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COMMENTARY

Colorado Supreme Court Permits Employers to Enforce Zero-Tolerance Drug Policies Against Medical Cannabis Users

On June 15, 2015, the Colorado Supreme Court held that Colorado employers can enforce zero-tolerance drug policies against employees who are permitted under state law to use medical cannabis, even if the employees use and are under the influence of the drug only during nonworking hours. The case, *Coats v. Dish Network, LLC*, No. 13SC394, 2015 CO 44 (2015), examined whether Colorado's "lawful activities statute," which protects employees from termination for "lawful activity off the premises of the employer during nonworking hours," restricts an employer's ability to terminate a state medical cannabis patient for off-duty use.[1] The Colorado Supreme Court held that the term "lawful" in the statute means that the off-duty activities in question must be lawful under *both* state and federal laws. While Colorado has legalized medical cannabis (and also recreational use of the drug), federal law still prohibits it. Accordingly, employers who dismiss employees for their medical drug use do not violate the lawful activities statute because using cannabis is still illegal under federal law. This decision provides some clarity (but leaves other questions unanswered) as companies and legal state medical cannabis patients continue to grapple with the tension between federal law and certain state laws regarding medical cannabis use.

Current State and Federal Cannabis Laws

The federal government has criminalized the use of cannabis and classified it as a Schedule I substance, which means the drug has a "high potential for abuse" and "has no currently accepted medical use in treatment in the United States," and there is "a lack of accepted safety for use of the drug or substance under medical supervision."[2]

Despite this criminalization at the federal level, many states have passed laws that legalize cannabis possession and use for medical purposes. Twenty-three states, plus the District of Columbia and Guam, currently allow medical cannabis.[3] In 2000, Colorado passed Amendment 20, which grants patients who use cannabis for medical purposes an affirmative defense to state criminal laws prohibiting the use of the drug.[4] Additionally, in 2012, Colorado voters passed Amendment 64, which permits the personal and recreational use of cannabis in the state.[5]

Fact Background and Analysis

Brandon Coats, the petitioner in this case, is a quadriplegic and suffers from painful muscle spasms. From

2007 to 2010, Coats worked as a telephone customer service representative for the respondent, Dish Network. In 2009, Coats received a Colorado medical cannabis license to help treat the pain caused by his quadriplegia. He consumed cannabis after work hours and in compliance with Colorado state law.

In 2010, Coats tested positive for THC during a random drug test. He had informed Dish that he was a registered medical cannabis patient and was likely to fail the test. Dish fired Coats after his positive drug test in accordance with the company's substance abuse policy.

Coats then filed a wrongful termination claim against Dish under Colorado's lawful activities statute.[6] He argued that his medical cannabis use, which occurred outside of work, was lawful under Colorado's Amendment 20.[7] The trial court dismissed Coats's claim, ruling that the state medical cannabis laws provide patients with an affirmative defense against state criminal prosecution but do not make their use of cannabis a "lawful" activity under section 24-34-402.5. Coats appealed.

The Colorado Court of Appeals affirmed the trial court's decision on different grounds. It concluded that the plain meaning of the term "lawful" under section 24-34-402.5 required the activity to be permitted by both state *and* federal law. The appellate court concluded that it did not need to reach the issue of whether Coats's cannabis use was lawful under state law because Coats's activity was illegal under the federal Controlled Substances Act.

The Colorado Supreme Court's 6–0 decision affirmed the Court of Appeals, and rejected Coats's argument that the General Assembly intended for the term "lawful" to mean "lawful under state law." Thus, the court concluded that Coats's use of cannabis was unlawful because it was prohibited by federal law. As such, Coats's use of cannabis was not protected under the lawful activities statute, and that statute did not provide a basis to overturn his discharge.

Implications

Although the *Coats* decision is limited to Colorado law, it provides some guidance for businesses operating in other states that permit medical cannabis. The opinion suggests that, as long as cannabis remains unlawful under federal law, companies likely can enact and enforce zero-tolerance drug policies even if employees have medical conditions for which they were granted medical cannabis permits under state law. The California Supreme Court reached essentially the same decision in 2008, holding that the Fair Employment and Housing Act did not require an employer to make accommodations for an employee who used medical cannabis.[8] The *Coats* decision is consistent with Ninth Circuit and Oregon State Supreme Court decisions holding that employers have no duty under the Americans with Disabilities Act to accommodate medical cannabis use because all cannabis use remains unlawful under federal law.[9]

However, before making employment decisions with respect to employees who use legal cannabis for medicinal or personal reasons, employers should familiarize themselves with the contours of the applicable state and local laws where they have employees and do business. Some states have passed legislation prohibiting employers from discriminating against employees for using medical cannabis, but their approaches differ. For example, Illinois permits nondiscriminatory zero-tolerance policies,[10] whereas Arizona specifically prohibits employers from discriminating against a registered medical cannabis user who has failed a drug test.[11] Because Arizona's statutory protections for medical cannabis users are explicit, a decision by Arizona's high court could potentially warrant a different result from the *Coats* decision. In addition to specific legal cannabis laws, the Washington D.C. Council recently voted to ban all pre-employment drug testing.

Given the nuances in various state laws and the recent proliferation of legislation and litigation regarding employee cannabis use, employers should review developments in this quickly evolving area prior to taking adverse employment actions against employees premised on cannabis use. To that end, employers should periodically review any substance abuse policies in order to confirm continuing compliance with all applicable laws where the employers maintain active workforces. Additionally, particularly in those states with anti-discrimination protections for medical cannabis users, employers should ensure consistent enforcement and application of their substance abuse policies by establishing consistent guidelines for when drug tests will be conducted and by testing broadly for alcohol and Schedule I drugs (as opposed to only testing for cannabis). Finally, employers

should always consider their employees' specific job duties and functions and carefully assess the tension between decriminalization of cannabis and applicable tort and occupational health and safety laws in crafting and enforcing substance abuse policies.

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Endnotes

1 Colo. Rev. Stat. Ann. § 24-34-402.5 (West 2015). Passed in 1990, Colorado's law states: "It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours" unless certain exceptions apply. Of the 23 states (plus D.C.) that permit medical cannabis use, six states have similar laws that protect workers from employment discrimination based on their lawful, off-duty activities: California, Illinois, Minnesota, Montana, Nevada, and New York. Some of these statutes specifically reference "lawful consumable products." Minn. Stat. Ann. § 181.938. *See also* N.Y. Lab. Law § 201-d(2) (McKinney 2015) (prohibits discrimination on the basis of "an individual's *legal use of consumable products* prior to the beginning or after the conclusion of the employee's work hours, and off of the employer's premises and without use of the employer's equipment or other property") (emphasis added).

2 21 U.S.C. § 812 (2012).

3 Several additional states permit the use of certain high-cannabidiol (CBD)/low-tetrahydrocannabinol (THC) nonpsychoactive strains, and four states and the District of Columbia have legalized recreational use.

4 *See* Colo. Const. amend. XX.

5 See Colo. Const. amend. LXIV.

6 *See* Colo. Rev. Stat. Ann. § 24-34-402.5 (West 2015).

7 *See* Colo. Const. amend. XX.

8 *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200 (2008)

9 *See James v. City of Costa Mesa*, 700 F.3d 394, 397 (9th Cir. 2012) (holding that because the ADA defines "illegal drug use" by reference to federal, rather than state, law, plaintiffs did not meet the requirements of "qualified individuals with a disability" under the ADA because the ADA expressly provides that "the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs"); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus*., 230 P.3d 518, 520-21, 526-30, 536 (Or. 2010) (holding that employers are not obligated to accommodate employees' medical cannabis use under the state's disability-discrimination statue because (i) Oregon law requires that statute be interpreted consistently with the ADA, (ii) to the extent the statute affirmatively authorized the use of medical cannabis, federal law preempts state law; and (iii) cannabis is still an illegal drug under federal law and therefore not protected under the ADA).

10 *See* 410 Ill. Comp. Stat. Ann. 130/50(b) (2014) ("Nothing in this Act shall prohibit an employer from enforcing a policy concerning drug testing, zero-tolerance, or a drug free workplace provided the policy is applied in a nondiscriminatory manner.").

11 *See* Ariz. Rev. Stat. Ann. § 36-2813(B) (2015) ("Unless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon … [a] registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment.").