Employment Law and Medical Marijuana—An Uncertain Relationship

by Matthew D. Macy

Employers face the increasing likelihood that they have employees who are using medical marijuana. Medical marijuana, however, remains illegal under federal law. The limited Colorado law on the intersection of state and federal law creates uncertainty for employers and employees.

The recent growth of medical marijuana use and its continued illegality under federal law raise questions regarding what rights employers and employees have with respect to medical marijuana. The law in Colorado provides some answers, in that employers do not have to allow use on their premises. Beyond that, however, the Colorado appellate courts have provided little guidance. The issue is that marijuana—medical or otherwise—remains illegal under federal law. This fact may leave employees little, if any, recourse for adverse employment decisions based on their use of medical marijuana.

Medical Marijuana Becomes the Law in Colorado

Medical marijuana entered the Colorado legal landscape in 2000 with the passage of Amendment 20. Amendment 20 inserted § 14 of Article XVIII to the Colorado Constitution, exempting medical marijuana from criminal prosecution under state law. However, medical marijuana remains illegal under federal law.

The medical marijuana industry has grown rapidly since the federal government announced in 2009 that prosecution of people complying with state medical marijuana laws is a low priority.[1] On June 29, 2011, the U.S. Justice Department issued a memorandum reiterating its position that it is not "an efficient use of federal resources to focus enforcement efforts on individuals with cancer or other serious illnesses" and their caregivers, when they comply with state law.[2] However, the June memo also states that the federal government retains the right to prosecute anyone involved in medical marijuana.[3] The disconnect between federal and state law creates a conundrum for employers and employees.

Guidance and Unanswered Questions

Amendment 20 authorizes the use of marijuana as a medicine to treat certain medical conditions. The law itself provides some guidance to an employer on whether it must accommodate marijuana use by an employee or job applicant. For example, an employer does not have to allow medical marijuana use on its premises. Amendment 20 specifically provides that "[n]othing in this section shall require any employer to accommodate the medical use of marijuana in any work place."[4] An employer does not have to accept dangerous conditions created by medical marijuana use. No medical marijuana patient may "[e]ngage in the medical use of marijuana in a way that endangers the health or well-being of any person. . . ."[5] Amendment 20, however, is silent on an employee or job applicant's use of medical marijuana off the employer's premises and when the use of the drug would not endanger anyone's health or safety.

The ADA and Related State Laws

The Americans with Disabilities Act (ADA) bars covered employers from discriminating against a qualified individual because of the person's disability, or because the person is regarded as disabled.[6] The ADA defines "disability" as having a "physical or mental impairment that substantially limits one or more major life activities of such individual."[7] "Major life activities" is defined broadly to include, among other things, working, speaking, breathing, learning, concentrating, and major bodily functions.[8] A legitimate user of medical marijuana likely will have a condition that substantially limits a major life activity as defined under the ADA.

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It is with the definition of "qualified individual" that a medical marijuana patient may find trouble when asserting the protection of the ADA:

> "[A] qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity [for example, the employer] acts on the basis of such use.[9]

The ADA further provides that employers may prohibit the use of illegal drugs at the workplace.[10] Poor performance because of illegal drug use does not warrant the protection of the ADA.[11]

The ADA defines the "illegal use of drugs" as the use, possession, or distribution of drugs when doing so is unlawful under the federal Controlled Substances Act (CSA).[12] "Drugs" are controlled substances on schedules I through V of the CSA.[13] Marijuana is listed as a schedule I substance.[14] No physician may prescribe Schedule I substances; there is no exception for medical marijuana.[15]

A medical marijuana user can argue that the definition of "illegal use of drugs" excludes the use of a drug when supervised by a licensed health care professional.[16] The user also may point to the Colorado law allowing doctors to recommend medical marijuana. However, substances listed under Schedule I of the CSA are deemed to have "no currently accepted medical use in treatment in the United States" and "[t]here is a lack of accepted safety for use of the drug or other substance under medical supervision."[17]

The U.S. Supreme Court has addressed questions of the CSA and state medical marijuana laws, although not in the employment context. In the 2001 case of *U.S. v. Oakland Cannabis Buyers' Cooperative*, the Court addressed an injunction issued against a medical marijuana dispensary.[18] The Oakland Cannabis Buyers' Cooperative opened a medical marijuana dispensary under California's law allowing for medical marijuana.[19] The federal government sued Oakland Cannabis, seeking to enjoin its operation as a violation of federal law, notwithstanding California's medical marijuana law.[20] The federal government prevailed at the trial court level.[21] Oakland Cannabis did not appeal, but chose to openly violate the injunction by continuing operations.[22] The federal government brought contempt proceedings, and those contempt proceedings ended up before the U.S. Supreme Court.[23]

Oakland Cannabis argued that marijuana was a medical necessity because it was the only drug "that can alleviate the severe pain and other debilitating symptoms of the Cooperative's patients."[24] The Court found that the CSA barred the use, dispensation, and prescription of marijuana.[25] The Court found that the CSA did not allow for a medical necessity defense to its prohibition of Schedule I substances such as marijuana.[26] *Oakland Cannabis* left open the question of whether the CSA was constitutional.[27]

In 2005, the U.S. Supreme Court answered that question with *Gonzales v. Raich*.[28] There, two medical marijuana users argued that application of the CSA as to them was unconstitutional.[29] Both were using medical marijuana in accordance with California's Compassionate Use Act.[30] One had her marijuana seized by federal law enforcement officers after a joint DEA and sheriff's raid on her house.[31] The Court noted the users' strong arguments about marijuana's therapeutic purposes and the unwise listing of marijuana as a schedule I substance under the CSA.[32] However, those arguments were not enough. The Court found that the CSA was constitutional.[33] These decisions indicate that a court reviewing the illegal drugs issue under the ADA likely will find that medical marijuana is an illegal drug, notwithstanding a state's medical marijuana law.

The Oregon Supreme Court case of *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries* is one such case.[34] There, an employee was using medical marijuana in compliance with Oregon law.[35] The employer terminated the employee when it learned of the employee's use of medical marijuana.[36] The employee brought a charge of discrimination, alleging a failure to accommodate under Oregon's disability discrimination law. The employer lost at the hearing and appealed the administrative law judge's ruling.[37] The Oregon Court of Appeals affirmed the ruling in the employee's favor.[38] The Oregon Supreme Court then reversed the Court of Appeals, finding that marijuana was an illegal drug that disqualified the employee for coverage under the state law.[39]

The Oregon disability discrimination law is similar to the federal ADA in that it excluded coverage for employees currently using illegal drugs.[40] The Oregon Supreme Court noted that, although Oregon law allows for medical marijuana, federal law does not.[41] The federal law banning marijuana included medical marijuana, per the Oregon Supreme Court.[42] This meant that the employee was not covered by Oregon's disability anti-discrimination law, because the Oregon law excluded the illegal use of drugs from its protection.[43]

The California Supreme Court, moreover, has noted that "[n]o state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users."[44] The statute and court rulings present a formidable obstacle to a medical marijuana user seeking the protection of the ADA. The issue remains unresolved in Colorado and in the Tenth Circuit.

The Colorado Anti-Discrimination Act

An employee may turn to the Colorado Anti-Discrimination Act (CADA). CADA, which is similar to the ADA, prohibits employer discrimination against an employee because of the employee's disability.[45] Unlike the ADA, CADA's definition of "disability" does not mention the illegal use of drugs in the employment context.[46] CADA specifically provides that the illegal use of drugs does not qualify as a disability in the fair housing context.[47]

The statute's silence on this issue in the employment context could support an argument that the exclusion of the illegal use of drugs under the ADA does not extend to an employment disability claim under CADA.[48] CADA and the ADA are substantially equivalent, and interpretation of CADA should be consistent with the ADA.[49] The Colorado Division of Civil Rights, for instance, issued rules that mirror much of what is in the ADA.[50] However, the state legislature chose to exclude the illegal use of drugs from CADA's protections in the housing context. The legislature's failure to include it in the employment context raises the question of whether the omission was an oversight, or whether the legislature intended to have CADA cover employees who are using illegal drugs.

A recent Colorado Court of Appeals decision in the unemployment benefits context does not bode well for an employee arguing for protection under CADA. In *Beinor v. Industrial Claim Appeals Office*, the Colorado Court of Appeals upheld the denial of unemployment benefits to an employee who was terminated after testing positive for marijuana, albeit medical marijuana.[51] The employee won at the hearing level, but the Industrial Claim Appeals Office

reversed, denying him benefits.[52] The Colorado Court of Appeals upheld the denial of benefits.[53]

The *Beinor* court was not persuaded by the ex-employee's arguments that Amendment 20 exempted him from CRS § 8-73-108(5)(e).[54] Section 108(5)(e) authorizes the denial of benefits when an employee tests positive for a controlled substance for which he or she does not have a prescription.[55] Amendment 20 does not authorize prescriptions; it created an exemption to state criminal law prosecution for medical marijuana.[56] Amendment 20 also does not create a constitutional right to medical marijuana use: "[T]he Colorado Constitution does not give medical marijuana users the unfettered right to violate employers' policies and practices regarding use of controlled substances."[57] The ex-employee filed a petition for *certiorari* with the Colorado Supreme Court. The Court in *Beinor*, in *dicta*, commented about a recent case out of the state of Washington, holding that Washington's similar medical marijuana law does not "require employers to accommodate employee's off-site use of medical marijuana."[58]

Medical Marijuana as Pretext for Discrimination

There is a potential avenue for a medical marijuana patient to assert the protection of the ADA and CADA, even with the exclusion for the illegal use of drugs. The ADA provides that it does not cover an otherwise qualified person who is "currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use."[59] The employer also may require drug tests without violating the ADA.[60] An employer may make "employment decisions based on such test results."[61] Medical marijuana remains an illegal drug.

The question is whether an employer can use an employee's or applicant's use of medical marijuana as a cover for prohibited disability discrimination. A *bona fide* medical marijuana user likely will have a condition that qualifies as a disability under the ADA. An employee may argue that medical marijuana use was not the basis for the adverse employment action and instead, the actual reason was the employee's underlying disability. No case law has addressed whether a plaintiff can successfully argue that the employer used medical marijuana as a pretext for what otherwise would have been unlawful discrimination.

Even so, the ADA as applied by the courts is not kind to the current use of illegal drugs. The Tenth Circuit takes the position that the current use of illegal drugs does not warrant the protection of the ADA.[62] The court has noted that:

> Significantly, while the mere status of being an illegal drug user may invoke protection under the ADA, that protection does not extend to those "currently engaging in the illegal use of drugs."[63]

The fact that marijuana remains illegal under federal law likely will present an obstacle to a pretext argument.

Colorado's Lawful Activities Statute

CRS § 24-34-402.5 provides that an employer may not terminate an employee for the employee's lawful conduct that occurs on the employee's own time, off the employer's premises. The employer may terminate the employee for such activity if it "relates

to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of the particular employee or a group of employees."[64] An employer also may terminate the employee to avoid a conflict of interest or the appearance of a conflict of interest.[65]

An employee using medical marijuana seeking the protection of § 402.5 will have difficulty proving that the use of medical marijuana is a lawful activity. Medical marijuana is lawful under Colorado law but remains illegal under federal law. The illegality under federal law likely will be sufficient to remove the employee from the protection of § 402.5.

Public Policy Wrongful Discharge Claims

Another argument an employee terminated for medical marijuana use may turn to is unlawful termination in violation of public policy. An employee has a claim for wrongful termination in violation of public policy when the employee is terminated after the employee refuses an employer's direction

> to perform an act that "would undermine a clearly expressed public policy related to the employee's basic responsibility as a citizen or the employee's right or privilege as a worker."[66]

The public policy must be

> clearly mandated such that the acceptable behavior is concrete and discernible as opposed to a broad hortatory statement of policy that gives little direction as to the bounds of proper behavior.[67]

An analysis of whether such a claim exists under the circumstances must be tempered by the appellate court's admonition not to give it an expansive view.[68]

Claims for wrongful termination in violation of public policy have been successful when the employer directs an employee to break the law, orders a violation of a code of professional conduct, terminates a government employee for exercising the employee's free speech right, terminates an employee over the employee's assertion of workers' compensation rights, or terminates an employee for asserting his or her rights under Colorado's Wage Order.[69] No Colorado appellate court has published a decision on whether an employee would have such a claim for being terminated for *bona fide* medical marijuana use. The *Beinor* decision, however, is an ill omen for the viability of such a claim.

The existing case law on public policy discharge leans against such a claim for medical marijuana use. The *Beinor* court did not find any right to unemployment benefits when an employer terminates an employee who tests positive for marijuana used in compliance with Amendment 20.[70] The Colorado Court of Appeals in *Slaughter* found that an employee does not have a claim for wrongful termination in violation of public policy for refusing to take a drug test.[71] There, the employee tested positive for marijuana that she admitted to using recreationally.[72] She was terminated when she refused a third drug test. She sued for wrongful termination in violation of public policy. One basis for that claim was that the employer violated her right to privacy with the drug test, and being terminated over her refusal to take the third test gave

her a wrongful termination claim.[73] The Colorado Court of Appeals disagreed. It found that a private

> employer with a previously established written drug policy who directs an employee to take a drug test does not undermine public policy relating to the employee's rights as a worker.[74]

The court came to that conclusion by first noting that "Colorado does not have a clearly expressed employee right to refuse drug testing."[75] The court concluded that an employer requiring a drug test per an established written policy did not undermine public policy.[76] The *Slaughter* and *Beinor* cases suggest that Colorado courts may be reluctant to recognize a public policy wrongful termination claim if an employer terminates an employee for medical marijuana use.

A plaintiff making an argument for such a claim will find little help with decisions from other states. Other state courts have rejected the notion of a public policy wrongful discharge claim for an employee's legitimate medical marijuana use.[77] For example, the Washington Court of Appeals dealt with a public policy argument in *Roe v. TeleTech Customer Care Management*.[78] An employee was terminated when she tested positive for marijuana.[79] She offered the employer evidence that she was using medical marijuana in compliance with Washington's medical marijuana law, but her employer did not make an exception to its drug-free workplace policy.[80] The employee argued that the state's medical marijuana law was an expression of public policy that patients could not be terminated just because they use medical marijuana.[81]

The Washington Court of Appeals disagreed and held that the employee did not have a cause of action under the state's medical marijuana law for unlawful termination.[82] The law afforded a defense to a state criminal prosecution, but did not give rise to an unlawful termination claim.[83] The appellate court also disagreed with the employee's public policy argument. The Washington law protected users and caregivers from criminal prosecution, but did not protect employees from being terminated for their medical marijuana use.[84]

The Montana Supreme Court in *Johnson v. Columbia Falls Aluminum* also rejected an argument that terminating a medical marijuana patient for using the drug violated Montana's public policy, and in violation of state and federal anti-discrimination laws.[85] The Montana Supreme Court noted that Montana's medical marijuana law also had a provision that it was not to be construed to require employers "to accommodate the medical use of marijuana in any workplace."[86]

Recently, in *Casias v. Wal-Mart Stores*, a federal district court in Michigan rejected an argument that terminating an employee for use of medical marijuana violated Michigan's public policy and that state's medical marijuana law.[87] The court noted that Michigan's medical marijuana law did not regulate private employment.[88] The court also rejected the argument that Michigan's medical marijuana law gave rise to a claim for wrongful termination in violation of public policy.[89] The judge mentioned state appellate court decisions in Washington, Montana, and California in support of his ruling.[90] Moreover, the judge raised an issue that may give other judges pause before finding that a claim exists for wrongful termination for medical marijuana use:

> [O]ne implication of Plaintiff's theory is that [Michigan's medical marijuana law] would expose a Michigan employer to civil liability for firing an employee for engaging in conduct that amounts to a federal felony.[91]

Because no Colorado appellate court has published a decision on the issue, the question remains unanswered in this state. The weight of existing case law favors the employer over the employee on the issue of medical marijuana. Whether the Colorado courts will follow this trend or strike a new path and recognize a public policy wrongful discharge claim has yet to be seen.

Conclusion

The intersection of medical marijuana and employment law is a relatively new and evolving area. The split between federal and state law, as well as the dearth of case law in Colorado, creates uncertainty for employers and employees. The current environment in the courts appears to be employer-friendly. That, however, may change. The changes could come through a court decision that upsets the current trend, or through legislation. Employers, employees, and their attorneys need to keep abreast of this developing area of law.

Notes

1. October 19, 2009, Memorandum by David W. Ogden, U.S. Deputy Attorney General, available at www.justice.gov/opa/documents/medical-marijuana.pdf.
2. *See* June 29, 2011, Memorandum by James M. Cole, U.S. Deputy Attorney General, available at extras.mnginteractive.com/live/media/site36/2011/0701/20110701_113435_pot_memo_one.pdf.
3. *See id*.
4. Colo. Const. art. XVIII, § 14(10)(b).
5. Colo. Const. art. XVIII, § 14(5)(a)(I).
6. 42 U.S.C. §§ 12102(1) and 12112(a).
7. 42 U.S.C. § 12102(1)(A).
8. 42 U.S.C. § 12102(2).
9. *Id*.
10. 42 U.S.C. § 12114(c)(1).
11. *See* 42 U.S.C. § 12114(c)(4).
12. 42 U.S.C. § 12111(6)(A).
13. 42 U.S.C. § 12111(6)(B).
14. 21 U.S.C. § 812(c).
15. *See U.S. v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001).
16. 42 U.S.C. § 12111(6)(A).
17. 21 U.S.C. § 812(b)(1)(B) and (C).
18. *Oakland Cannabis, supra* note 15.
19. *Id*. at 486.
20. *Id*. at 486-87.
21. *Id*. at 487.
22. *Id*.
23. *See id*.
24. *Id*.
25. *Id.* at 491 ("Whereas some other drugs can be dispensed and prescribed for medical use, *see* 21 U.S.C. § 829, the same is not true for marijuana.").
26. *Id*. at 494-95.
27. *Id*. at 494.
28. *Gonzales v. Raich*, 545 U.S. 1 (2005).
29. *Id*. at 8.
30. *Id*. at 7.
31. *Id*.
32. *Id*. at 9, 27-29.
33. *Id*. at 26.
34. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010).
35. *See id*. at 520.
36. *See id*. at 520-21.

37. *See id*. at 521.
38. *See id*. *See also Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus*., 186 F. 3d 300 (Or.App. 2008), *rev'd*, 230 P.3d 518 (Or. 2010).
39. *See Emerald Steel, supra* note 34 at 535-36.
40. *See id*. at 525.
41. *See id*. at 527.
42. *See id*. at 529 (the CSA "prohibits the use of marijuana without regard to whether it is used for medicinal purposes").
43. *See id*. at 535-36.
44. *Ross v. Ragingwire Telecomm., Inc.*, 42 Cal.4th 920, 926 (2008) (citations omitted).
45. CRS §§ 24-34-301(2.5)(a) ("disability") and -402(a).
46. *Compare* CRS § 24-34-301(2.5)(a), *with* 42 U.S.C. § 12114(a).
47. CRS § 34-34-301(2.5)(b)(I).
48. *See generally Specialty Rests. Corp. v. Nelson*, 231 P.3d 393, 402 (Colo. 2010) ("the General Assembly's failure to include particular language is a statement of legislative intent, not a mere omission").
49. *See Tesmer v. Colorado High Sch. Activities Ass'n*, 140 P.3d 249 (Colo.App. 2006); Colo. Div. Civil Rights Rule 60.1(B).
50. *See* Colo. Div. Civil Rights Rules 60.1 and 60.2.
51. *Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970 (Colo.App. 2011), *cert. pending.*
52. *See id*. at 971-72.
53. *See id*.
54. *See id*. at 974-76.
55. CRS § 8-73-108(5)(e) requires that the drug test be done in accordance with a previously published drug test policy and that the testing be done at certain facilities.
56. *See Beinor, supra* note 51 at 974-75.
57. *Id*. at 976.
58. *Id*. at 976-77, *citing Roe v. TeleTech Customer Care Mgmt. (Colo.), LLC*, 257 P.3d 586 (Wash. 2011).
59. 42 U.S.C. § 12114(a).
60. *See* 42 U.S.C. § 12114(d).
61. *Id*.
62. *See, e.g., Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 609 (10th Cir. 1998).
63. *Id*. (citations omitted).
64. CRS § 24-34-402.5(1)(a).
65. CRS § 24-34-402.5(1)(b).
66. *Slaughter v. John Elway Dodge S.W./Autonation*, 107 P.3d 1165, 1168 (Colo.App. 2005) (citation omitted).
67. *Id*. (citation omitted).
68. *See id*.
69. *See Bonidy v. Vail Valley Ctr. For Aesthetic Dentistry, P.C.*, 186 P.3d 80 (Colo.App. 2008) (employee asserted rights under Colorado's Wage Order 22); *Wisehart v. Meganck*, 66 P.3d 124 (Colo.App. 2002) (listing and summarizing cases), *cert. denied* (Colo. 2003).
70. *See Beinor, supra* note 51 at 974-77.
71. *Slaughter, supra* note 66 at 1170.
72. *See id*. at 1167.
73. *See id*.
74. *Id*. at 1170.
75. *Id*.
76. *See id*.
77. *See, e.g., Ross, supra* note 44 at 931-33.
78. *Roe v. TeleTech Customer Care Mgmt.*, 216 P.3d 1055 (Wash.App. 2009), *aff'd*, 257 P.3d 586 (Wash. 2011).
79. *Id*. at 1057.
80. *See id*.
81. *See id*. at 1058.
82. *See id*. at 1059-61.
83. *See id*.
84. *See id*. at 1061.
85. *Johnson v. Columbia Falls Aluminum Co.*, 350 Mont. 562, No. DA 08-0358 at ¶¶ 5 and 11 (2009) (unpublished).
86. *Id*. at ¶ 5.
87. *See Casias v. Wal-Mart Stores, Inc.*, No. 10-CV-781, Op. at 11-19 (W.D.Mich. Feb. 11, 2011).
88. *See id*. at 12-18.
89. *See id*. at 18-19.
90. *Id*. at 19 n.8.
91. *Id*. at 13 n.5. ■