California Supreme Court Answers Question—Are Employers Required to Accommodate Medical Marijuana Use?

On January 24, 2008, the California Supreme Court in *Ross v. Ragingwire Telecommunications, Inc.* answered the question of whether it was unlawful for an employer to fire or refuse to hire a person who used marijuana to treat chronic back pain as allowed by California's Compassionate Use Act of 1996 and who failed its pre-employment drug test because of that use.

The California Compassionate Use Act gives a person who uses marijuana for medical purposes on a physician's recommendation a defense to state criminal charges involving the drug. The plaintiff/employee claimed in this case that the employer discriminated against him on the basis of his disability, failed to make reasonable accommodation for his disability, and terminated him in violation of public policy when it terminated him because he failed the employer's pre-employment drug test when he tested positive for marijuana. The employee argued that since medical marijuana use was legal in California the employer was not permitted to prohibit him from using it and in fact needed to accommodate his use.

The California Supreme Court determined as matter of law that California's disability discrimination laws do not require employers to accommodate the use of illegal drugs and the Act did not change marijuana's status as an illegal drug; it was simply a narrow exception to some of the criminal laws. It also found that the Compassionate Use Act does not require employers to accommodate marijuana use by their employees. The Supreme Court held that the employer had not prohibited the employee from using marijuana, it had only refused to employ him since he did so.

While not identical to the California Compassionate Use Act at issue in this case, the Washington Medical Marijuana Act is similar in intent and scope. RCW 69.51A. The Washington Act as approved by the voters in 1998 said: "Nothing in this chapter requires any accommodation of any medical use of marijuana in any place of employment, in any school bus or on any school grounds or in any youth center." RCW 69.51A.060. In 2007, this section was amended by the legislature to read: "Nothing in this chapter requires any accommodation of any on-site medical use of marijuana…Laws of 2007 Ch. 371§ 6. It is unclear what was intended by this change and the 2007 legislative history does not address it, or speak to any employment issues. Legislation was adopted in California in 2003 which is similar to this section which provides "Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of employment or during the hours of employment…." The California plaintiff argued that since this section did not address use at home, it required the employer to accommodate his use of marijuana at home. The California Supreme Court rejected this contention and said also "given the controversy that would inevitably have attended a legislative proposal to require employers to accommodate marijuana use, we do not believe [this section] can reasonably be understood as adopting such a requirement silently and without debate." Even though five legislators who authored the bill told the court that was exactly their

intent, the court refused to consider this since there was no evidence the legislature knew of or shared this intention.

We cannot predict what the Washington court would do if faced with a similar challenge, but this California decision may give some guidance.