A Blunt Analysis: A Look at States Grappling with Medical Marijuana and Employment

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I. INTRODUCTION

In the United States, the legal discrepancy between federal and state law is resolved by the Supremacy Clause of the U.S. Constitution, which states that "This Constitution . . . shall be the supreme law of the land . . . ."[1] However, uncertainty arises when federal government policy yields enforcement over state laws, allowing states to proceed as they see fit. Over the last two decades, the legalization of medical marijuana has come to the forefront of the conflict between state and federal laws.

In 1996, California became the first U.S. state to legalize the use of medical marijuana.[2] In the 21 years since then, a total of 28 states, Washington D.C., Guam, and Puerto Rico have legally authorized cannabis and medical marijuana programs.[3] Generally, states with these comprehensive programs regulate most aspects of the medical marijuana industry, including dispensing, growing, classifying, and determining permissible forms of cannabis and qualified users.[4]

In stark contrast, marijuana remains classified as an illegal substance under federal law.[5] Specifically, the federal government categorizes marijuana as a Schedule I substance under the Controlled Substances Act ("CSA").[6] The substance is considered highly likely to make users

[1] U.S. CONST. art. VI, cl. 2.
[2] The National Conference of State Legislatures, *State Medical Marijuana Laws*, NACL.ORG.(Mar. 16, 2017), http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*

dependent and has not been accepted for medical use under the industry standard.[7] Despite the illegal use of medical marijuana under federal law, many states continue to enact state legislation that permits medical marijuana use, placing employers in a compromising position.

This article will examine the tension caused by state legislation that permits the use of medical marijuana, although it is illegal under federal law. It will observe cases from two states and discuss implications that arise because of conflicting federal and state marijuana laws. Next, this paper will analyze how states reconcile the divergence in federal and state law. Finally, this paper will discuss employers' and employees' concerns that courts should consider to create a uniformed approach to these types of cases.

II. THE OBAMA FEDERAL MARIJUANA POLICY

Although medical marijuana is illegal under federal law, the Obama administration showed a favorable attitude towards its medicinal use. The Obama administration departed from the Bush administration's no tolerance policy against marijuana, beginning first with its memorandum authorizing prosecutors to refrain from using prosecutorial resources to enforce federal laws in states that permitted medical marijuana use. On October 19, 2009, former Deputy Attorney General, David Ogden, wrote a memorandum to selected U.S. attorneys where he addressed how the federal government prioritized cases involving the use of medical marijuana.[8] The correspondence was intended to guide federal investigations and prosecutions of marijuana in states authorizing medical marijuana use, because the Department of Justice ("DOJ") still held

[7] *Id.*
[8] David Ogden, *Memorandum for Selected United State Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, THE UNITED STATES DEPARTMENT OF JUSTICE ARCHIVES (October 19, 2009), https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states.

the position that it was "commit[ed] to the enforcement of the [CSA] in all States."[9] This correspondence, however, articulated the DOJ's dedication to the efficient use of its limited resources.[10]

Generally, the memorandum established that U.S. attorneys in states that permitted medical marijuana use should not prioritize federal resources on "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[11] It did not modify the DOJ's authority to enforce law precluding "the manufacture, production, distribution, possession, or use of marijuana on federal property."[12] Nor did it legalize or provide a legal defense for offenders of the CSA.[13]

Nearly four years later, former U.S. Deputy Attorney General, James Cole, wrote a guide regarding marijuana enforcement to all U.S. attorneys."[14] In the correspondence, Cole explained that the guidance applied solely to federal enforcement activities, including civil and criminal investigations and prosecutions.[15] In light of states legalizing possession of marijuana, Cole also addressed the federal government's position on marijuana and regulation of marijuana production, processing, and sale.[16] Cole assured U.S. attorneys that the DOJ was committed to "using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way."[17]

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[9] *Id.*
[10] *Id.*
[11] *Id.* at 1-2.
[12] *Id.* at 2.
[13] *Id.*
[14] James M. Cole, *Justice Department Announces Update to Marijuana Enforcement Policy, Guidance Regarding Marijuana Enforcement*, THE UNITED STATES DEPARTMENT OF JUSTICE (Aug. 29, 2013), https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy..
[15] *Id.*
[16] *Id.*
[17] *Id.*

III. AN UNCERTAIN FUTURE: THE TRUMP ERA

In February 2017, Jeff Sessions, former U.S. Senator known for publicly speaking against legalizing marijuana, was confirmed as the U.S. Attorney General. Many speculate that the federal government's enforcement policies will tighten against residents in states that have legalized marijuana. At a White House press briefing, former press secretary Sean Spicer suggested a similar position based on his comments on federal marijuana law reform.[18] Spicer said he expected "greater enforcement" of federal marijuana laws on states, because the Trump administrations differentiates between medical and recreational use.[19] However, Spicer did not solidify the administration's position on the law.

A shift in policy under the Trump administration would raise two salient issues. First, it would disrupt marijuana markets in states.[20] For those states that have successfully regulated marijuana use, manufacture, and sales, this would likely cause financial strain on state markets, which fundamentally influence the federal market. Second, federal enforcement could strain federal resources, an issue the Obama administration tried to evade by adopting a "nonenforcement" position concerning states legalizing marijuana.

Based on the trend among states to regulate marijuana laws and operations, it is practical and financially beneficial to continue with a nonenforcement policy. However, it contributes to unpredictable legal outcomes among states that have legalized marijuana. Particularly, states are faced with claims where plaintiffs have been terminated after failing drug tests. State courts must balance the employer's interests against the employee's interest, and consider the discrepancy between lawful behavior under state law and unlawful behavior under federal law.

[18] *Id.*
[19] *Id.*
[20] *Id.* at 2.

IV. STATE MARIJUANA LAWS

In a California case, the California Supreme Court was faced with a set of facts concerning a patient seeking reasonable accommodation of relief under the state medical marijuana law, and its decision turned on the conflict between state and federal marijuana law.

A. *California*

In *Ross v. RagingWire Telecommunications, Inc.*, Plaintiff's physician recommended marijuana to treat his chronic back pain, pursuant to the Compassionate Use Act.[21] Defendant offered Plaintiff a job, but employment was contingent upon negative test results on a pre-employment drug test.[22] Prior to taking the test, Plaintiff submitted a copy of his physician's recommendation for marijuana to the clinic that administered the test.[23] Plaintiff started working before Defendant received his drug test results.[24] Once Defendant was informed of Plaintiff's negative drug test, Defendant suspended Plaintiff.[25] Plaintiff gave defendant a copy of his doctor's note, and Defendant's representative told Plaintiff that it would contact his doctor.[26] After a discussion among Defendant's board of directors, Plaintiff was fired because of his marijuana use.[27]

Plaintiff sued defendant, alleging that defendant violated the California Fair Employment and Housing Act ("FEHA") by denying him employment based on his positive testing for illegal drugs and failing to make a reasonable accommodation for Plaintiff.[28] Under Government Code § 12940 of the FEHA, "[i]t shall be an unlawful employment practice . . . (a) [f]or an employer,

[21] Ross v. RagingWire Telecomms., Inc., 42 Cal. 4th 920, 924 70 Cal. Rptr. 3d 382, 174 P.3d 200 (2008)..
[22] *Id.*
[23] *Id.* at 924-925.
[24] *Id.* at 925.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at 926.

because of the . . . physical disability [or] medical condition . . . of any person, to refuse to hire or employ the person . . . or to bar or discharge the person from employment . . . ."[29] Additionally, an employer may terminate or refuse to hire a person who, because of a medical condition or disability, "is unable to perform his or her essential duties even with reasonable accommodations."[30]

The California Supreme Court determined that the Compassionate Use Act did not remove marijuana's potential for abuse or the employer's legitimate interest.[31] Additionally, the court found that employers were permitted to deny employment based on drug use for three salient reasons.

First, the court held that California voters did not intend to require employers to accommodate medical marijuana use by their employees.[32] Second, the Compassionate Use Act was not intended to cover employment law issues.[33] The court found that the act's operative provisions provide guidance exclusively to criminal law and do not mention employment law.[34] The Act simply entitled a patient or patient's primary caregiver to possess or grow marijuana for medical purposes with a physician's recommendation without criminal prosecution.[35] Third, California's highest court decided that Plaintiff's termination did not violate the public policy that underlines an adult patient's right "to determine whether or not to submit to lawful medical

[29] *Id.* at 925.
[30] *Id.* at 925-26.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* 929.

treatment," a right supported by the state constitution and common law.[36] Thus, Plaintiff's claim was unsuccessful.[37]

B. *Colorado*

Colorado's Supreme Court held that "under . . . section 24-34-402.5, C.R.S. (2014), Colorado's 'lawful activities state,' the term 'lawful' refers only to those activities that are lawful under both state and federal law."[38] Thus, employees who engage in medical marijuana use that is permitted by state law and prohibited by federal law are not protected under the statute.[39]

Brandon Coats filed a complaint against his former employer defendant Dish Networks, L.L.C.[40] Plaintiff had been a quadriplegic since he was a teenager. From 2007 through 2010, Plaintiff worked as a telephone customer service representative for Defendant Dish.[41] In 2009, Plaintiff obtained a Colorado license to use medical marijuana,[42] pursuant to the Medical Marijuana Amendment, Colo. Const. art. XVIII, § 14.[43] Plaintiff asserted that he used marijuana according to the restrictions of the license, refrained from use on the Defendant's property, and was never under the influence of marijuana at work.[44] After plaintiff tested positive for marijuana, Defendant fired him, alleging a violation of the Company's drug policy.[45]

Plaintiff filed a lawsuit claiming that his termination violated the Lawful Activities Statute, § 24-34-402.5, an employment discrimination provision of the Colorado Civil Rights

[36] *Id.* at 933.
[37] *Id.*
[38] Coats v. DISH Network, LLC, 303 P.3d 147, 149 (2013).
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*

Act (CCRA).[46] According to Plaintiff, this statute prohibits an employer from terminating an employee for "engaging in any lawful activity off the premises of the employer during nonwork hours," unless the activity falls under the exceptions.[47] Plaintiff argued that use of medical marijuana outside of work was "lawful" under the Lawful Activities Statute.[48]

Defendant argued that Plaintiff's termination did not violate § 24-34-402.5, because medical marijuana use remains prohibited under federal law.[49] Relying upon *Beinor v. Indus. Claim Appeals Office*, the trial court exclusively addressed the state law issue.[50] The court decided the Lawful Activities Statute did not establish a state constitutional right to state-licensed medical marijuana use.[51] Instead, the provision created an affirmative defense from prosecution for use of medical marijuana.[52] The court dismissed the complaint[53] and Plaintiff appealed.[54]

In a split decision, the appellate court affirmed the trial court's decision.[55] The majority reasoned that the plain meaning of the Lawful Activities Statute permitted "lawful" activities that are governed by state and federal law and not prohibited by both state and federal law.[56] The dissent argued that the term "lawful" must be consistent with state law, rather than federal law.[57] In the dissent, Judge Webb argued that the majority's interpretation failed to carry out the

[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* at 150.
[55] *Id.*
[56] *Id.*
[57] *Id.*

purpose of the statute, because it "improperly narrow[ed] the scope of the statute's protection."[58] Judge Webb reasoned that given the Amendment made state-licensed medical marijuana use "at least lawful," plaintiff's use should be safeguarded by the statute.[59] The Colorado Supreme Court reviewed de novo.[60] The Court determined that by its terms the statute exclusively permits "lawful" activities; however, the provision does not define the term "lawful."[61] The Court looked to the language of the statute to interpret the undefined statutory term.[62] The Court also utilized its previous Webster's Dictionary definition of "lawful" as "in accordance with the law or legitimate.[63]

The Court reasoned that it did not consider the term "lawful" to be limited to just Colorado state law.[64] Instead, the Court determined that the term is used in a broad sense, indicating that "lawful" activity was intended to comply with federal and state law.[65] As a result, the Colorado Supreme Court stated that there was no exception for medical marijuana or marijuana authorized by state law.[66] The court thus held that plaintiff's use of medical marijuana was illegal under federal law and unprotected by § 24-34-402.5.[67]

V. RECONCILING THE STATE COURTS' DECISIONS

As the court mentioned in *Ross*, employers are most likely concerned with safety, diminished productivity, and potential liability. A company could also have divergent policies per state where an employee could be discharged in one state, but not in another, for the same

[58] *Id.*
[59] *Id.* at 157.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*

action.[68] On the other hand, employees that have a medical license to ingest marijuana are concerned with the state infringing on their privacy rights and interfering with their preferred medical treatment. An employee would argue his or her fundamental right to not disclose medical conditions and right to choose medical treatment. Additionally, an employee would be concerned about allowing his or her employer dictate and control their behavior outside of work or in the comfort of his or her home.

If courts were to balance employers and employees' interests, then judges would likely meet in the middle and establish uniformity amongst those states that have legalized medical marijuana. For instance, the Arizona Medical Marijuana Act ("AMMA") has stuck a balance between these two factors.

According to the AMMA,

> Unless a failure to do so would cause an employer to lose . . . monetary or licensing related benefit under federal law . . . an employer may not discriminate against a person in hiring, termination or . . . otherwise penalize a person based upon . . . patient's positive drug test for marijuana . . . unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment."[69]

Minimal case law exist that applies this statute; however, the legislators clearly intended some balance of the employer's interests against those of employees registered to lawfully use marijuana. For instance, the language prohibits an employer from discriminating in the hiring process and during employment. Employee's privacy interests are alleviated, because they can continue with their marijuana treatment in the privacy of their homes. However, it also provides

[68] John DiNome, Amanda D. Haverstick, and Hadley B. Perkins, *Medical Marijuana and the Workplace: What employers Need to Know Now*, FORBES (Dec. 2, 2014), https://www.forbes.com/sites/theemploymentbeat/2014/12/02/medical-marijuana-and-the-workplace-what-employers-need-to-know-now/#2643415d66b8.
[69] A.R.S. § 36-2813 A-B (2).

an exception for those employers who could potentially encounter monetary loss or loss of federal licensing in compliance of this state law. It also resolves employers' concerns about injuries or damages related to impairment caused by marijuana, possession, or use on the employers' premises. Although this law neither addresses employers' ability to create zero-tolerance policies nor does it communicate ways in which employers should determine "impairment" of individual employees, it does narrow the disparity in managing issues related to permissible use of marijuana.

VI. CONCLUSION

Colorado's general use of the Supremacy Clause to support the defense in *Coats* also does not give much direction as to the court's decision on the use of medical marijuana. In *Coats*, plaintiff's demise may have turned on his use of CCRA to bring a claim, instead of law specific to compassionate use of medical marijuana. One could hypothesize that plaintiff might have had a more favorable outcome if he brought the case forward under a disability statute or compassionate use statute.