

California Employers Can Refuse To Employ Individuals Who Fail A Drug Test Due To “Medicinal Marijuana” Use

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In an opinion issued last week, the California Court of Appeal held in *Ross v. Ragingwire Telecommunications* that an employer does not violate the Fair Employment and Housing Act (FEHA), or any fundamental public policy, by firing or refusing to hire a person who uses illegal drugs, including persons who are using marijuana at a physician’s recommendation for medical purposes.

California’s Compassionate Use Act of 1996 provides that certain state criminal statutes, which prohibit the possession and cultivation of marijuana, do not apply to patients and/or their caregivers who possess or cultivate marijuana for personal medical purposes with the approval of a physician. Other states have passed similar laws. After the law was passed, there was an open question as to whether employees were required to permit California applicants and employees to use marijuana under the Compassionate Use Act in order to comply with the FEHA, or whether they could defend an adverse employment action based on federal law which prohibits all marijuana use and possession. Earlier this year, the United States Supreme Court provided some guidance in *Gonzales v. Raich*, which held that the federal government had the power to prohibit the use of marijuana in California (and all other states), even if such use complied with the Compassionate Use Act or similar laws.

In last week’s case, Gary Ross was fired from his systems administrator position after a preemployment drug test came back positive for THC. He had been using marijuana at his doctor’s recommendation for his chronic back pain. Ross sued his employer, arguing that his termination violated the FEHA and public policy because his use of marijuana was necessary to alleviate pain caused by a disability, and his employer was therefore required to let him use marijuana as a reasonable accommodation. Ross argued that the Compassionate Use Act represented a fundamental public policy and that his termination violated that policy.

The Court of Appeal held that “nothing in FEHA precludes an employer from firing, or refusing to hire, a person who uses an illegal drug. Because the possession and use of marijuana is illegal under federal law, a court has no legitimate authority to require an employer to accommodate an employee’s use of marijuana, even if it is for medicinal purposes and thus legal under California law.” The court declared that employers have legitimate interests in not employing persons who use illegal drugs. The court stressed that the Compassionate Use Act says nothing about protecting employment rights and only applies to a few select state criminal laws, all of which are “trumped” by federal law. “Because an employer’s decision not to employ someone who is violating federal criminal laws is not a criminal sanction imposed by the state, it does not violate the policy set forth in the Compassionate Use Act.”

