Court Says ACLU Can't Blow Smoke Over the Real Purpose of the Michigan Medical Marijuana Act.

14. February 2011 By Steve Palazzolo

If you follow this blog you might remember (unless you take advantage of this statute and then you might not remember) that back in July we posted on the first challenge to an employment termination supposedly in violation of the Michigan Medical Marihuana Act. See MCL 333.26421 *et. seq* (MMMA).

I told you before, by the way, and I'll tell you again I did not spell Marijuana with an 'h' instead of a 'j' — the Michigan Legislature did. I don't know why. And back in the July post we pointed out the incongruity in the MMMA that the courts were going to have to deal with.

At that time I wrote:

"Sec. 4. (a) A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or **disciplinary action by a business** . . . for the medical use of marihuana . . . ."

"Seems pretty clear. You can't fire someone for using medical marihuana, end of story, right? Not so fast, my friends. You see, Section 7 of the Act states: "(c) Nothing in this act shall be construed to require: . . . (2) An employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana."

Well, the U.S. District Court for the Western District of Michigan, Southern Division (and yes, that is a mouthful) dismissed the lawsuit brought by Joseph Casias and the ACLU against Wal-Mart. Mr. Casias had alleged that he was discharged by Wal-Mart in violation of the MMMA and in violation of Michigan public policy. The opinion is pretty straightforward. After dealing with some procedural issues that are really only interesting to lawyers, the Court got right into an analysis of the statute and whether Mr. Casias had a cause of action against a private employer making a personnel decision. The Court noted that Mr. Casias put forward two theories for his argument that the MMMA prohibited the termination of his employment:

First, Plaintiff argues the MMMA provides him with an implied right of action. Even Mr. Casias acknowledges his chances on this theory are remote, given the strictness of the current test in Michigan case law. *See Lash v. City of Traverse City*, 479 Mich. 180, 192-93 (2007) (a private right of action cannot be inferred without evidence of legislative intent). Under his second theory, Mr. Casias's cause of action stems from the defendant's alleged violation of the public policy of Michigan, as found in the MMMA.

In the opinion issued Friday, the Court disagreed with both of Mr. Casias' theories. Judge Jonker first stated: "The fundamental problem with Plaintiff's case is that the MMMA does not regulate private employment. Rather, the Act provides a potential defense

to criminal prosecution or other adverse action by *the state*." Judge Jonker went on to note that Mr. Casias public policy argument would confer on medical marijuana patients rights, to this point conferred only on a select group of people based on immutable characteristics like race, sex and religion. Judge Jonker stated: Further, the MMMA does not indicate a general policy on behalf of the State of Michigan to create a special class of civil protections for medical marijuana users." You can see Judge Jonker's opinion here.

Ultimately the Court concluded that:

The MMMA [is]meant to provide some limited protection for medical marijuana users from state actions, primarily arrest and prosecution. Even the scope of that protection is unclear and limited. . . . Nothing in the language or the purpose of the MMMA indicates an intent of the Michigan voters to regulate private employment, and the MMMA does not address private employment directly. Whatever protection the MMMA does provide users of medical marijuana, it does not reach to private employment.

So, Mr. Casias stays fired, for now. And your drug testing policy has not "gone up in smoke," for now. Why do I say "for now," you ask? Well, for one thing, this case was decided by a Federal Court. A Michigan Court might have a different interpretation. And, the ACLU says it will appeal.

According the Wall Street Journal Law Blog:

The American Civil Liberties Union, counsel to Casias, has said it will appeal. "Today's ruling does not uphold the will of Michigan voters, who clearly wanted to protect medical marijuana and facilitate its use by very sick people like Joseph Casias," the ACLU said in a statement. "A choice between adequate pain relief and gainful employment is an untenable one."

You can see the WSJLB post at http://blogs.wsj.com/law/2011/02/11/judge-okays-walmarts-firing-of-medical-marijuana-user/

So, while this is obviously a positive outcome for employers, it is not necessarily the last word on the MMMA. If you have any questions about your policy or if you need one, as always, give us a call.