A Timely Analysis of Legal Developments

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Washington Supreme Court Blunt in Ruling: No Claim for Wrongful Discharge Under State's Medical Use of Marijuana Act

By Daniel Thieme and Dale Deitchler

Washington employers with drug-free workplace programs received a boost this month. The Washington Supreme Court has ruled that the state's Medical Use of Marijuana Act (MUMA)[1] does not require accommodation of medical marijuana use. *Roe v. Teletech Customer Care Management (Colorado) L.L.C.* (June 9, 2011).[2]

Adopted by the voters in 1998, MUMA decriminalized medical marijuana use under Washington law. The *Teletech* decision clarifies that MUMA provides *only* a criminal law defense, and does not prohibit an employer from discharging an employee for using marijuana for medical reasons. In so ruling, the Washington court became the fourth state supreme court, following courts in California,[3] Montana,[4] and Oregon,[5] to decide that employers need not accommodate marijuana users under state "medical marijuana" or "compassionate use" statutes.[6]

Roe's Medical Marijuana Use for Migraines, and Termination of Employment Following Positive Drug Test

Jane Roe[7] suffered from debilitating migraine headaches causing chronic pain, nausea, blurred vision, and light sensitivity. After trying medications she claimed provided no significant relief, Roe, who was already using marijuana regularly,[8] became a patient of Dr. Thomas Orvald at The Hemp and Cannabis Foundation Medical Center in Bellevue, Washington. Dr. Orvald issued Roe a "Documentation of Medical Authorization to Possess Marijuana for Medical Purposes in Washington State." Roe's subsequent use of marijuana, in compliance with MUMA, alleviated her headache pain with no side effects and allowed her to care for her children and to work. She used marijuana only in her home.

Thereafter, TeleTech offered Roe a job contingent on a drug screening, gave Roe its policy requiring a negative drug test result, and told her that noncompliance would result in employment ineligibility. Roe told TeleTech she used medical marijuana and offered to provide a copy of her medical authorization. TeleTech declined. Roe submitted to the required drug test, and began employment with Teletech. The same day Roe started work, TeleTech received Roe's positive drug test results. Shortly thereafter, TeleTech terminated Roe's employment, consistent with TeleTech's drug policy.

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Roe's Lawsuit

Roe sued TeleTech, claiming her termination violated MUMA and clear public policy established by MUMA. Roe relied primarily on language in MUMA stating users of medical marijuana "shall not be penalized in any manner, or denied any right or privilege, for such actions," coupled with a provision stating the law did not "require[] any accommodation of any medical marijuana use in any place of employment." Roe argued this language required employers to accommodate medical marijuana use occurring *outside* of any place of employment.

The Court Rejects Roe's Claims

Both the trial court and the Washington Court of Appeals dismissed Roe's case, accepting Teletech's argument that MUMA provides only a defense to criminal prosecution, not employment protections.

Based on "the unambiguous language of MUMA," the Washington Supreme Court affirmed. Interpreting the initiative language "as the average informed voter . . . would read it," and considering the law as a whole, the court noted that MUMA's protections against denial of "any right or privilege" immediately follow the grant of an affirmative defense against criminal prosecution. That demonstrates, the court held, that the law's protections are limited to criminal proceedings. The court also rejected as a logical fallacy Roe's argument that, because MUMA specifies employers need not accommodate marijuana use in a place of employment, the court should imply that use outside of places of employment must be accommodated.[9] The court also found that, even if MUMA was facially ambiguous, the various forms of external evidence on which Roe relied were insufficient to show that the voters intended MUMA to provide employment protections.[10]

Finally, the court found no *clear* public policy in MUMA that would support a claim of wrongful discharge in violation of public policy. While Roe cited MUMA language indicating that the use of marijuana was a "personal decision," the court found the language to be taken out of context, and, read properly, related to a physician's decision to prescribe marijuana: "*the decision to authorize* [medical marijuana use] . . . is a personal, individual decision" (emphasis added). Further noting that marijuana use remains illegal under federal law, the court said that finding a broad public policy exists requiring employers to allow employees to engage in illegal activity would be inconsistent with the requirement that the court "proceed cautiously" when adopting new public policy exceptions to at-will employment.

Questions *Teletech* Leaves Unanswered

TeleTech does not directly address every argument a Washington employee might make when seeking accommodation for medical marijuana use. But the arguments that remain open are not likely to be adopted by the courts.

Some practitioners have argued that the Washington Law Against Discrimination requires an employer to consider permitting off-duty use of medical marijuana as a reasonable accommodation, at least in non-safety-sensitive positions. Unlike the Americans with Disabilities Act (ADA), the Washington discrimination law does not expressly exclude current illegal drug users from its coverage. The Washington Human Rights Commission has issued guidance that state law does not protect current users of illegal drugs, but this guidance has not been issued in a regulation or tested in the courts, and the Washington Supreme Court has stated in a different context that misconduct resulting from a disability is part of the disability and not a separate basis for termination.[11] It is therefore noteworthy that, in *Teletech*, the Washington Supreme Court referred favorably to the Commission's position on this issue.[12] It appears likely that the current court would agree it is not a "reasonable" accommodation to require that an employer tolerate an employee's actions that violate federal law.

An additional potential argument for requiring some employers to accommodate medical marijuana use could be based on the extensive amendments of MUMA that Governor Gregoire signed into law on April 29, 2011.[13] Among other things, those amendments added language specifying: "Employers may establish drug-free work policies. Nothing in this chapter requires an accommodation for the medical use of cannabis if an employer has a drug-free work place."[14] We expect to see employees argue that this amendment impliedly requires accommodation of off-site medical marijuana use if an employer has *not* established and enforced a drug-free workplace policy. Such an argument would seem to be squarely contradicted by the logic of the *TeleTech* decision, however. It is also noteworthy that earlier versions of this legislation expressly required employers to accommodate medical marijuana use, but the legislature ultimately rejected those provisions.

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To the extent an employee asserts these or other arguments for accommodation of medical marijuana use, employers should assert the defense of implied federal preemption. The *TeleTech* court did not address this defense, which was recently adopted by the Oregon Supreme Court.[15]

Practical Implications

Under *TeleTech* and for the foreseeable future, it appears Washington employers can lawfully establish and administer drug-free workplace and testing policies prohibiting all marijuana use, and generally may take adverse employment action based on medical marijuana use by applicants and employees.

That being said, it bears emphasis that employers must at all times consider what if any disability discrimination law obligations may still apply. For example, presentation of a medical marijuana authorization may trigger an obligation to consider forms of accommodation other than accommodating marijuana use, such as time off or prescription for marinol, which contains the active ingredient in marijuana, with respect to the underlying condition. Similarly, because Washington and federal employment disability and leave laws provide protections to employees who are in recovery or have successfully completed recovery, it is usually not advisable to make an employment decision based on an individual's participation in treatment or rehabilitation.

Further, while the employer's drug testing policy was not directly at issue in *TeleTech*, employers should carefully review their policies. Employers who do not yet have a written drug-free workplace policy should consider adopting one, in light of the 2011 amendment to MUMA specifying that accommodation of medical marijuana is not required "if an employer has a drug-free work place." Policies should specifically prohibit all (not just on-site or work time) illegal drug use, as testing programs typically only measure substance levels currently in an individual's system, not when a substance was used. Careful drafting is also prudent with respect to policy language permitting prescription drug use so that employers are not inadvertently permitting medical marijuana use.[16]

The Washington Supreme Court's decision in *TeleTech* invites medical marijuana advocates to continue to lobby to add express employment protections to MUMA. Learning from comparable decisions of other state supreme courts (and the court of appeals decision in *TeleTech*), medical marijuana supporters in Arizona and Delaware have campaigned successfully for the enactment of precisely those kinds of laws. It remains to be seen whether such efforts will ultimately succeed in Washington, and, if they do, whether the results will stand up to a federal preemption defense.

For the time being, however, Washington law supports, without exceptions for medical marijuana use, enforcement of drug-free workplace and testing programs. Meanwhile, the law in other states remains in flux. Sixteen states and the District of Columbia have some form of medical marijuana statute, and thus far this issue has been resolved by the courts in only four of them. Employers are advised to stay tuned for further developments.

Daniel Thieme is a Shareholder in Littler Mendelson's Seattle office, and Dale Deitchler is a Shareholder in the Minneapolis office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Thieme at dthieme@littler.com, or Mr. Deitchler at ddeitchler@littler.com.

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[1] Chapter 69.51A RCW.

[2] Case No. 83768-6 (En Banc).

[3] *Ross v. RagingWire Telecommunications, Inc.*, 42 Cal. 4th 920 (2008).

[4] *Johnson v. Columbia Falls Aluminum Company, LLC*, 2009 MT 108N (2010) (unpublished).

[5] *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 348 Ore. 159 (2010).

[6] A federal district court in Michigan reached the same conclusion in January with respect to Michigan's medical marijuana statute. *Casias v. Wal-Mart Stores, Inc.*, 2011 U.S. Dist. LEXIS 15244 (W.D. Mich. Feb. 11, 2011).

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[7] The plaintiff sued under a pseudonym because medical marijuana use is illegal under federal law.

[8] Roe was using marijuana more than four times a day, but said she would use 50% more if it were easier and cheaper to obtain.

[9] The *TeleTech* court likewise rejected Roe's argument that a 2007 amendment, which changed this exclusion to specify that "on-site" use need not be accommodated, meant that "off-site" use must be accommodated. The court said the amendment made no material change to the law.

[10] Roe relied on statements from one of the initiative's drafters that MUMA was intended to protect employment "privileges," and language in the voters pamphlet that MUMA would "prohibit marijuana use in the workplace."

[11] *Riehl v. Foodmaker, Inc*., 152 Wash. 2d 138, 152 (2004).

[12] *Slip Op*. at p. 24, n.10.

[13] Laws of 2011, Ch. 181, partially vetoed, effective July 11, 2011.

[14] *Id*., § 501, enacting RCW § 69.51A.060(6).

[15] *Emerald Steel Fabricators*, 348 Ore. at 172-90.

[16] Employers should also carefully review their pre-employment paperwork, including offer letters. For example, it is advisable to ensure applicants do not start work before job offer conditions, such as a satisfactory background check or passing a drug screen, have been satisfied.

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