First Time For Everything—Court Determines Federal Law Does Not Preempt State Medical Marijuana Law's Employee Protections

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Earlier this month, a Connecticut federal district court held that federal laws prohibiting use and sale of marijuana do not preempt Connecticut's Palliative Use of Marijuana Act ("PUMA"), which expressly protects job applicants and employees from employment discrimination due to medical marijuana use legalized under state law. *See Noffsinger v. SSC Niantic Operating Company LLC, d/b/a Bride Brook Nursing & Rehabilitation Center* (D. Conn. Aug. 8, 2017). Proponents of medical marijuana should be encouraged by the court's narrow view of federal laws, but before employers in Arkansas rush to revise workplace drug and alcohol-testing policies, some review of the details is warranted.

Case Facts

In *Noffsigner*, the defendant, a nursing facility in Niantic, Connecticut, recruited the plaintiff, a recreation therapist, and extended her a job offer contingent on her passing a pre-employment drug test. The plaintiff promptly told the nursing facility administrator that she was a qualifying patient under PUMA, had properly registered for a medical marijuana certificate, and was using Marinol, a synthetic form of marijuana to treat her post-traumatic stress disorder. The plaintiff further explained that she took one capsule of Marinol each night before bed and would not be impaired at work. Subsequently, the plaintiff took and failed the drug test, testing positive for cannabis. The defendant rescinded its job offer.

The plaintiff sued, alleging, among other things, a violation of PUMA's anti-discrimination provision. The defendant moved to dismiss, asserting the plaintiff's PUMA claim was preempted by three federal statutes: the Controlled Substances Act ("CSA"), the Americans with Disabilities Act ("ADA"), and the Food, Drug, and Cosmetic Act ("FDCA").

Case Holding

After discussing the theories of preemption, the *Noffsinger* court found *no* federal preemption of the state statute by adopting a very narrow view of the federal laws. Though the court recognized that the state statute affirmatively authorizes conduct that the federal statutes prohibit—marijuana use—the conflict was *not* sufficient to conclude that the state statute is an "obstacle" to the federal statutes' goals. Regarding the CSA, the court clarified that while the federal statutes prohibit marijuana use, they do not prohibit *employing* marijuana users or seek to regulate employment practices at all. Addressing the ADA, the court noted that while the ADA explicitly allows employers to prohibit illegal drug use *at the*

workplace, it does not authorize employers to take adverse employment action based on illegal drug use *outside of the workplace*. Lastly, the court determined that because the FDCA does *not* regulate employment, the state statute's anti-discrimination provision could not conflict with or pose an obstacle to the FDCA goals of preventing use of drugs unapproved by the Food and Drug Administration.

Implications

Noffsinger is noteworthy because it is the first decision to conclude that marijuana's unlawful status under federal law does not automatically bar a discrimination claim based on conduct protected by state medical marijuana laws. While the decision is specific to Connecticut's PUMA, the court's conclusion may change the "zero tolerance" strategy many employers have against drug use, especially those employers operating in states that provide favorable employment protections for medical marijuana users. Currently, nine states, including Connecticut, have passed medical marijuana laws that include explicit anti-discrimination protections from adverse employment actions. Arkansas is frankly not one of those states.

To illustrate, Connecticut's PUMA expressly protects job applicant and employee medical marijuana users by providing that "unless required by federal law or required to obtain 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 or primary caregiver . . ." *See* CONN. GEN. STAT. § 21a–408p(b). Arkansas' Medical Marijuana Amendment ("MMA") does not have this employee protection, and instead authorizes and protects *employer* actions taken against qualifying patients and designated caregivers such as: 1) taking assessment measures to control the job performance of an employee; 2) reassigning an employee to different positions or job duties; 3) placing an employee on paid or unpaid leave; 4) suspending or terminating an employee; 5) requiring an employee to successfully complete a substance abuse program; 6) refusing to hire an applicant; or 7) any combination of these actions. *See* ARK/ CONST. AMEND. XCVIII, § 3(f)(3)(C). Further, Arkansas's MMA protects employers that act with the "good faith belief" that a qualifying patient is engaged in the use of marijuana while on the employer's premises or during employment hours. *See* ARK/ CONST. AMEND. XCVIII, § 3(f)(3)(B)(ii).

Given the Arkansas language, Arkansas employers can likely still argue that the federal CSA, which criminalizes marijuana, preempts Arkansas' MMA. Until *Noffsinger*, there was really no contrary authority. *See United States v. Oakland Cannabis Buyers Co-Op*, 532 U.S. 483 (2001) (holding that growers can be prosecuted); and *see Gonzales v. Raich,* 545 U.S. 1 (2005) (holding that users can be prosecuted); *see also Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries,* 348 Or. 159 (2010) (holding specifically that the CSA preempts Oregon's Medical Marijuana Act).

Take Aways

The *Noffsinge*r decision is not binding on Arkansas federal courts, but an appeal to the United States Court of Appeals for the Second Circuit is always possible. *Noffsinger* is the second decision this summer to assess the employment impact of a state law permitting the use of medical marijuana. *See Barbuto v. Advantage Sales & Marketing, LLC,* 78 N.E.3d 37 (2017) (Massachusetts Supreme Judicial Court determining that an employer has obligations to accommodate lawful medical marijuana users under Massachusetts' disability discrimination laws). Simply put, *Barbuto* and *Noffsinger* may signal a new drift towards expanding the protections that must be afforded to employees who use medical marijuana under state law, at least in states where the medical marijuana law specifically protects job applicants and employees properly using medical marijuana under those states' laws. Perhaps, if anything, Arkansas employers should at least have more than just "it's illegal under federal law" as their basis against medical marijuana use.