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Legalized Marijuana and the Drug-Free Workplace, the Saga Continues: Coats v. Dish Networks, LLC.

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The national trend toward liberalization of marijuana laws continues.

As of this writing, 23 states and the District of Columbia allow the sale, purchase and use of marijuana for medical purposes, while four states – Alaska, Washington, Oregon, Colorado – and the District of Columbia permit the sale and consumption of marijuana for recreational purposes. Yet this apparent sea-change in attitudes toward marijuana use has not yet impacted employers' ability to maintain drug-free workplaces. Virtually every state court that has addressed the issue has followed the lead of California Supreme Court, which held, in a case called Ross v. Ragingwire Telecommunications, Inc., that employers are not required to accommodate employees who use medical marijuana, and that employees may lawfully be terminated for testing positive for medical marijuana in a workplace drug test. Courts in Washington, Oregon, Montana, Michigan, and Colorado agree. A common theme in these cases is that medical marijuana statutes (and by implication, the more-recent recreational use statutes) are decriminalization laws, not grants of affirmative rights or employment regulations. The sole exception is the State of Maine; however, that is because Maine's medical marijuana statute expressly prohibits employers from refusing to employ or penalizing persons solely because of their use of medical marijuana, "unless failing to do so would put the ... employer ... in violation of federal law or cause it to lose a federal contract or funding." But aside from this one exception, the general rule is fairly summarized in this NBCNews.com headline: "Puff, Puff, Pink Slip: Legal Weed Use Still Carries Job Risks."

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A very recent case continues this consistent trend. **In the case of Coats v. Dish Networks, LLC, the Supreme Court of Colorado reviewed a 2013 Colorado appellate court decision dismissing an employee's employment discrimination claim against an employer that terminated him for his allegedly off-duty use of medical marijuana.** The case was argued before the Colorado Supreme Court on September 30, 2014, and a decision was issued on June 15, 2015, affirming the appellate court's determination. Once again, as has been the case in virtually every state that has addressed the issue, employers retain the ability to enforce drug-free workplace policies even in the face of statutes purporting to allow the use of marijuana for medical – and, by implication, recreational – purposes.

Look Inside for Details

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FACTS OF THE CASE

The plaintiff, Brandon Coats, is a quadriplegic who had been employed by Dish Networks, LLC, as a telephone customer service representative. Coats was licensed by the State of Colorado to use medical marijuana under the Medical Marijuana Amendment to the Colorado state constitution. Coats claimed that he complied with the Colorado medical marijuana laws at all times, never used marijuana while at work, and was never under the influence of marijuana at work, although he claimed that the use of marijuana was effective in ameliorating the symptoms of his medical condition. Although Dish was allegedly aware that Coats was using marijuana for medical purposes only, Dish nonetheless fired him after he tested positive for marijuana based on a random drug test. Dish maintains a zero-tolerance drug policy. Coats never denied producing a positive test result despite denying that he ever was under the influence of marijuana at work.

After his termination, Coats sued Dish under Colorado's "Lawful Activities Statute," which prohibits an employer from terminating an employee because the employee engaged in "lawful activity off the premises of the employer during non-working hours." Coats argued that his use of medical marijuana pursuant to Colorado's Medical Marijuana Amendment was lawful activity. Dish argued, in part, that the use of medical marijuana was not a "lawful activity" because all marijuana use is prohibited under federal law. The trial court granted Dish's motion to dismiss, and by a split two-one decision, the Colorado Court of Appeals affirmed. The plain and ordinary meaning of "lawful" is that which is "permitted by law." Because activities conducted in Colorado are subject to both state and federal law, for an activity to be "lawful" in Colorado, it must be permitted both by state and federal law. An activity that violates federal law but complies with state law cannot be "lawful" under the ordinary meaning of the term. Because federal law prohibits all marijuana use, medical marijuana use cannot be deemed to constitute "lawful activity."

Coats attempted to persuade the court to read the phrase, "lawful activity," as being limited to state law. According to Coats, the Colorado legislature intended to permit employers to terminate employees for off-duty activity that was unlawful under Colorado law only. The appeals court majority rejected this argument. "[While] we agree that the general purpose of the [Lawful Activities Statute] is to keep an employer's proverbial nose out of an employee's off-site off-hours business ... we can find no legislative intent to extend employment protection to those engaged in activities that violate federal law."

The dissenting judge, however, found Coats' argument persuasive. According to the dissenting judge, interpreting "lawful activity" as meaning "lawful" under both state and federal law would somehow require the State of Colorado to enforce federal law, and would somehow interfere with Colorado's authority to regulate employer-employee relationships within the state. According to the dissenting judge, the absence of any federal off-duty conduct statute "suggests that protecting employee's off-the-job autonomy is primarily a matter of state concern." The dissenting judge added, "Narrowing the scope of employer protection by looking beyond state law to activities that are proscribed only at the federal level would limit [the] protection" of the Colorado Lawful Activities Statute. The dissenting judge recognized that marijuana use remained a crime under federal law. However, in his view, a Colorado employer may lawfully terminate a medical marijuana user only if refraining from committing federal crimes was a "bona fide occupational qualification."

Drug-free workplace policies and drug testing would clearly come under significant restriction if the dissent's view were to be accepted and become law. And the dissent's logic would apply with equal force to recreational marijuana users under Colorado's new recreational use law, further restricting employers in their efforts to maintain drug-free workplaces.

ARGUMENT BEFORE THE COLORADO SUPREME COURT

No doubt encouraged by the dissenting judge, Coats petitioned the Colorado Supreme Court to review the appeals court decision. The Colorado Supreme Court granted Coats' request on January 27, 2014, and oral argument was conducted on September 30, 2014.

During oral argument, the Justices appeared skeptical of Coats' claim that the term, "lawful activity," meant "lawful under state law only." Coats' attorney argued that the absence of an express reference to federal law in the Colorado Lawful Activities Statute meant that federal law was not to be considered in determining what was and was not "lawful activity." The Justices were troubled by this argument, which appeared to be a license for employees to violate federal law without any workplace consequence.

On the other hand, several justices questioned Dish's attorney as to the meaning of drug "use" under Dish's zero-tolerance policy. It was pointed out that Coats was not accused of being intoxicated at work, and that there was no evidence that his medical marijuana use had affected his job performance. Dish's attorney responded that a positive test result standing alone constitutes "use" even in the absence of evidence of intoxication.

Dish's attorney also tried to argue that by claiming that marijuana had ameliorated his medical symptoms, Coats had "admitted" to being "affected" by marijuana at work, and that being "affected" by marijuana at work constituted "use" of marijuana at work. The Justices greeted this particular argument with skepticism.

One Justice expressed confusion as to whether Dish's policy prohibited only actual impairment on the job, or instead prohibited the presence of a detectable amount of a prohibited substance because using prohibited substances is itself unlawful. Dish's attorney argued that the zero-tolerance policy prohibited any detectable level of a controlled substance, but the Justice questioned whether the record was clear on this point.

Curiously, Dish's attorney made no reference in her argument to workplace safety concerns. Coats had tested positive during a random drug test. Random drug testing is deemed to be particularly invasive of employee privacy and is therefore permitted only when an employer can assert a countervailing interest, such as workplace safety, that outweighs employee privacy rights. Dish's attorney made no reference to workplace safety or any other justification for Dish's zero-tolerance policy during oral argument. Notably, Coats did not dispute that it was appropriate to subject him to random drug testing even though his position as a telephone customer sales representative does not appear on its face to be a safety-sensitive position.

Significantly, the State of Colorado participated in the case and argued in support of Dish's position. The State argued that the Lawful Activity Statute provides no protection for activities that are unlawful under either state or federal law. The State also cited cases from other states holding that medical marijuana statutes do not create employment rights for medical marijuana users.

DECISION OF THE COLORADO SUPREME COURT

On June 15, 2015, the Colorado Supreme Court issued a unanimous decision in Coats that affirmed the lower court decisions and allowed Dish to terminate Coats for producing a positive result for marijuana during a random drug test at work. That Coats was using marijuana for medical purposes under state law did not immunize him from termination under Dish's zero-tolerance policy. The Colorado Lawful Activity Statute only protects off-duty activity that is lawful under both state and federal law. The term, "lawful," does not extend to activity that is lawful under state law but unlawful under federal law, and the unanimous Court "decline{d} to engraft a state law limitation onto the term."

The federal Controlled Substances Act lists marijuana as a Schedule I substance, "meaning federal law designates it as having no medical accepted use, a high risk of abuse, and a lack of accepted safety for use under medical supervision." The use, possession and manufacture of marijuana is a federal criminal offense, and there "is no exception for marijuana use for medical purposes, or for marijuana use conducted in accordance with state law." Because Coats' use of marijuana was unlawful under federal law, Colorado's Lawful Activity Statute did not protect it.

Despite changing attitudes toward marijuana generally, there appears to be little interest among the judiciary in converting relaxed state laws on marijuana use into employment rights for drug-using employees.

Because it decided the case solely on the question whether marijuana use is "lawful," the Court did not need to address the question whether a positive result following a random drug test conducted during working hours constitutes on-duty "use" of marijuana – the issue on which Dish's attorney had been questioned during oral argument. One can certainly argue that having a sufficient amount of a controlled substance in one's system to produce a positive result constitutes on-duty "use" because of the unacceptably high correlation between a positive result and the danger of actual impairment. But in Colorado at least, that question remains open.

Although the Coats case turned on a narrow issue of statutory interpretation, it clearly reflects the continuing nationwide trend of allowing employers to continue to enforce drug-free workplace policies even in the face of state laws permitting marijuana use. The Colorado Supreme Court had the opportunity to hold in Coats' favor by adopting the reasoning of the dissenting judge at the appellate court level, but declined to do so. Despite changing attitudes toward marijuana generally, there appears to be little interest among the judiciary in converting relaxed state laws on marijuana use into employment rights for drug-using employees.

About the Author

Stephen E. Trimboli, Esq. has been recognized as a New Jersey Super Lawyer, and was named as an Employment Law Super Lawyer in 2008. He was the recipient of the 1996 County Service Award from the New Jersey Association of Counties; the 1994 Pace Setter Award from the National Public Employer Labor Relations Association, and the 1999 Paul Gallien Award from the National Council on Alcoholism and Drug Dependence, North Jersey Area.

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