Colorado Court Rules Use of 'Medical Marijuana' Not 'Lawful' under State's 'Legal Activities' Law

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A Colorado appeals court has held that an employee's off-duty use of "medical marijuana," although allegedly in accordance with the state's medical marijuana law, was not lawful or protected for purposes of the state's "legal activities" law, and therefore his employer did not violate that law by dismissing him. *Coats v. Dish Network, L.L.C.*, Nos. 12CA0595 & 12CA1704, 2013 Colo. App. LEXIS 616 (Colo. App. Apr. 25, 2013).

The employee, Brandon Coats, was fired by his employer after he tested positive for marijuana on a drug test, in violation of the employer's drug policy. A quadriplegic, Coats alleged he was licensed to use marijuana pursuant to Colorado's Medical Marijuana Amendment, Colo. Const. art. XVIII, § 14 (Amendment). Coats further alleged he never used marijuana on the employer's premises and never was under the influence of marijuana at work.

Coats claimed his termination violated the state's Lawful Activities statute, an employment discrimination provision of the Colorado Civil Rights Act, § 24-34-402.5. That law 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. The employer moved to dismiss, arguing the use of medical marijuana was not "lawful activity" because it was prohibited under both state law and federal law. The trial court granted the motion on the ground that medical marijuana use was not "lawful activity" under Colorado law.

The appellate court affirmed, but on slightly different grounds – finding that medical marijuana use was not "lawful activity" under federal or state law. At the outset, the Court noted that marijuana was illegal under the federal Controlled Substance Act at the time of Coats's termination (and still is illegal). *See* 21 U.S.C. § 844(a); *Gonzales v. Raich*, 545 U.S. 1, 29 (2005) (state law authorizing possession and cultivation of marijuana does not circumscribe federal law prohibiting use and possession); *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200, 204 (Cal. 2008) ("no state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical user"). *See also Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.2d 518 (Or. 2010) (federal Controlled Substances Act pre-empts the Oregon Medical Marijuana Act to the extent that state law affirmatively authorizes the use of medical marijuana).

Coats conceded that marijuana is illegal under federal law, but argued that his medical marijuana use was lawful because the statutory term "lawful activity" referred only to state law, not federal law. The Court disagreed. Because the statute did not define the term "lawful," the Court looked to its ordinary meaning, which is "permitted by law." The Court further explained that activities in Colorado, including medical marijuana use, are subject to both state and federal law, citing the U.S. Supreme Court's *Raich* (federal Controlled Substances Act applies to state activities including marijuana use). Therefore, Coats's use of marijuana had to comply with both state and federal law. Moreover, there was nothing in the legislative history of the legal activities law that indicated any intent to include activities prohibited only by federal law.

In sum, because marijuana use is illegal under federal law, the Court affirmed the dismissal of Coats's case. A dissenting opinion argued that the phrase "lawful activity" is ambiguous, and that the purpose of the lawful activities law was to protect employees from discriminatory discharge when they engaged in a lawful activity under state law.

Currently, 18 states and the District of Columbia have "medical marijuana" laws. Several additional states are considering enacting such laws. The language of these laws varies from state to state. Some medical marijuana laws impose no obligations on employers (or, in some cases, even declare that employers need

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not accommodate marijuana use at work), while others contain anti-discrimination provisions applicable to employment. In all cases, employers must decide on the policy they will follow with regard to “medical marijuana,” particularly when marijuana still is illegal under federal law.

If you should have any questions, or if you require assistance with your drug and alcohol testing program, please contact the Jackson Lewis attorney with whom you regularly work..