



Oregon Employers Lose Latest Round of Medical Marijuana Battle

Insights

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On June 11th, the Oregon Court of Appeals dealt a blow to employers fighting medical marijuana in the workplace, letting stand an administrative decision which had granted a victory to a medical marijuana user (*Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*). Although the decision was largely based on technical grounds, the Court of Appeals passed up an opportunity to side with employers and the decision may lend comfort to workers' advocates who support looser workplace drug rules.

The Facts – A Long Strange Trip

In 2003, temp worker Anthony Scevers began working as a steel press operator at Emerald Steel Fabricators in Eugene, Oregon. The company typically 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, nor did it ensure that he tested clean with the staffing agency.

Unknown to Emerald Steel, Scevers was one of the many thousands of Oregonians who have medical marijuana cards through the Oregon Medical Marijuana Program (OMMP), and he regularly smoked marijuana because of nausea, stomach cramps, and vomiting. He never smoked pot 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. Rather than filing a lawsuit in court, Scevers 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.

The Administrative Process – Employer's Defense goes up in Smoke

The charge ultimately proceeded to an administrative hearing before an ALJ 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. This would ultimately be their downfall.

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Soon after the hearing, the tide started turning in employers' favor: 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*).

But by then it was too late for the company to raise their best defenses, and despite several attempts 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, which issued its decision June 11th, 2008.

The Appellate Decision – *Employer left high and dry*

The Court of Appeals rejected Emerald Steel's appeal in a fairly technical opinion which focused more on procedural issues and the proper method of preserving objections than it did on the underlying issue of medical marijuana. 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. It is not known whether Emerald Steel will appeal this decision to the Oregon Supreme Court.

What Does This Mean For Employers? – *Coming back down*

Prior to this decision, most things seemed to be going in the right direction for Oregon employers in the medical marijuana battle. Since 2005, employers have had the benefit of several helpful legal decisions, and it seemed likely that the tide would continue in management's favor. Will this decision change that view, or is this to be seen as a mere speed bump on the path to ultimate victory?

Certainly any decision by the second highest court in the State needs to be respected and cannot be taken lightly. Even though the decision was reached through technical grounds that are not likely to be repeated, it stands to reason that employers should tread cautiously until more definitive rulings are issued. The lessons to be learned from this decision include ensuring a drug-free workplace by requiring temporary employees to test clean for illegal substances before accepting placement.

Moreover, if any employee self-identifies as having a medical marijuana card, you should start an interactive process with that employee to determine whether a true disability is present and whether other accommodations besides drug use will allow for the performance of essential functions.

For more information contact any of the attorneys in our Portland office at 503.242.4262.

This Legal Alert is intended to provide an overview of an important new law. It is not intended to be, nor should it be construed as, legal advice for any particular fact situation.