

Medical Marijuana Laws: Obstructing Congress?

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Abstract

A recent decision from the Oregon Supreme Court casts a new light on state laws authorizing the use of medical marijuana, particularly in the workplace. Its helpful discussion includes a warning that state laws that put themselves on a collision course with federal law are invalid from the outset.

Oregon's medical marijuana law was introduced by voter initiative in 1998. It established a state registry program intended to protect eligible users who are resident in the state from state criminal prosecution for the production, possession or delivery of marijuana. Applicants must have a qualifying debilitating medical condition verified by an attending physician; conditions can be objective or subjective including "severe pain."⁽¹⁾ The statute is codified at ORS 475.300-346, and administrative rules appear at OAR 333-008-0000 to 333-08-0120. Over the decade from April 2000 to April 2010 the number of authorized cardholders grew from 500 to 32,929, with an additional 16,922 cards issued to caregivers as of April 2010.⁽²⁾

At first blush the law did not appear to require employers to adjust their substance abuse policies. Under federal and state disability law,⁽³⁾ employers are generally required to adjust policies to accommodate employees with disabilities to the extent such adjustments can be made without undue hardship. Under federal disability law, however, accommodation of marijuana use or users could not be required because marijuana is a Schedule I drug under the federal Controlled Substances Act, 21 USC 812(c), and therefore wholly illegal. Federal law permits adverse actions taken against employees or applicants based on their current illegal use of drugs. State law, however, was apparently not as clear as it initially seemed to employers.

The Oregon Medical Marijuana Act (ORS 475.340) provides that nothing in the law shall be construed to require "an employer to accommodate the medical use of marijuana in any workplace." However, "use" is defined to mean production, possession, delivery, or administration. In the first appellate decision that attempted to define an employer's obligation, the Oregon Court of Appeals concluded that an employee who used the drug outside of the physical workplace was not using it in the workplace, and therefore an employer might be obligated to accommodate the user by adjusting its substance abuse policies (*Washburn v. Columbia Forest Products, Inc.* 197 Or.App. 104, 112, 104 P.3d 609, 613 (2005)). *Washburn* was later overturned by the Oregon Supreme Court, but on a conclusion that the employee did not have a disability in the first place. To be sure, the Court of Appeals recognized that the issue of accommodating a possibly impairing drug presented some issues for employers:

"However, whether defendant must accommodate plaintiff in these circumstances remains a matter for the trial court. ORS 475.340(2) makes clear that employers are not required to accommodate certain specified things. That the medical use of marijuana in the workplace need not be accommodated under ORS 475.340(2) does not per se establish, however, that, under all circumstances, an employee's medical use of marijuana must be accommodated by an employer. In other words, our conclusion that ORS 475.340(2) does not apply here does not mean that plaintiff is automatically entitled, under Oregon disability law, to the accommodation that he requested. That question remains to be resolved by the trial court, applying pertinent aspects of Oregon disability law to the particular facts. Although we express no opinion on the matter, we note that defendant's concern about employees coming to work under the influence of marijuana might provide, under some circumstances, justification for not accommodating plaintiff given various provisions of Oregon disability law, including the concepts of *reasonable* accommodation, undue hardship, and qualification for a position." *Washburn v. Columbia Forest Products, Inc.* 197 Or.App. 104, 116-117.

Because the Supreme Court overruled the Court of Appeals on the issue of whether the employee had a disability, the analysis of whether an employer was required to accommodate users remained intact. That set the stage for *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 348 Or. 157 (2010).

Emerald Steel does structural and mechanical steel fabrication and machining. In 2003 the company hired a temporary employee who was an authorized user under the state program. He used the drug daily, though never on the company's premises. The question of his drug use arose when, after several weeks of satisfactory employment, he was about to be offered regular employment. That, however, would require him to pass a drug test so he disclosed his drug use and was discharged; the employer did not discuss possible accommodations with him.⁽⁴⁾ The case had a complicated procedural path from the

administrative agency, Oregon's Bureau of Labor and Industries, to the Oregon Supreme Court but the state's highest court did not permit claimed procedural irregularities to get in the way of issuing a dispositive ruling on the state's marijuana law. Two other states, California and Washington, had ruled that employers are not required to accommodate users under those state laws, but in both cases the decisions were made by interpreting the text of those state laws.⁽⁵⁾ The Oregon court focused its analysis not on the structure of the state law, but instead on how the state could not have such a law in light of contrary federal drug policy. That requires a Constitutional analysis.

The Constitution's Supremacy Clause makes clear that in the case of conflict between federal law and state law, federal law prevails or preempts state law. That can happen, for example, in the case of a federal law that expressly displaces inconsistent state law, or in the case of a federal law intended to "occupy the field," or in a case of actual conflict resulting in the physical inability of a person to comply with both federal and state law. Or, preemption can be implied where state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. In such a case, state law must fall so that the Congressional objectives can be met. The Oregon court resolved the preemption analysis on that point, stating that "affirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled substances Act" by affirmatively authorizing the very conduct that federal law prohibits. That means that any state provision that attempts to authorize the use of marijuana is preempted and without effect. This is so-called "obstacle preemption."

The employee's arguments shattered against that analysis because he was utterly dependent on arguing that he was not engaging in the illegal use of drugs, for which he had to argue that he was affirmatively authorized to use marijuana, something a state cannot do. As a result, no Oregon employer is required to accommodate a medical marijuana user regardless of where he uses the drug, and no Oregon employer is required to engage in an interactive process about modifying a substance abuse program.

The decision is broader than the employment context however, and it bears consideration in looking at the legality of medical marijuana laws generally. A state is not required to apply its criminal laws to marijuana. That follows from a Constitutional principle that makes clear that Congress lacks the authority to criminalize conduct that a state chooses to leave unregulated by state law. So, under this reasoning, any state could decide not to criminalize marijuana under state law. That is not, however, the same thing as telling individuals they are permitted to use the drug.

Much of the Emerald Steel opinion is based on the thought that the Oregon state law attempted to authorize or permit medical marijuana use (and is therefore subject to obstacle preemption); the question it leaves is whether the law can be rewritten to avoid obstacle preemption and additionally impose accommodation obligations on employers. Though it seems unlikely, this has been an area in which proponents have shown themselves to be astonishingly creative.

Oregon has, in its own way, been ground zero for the battle to legalize marijuana. One result of *Emerald Steel v. Bureau of Labor and Industries* may be that the battle moves to other states. In that case, the decision is a primer on the force of obstacle preemption. The real question may still be whether Congress can be persuaded to reschedule the drug.

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References

1. OAR 333-008-0010.
2. The state releases statistics on a quarterly basis and publishes them on the program's website at <http://www.oregon.gov/DHS/ph/ommp/data.shtml>.
3. The accommodation obligation is imposed by the federal Americans with Disabilities Act, 42 USC §12112 and by Oregon state law at ORS 659A.112 and 659A.118.
4. State and federal disability law generally interpret the accommodation requirement to include an obligation to engage in a meaningful interactive process to discuss a reasonable accommodation for qualified employees with a disability.
5. *Roe v. Teletech Customer Care Management*, 152 Wash.App. 388, 216 P.3d 1055 (2009); *Ross v. Ragingwire Telecommunications, Inc.*, 42 Cal.4th 920, 70 Cal.Rptr.3d 382, 174 P.3d 200 (2008).