Published on *The National Law Review* https://natlawreview.com

Connecticut Court’s First Decision on Medical Marijuana Use Discrimination Is a Buzzkill for Employers

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Connecticut law allows the use of marijuana by qualified patients for medicinal purposes and expressly prohibits employers from taking adverse employment actions because of an individual’s status as a qualified medical marijuana user. Federal law classifies marijuana as an illegal controlled substance and categorically prohibits the use of marijuana for any purpose. For employers in Connecticut with pre-hire drug testing requirements and policies on illegal drug use, this conflict has led to a cloudy haze as to what actions may be taken if a registered medical marijuana user fails an employment-related drug test.

In the first case to squarely address this conundrum in Connecticut, *Noffsinger v. SSC Niantic Operating Company*, LLC, No. 3:16-cv-01938 (August 8, 2017), a federal district court judge found that there is no conflict between federal and Connecticut marijuana regulation and held that federal law does not preempt Connecticut law. Accordingly, a cause of action may be maintained under Connecticut’s medical marijuana law for firing or refusing to hire a user of medical marijuana, even where the individual has failed a drug test.

Regulation of Medical Marijuana in Connecticut

In 2012, the Connecticut legislature passed the Palliative Use of Marijuana Act (PUMA). As with similar statutes in other states, PUMA permits the use of medical marijuana by “qualifying patients” with certain debilitating medical conditions, including post-traumatic stress disorder (PTSD). One significant distinction, however, is that PUMA is one of the few state statutes that contains an express non-discrimination provision, which protects employees from adverse employment actions taken based upon the employee’s status as a “qualifying patient” of medical marijuana. Specifically, PUMA states that “unless required by federal law or required to obtain federal funding”:

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. . . . 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.

While the language of the act is fairly clear, what is not so clear is how an employer can abide by its

dictates on non-discrimination against users of medical marijuana while also consistently applying a pre-employment drug-testing policy and complying with federal law. In a case of first impression, a district court judge in Connecticut addressed the question of whether it was possible for an employer to do so, or whether federal law precluded enforcement of the act.

Noffsinger v. SSC Niantic

In Noffsinger, a Connecticut nursing home rescinded a job offer to a prospective employee, Katelin Noffsinger, after she tested positive for marijuana in a routine pre-employment drug screening. Noffsigner had provided the nursing home with her registration demonstrating that she was legally prescribed marijuana by her physician to treat PTSD. Noffsinger sued, alleging that the nursing home violated the non-discrimination protections of PUMA by failing to hire her based upon her status as a "qualifying patient" of medical marijuana.

The nursing home moved to dismiss the suit, arguing that the anti-discrimination provision of PUMA was preempted from enforcement by the federal Controlled Substances Act (CSA), the Americans with Disabilities Act (ADA), and the Federal Food, Drug, and Cosmetic Act (FFDCA). In essence, it argued that because PUMA acted as an obstacle to the enforcement of these federal laws that, inter alia, prohibit marijuana use and deny protections to users of illegal drugs, PUMA was invalid due to the Supremacy Clause of the United State Constitution.

In denying the nursing home's motion to dismiss the PUMA cause of action, the court answered some open questions for employers in Connecticut and provided some guidance for employers in other states with similarly-worded statutes.

Private Right of Action

One of those questions was whether an individual could even bring a private lawsuit for an employer's violation of PUMA. The act contains no express language that provides for a private right of action by an aggrieved applicant or employee. The court, however, found that the act impliedly provided for individuals to bring claims under the act based upon legislative testimony indicating that PUMA would provide protections for employees that would be enforceable in the courts. While in no way binding upon other courts, the finding of an implied right of action could have a persuasive effect in other states with similarly worded statutes, including New York, Maine, and Minnesota.

No Preemption

The court held that federal law does not preempt PUMA's anti-discrimination employment provision. In regard to the CSA, which makes it a federal crime to use marijuana, the court found that the CSA does not regulate the employment relationship (by making it illegal to employ a marijuana user, for example), so the anti-discrimination provision of PUMA does not preempt or conflict with the CSA. For similar reasons, the court found that the FFDCA, which does not include medical marijuana as an approved drug by the FDA, does not regulate employment.

The court also found that the ADA similarly did not preclude PUMA's enforcement. The nursing home argued that because the ADA allows employers to hold all employees to equal qualification standards, the ability to successfully pass a drug test was a qualification standard applicable to all employees, and PUMA conflicted with the ADA's purpose. The court was unconvinced, reasoning that "qualification standards" must be job-performance/behavior-related, and there was no claim that

Noffsinger's marijuana use would occur in the workplace or adversely affect her job performance.

Federal Law Carve Out and Equal Protection Clause Not Applicable

The court dispensed with the nursing home's last two defenses against the enforcement of PUMA, which were based on the statutory carve-out language and the equal protection clause, finding them "absurd" and "frivolous," respectively. The court found that the nursing home could not utilize the carve-out language of PUMA, which states that employers are prohibited from refusing to hire a qualifying patient "unless required by federal law of required by federal funding." While the nursing facility is subject to federal regulation requiring compliance with federal law, the court found that hiring a medical marijuana user, in and of itself, would violate any law.

The court also rejected the argument that PUMA violates the equal protection clause by treating one class of employees (medical marijuana users) different than other similarly situated employees (recreational marijuana users), finding that the legislature could have a rational basis for distinguishing between people using marijuana for medicinal purposes, as compared to those "who use marijuana at their whim to get high."

Key Takeaways

Employers in Connecticut and elsewhere may want to review their drug policies in light of this decision and to address the quickly-changing landscape of medical marijuana in the workplace—especially relating to pre-employment drug testing. Noffsinger takes aim at blanket policies by employers that deny or terminate employment for a positive drug test for marijuana. This case may be of particular interest to employers in other states with laws that, similar to Connecticut, contain express anti-discrimination protections for medical marijuana users, namely Arizona, Delaware, Illinois, Maine, Nevada, New York, Minnesota, and Rhode Island.

Noffsinger's key holdings are the implication of a private right of action and that federal law does not preempt a discrimination claim by an employee under a state's medical marijuana law. While the decision addresses only the language of PUMA, other jurisdictions are likely to follow the Connecticut court's lead. Indeed, this is the second employee-friendly decision in this past month to affirm job protections for medical marijuana users. The Massachusetts Supreme Judicial Court, on July 17, 2017, found that an employer has an obligation to accommodate medical marijuana users under Massachusetts's disability discrimination laws. As more states legalize marijuana, it is more important than ever for employers to see through the smoke and to stay up to date on the developing legal landscape.

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National Law Review, Volume VII, Number 244

Source URL:https://natlawreview.com/article/connecticut-court-s-first-decision-medical-marijuana-use-discrimination-buzzkill