

In This Issue:

April 2010

Oregon employers' long wait for a definitive answer regarding whether they have to accommodate employees' medical marijuana use in the workplace has come to an end. The Oregon Supreme Court recently ruled that Oregon employers have no duty to accommodate medical marijuana use in the workplace, and thus may take adverse employment action against employees who are currently using medical marijuana without fear of running afoul of Oregon's disability discrimination laws.

The Smoke Has Cleared – Oregon Supreme Court Finds Medical Marijuana Use at Work Not Protected

By Patricia A. Haim, Nancy N. Delogu and Jennifer A. Nelson

Oregon employers' long wait for a definitive answer regarding whether they have to accommodate employees' medical marijuana use in the workplace has come to an end. On April 15, 2010, the Oregon Supreme Court ruled that Oregon employers have no duty to accommodate medical marijuana use in the workplace, and thus may take adverse employment action against employees who are currently using medical marijuana without fear of running afoul of Oregon's disability discrimination laws.

The Decision

The case, *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, involved Emerald Steel's 2003 termination of Anthony Scevers, an employee who used marijuana for anxiety, panic attacks, nausea, vomiting, and severe stomach cramps – all of which he claimed substantially limited his ability to eat. Based upon a signed statement from his physician that marijuana could “mitigate the symptoms or effects” of his condition, Scevers obtained a medical marijuana card in 2002. He began working for Emerald Steel as a temporary drill press operator in 2003, and used marijuana one to three times per day throughout his employment. However, when offered permanent employment subject to passing a drug test, he told Emerald Steel about his medical marijuana use and was terminated one week later.

Scevers filed a complaint with the Oregon Bureau of Labor and Industries (BOLI), alleging, among other things, that Emerald Steel had discriminated against him by failing to make reasonable accommodation for his disability (*i.e.*, by refusing to make an exception to a general workplace rule prohibiting the use of illegal drugs in the workplace). BOLI agreed with Scevers and the Oregon Court of Appeals upheld BOLI's decision on strictly procedural grounds. The Oregon Supreme Court reversed, finding that employers have no duty to accommodate the use of marijuana – even when that use is sanctioned by the Oregon Medical Marijuana Program. The court's holding is based on the premise that because the federal Controlled Substances Act makes all

marijuana use illegal, it preempts the section of the Oregon Medical Marijuana Act authorizing its use. Therefore, the court reasoned, medical marijuana use constitutes “illegal use of drugs” for purposes of the definitions included in Oregon’s disability discrimination law which exclude current illegal drug users from its protection.

Years of Uncertainty Come to an End

The Oregon Supreme Court’s decision ends what has been more than a decade of uncertainty for employers on this issue, as the law has been in flux since 1998 when Oregon voters passed the ballot measure that became the Oregon Medical Marijuana Act (OMMA). In the first test case, *Washburn v. Columbia Forest Products, Inc.*, the Oregon Court of Appeals held that an employer’s failure to accommodate an employee’s medical marijuana use violated Oregon’s law against disability discrimination. While the Oregon Supreme Court reversed that decision in 2006, it did so on other, indirect, grounds, with only one justice stating that he did not believe that allowing medical marijuana use would be a reasonable accommodation. As a result, there has been no definitive guidance – until now – as to whether Oregon employers must accommodate medical marijuana use.

The *Emerald Steel* decision is consistent with court rulings in other states with medical marijuana laws, including California, Montana, and Washington.

Practical Implications for Employers

Oregon employers can feel confident, at least for now, in establishing drug-free workplace policies, administering drug tests, and making employment decisions due to medical marijuana use by an employee or applicant without fear of running afoul of the state’s disability discrimination laws. Employers may discipline, refuse to hire, or terminate an employee or applicant who fails to pass a drug test or otherwise violates a drug-free policy, regardless of whether that employee or applicant possesses a medical marijuana card. That being said, employers should keep in mind that both Oregon and federal laws protect individuals who are in *recovery* from substance abuse, and they should not make any employment decisions on that basis.

Efforts to overturn the Oregon Supreme Court’s decision through legislation, initiative, and/or an appeal to the U.S. Supreme Court are possible. The *Emerald Steel* decision is based on the premise that Oregon’s statutory protections against disability discrimination do not apply to employees engaged in illegal drug use, and that using medical marijuana in compliance with the OMMA is still illegal drug use. This leaves the door open to a potential statutory fix by the Oregon legislature. In addition, given the popular support for the Medical Marijuana Program in Oregon, it would not be surprising to see an attempt to undo the court’s decision through a voter initiative. The U.S. Supreme Court has yet to weigh in on this subject, though it has rejected earlier efforts to overturn states’ medical marijuana laws, finding that they were not preempted by the federal Controlled Substances Act. Employers should stay tuned for the next chapter, though for now, the law in Oregon is clearly on the side of employers who wish to enforce their drug-free workplace policies.

.....
 Patricia A. Haim is a Shareholder in Littler Mendelson’s Portland office; Nancy N. Delogu is the Office Managing Shareholder in Littler Mendelson’s Washington, D.C. office; and Jennifer A. Nelson is an Associate in Littler Mendelson’s Portland office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Ms. Haim at phaim@littler.com, Ms. Delogu at nndelogu@littler.com, or Ms. Nelson at jnelson@littler.com.