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In the First Case of its Kind, Court Rules Federal Law Does Not Trump Employee Protections under State Medical Marijuana Law

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Employers nationwide take note: if your workplace drug and alcohol-testing policies take a *zero tolerance* approach to medical marijuana because the use, distribution, or possession of marijuana is unlawful under *federal law*, a recent federal court decision interpreting state law could be a game-changer. On August 8, 2017, in *Noffsinger v. SSC Niantic Operating Company LLC, d/b/a Bride Brook Nursing & Rehabilitation Center*, a Connecticut federal district court held that various federal laws prohibiting use and sale of marijuana do not preempt Connecticut's Palliative Use of Marijuana Act (PUMA), which protects employees and job applicants from employment discrimination based on medical marijuana use permitted under state law. The core implication of the *Noffsinger* decision is that federal law does not prohibit employment of illegal drug users. The decision is also the first to imply a private cause of action under PUMA's employment anti-discrimination provisions.

Plaintiff's PTSD, Failed Drug Test, and PUMA Claim

The plaintiff claimed she was diagnosed with post-traumatic stress disorder (PTSD) and that as a result, her doctors recommended she use medical marijuana. She registered with the Connecticut Department of Consumer Protection, and following registration, began using Marinol, a synthetic form of marijuana.

The defendant recruited the plaintiff in 2016, extending an employment offer contingent on plaintiff's passing a pre-employment drug test. The plaintiff notified the employer that she was a registered medical marijuana user who took Marinol, but only at night before bed so she would not be impaired at work. The plaintiff then took the pre-employment drug test.

The day before the plaintiff was scheduled to start work, the drug-testing company informed the parties that the plaintiff had tested positive for cannabis. That same day, the defendant rescinded the plaintiff's job offer because of the failed drug test.

The plaintiff sued, alleging the defendant violated PUMA's anti-discrimination provision. The defendant moved to dismiss, primarily asserting plaintiff's PUMA claim was preempted by three federal statutes: the Controlled Substances Act (CSA), the Americans with Disabilities Act (ADA), and the Food, Drug, and Cosmetic Act (FDCA).

Court Rules Federal Law Does Not Prohibit Employing Illegal Drug Users and Implies Private Cause of Action under PUMA

The *Noffsinger* court found no federal preemption of PUMA. The court first analyzed the CSA, the federal statute criminalizing marijuana use. While the court recognized that PUMA affirmatively authorizes the very conduct the CSA expressly prohibits—*i.e.*, marijuana use—this conflict was not enough to support a conclusion that PUMA is an obstacle to CSA's goals. While the court recognized that the CSA prohibits marijuana use, the court noted that the CSA does not prohibit employing marijuana users, nor does it seek to regulate employment practices at all. For this reason, the court concluded that the CSA did not prevent the plaintiff from making a claim based on PUMA's prohibition on "an employer . . . taking adverse action against an employee on the basis of the employee's otherwise state-authorized medicinal use of marijuana."

The court reached the same conclusion under the ADA. Initially, the court stressed that the ADA's primary purpose is to protect employees from discrimination, a purpose shared under PUMA's anti-discrimination provision. The court then explained that while the ADA explicitly allows employers to prohibit illegal drug use *at the workplace*, it does not authorize employers to take adverse employment action based on illegal drug use *outside of the workplace*. Accordingly, the court found that the ADA does not preempt PUMA's medical marijuana anti-discrimination provision. Notably, the court also specifically rejected the argument that employers can universally use a negative drug-test result as a qualification standard for employment.

Finally, the court concluded the FDCA—the statute that authorizes the federal Food and Drug Administration to oversee the safety of food, drugs and cosmetics—did not preempt PUMA. Although the court recognized that PUMA permits drug use that the Food and Drug Administration has not approved, the court once again adopted a narrow view of federal law, finding the FDCA does not regulate employment. As a result, PUMA's anti-discrimination provision, the court ruled, did not conflict with or pose an obstacle to FDCA goals.

The court then held—again on an issue of first impression—that an implied private right of action exists under the PUMA's anti-discrimination prohibition (PUMA does not contain an explicit private cause of action) for an employer's adverse employment actions taken based on rights protected by PUMA. The *Noffsinger* court reasoned that without a private cause of action, PUMA, "would have no practical effect, because the law does not provide for any other enforcement mechanism."

The Court Failed to Address the Legality of Marinol Use Under Federal Law

The *Noffsinger* decision is somewhat odd because Marinol (or dronabinol) is lawful under the CSA – it is a CSA Schedule III drug that can be prescribed and used without violating the CSA.¹ Thus, the very conduct forming the basis for plaintiff's state-law discrimination claim was potentially also actionable under the ADA, but neither the parties nor the court addressed this issue. For this reason alone the decision may be of limited value in future cases where an applicant or employee's drug use is in fact prohibited by federal law.

¹ 21 C.F.R. § 1308.13 (g).

Employer Takeaways

Noffsinger is significant because it is the first decision to conclude that marijuana's unlawful status under federal law does not bar a discrimination claim based on conduct protected by state medical marijuana laws. While the decision specifically concerns PUMA, its conclusion may have far-reaching consequences that can substantially change the playing field for employers, including employers that operate in the growing number of states that also provide affirmative employment protections for medical marijuana users.

Many years ago, the United States Supreme Court ruled that both medical marijuana growers and users could be prosecuted under the CSA.² Additionally, seven years ago, the Oregon Supreme Court expressly held that the CSA preempts the Oregon Medical Marijuana Act.³

Thus, until *Noffsinger*, employers could generally—without contrary authority—reasonably argue that the federal CSA, which criminalizes marijuana, preempts state medical marijuana laws. This allowed employers to enforce a drug-testing policy under which all applicants and employees were subject to adverse action for positive test results because marijuana remained illegal as a matter of federal law.⁴ So long as the policy was applied uniformly, the employer could take the position that it was not taking action against an employee due to the employee's status as a medical marijuana user, but, rather, was simply enforcing a policy applicable to all employees with respect to drugs that are illegal under federal law. *Noffsinger* arguably invalidates that approach under Connecticut law, and courts in other jurisdictions with similar medical marijuana statutes might follow this lead.

As noted above, *Noffsinger* also is significant because the court concluded that there is a private cause of action for violations of the PUMA discrimination provision. By recognizing an implied cause of action, the decision could increase the potential for litigation in other states with medical marijuana laws without an express statutory enforcement mechanism.

The *Noffsinger* decision is not binding on other courts, but an appeal to the United States Court of Appeals for the Second Circuit is likely. As the first decision of its kind, there is risk that other courts may decide the reasoning of the decision is persuasive, particularly in states with robust medical marijuana laws that provide affirmative anti-discrimination and other employment protections. It bears emphasis that *Noffsinger* is the second significant decision this summer to assess the employment impact of a state law permitting the use of medical marijuana. In *Barbuto v. Advantage Sales & Marketing, LLC*, SJC-12226, the Massachusetts Supreme Judicial Court determined that an employer has obligations to accommodate lawful medical marijuana users under Massachusetts disability discrimination laws. *Barbuto and Noffsinger* may signal a new trend expanding the protections that must be afforded to employees who use medical marijuana under state law.

2 *United States v. Oakland Cannabis Buyers Co-Op*, 532 U.S. 483 (2001) (growers can be prosecuted); *Gonzales v. Raich*, 545 U.S. 1 (2005) (users can be prosecuted).

3 *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 348 Or. 159 (2010). See also Christopher Leh, [Oregon Supreme Court Decides Employers Not Required to Accommodate an Employee's Use of Medical Marijuana](#), Littler ASAP (May 3, 2010). The employer in *Noffsinger* does not appear to have argued, like the employer in *Emerald Steel*, that the state medical marijuana law in its entirety was preempted.

4 In the recent decision in *Barbuto v. Advantage Sales and Marketing*, SJC-12226 (Mass. July 17, 2017), in which the Supreme Judicial Court of Massachusetts recognized a state disability law claim brought by a medical marijuana using applicant, [the employer had waived federal preemption defenses](#). See Christopher B. Kaczmarek, Nancy Delogu, and Richard Marks, [Massachusetts Supreme Judicial Court Creates Employer Obligation to Accommodate Employees Using Medical Marijuana](#), Littler Insight (July 19, 2017).