

OREGON EMPLOYERS CLAIM VICTORY IN MEDICAL MARIJUANA BATTLE

Insights

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On April 15, 2010 the Oregon Supreme Court handed employers a comprehensive victory in the long-running medical marijuana battle, deciding that employers need not accommodate an employee's use of medical marijuana. The decision now means that employers can rest comfortably knowing they can consistently enforce their zero tolerance drug policies without regard to medical marijuana registry status. *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries.*

A Long, Strange Trip – The Facts

In 2003, temporary worker Anthony Scevers began working as a steel press operator at Emerald Steel Fabricators in Eugene on a temp-to-hire basis. 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 check with the staffing agency to learn whether he had passed a drug screen with them. 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, and there was 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. Scevers told his supervisor that he tried other medications to accommodate his ailments, but marijuana was the most effective treatment. Without engaging in interactive dialogue to determine if alternative accommodations might be appropriate, the company told Scevers that they would not hire him as a regular employee, and ended his temporary assignment. 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.

***Dazed and Confused* – The Agency and Court of Appeals Rule For Employee**

The state agency issued an order in favor of the employee, ruling that the employer failed to reasonably accommodate Sceverson's disability and also failed to engage in a mandatory "interactive process" to investigate possible accommodations. In June, 2008, the Oregon Court of Appeals agreed with the agency 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 drug use in the workplace.

But the decision gave comfort to medical-marijuana advocates and left most employers in a state of confusion, unsure about the legal boundaries and what was permitted in the workplace. A series of other conflicting court decisions in Oregon state courts and at the federal level only seemed to complicate matters, adding to the uncertainty.

***High Times* – The Supreme Court Hands Employers Victory**

On April 15, 2010, the Oregon Supreme Court handed employers a victory by reversing the Court of Appeals in a 5-2 opinion and clearing up any uncertainties. The Court first said that it would allow the employer to advance all necessary arguments and defenses, and would not be deciding the matter on "technical" grounds as the Court of Appeals did. The Court then ruled that medical marijuana – although excluded from state criminal statutes under the OMMP program – was still considered an "illegal drug" under federal law. Therefore, no employer could be forced to accommodate the use of an illegal substance because state disability discrimination law specifically says that illegal drug users are not protected by the statute.

The Court held that even if the employer failed to engage in an interactive process, there was no obligation to engage in that process because of the illegal nature of the employee's activities. The Court could not have been more clear: "Under Oregon's employment discrimination laws, employers are not required to accommodate an employee's use of medical marijuana."

What Does This Mean For Employers?

This decision could not be better for Oregon employers. The highest court in the state has now said that employers need not accommodate medical marijuana users in the workplace. Employers should feel free to evenhandedly apply zero-tolerance policies, consistently disciplining those who violate the policy and refusing to hire those applicants who fail drug screens, regardless of medical marijuana registry status.

We recommend that such a policy be issued in writing to applicants and employees, and that employers clearly indicate that medical marijuana is prohibited just as is any other controlled substance. Employers need not engage in any interactive process to determine whether the medical marijuana use should be accommodated or excepted.

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.