary submissions by the parties. For purposes of its ruling, the court assumed the truth of all of the plaintiff's factual allegations.

According to the plaintiff's complaint, Gary Ross suffered from a serious back impairment and used marijuana for pain relief. Ross' doctor recommended the use of marijuana, under the Compassionate Use Act of 1996.

Ragingwire made a conditional job offer to Ross. Before taking the requisite pre-employment drug test, Ross furnished the testing clinic with a copy of his physician's written recommendation for medical marijuana. Ross submitted to the test and started working before the clinic conveyed the test results to the employer. He tested positive for tetrahydrocannabinol, or THC, the main chemical found in marijuana. On learning of the positive test result, Ragingwire discharged Ross for testing positive, even though he apprised had Ragingwire of his doctor's recommendation.

Ross filed a lawsuit asserting disability discrimination and wrongful termination. He alleged that Ragingwire's decision to fire him because he used marijuana, and its failure to provide him with reasonable accommodation, discriminated against him on the basis of his disability and constituted wrongful termination in violation of public policy. Ross also alleged that his use of marijuana did not affect his ability to perform the job he was offered and that, moreover, he had been working in the same field without any complaints or problems before being hired by Ragingwire.

Ragingwire asked the trial court judge to throw the case out even before any discovery was taken. The company argued, principally, that using marijuana is illegal under federal law and that nothing in the state Fair Employment and Housing Act or Compassionate Use Act requires an employer to tolerate, much less accommodate, illegal drug use. The trial-court judge ruled for the company and put an end to the case.

On Sept. 7, the 3rd District Court of Appeal affirmed that ruling. As to FEHA, the appellate court held, "It is not reasonable to require an employer to accommodate a disability by allowing an employee's drug use when such use is illegal." Moreover, California courts have no authority to compel an employer to accommodate medical-marijuana use under FEHA or the Compassionate Use Act.

The court explained that, although the Compassionate Use Act provides limited immunity from criminal prosecution under state law, federal law still prohibits the use of marijuana. "If FEHA is to be extended to compel such an accommodation," the court declared, "that is a public policy decision that must be made by the Legislature, or by the electorate via initiative, and not by the courts."

Likewise, the court refused to rewrite the Compassionate Use Act to provide protection for job applicants. For these same reasons, the court rejected the plaintiff's wrongful-termination claim.

Without minimizing the fact that California law recognizes legitimate medical reasons for using marijuana, the Court of Appeal emphasized the countervailing interest that employers have in ascertaining whether job applicants are abusing illegal drugs, so that they may decline to hire those individuals.

In that regard, the court noted the "well-documented" problems that are associated with the abuse of marijuana and other drugs by employees, including increased absenteeism, diminished productivity, greater health costs, increased safety problems and potential liability to third parties, and more-frequent turnover.

The Court of Appeal's opinion is a welcome development for California employers who conduct or plan to conduct pre-employment drug tests. However, employers should be mindful of the following points.

The opinion does not change FEHA's standard for establishing that an individual has a "disabling" impairment. This standard remains considerably easier for an individual to meet than the federal standard. In any event, state and federal law protect recovered substance abusers. Therefore, the distinction between current and former abusers continues to retain its vitality.

The opinion speaks only to a specific set of facts: whether an employer must accommodate a disability by excusing a job applicant's positive pre-employment drug test. FEHA's broad standard for "reasonable accommodation" remains intact. If a current employee requests an alternative accommodation such as requesting time off from work for rehabilitation, before otherwise violating any work rules, the employer must consider that request in good faith. Time off for this purpose is allowed by various state and federal laws, including the Family and Medical Leave Act and California Labor Code Section 1025. Time off to permit the employee to switch to another medication might be reasonable, as well.

Whether a state court will reach a different result outside of California remains to be seen. However, multistate employers must comply with the state laws in place in all locations where they do business.

Although the defendant employer's drug-testing policies were not at issue in *Ross*, employers should review their policies carefully. For example, policies should prohibit carefully all illegal drug use, not just drug use that occurs on work time or at work, because most employer drug-testing programs measure only the quantity of drug in a person's system and cannot determine when the substance was ingested.

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