ASAP™
A Littler Mendelson **Time Sensitive** Newsletter

in this issue:

JANUARY 2008

California Supreme Court holds that employers no longer face the Hobson's choice of hiring an applicant who is using "medical marijuana" or refusing to hire that applicant and risking an expensive lawsuit.

California Edition
A Littler Mendelson California-specific Newsletter

California Employers No Longer Holding Their Breath: Applicants Using Medical Marijuana May Be Denied Employment

By Rod M. Fliegel and Nancy N. Delogu

Must a California employer hire a job applicant who tests positive on a pre-hire drug test, but claims to be using marijuana for "medical reasons?" - "No," according to the California Supreme Court. On January 24, 2008, the court held that employers may decline to hire applicants who use marijuana in violation of federal law, even if that use would not be a violation of state criminal law. The court declared: "Nothing in the text or history of the Compassionate Use Act [Cal. Health & Safety Code § 11362.5] suggests the voters intended the measure to address the respective rights and duties of employers and employees. Under California law, an employer may require preemployment drug tests and take illegal drug use into consideration in making employment decisions." The decision, *Ross v. Ragingwire Telecommunications, Inc.*, No. S138130 (Jan. 24, 2007), is noteworthy for all employers who conduct, or are considering conducting, preemployment drug tests.

Setting for the Case

Ross was decided on the pleadings. The only facts in the case were taken from the plaintiff's lawsuit itself, not from any evidentiary submissions by the parties. For purposes of its ruling, the court assumed the truth of all of the plaintiff's factual allegations. According to the plaintiff's complaint, he suffered from a serious back impairment and used marijuana for pain relief. The plaintiff's doctor recommended the use of marijuana, pursuant to California's Compassionate Use Act.

The employer made a conditional job offer to the plaintiff. Before taking the requisite preemployment drug test, the plaintiff furnished the testing clinic with a copy of his physician's written recommendation for medical marijuana. The plaintiff then submitted to the test and started working before the clinic conveyed the test results to the employer. He tested positive for Tetrahydrocannabinol ("THC"), the main chemical found in marijuana. Upon learning of the positive test result, the employer discharged the plaintiff for testing positive, even though he apprised the employer of his doctor's recommendation.

The plaintiff filed a lawsuit asserting disability discrimination and wrongful termination. The plaintiff alleged that the employer's decision to fire him because he used marijuana, and its failure to provide him with "reasonable accommodation," discriminated against him on the basis of his "disability" and constituted wrongful termination in violation of public policy. The plaintiff also alleged that his use of marijuana did not affect his ability to perform the job he was offered, and moreover, that he had been working in the same field without any complaints or problems before being hired by Ragingwire.

The employer asked the trial court judge to throw the case out based on these allegations. The employer argued, principally, that it is illegal under federal law to use marijuana, and nothing in the

California Fair Employment & Housing Act (FEHA) or Compassionate Use Act require an employer to tolerate, much less accommodate, illegal drug use. The trial court judge ruled for the employer and the plaintiff appealed. In 2005, a California Court of Appeal affirmed that ruling.

The Supreme Court's Ruling

In upholding the two lower court rulings, the majority of the California Supreme Court adopted a narrow construction of the Compassionate Use Act and what Justice Werdegar termed its "modest objectives." Emphasizing the fact that the use of marijuana remains illegal under federal law, the court explained: "No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users. Instead of attempting the impossible, California's voters merely exempted medical users and their primary caregivers from criminal liability under two specifically designated state statutes. Nothing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and obligations of employers and employees."

The court also rejected the plaintiff's expansive reading of an employer's accommodation obligation under the FEHA, concluding: "The FEHA does not require employers to accommodate the use of illegal drugs." Here, the court looked to its prior decision regarding preemployment drug testing in *Loder v. City of Glendale,* 14 Cal. 4th 846 (1997). *Loder* involved California's medical privacy statute (Cal. Civ. Code § 56 et seq.) and the state constitution, not the Compassionate Use Act. In upholding preemployment drug testing, the court acknowledged the seemingly unremarkable proposition that employers have a legitimate reason for conducting such testing "[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...."

Finally, the court held that the plaintiff could not anchor a public policy tort claim in the Compassionate Use Act. The court reasoned that because the Act was not directed at the employer-employee relationship, it "did not put defendant on notice that employers would thereafter be required under the FEHA to accommodate the use of marijuana."

Practical Implications

The court opinion is a welcome development for California employers who conduct, or plan to conduct, preemployment drug tests. State law has been uncertain since the court agreed to review the 2005 decision from the court of appeal. However, employers should be mindful of the following points:

- The opinion does not change the FEHA's liberal standard for establishing that an individual has a "disabling" impairment. That standard remains considerably easier for an individual to meet than the federal standard. In any event, state and federal law protects *recovered* substance abusers. Therefore, the distinction between current and former abusers continues to retain its vitality.
- The opinion only speaks to a specific set of facts – whether an employer must accommodate a disability by excusing a job applicant's positive preemployment drug test. The FEHA's broad standard for "reasonable accommodation" also remains intact. If a current employee requests an alternative accommodation such as requesting time off from work for rehabilitation, before otherwise violating any work rules, the employer must consider that request in good faith. Time off for this purpose is allowed by various state and federal laws. Time off to permit the employee to transition to another medication might be reasonable as well.
- Efforts to overturn the court's decision through legislation can be expected. Furthermore, whether another state's courts would reach a different result remains to be seen. More than 10 states have laws similar to California's Compassionate Use Act. This is important for multi-state employers.
- While the defendant employer's drug testing policies were not at issue in *Ross*, employers should carefully review their policies. For example, policies should carefully prohibit all illegal drug use, and not just drug use that occurs on work time or while at work, since most employer drug testing programs measure only the quantity of drug in a person's system, and cannot determine when the substance was ingested.
- Employers should carefully review their pre-hire paperwork, including offer letters. Employers should also emphasize, and take measures to enforce, restrictions on allowing any applicant to start work before the conditions for the job offer have been satisfied. .

Rod. M. Fliegel is a Shareholder in Littler Mendelson's San Francisco office. Nancy N. Delogu is a Shareholder in Littler Mendelson's Washington, D.C. office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Fliegel at rfliegel@littler.com, or Ms. Delogu at nndelogu@littler.com.