



## Nursing Home Sued for Refusing to Hire Medical Marijuana User

Alan C. Horowitz

On September 5, 2018, in *Noffsinger v. SSC Niantic Operating Co., LLC*,<sup>1</sup> a federal district court in Connecticut sided with a plaintiff who sued a nursing home that refused to hire her because she used medical marijuana as recommended by her physician. The court's decision, which represents a departure from recent decisions by other courts addressing this issue, has significant implications for both employers and employees who use medical marijuana. Because 31 states, as well as Puerto Rico and Guam, have legalized medical marijuana, we are likely to see more legal battles involving employment discrimination like the one described below.

### The Job Offer

In July 2016, Plaintiff Katelin Noffsinger (Noffsinger) was offered a position as the Activities Manager for Defendant, Bride Brook Nursing & Rehabilitation Center (Bride Brook). Her employment was conditioned on passing a drug screen. Before Noffsinger took the drug test, she told her future employer that she suffered from post-traumatic stress disorder (PTSD) as a consequence of a car accident. According to the court, Noffsinger's physician recommended treating the PTSD with medical marijuana. Noffsinger qualified to use medical marijuana pursuant to Connecticut's Palliative Use of Marijuana Act (PUMA). As required by PUMA, she was registered with the Connecticut Department of Consumer Protection as a patient who was qualified to use medical marijuana.

### The Follow-Up Meeting

During a follow-up meeting with the nursing home's administrator on July 25, 2016, Noffsinger disclosed her diagnosis of PTSD and the fact that as a "qualifying patient" under PUMA, she used medical marijuana at home. Noffsinger showed an empty pill container and her registration certificate to the administrator at her follow-up meeting. Noffsinger also provided a urine sample for a pre-employment drug screen which tested positive for THC, one of the components of marijuana. The administrator contacted the nursing home's compliance officer regarding Noffsinger's qualified use of medical marijuana and was told that Noffsinger "will be disqualified" from employment if the drug screen was positive for medical marijuana because it remains illegal under federal law. The day before Noffsinger was scheduled to begin her new job, she received a call informing her that Bride Brook rescinded the job offer because she tested positive for marijuana.

### The Suit

Because Bridge Brook rescinded the offer of employment, Noffsinger filed a complaint in the Connecticut Superior Court alleging: 1) a violation of PUMA's anti-discrimination provisions, 2) negligent infliction of emotional distress, and 3) wrongful rescission of her job offer, in violation of public policy. Following the removal of Noffsinger's complaint to federal district court, the parties filed cross-motions for summary judgment, and the court allowed the case to move forward regarding a violation of PUMA and negligent infliction of emotional distress.

<sup>1</sup> No. 3:16-CV-01938 (JAM), 2018 WL 4224075, at \*1 (D. Conn. Sept. 5, 2018).

## The Decision

### *Employment Discrimination under PUMA*

Bride Brook argued that it was exempt from PUMA's anti-discrimination provisions because the federal Drug Free Workplace Act (DFWA) "barred it from hiring the plaintiff." Bride Brook argued that its substance abuse policy was necessary to comply with the DFWA. The court rejected that argument, noting that "The DFWA does not require drug testing. Nor does the DFWA prohibit federal contractors from employing someone who uses illegal drugs outside of the workplace, much less an employee who uses medical marijuana outside the workplace in accordance with a program approved by the state." Bride Brook made several other arguments related to PUMA, all of which the court rejected, stating that Noffsinger was a "qualifying patient" and as such that Bride Brook's rescission of the job offer was contrary to her right not to be subject to discrimination.

### *Negligent Infliction of Emotional Distress*

The court granted Bride Brook's motion for summary judgement on the claim for negligent infliction of emotional distress holding that Bride Brook did not engage in any unreasonable conduct and that Noffsinger did not lose the opportunity to remain with her prior employer as a consequence of any actions or delays by Bride Brook. Thus, the court allowed Noffsinger's claim of discrimination under PUMA to go to trial.

## The Take-Aways

The ultimate decision in this employment discrimination suit will be determined at trial. However, employers – especially those in the 31 states that have legalized medical marijuana - need to be aware of the law in their respective states. Courts in other states have reached a different conclusion regarding medical marijuana and employment. For example, in the case of *Ross v. Ragingwire Telecommunications, Inc.*,<sup>2</sup> the California Supreme Court held that employers are not required to accommodate an employee's use of medical marijuana. That court stated that "[a]n employer may require pre-employment drug tests and take illegal drug use into consideration in making employment decisions."

Because marijuana remains a Schedule I controlled substance under the federal Controlled Substance Act, it places employers on the horns of a dilemma. Even if an employer complies with state law, it needs to be aware that marijuana growth, distribution, possession and sale is illegal under federal law.<sup>3</sup> Notwithstanding the federal law's prohibition on the use of medical marijuana, the majority of Americans now live in jurisdictions where medical marijuana is legal under state law. As the growing use of medical marijuana and the case above illustrate, employers should seek competent legal counsel regarding its hiring and firing practices in this area.

<sup>2</sup> 42 Cal. 4th 920, 933 (2008).

<sup>3</sup> In a historic decision, on June 25, 2018, the U.S. Food and Drug Administration announced that it approved the use of Epidiolex (cannabidiol) [CBD], a cannabinoid (marijuana) used to treat two rare causes of pediatric seizures in patients two years and younger. Based on pending legislation in both the House and Senate, we are likely to see a relaxing of federal laws concerning medical marijuana. Still, healthcare providers and others need to be aware of the legal issues in the rapidly changing landscape involving medical marijuana.

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