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It's High Times for Employers: The Sixth Circuit Holds Michiga Employers Can Say Nope to Dope

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The United States Court of Appeals for the Sixth Circuit ruled in *Casias v. Wal-Mart Stores*, that the Michigan Medical Marijuana Act ("MMMA") does not regulate private employment and, therefore, did not protect Joseph Casias, a Wal-Mart worker authorized to use marijuana for medical reasons, from being fired after he failed a drug test.

Employers and the courts continue to wrestle with issues involving whether employers must accommodate medical marijuana use by their employees. On one hand, marijua under the federal Controlled Substances Act ("CSA") and, therefore, does not need to be accommo federal Americans with Disabilities Act ("ADA"). However, 17 states currently have legalized some f medical marijuana use: Alaska (1998), Arizona (2010), California (1996), Colorado (2000), Connec Delaware (2011), Hawaii (2000), Maine (1999), Michigan (2008), Montana (2004), Nevada (2000), (2010), New Mexico (2007), Oregon (1998), Rhode Island (2006), Vermont (2004), Washington (19 the District of Columbia (2010). The language of each state's law can differ, and the courts therefor state law issues on a case-by-case basis. The Michigan statute is the most recent one to come ur review. Here, is the background of that case and how the Sixth Circuit came to the conclusion it did

In 2008, Michigan voters enacted the MMMA by referendum to provide protection for the medical us allows only a “qualifying patient” or a “primary caregiver” to whom the state has issued a registry ca administer medical marijuana and prohibits, in part, “disciplinary action by a business or occupatio professional licensing board or bureau” against a person to whom the state has issued a registry or administration of medical marijuana. The key word in the statute for purposes of the *Casias* cas and here's why.

Casias started working at Wal-Mart in 2004 as an inventory control manager. He was later diagnos cancer and an inoperable brain tumor. Due to his ongoing head and neck pain, he received a med registry card and began using marijuana to manage his pain in the summer of 2009. Later that sa injured his knee at work, went to the hospital and was subjected to a standard drug test pursuant t policy. Prior to the test, Casias showed his card to the testing staff. Well, as you probably guessed positive for marijuana. He showed his shift manager his registry card, and informed his manager th consumed marijuana while at work or came to work high. Nevertheless, Casias was fired for failing

Casias sued Wal-Mart for wrongful discharge for violating the MMMA. The U.S. District Court for the of Michigan dismissed Casias' lawsuit finding that the word “business” in the statute does not regu employment actions and that the MMMA "contains *no language* stating that it repeals the general ru employment in Michigan or that it otherwise limits the range of allowable private decisions by Michi businesses."

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The Sixth Circuit agreed and held that the MMMA prohibits "disciplinary action by a business or occ professional licensing board or bureau" against a "qualifying patient." Focusing on the key term "b argued that although the MMMA does not expressly refer to employment, the term "business," as us was independent and expanded the MMMA's protections to private employers. In other words, Cas Wal-Mart was a "business" and thus fell within the MMMA prohibitions which precluded "disciplinary business or occupational or professional licensing board or bureau" against a person with a medi registry card.

Wal-Mart countered, arguing that the term "business" modified the phrase "licensing board or bure did not extend the MMMA's protections.

The Sixth Circuit agreed with Wal-Mart and expressly rejected Casias' proposed interpretation of the the Court found could prevent any employer in the state from disciplining a qualified patient who us under the MMMA. The Sixth Circuit, siding with Wal-Mart, opted not to read the term "business" inde Rather, it concluded that the word "business," as used in the MMMA, *modified* the phrase "licensing bureau," and that the MMMA "is simply asserting that a 'qualifying patient' is not to be penalized or a 'business or occupational or professional licensing board or bureau' for his medical use of mari Therefore, because the term "business" merely described or qualified the type of "licensing board not refer to employment:

> Based on a plain reading of the statute, the term "business" is not a stand-alone term as P but rather the word "business" describes or qualifies the type of 'licensing board or bureau" context, and taking into consideration the natural placement of words and phrases in relatio another, and the proximity of the words used to describe the kind of licensing board or burea the statute, it is clear that the statute uses the word 'business' to refer to a 'business' licens bureau, just as it refers to an 'occupational' or 'professional' licensing board or bureau.

The Court further explained that adopting Casias' argument would create an entirely new protected in Michigan and "mark a radical departure from the general rule of at-will employment in Michigan." case was one involving statutory interpretation, the Court highlighted the importance of carefully cra groundbreaking legislation like the MMMA, and held that the MMMA does not govern private employ The Court went one and noted that other states including California, Montana, and Washington ha their states' similar medical marijuana laws do not govern private employment actions.

The Court noted the limited application of the MMMA that merely provides a defense to criminal pro adverse actions by the state: "All the MMMA does is give some people limited protection from prose state, or from other adverse state action in carefully limited medical marijuana situations."

The Takeaways

The Sixth Circuit governs Kentucky, Michigan, Ohio and Tennessee. Of these four states, only Mich allows for medical marijuana. This is not to say that the other states have not tried and/or are not try issue forward.

For example, Ohio has had two recent initiatives legalize medical marijuana — the Ohio Medical C the Ohio Alternative Treatment Amendment. Neither one, however, made it in on the November 201 because neither received the necessary 385,000 signatures required by the July 19, 2012 deadline

As for Tennessee, the Tennessee's House Health and Human Resources committee recently app prompts the state's Board of Pharmacy to conduct research proving that residents of Tennessee w conditions could benefit from a prescription for cannabis. If passed by Tennessee's government, t the research of marijuana would begin this fall and report their findings back late next year. This co medical marijuana in Tennessee is closer to becoming a reality.

Kentucky has been the slowest of the four to get aboard the cannabis train, but this year. Louisville Clark introduced SB 129, which proposed rescheduling marijuana under state law and would have to prescribe it to patients with debilitating illnesses without fear of arrest. While the bill never receiv did not pass this year, it did receive a lot of media attention and will likely continue to be an issue.

While more and more states are leaning toward authorizing and/or decriminalizing the use of med *most* of their "approval" has not been extended into private employment regulation. Consequently, an individual who uses marijuana may be protected from criminal prosecution, but his or her empl similarly be protected.

The Sixth Circuit's decision, which is consistent with rulings in other states with similar medical m supports a private employer's decision to refuse to accommodate an employee's use of medical m

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continue to enforce its polices prohibiting the use of medical marijuana in the workplace. Thus, Mi employers should have a better sense of comfort if they choose to discipline or discharge employe positive for marijuana but who offer medical marijuana registration cards as excuses. Although the decision does not answer all questions regarding medical marijuana in the workplace, *e.g.*, it doe what would happen in the public employer context, or break down all legal hurdles to disciplining e answer one important question that has festered since the law's enactment.

As far as some helpful tips for employers, here are a few:

1. In each state where you have operations, determine what each state law provides for regar marijuana. Employers should stay apprised of their state laws on the issue, especially as th drug testing and accommodating the use of medical marijuana in the workplace. For exam states' laws on medical marijuana have been interpreted *not* to require employers to accor employee's use in the workplace, Connecticut's law, An Act Concerning the Palliative Use o which became effective this week on October 1, 2012, goes further than most similar laws a forbids employers from refusing to hire, discharging, penalizing, or threatening individuals f medical marijuana use. However, it also provides that employers may prohibit the use of in substances during work hours and may discipline employees for being under the influence substances during work hours. While no court has interpreted this law yet, it is likely that it w holdings interpreting the California, Michigan, Montana, Oregon and Washington laws on m marijuana, and will more in line with what the courts in Maine and Rhode Island, who have prohibiting adverse employment action on the basis of medical marijuana, have to say on t
2. For all employers, regardless of state law, review your policies to make sure that illegal dru state and federal law is prohibited, and that your policies prohibit any detectable amount of including medical marijuana if allowed by state statute, in an applicant's or employee's sys opposed to using an "under the influence" standard. This includes providing clear informati position on drug and alcohol testing. In addition:

- Notify applicants in writing of your medical marijuana policy at the time of application and no employees of your policy on medical marijuana; and
- Ensure that your human resource employees are trained and know how to respond to med issues as they arise.

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