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Refusing to Hire Medical Marijuana User Puts Employer in Jeopardy

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The following is a wake-up call to all employers, especially those in the health care industry, that have adopted "zero tolerance policies." These policies will increasingly butt up against the tidal wave of laws legalizing the medical and recreational use of marijuana. In a just-decided case, a federal judge in Connecticut issued a ruling in favor of a medical marijuana user whose offer of employment at a nursing home was rescinded after she tested positive for marijuana.

In *Noffsinger v. SSC Niantic Operating Co. d/b/a Bride Brook Nursing & Rehab Center* the court ruled in favor of Katelyn Noffsinger, a candidate for employment as an Activities Manager at Bride Brook Health & Rehabilitation Center, a nursing home. The nursing home was held to have violated the Connecticut Palliative Use of Marijuana Act (PUMA) when it revoked Noffsinger's employment offer based on her status as a lawful medical marijuana user. Noffsinger's employment offer was contingent upon her passing a pre-employment drug test. She told the interviewer she was a qualified marijuana user under Connecticut's medical marijuana law because she was receiving treatment for post-traumatic stress disorder. She explained that she used prescription marijuana only in the evenings as a "qualifying patient" under Connecticut law, and showed the interviewer her state registration certificate. Her pre-employment drug test came back positive for THC, and her employment offer was revoked.

Noffsinger sued the nursing home on a number of claims, including that the revocation of her employment offer violated the anti-discrimination provisions in PUMA, which state:

No employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient or primary caregiver… Nothing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours.

Conn. Gen. Stat. § 21a-408p(b)(3).

The nursing home argued that it was exempt from the anti-discrimination provisions in PUMA

because it was subject to the federal Drug Free Workplace Act (DFWA), which is located at 41 U.S.C. § 8102. The court also rejected that argument. Instead, the court ruled that the DFWA does not prohibit federal contractors from employing someone who uses illegal drugs outside the workplace. Moreover, the court further ruled that the DFWA does not prohibit federal contracts from employing individuals who use medical marijuana outside the workplace in accordance with a program provided by state law. The court also ruled that nothing in the DFWA required pre-employment drug testing.

The nursing home also argued that that the federal False Claims Act prevented it from hiring Noffsinger because employment of someone who uses medical marijuana in violation of federal law would amount to defrauding the federal government, which could therefore violate the False Claims Act. The court rejected this argument, too, and instead ruled that Noffsinger's medical marijuana use outside work hours would not constitute fraud for purposes of the False Claims Act.

This decision provides some valuable lessons for employers who are confronted with the increasingly profound conflict between the way state laws and federal laws treat the use of marijuana:

- Despite some form of legalization in over 30 states, under federal law marijuana remains a Schedule I controlled substance (along with substances like heroin). This creates a compliance paradox for employers, especially those in the health care industry who are subject to heavy federal regulation.
- Not every state's marijuana law has an anti-retailiation provision like Connecticut's law. It is important for employers to know the marijuana laws in each of the states they have employees.
- Even in states whose marijuana laws have no anti-retaliation provision, the duty to accommodate disabilities may conflict with the desire to prohibit employees from using marijuana, even when off-duty.
- The particular job that an employee performs may give a cannabis-banning employer more leeway. For example, contrast the health, safety, and liability risks associated with the job duties of an Activities Manager in a nursing home with those of the job duties of a neurosurgeon in a hospital.
- Employers who have a zero tolerance policy that extends to off-duty use need to rethink the defensibility of never accommodating what might otherwise be lawful marijuana use under state law.

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