



# The Personnel File

NEWS AND DEVELOPMENTS IN EMPLOYMENT LAW FOR CALIFORNIA'S EMPLOYERS

## **Clearing the Haze: Must Employers Tolerate the Use of Medical Marijuana by Their Employees?**

### **Introduction**

Medical marijuana has been in the news lately – from changes in the enforcement of federal drug laws to the establishment of Oaksterdam University, California's first "cannabis college." With all of the recent headlines regarding medical marijuana, employers may have questions about whether they must accommodate their employees' use of medical marijuana. However, as explained below, California law is clear that employers are not obligated to tolerate the use of medical marijuana by their employees.

### **Background**

In 1996, California voters passed Proposition 215, also known as the Compassionate Use Act, which removes criminal penalties for possession and cultivation of marijuana for medical purposes by patients who have a physician's recommendation or approval. The Compassionate Use Act also provides protection to doctors who recommend the use of marijuana to their patients.

Despite these changes to state law, marijuana remains a Schedule I controlled substance under federal law, meaning that the federal government considers the drug to have "no currently accepted medical use." Other Schedule I controlled substances include LSD, ecstasy and heroin. Therefore, from 1996 to early 2009, the federal government continued to enforce federal laws against marijuana sale and cultivation. During this time, California citizens cultivating or selling marijuana were periodically arrested, and thousands of marijuana plants were seized by federal agents.

### **Recent Developments**

Early in his presidential campaign, Barack Obama made it clear that his approach to medical marijuana would differ from that of his predecessor, stating "I would not have the Justice Department prosecuting and raiding medical marijuana users. It's not a good use of our resources." Accordingly, in March 2009, Attorney General Eric Holder announced that the Justice Department would no longer raid marijuana dispensaries that follow state laws. Then, on October 19, 2009, the Justice Department announced that the federal government will not prosecute individuals using marijuana for medical purposes, or dispensaries providing medical marijuana, provided that they adhere to state laws.

Due in part to the federal government's new enforcement guidelines, the number of medical marijuana dispensaries in California has rapidly increased. For example, the City of Los Angeles is now home to an estimated 1,000 dispensaries. However, only 186 are formally registered with the City. In response, the Los Angeles City Council recently decided to cap the number of allowed dispensaries at 70, in addition to those dispensaries which initially registered with the City. Other cities were also caught off-guard by the proliferation of medical marijuana dispensaries. For instance, San Diego is now considering a permit process and zoning requirements in order to regulate their already-existing dispensaries. Other cities and counties have decided to take a zero-tolerance approach to medical marijuana distribution. Currently, eight counties and approximately 120 cities in California have enacted outright bans on medical marijuana dispensaries.

### **The Bottom Line for Employers**

With the changes to federal law and the proliferation of medical marijuana dispensaries, employers may be confused about whether they must tolerate the use of medical marijuana by employees. However, as discussed in the April 17, 2008 edition of *The Personnel File, Ross v. RagingWire Telecommunications, Inc.* has settled this issue for California employers. In this case, Gary Ross applied for and was offered a job at RagingWire as a Lead Systems Administrator. Ross had chronic back pain, and used medical marijuana on his doctor's recommendation. Before starting work, RagingWire sent Ross to take a drug test at a local medical clinic. Ross gave the clinic a copy of his doctor's recommendation for medical marijuana before taking the test. Three days later, before the results of the test were known, Ross began work at RagingWire. Later that week, the clinic informed RagingWire that Ross tested positive for tetrahydrocannabinol (THC), a chemical found in marijuana. A few days later, RagingWire's CEO informed Ross that he was being fired due to his marijuana use. Ross sued, alleging that RagingWire violated the Fair Employment and Housing Act ("FEHA") by failing to accommodate his disability, and that it terminated him in violation of public policy.

The Supreme Court rejected Ross' claims, finding that the Compassionate Use Act of 1996 does not give medical marijuana users protection under FEHA. The Court's decision rests on three primary factors. First, the Compassionate Use Act was written to protect patients who possess or cultivate marijuana for medical use, and to protect doctors who recommend marijuana. The Court found that, in approving Proposition 215, California voters had no intention to "speak so broadly" as to address rights and obligations of employers and employees. Second, the Court's opinion emphasized that marijuana is still illegal under federal law, stating "[n]o state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users." Third, the Court noted the potential for abuse of marijuana, and employers' legitimate interest in avoiding employees who use it. The Court also rejected Ross' argument that he was terminated in violation of public policy, finding that there is no public policy in the employment context protecting an employee's right to use medical marijuana.

## **Conclusion**

The federal government's changed enforcement priorities and the proliferation of dispensaries may lead to an increase in applicants or employees who use medical marijuana. Nonetheless, employers can continue to rely on the firm precedent of *Ross v. RagingWire*. Although employers may choose to employ workers who use medical marijuana, employers are not required to provide accommodations to those who use medical marijuana, such as excusing or waiving an employee or applicant's positive drug screen..

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