

Dear Friend

The California Supreme Court just handed down a decision that is a huge loss for the proponents of "medical" marijuana. I have summarized the case below. I put in **bold** some great language from the court.

The case holds that "medical" marijuana users can be fired for marijuana use.

Ross v. Raging Wire Telecommunications, 2008 WL 191216 (page 8)(Cal. 2008)

A newly hired employee filed a lawsuit against his former employer alleging a violation of the California Fair Employment and Housing Act (FEHA) because he got fired for testing positive on a pre-employment drug test. [FN1]. The employee also claimed that firing him for failing a drug test violated the state medical marijuana law - the Compassionate Use Act. [FN2]

The California Supreme Court held that the FEHA did not require an employer to accommodate an employee who used medicinal marijuana. An employer may require pre-employment drug tests and take illegal drug use into consideration in making employment decisions. The disability discrimination provisions of FEHA did not require an employer to accommodate an employee who used medicinal marijuana at home on physician's recommendation under Compassionate Use Act. The Compassionate Use Act provided a defense in state criminal prosecutions, but it was not intended to eliminate an employer's legitimate interest in whether employees used drugs banned by federal law or to otherwise extend to employment law.

The firing of the employee did not implicate the employee's privacy right to determine his own medical treatment. The Compassionate Use Act only gives a person who uses marijuana for medical purposes on a physician's recommendation a defense to certain state criminal charges involving the drug, including possession. The employee's position might have merit if the Compassionate Use Act gave marijuana the same status as any legal prescription drug. But the act's effect is not so broad. **No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law even for medical users.** [FN3]

The FEHA does not require employers to accommodate the use of illegal drugs. **The employer's interest was legitimate “[i]n light of the well-documented problems that are associated with the abuse of drugs and alcohol by employees-increased absenteeism, diminished productivity, greater health costs, increased safety problems and potential liability to**

third parties, and more frequent turnover....” [FN4]

The Compassionate Use Act does not eliminate marijuana's potential for abuse or the employer's legitimate interest in whether an employee uses the drug. Marijuana, as noted, remains illegal under federal law because of its “high potential for abuse,” its lack of any “currently accepted medical use in treatment in the United States,” and its “lack of accepted safety for use ... under medical supervision.” [FN5]

The proponents of the Compassionate Use Act consistently described the proposed measure to the voters as motivated by the desire to create a narrow exception to the criminal law. The proponents spoke, for example, of their desire to “protect patients from criminal penalties for marijuana” [FN6] and not to “send cancer patients to jail for using marijuana.” Proponents argued that, under the measure, “[p]olice officers can still arrest anyone for marijuana offenses. Proposition 215 simply gives those arrested a defense in court, if they can prove they used marijuana with a doctor's approval.” [FN7] This did not limit employers.

Plaintiff also argued that his discharge violated the public policy that underlies an adult patient's right “to determine whether or not to submit to lawful medical treatment.” [FN8] However, the court held that the employer has not prevented the employee from having access to marijuana. The employer has only refused to employ the employee. **To assert that the employer’s refusal to employ the employee affects his access to marijuana is merely to state the argument that the Compassionate Use Act gives plaintiff a right to use marijuana free of hindrance or inconvenience that is enforceable against third parties. The court rejected that argument. [FN9]**

References

1. Gov.Code, § 12900 et seq.; see id., § 12940, subd. (a)
2. Compassionate Use Act of 1996 (Health & Saf.Code, § 11362.5, added by initiative, Prop. 215, as approved by voters, Gen. Elec. (Nov. 5, 1996)
3. 21 U.S.C. §§ 812, 844(a); *Gonzales v. Raich*, 545 U.S. 1, 26-29 (2005); *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 491-495 (2001)
4. *Loder v. City of Glendale*, 14 Cal.4th 846, 882-883, 59 Cal.Rptr.2d 696, 927 P.2d 1200 (CA 1997)
5. 21 U.S.C. § 812(b)(1); see *Gonzales v. Raich*, supra, 545 U.S. 1, 14, 125 S.Ct. 2195, 162 L.Ed.2d 1.)

6. Ballot Pamp., Gen. Elec. (Nov. 5, 1996) argument in favor of Prop. 215, p. 60) and not to “send cancer patients to jail for using marijuana” (id., rebuttal to argument against Prop. 215, p. 61).
7. Ballot Pamp., supra, rebuttal to argument against Prop. 215, p. 61
8. Cobbs v. Grant 8 Cal.3d 229, 242, 104 Cal.Rptr. 505, 502 P.2d 1 (1972)
9. Ross v. Raging Wire Telecommunications, 2008 WL 191216 (page 8)(Cal. 2008)