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Colorado Supreme Court Upholds Termination of Employee for Medical Marijuana Use

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On June 15, the Colorado Supreme Court provided good news to Colorado employers that prohibit employee marijuana use. In the long-awaited decision in *Coats v. Dish Network*, the court ruled that medical marijuana use—which is permitted under state law but prohibited under federal law—is not a “lawful activity” under Colorado’s lawful activities statute.

In November 2000, Colorado voters passed an amendment to the state Constitution—Amendment 20 or the Medical Marijuana Amendment—which allowed patients suffering from certain conditions to obtain a state-issued registration card for the purchase and use of marijuana without fear of criminal prosecution by state authorities. Although the Medical Marijuana Amendment states “[n]othing in this section shall require any employer to accommodate the medical use of marijuana in any workplace,” there was uncertainty surrounding the interplay between the Medical Marijuana Amendment and Colorado’s lawful activities statute, an employment discrimination provision in the Colorado Civil Rights Act.¹ Specifically, advocacy groups claimed that because the Medical Marijuana Amendment decriminalized marijuana use, the lawful activities statute prohibited Colorado employers from disciplining or firing employees for off-duty use.

Following its review of the generally understood meaning of the word “lawful,” as well as the General Assembly’s intent when it enacted Section 24-34-402.5 of the Colorado Civil Rights Act, the *Coats* court clarified that the word “lawful” is not limited to what is permissible under state law only, but also contemplates the lawfulness of the activity in question under federal law. In reaching this decision, the Colorado Supreme Court recognized that marijuana remains a prohibited Schedule I substance under the federal Controlled Substances Act, rendering its use and possession unlawful under federal law. Marijuana, even for medical purposes, therefore, falls outside the ambit of Colorado’s statutory protection for *lawful* off-duty conduct.

¹ Colo. Rev. Stat. Section 24-34-402.5(1), states that “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 such a restriction: (a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or (b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.”

The court did not address recreational, as opposed to medical, use of marijuana, but there is every reason to believe that the same result applies in the context of recreational use.²

Coats' Medical Marijuana Use and Termination of Employment Following Positive Drug Test

The plaintiff, a quadriplegic, was employed as a telephone customer service representative from 2007 to 2010. According to his complaint, the plaintiff's doctor recommended that he use medical marijuana to supplement more traditional medications. Accordingly, the plaintiff became licensed by the state of Colorado, pursuant to the Medical Marijuana Amendment, to purchase marijuana, which he claimed he reserved for use at home. As a result of his off-duty use, during a random drug test at work, the plaintiff tested positive for Tetrahydrocannabinol ("THC"), which is the psychoactive ingredient in marijuana. In keeping with its drug policy, the company terminated the plaintiff's employment.

The plaintiff sued the employer, claiming his termination violated Colorado's lawful activities statute. The statute prohibits an employer from discharging an employee for "engaging in any lawful activity off the premises of the employer during nonworking hours," subject to certain exceptions. In his complaint, the plaintiff alleged that the Medical Marijuana Amendment made his use of medical marijuana a lawful activity under Colorado state law, and that his termination therefore violated the statute.

The employer filed a motion to dismiss the complaint. Its primary argument was that marijuana use is not protected by Colorado's lawful activities statute. The employer explained that to be protected, off-duty conduct must be lawful under both state and federal law. Therefore, the statute did not protect his use of medical marijuana (even if it was off its premises and during non-working hours) because marijuana use is illegal under federal law. The employer argued also that the Medical Marijuana Amendment did not make the use of medical marijuana lawful or confer a constitutional right upon the plaintiff to use medical marijuana. Rather, the employer asserted that the Medical Marijuana Amendment only created an affirmative defense to state criminal conviction against a patient who possesses and uses the drug in compliance with the amendment.

In response to the employer's arguments, the plaintiff claimed that the lawful activities statute does not reference federal law, and therefore activity only has to be lawful under state law in order to be protected. The plaintiff contended that the Medical Marijuana Amendment conferred an affirmative right to use medical marijuana on those who qualify. Therefore, the plaintiff concluded that his use of medical marijuana was lawful under state law and, accordingly, constituted a "lawful activity" under the statute.

The district court granted the employer's motion to dismiss. It held that prior "interpretations of the Medical Marijuana Amendment limit the effect of the amendment as an affirmative defense to criminal prosecution," and that, "[t]he amendment does not make the use of medical marijuana a lawful activity, so as to preclude an employer from termination based on this conduct." Therefore, since the "use of marijuana, even where such use is in full compliance with Colorado's Medical Marijuana Amendment, is not a lawful activity," the plaintiff's claim failed.

The Colorado Court of Appeals upheld the dismissal, but came to its conclusion using a slightly different legal analysis. It determined that "for an activity to be 'lawful' in Colorado, it must be permitted by, and not contrary to, both state and federal law." Thus, the appellate court concluded that "because plaintiff's state-licensed medical marijuana use was, at the time of his termination, subject to and prohibited by federal law . . . it was not 'lawful activity' . . ." Accordingly, it upheld dismissal of the complaint.

The plaintiff appealed, and the Colorado Supreme Court granted the appeal on two issues: (a) whether the lawful activities statute protects employees from discretionary discharge for lawful use of medical marijuana outside the job where the use does not affect job performance; and, (b) whether the Medical Marijuana Amendment makes the use of medical marijuana "lawful" and confers a right to use medical marijuana to persons lawfully registered in the state.

The Colorado Supreme Court Affirms the Lower Court Decision

With regard to the first issue, the Colorado Supreme Court affirmed the appellate court's decision that because the plaintiff's marijuana use was unlawful under federal law, it could not fall within the lawful activities statute's protection for "lawful" activities. In arriving at this decision,

² In addition to the *Coats* decision, Colorado employers should be aware of an earlier employer favorable decision in *Curry v. MillerCoors, Inc.*, 2013 U.S. Dist. LEXIS 118730 (D. Colo. Aug. 21, 2013) in which the U.S. District Court for the District of Colorado dismissed disability and privacy law challenges related to employment termination following a positive test result notwithstanding assertion that use of medical marijuana was lawful under Colorado law.

the court first determined that because the statute did not define the word “lawful,” the court must construe the term “with a view toward giving the statutory language its commonly accepted and understood meaning.” The court therefore looked to its own prior construction of the word, as well as that of courts in other states, and agreed that the term “lawful” is “that which is ‘permitted by law’ or, conversely, that which is not contrary to, or forbidden by law.”

In considering whether “lawful” under the state statute subsumed activities that are unlawful under federal law, the court refused to adopt the plaintiff’s reading that the term refers only to actions that are “lawful under Colorado state law.” Instead, the court asserted that “the term is used in its general, unrestricted sense, indicating that a ‘lawful’ activity is that which complies with applicable ‘law,’ including state and federal law.” The court emphasized that the federal Controlled Substances Act prohibits the use of marijuana for medical purposes and makes no exception for its use in accordance with any state’s law.³ The plaintiff’s use of medical marijuana, therefore, could not be protected activity under the lawful activities statute because it was unlawful under federal law.

Finally, the court disagreed with the plaintiff’s argument that the Colorado General Assembly intended the word “lawful” to mean “lawful under Colorado law,” stating that it could “find nothing to indicate that the General Assembly intended to extend section 24-34-402.5’s protection for ‘lawful’ activities to activities that are unlawful under federal law.” All told, the court held that “because [the plaintiff’s] marijuana use was unlawful under federal law, it does not fall within section 24-34-402.5’s protection for ‘lawful’ activities.”

In light of this ruling, the court declined to address the second issue – whether Colorado’s Medical Marijuana Amendment makes the use of medical marijuana “lawful” by conferring a right to individuals lawfully registered to use it within the state.

Practical Implications

Under *Coats*, Colorado employers can, without running afoul of the lawful activities statute, continue to administer drug-free workplace and testing policies, including taking adverse action on the basis of a positive marijuana test result even if the employee has a physician’s recommendation for medical marijuana. Additionally, employers may take adverse employment action, including dismissal, against prospective and current employees based on their use of substances deemed illegal under state and/or federal law without exposure under the lawful activities statute. To support adverse action, if any, however, employers should ensure that their policies clearly define “illegal” drug use to include all drugs made illegal under federal, state or local law. Employers should also re-visit policy provisions relating to “prescription” medications to ensure that unqualified prescription medication use is not authorized, and administer testing policies and disciplinary decisions in a fair and consistent manner.

Although not addressed by the Colorado Supreme Court, the *Coats* decision provides strong support for the proposition that employers may enforce drug policies against employees in Colorado who use recreational marijuana following the passage of Amendment 64. Like the Medical Marijuana Amendment, Amendment 64 is a marijuana-related amendment to the Colorado State Constitution. Amendment 64 decriminalizes an adult’s recreational use of marijuana without a physician’s recommendation. The analysis in the *Coats* decision applies with equal force to recreational as well as medical use, so it is very likely that a challenge to a discharge for recreational marijuana use will meet the same fate as the plaintiff’s claim.

It bears emphasis that the *Coats* decision does not address potential challenges under other employment laws or court decisions such as disability laws or employee privacy rules. However, *Coats* makes it more likely that the outcome of such disputes will be employer-favorable.

In Colorado and nationwide, the legal landscape and public perception of marijuana use is rapidly changing. As such, employers should continue to monitor the debate on medical and recreational marijuana for further developments. Certainly, to the extent marijuana is ever decriminalized under federal law, the *Coats* decision will be significantly undermined.

³ The court cited to the U.S. Supreme Court’s decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), which found that “[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail,” including in the area of marijuana regulation.”