Marijuana Decriminalization and The Workplace

Developing Trends or is Colorado Still *"One Toke Over the Line Sweet Jesus"*?

In 1996, voters in California passed Proposition 215, legalizing marijuana for medical use under state law. Colorado followed suit in 2000, when Colorado voters passed an amendment to the Colorado Constitution, Amendment 20, which allowed patients suffering from certain conditions to obtain a state-issued registration card for the purchase and use of marijuana without fear of criminal prosecution by *state* authorities. In 2012, voters in Colorado and Washington went a step further, for the first time permitting the recreational use of marijuana under state law. Today, thirty-seven states plus the District of Columbia permit the use of marijuana for medicinal purposes – with a further ten states permitting so called low-grade THC products.[1] As of the end of 2022, twenty-six states, and DC, permit the recreational use of marijuana, with bills filed to legalize recreational use in more than a dozen additional states in 2023.

Despite the trend at the state level, marijuana remains listed as a controlled substance under Federal law. (28 U.S.C. §801 *et seq)* rendering its use, even for medicinal purposes, unlawful. At the federal level, bills liberalizing the national laws on the subject have continued to gain some traction, and in 2022 Congress adopted a law permitting medical research into cannabis in an overwhelmingly bipartisan manner. *Medical Marijuana and Cannabidiol Research Expansion Act*, 136 Stat. 257.

Despite the trend towards liberalization, many employers continue to employ a zero-tolerance policy towards the use of cannabis products and treat their use no differently than other illegal drugs. Often, these policies are compelled by federal law or regulation. *See e.g.*

[1] https://www.ncsl.org/health/state-medical-cannabis-laws (As of March 17, 2023)

Drug-free Workplace Act of 1988, 41 U.S.C. § 701 *et seq.,* which requires federal contractors to ensure their workplaces remain free of drugs barred by the Controlled Substances Act; U.S. Department of Transportation regulations applicable to truck drivers and other CDL holders, 49 CFR §40.151 (directing finding of positive marijuana test, even if license-holder, is prescribed for medical use pursuant to state law).

Meanwhile, many states that have liberalized their laws did so while at the same time making clear that employers still have the right to discharge employees for what would be otherwise lawful use under state law.

> *See* Colo. Const. Amend. 64 §6(a) ("nothing in this section is intended to…affect the ability of employers to have policies restricting the use of marijuana by employees."). In Colorado, however, tension existed between Amendment 64 and Colo. Rev. Sat. Section 24-34-402.5 (1) which provides that an Employer is prohibited from discharging an Employee for "engaging in any lawful activity off the premises of the Employer during non-working hours, subject to certain exceptions."

The question then became, is marijuana use "*lawful", barring termination, for its use off business premises and hours, if it is permissible under state, but not federal law?* Here too, however, more and more jurisdictions are now limiting the rights of employers by prohibiting employment actions taken in response to the off-duty use of recreational marijuana. As of 2022, at least 5 states and a number of major cities have prohibited such conduct[2]. For example, in 2021, Montana passed House Bill 701 which generally prohibits (with numerous exceptions) employers from discharging employees for off-duty consumption of marijuana products. In New York state, the legislature passed a law generally prohibiting all employers, both public

[2] *Marijuana Use by Employees: Drug-Free Policies And The Changing Legal Landscape*. Fordham Urban L.J. Vol. 49 No. 3 (2022).

and private, from discharging an employee for recreational marijuana use. N.Y. Lab. Law. §201-D. However, guidance[3] was issued that permits employers to engage in such discharges where any of the following criteria are met:

- The employer is or was required to take action based on New York State or federal law, regulation, ordinance or any other New York State or federal governmental mandate.
- The employer's failure to act would cause the employer to be in violation of federal law.
- The employer's failure to act would cause it to lose a federal contract or federal funding.
- The employee, *while working*, manifests specific articulable symptoms of marijuana impairment that decrease or lessen the employee's performance of their tasks or duties.
- The employee, *while working*, manifests specific articulable symptoms of marijuana impairment that interfere with the employer's obligation to provide a safe and healthy workplace, free from recognized hazards, as required by state and federal occupational safety and health laws.

Thus, employers in many jurisdictions are increasingly faced with the inability to enforce what was traditionally a straightforward, zero-tolerance policy, and are instead forced to engage in often fact-specific inquiries when determining whether a policy is permitted or if just cause exists for a discharge. In Colorado, this matter simmered for many years until the Colorado Supreme Court resolved the issue definitively in 2015 in *Coats v. Dish Network, LLC*, 2015 CO 44, 350 P.3d 849. The Plaintiff, a quadriplegic, was employed as a telephone customer service representative from 2007 to 2010. His doctor recommended that he use medical marijuana to supplement more traditional medications material to his condition. As a result, Coats secured a license to purchase marijuana, which he claimed was used only at home. During a random drug test at work, Plaintiff tested positive for THC – in keeping with its drug policy, Dish terminated his employment.

[3] https://dol.ny.gov/system/files/documents/2021/10/p420-cannabisfaq-10-08-21.pdf. (As of March 17, 2023)

Coats sued Dish, claiming his termination conflicted with Colorado's lawful activity statute, which prohibits an employer from discharging an employee for "engaging in any lawful activity off the premises of the employer during non-working hours."

Dish filed a Motion primarily arguing that marijuana use is not protected by Colorado's lawful activity statute, as the off-duty conduct was lawful under both state *and* federal law. Essentially, Dish argued that the medical marijuana amendment did not make the use of marijuana lawful, but rather, only created a defense to a state criminal conviction against someone who possessed and used the drug in compliance with the amendment.

The District Court granted Dish's Motion and that decision was upheld by the Colorado Court of Appeals which held that "for an activity to be "lawful" in Colorado, it must be permitted and not contrary to, state and federal law." Ultimately, the Colorado Supreme Court affirmed the Appellate decision.

In an attempt to prohibit the termination of employees for legal marijuana use, off employer premises, whether for medical or recreational use, the Colorado state legislature considered HB 20-1089. The bill would have protected employees from termination for marijuana use, whether recreationally or medically. Surprisingly, the House Business Affairs and Labor Committee voted 10-0 against the proposed legislation.

Finally, employers in states where marijuana is permitted for medical use must consider applicable federal and state anti-discrimination laws. Although many courts, including the Ninth Circuit[4], have held that the Americans with Disabilities Act does not protect an employee's use of medical marijuana, courts have begun to differ on this topic. *See e.g. Wild*

[4] *James v. City of Costa Mesa*, 700 F.3d 394 (2012).

v. Carriage Funeral Holdings, Inc., 241 N.J. 285 (2020) (reversing trial court dismissal under state anti-discrimination law of claim for reasonable accommodation of medical marijuana use). Moreover, although *Coats* did not address what the decision would be for the use of recreational marijuana, the result would almost certainly be the same.

Arbitrators Are Faced with the Same Shifting Legal Landscape

Arbitrators considering these issues, often in the context of an alleged just cause discharge, have been forced to consider these issues in the face of the ever changing – and often conflicting – legal landscape. In 2012, Arbitrator John Sass sustained a grievance by a terminated employee of a King Soopers grocery store in Colorado[5]. The employee had been terminated following his conviction for marijuana possession (at the time a class 2 petty offense in Colorado). The Arbitrator held that because of the nature of the criminal conduct, which was akin to a parking ticket, the employer would have to demonstrate a nexus to the workplace in order to support the discharge. The employee's conduct, however, was entirely off-duty and unconnected to the workplace. As such, the employee was ordered reinstated. *Id*. Whether the outcome would be the same given *Coats* is open to question.

Likewise, in an Oregon case a county employee who was prescribed medical marijuana, wore a jacket which smelled of marijuana to a training session. *See Lane County*, 136 BNA LA 585 (Jacobs 2016). There was no evidence that the employee was impaired or under the influence at work. The Arbitrator ultimately determined under traditional just cause principles that discharge was too severe a remedy under the circumstances. *Id*. However, in an older Oregon case the arbitrator overturned an employee discharged for medical marijuana use

[5] *King Soopers*, 131 BNA LA 459 (2012)

despite clear CBA language prohibiting the use of marijuana, even for medicinal reasons. Ultimately, the United States District Court for the District of Oregon vacated the award because the award failed to draw its essence from the parties' CBA[6].

Given the rapidly changing landscape, arbitrators will no doubt be forced to continue to engage in detailed and fact-intensive examinations of cases involving the potentially lawful use of marijuana by employees and employer efforts to prohibit the conduct.

The battleground often revolves around the test administered and whether it is reliable, with an appropriate chain of custody- and whether there appears to be some relationship between an adverse test result and the job performance of the employee. Additionally, arbitrators are often faced with a circumstance where there appears to have been an attempt to alter the test, typically urine, to obtain a favorable result. *These are fact intensive and often require specific credibility determinations.* Of course, the key to the analysis, at its core, is what the CBA permits or requires.

[6] *Freightliner, LLC v. Teamsters Local 305*, 336 F.Supp.2d 1118 (2004).