



CASE REPORT

Medical Marijuana: Employer's Duty to Accommodate. Duty to accommodate medical marijuana use in the workplace. Roe v. TeleTech, Docket No. 83768-6, _____ Wn.2d._____, _____ P.3d._____.

I. Facts. Jane Roe (pseudonym assumed for privacy) is a migraine headache sufferer who obtained a medical authorization for the use of medical marijuana. She applied for and was offered a job with TeleTech as a customer service representative. The offer was contingent on the results of a reference and background check, and a drug screen. TeleTech's drug policy requires all employees to have a negative drug test result. When Ms. Roe was informed of the policy, she informed TeleTech of her use of medical marijuana and offered to provide the company with a copy of her authorization. TeleTech declined. When the positive drug test results were returned to TeleTech, she was discharged after the company confirmed that it does make an exception for medical marijuana.

Ms. Roe then sued TeleTech claiming that her termination was (1) in violation of the Medical Use of Marijuana Act, and (2) in violation of a clear public policy allowing medical marijuana use under MUMA. The Superior Court of Kitsap County granted TeleTech's motion for summary judgment. The Court of Appeals, Division II, upheld Roe's dismissal.

11. Applicable Law and Analysis. The Washington State Supreme Court upholds the decision of the Washington Court of Appeals, Division II, finding that an employee discharged for her use of medical marijuana, properly authorized, has no cause of action under either the Medical Use of Marijuana Act (MUMA), Chapter 69.51A RCW or on public policy grounds. This holding is consistent with the decisions of other state courts including California, Oregon, and Michigan.

The Court found that the initiative, MUMA, was unambiguous. The language of the initiative is such that "the average informed voter voting on the initiative" would believe only that he or she was voting to create an affirmative defense to criminal prosecution. Language in RCW 69.51A.040(1) referring to prohibitions against the denial "of any right or privilege" was found by the Court, when read in context, to refer to criminal prosecution and not create any obligation on private employers.

The 2007 amendments by the legislature to RCW 69.51A.060(4) confirm that employers are not obligated to accommodate "offsite" marijuana use. Using an analysis based in logic rather than broad public policy, the Court found that this clarifying intent was both redundant and consistent with the intent of the initiative that it not create an employment right to offsite marijuana use. The Court specifically held that:

...there is no evidence voters intended MUMA to provide employment protections or to prohibit an employer from discharging an employee for medical marijuana use. Further, implying a cause of action against a private entity is inconsistent with a statutory claim intended to provide an affirmative defense to state criminal prosecution.

The Court then went on to dismiss appellant's claim that a cause of action exists for a violation of "public policy." Applying the four-part test utilized by the Court in determining whether such a public policy exists, the Court found that MUMA does not proclaim a clear public policy prohibiting the discharge of an employee for medical marijuana use. As the Court noted: "MUMA's only reference to employment is an explicit statement against requiring employers to accommodate medical marijuana use."

The Court also cited an opinion letter from the Washington State Human Rights Commission acknowledging that it "would not be a reasonable accommodation or disability for an employer to violate federal law or to allow an employee to violate federal law, by employing a person who uses medical marijuana."

III. Conclusion. The Washington Supreme Court joins other state courts which have examined this issue in holding that, absent a specific enactment by the legislature, MUMA does not require the accommodation of medical marijuana use by an employer. Please note that the decision does not prohibit such an accommodation. Public employers are free to adopt strict "no tolerance policies" for their employees or to look at a broad range of options, including treating medical marijuana as any other prescription drug. Nothing in the State Supreme Court's decision or indeed in the federal Drug-Free Workplace Act requires an employer to discharge an employee found to have used medical marijuana. Employers are therefore free to define their individual position in both their general personnel policies and their "Drug-Free" Workplace policies. The federal Drug-Free Workplace Act requires employers to take action up to discharge, but are not required to discharge employees who use medical

Public employers should also be aware that under *Robinson v. Seattle*, blanket pre-employment testing policies are prohibited by Article I, § 7 of the Washington State Constitution. Washington public employers may require drug tests only upon a "individualized suspicion" or for certain positions with a solid public safety basis.

Employers should consider their existing policy language, and their practice when dealing with Union employees. *Roe v. TeleTech* holds that employers have discretion to discharge employees for medical marijuana use, but that decision must be considered in the context of your existing past practice and your current written policies.