# California Supreme Court Affirms Employer's Ability To Terminate Employee For Off-Duty Medical Marijuana Use

January 2008
by Christine E. Lyon

**Related Practices:**

- Employment and Labor
- Privacy and Data Security

By Christine Lyon [1]

May a California employer refuse to hire a candidate who tests positive for marijuana use, if the candidate is qualified to use marijuana for medical purposes under California law? Does it matter that such marijuana use is still illegal under federal law? On Thursday, the California Supreme Court held that California law does not prohibit an employer from refusing to employ a medical marijuana user, even if his marijuana use is permitted under California law.[2] This case highlights the tension between a job applicant's expectation of privacy regarding off duty conduct and the employer's desire to prohibit even off duty drug use by its employees.

**Background**

The facts before the court were fairly straightforward. The plaintiff, Gary Ross, suffered a back injury during his military service, for which he receives disability benefits. Under California's Compassionate Use Act, Mr. Ross is allowed to use marijuana to treat his back pain and muscle spasms. While his use of medical marijuana is permitted under California law, it remains illegal under federal law.

In September 2001, Mr. Ross received a job offer from RagingWire Telecommunications, Inc. ("RagingWire") for the position of lead systems administrator. Mr. Ross accepted the job offer and took the mandatory pre employment drug test. Before taking the drug test, he gave the clinic a written recommendation from his doctor to use marijuana for medical purposes.[3] Not surprisingly, Mr. Ross tested positive for marijuana use.

By the time the clinic informed RagingWire of Mr. Ross's positive drug test results, he had been working for RagingWire several days. RagingWire suspended Mr. Ross based on his positive drug test results. At that time, Mr. Ross gave RagingWire documentation of his status as a qualified medical marijuana patient and explained that he used marijuana to relieve chronic back pain. RagingWire confirmed this information with Mr. Ross's doctor but ultimately terminated his employment based on his off duty marijuana use.

Mr. Ross filed a civil lawsuit against RagingWire, alleging that his use of medical marijuana was authorized by California's Compassionate Use Act and that it was unlawful for RagingWire to terminate him for using medical marijuana. Specifically, he claimed that RagingWire discriminated against him based on his disability (chronic back pain from injuries sustained during military service), by refusing to permit his use of the pain medication (marijuana) recommended by his doctor. He also claimed that RagingWire terminated his employment in violation of California public policy. In response, RagingWire argued that an employer is not required to tolerate drug use that is illegal under federal law, even if it may be permitted under California law.

**Conflicting California and Federal Law on Medical Marijuana Use**

This case highlights the conflict between California and federal law concerning the use of marijuana for medical purposes. In 1996, California's voters approved Proposition 215, which allows the use of marijuana for medical purposes upon a physician's recommendation. Specifically, the Compassionate Use Act states that certain California laws penalizing marijuana possession and cultivation do not apply to a patient who possesses or cultivates marijuana for his or her personal medical purposes upon the written or oral recommendation or approval of a physician.[4] The Compassionate Use Act also provides that no physician in California shall be punished for recommending marijuana to a patient for medical purposes.[5]

Notwithstanding California's Compassionate Use Act, the federal Controlled Substances Act still prohibits the possession, use, and cultivation of marijuana. *See* 21 U.S.C. § 841 *et seq.* California law does not affect the federal prohibition on marijuana use, nor prevent its enforcement in California. The United States Supreme Court has confirmed that the federal government can enforce federal laws against marijuana use in California, even if the marijuana use is covered by the Compassionate Use Act.[6]

**The Long Road to the California Supreme Court**

RagingWire demurred to Mr. Ross's complaint—in other words, RagingWire argued that, even if all of Mr. Ross's factual allegations were true, his case would fail as a matter of law. RagingWire emphasized that marijuana use is still illegal under federal law and that employers are under no obligation to employ marijuana users. Mr. Ross opposed the demurrer by arguing that his medical marijuana use was lawful under the Compassionate Use Act and, thus, legally protected activity under California law. The trial court entered judgment in favor of RagingWire, concluding that Mr. Ross's use of medical marijuana violated federal law and thus remained unlawful, even if he was protected from state criminal liability under the Compassionate Use Act.

Mr. Ross appealed the judgment to the Court of Appeal of California. The Court of Appeal also ruled in RagingWire's favor, stating that California law does not prohibit an employer from firing, or refusing to hire, a person who uses an illegal drug.[7] Although the Compassionate Use Act provides users of medical marijuana with a limited immunity against state criminal prosecution, the Court of Appeal emphasized that marijuana use is "still illegal under federal law even when it is being used for medicinal purposes in accordance with the Compassionate Use Act."[8] Accordingly, the Court of Appeal agreed with the trial court that an employer could lawfully terminate an employee for using marijuana, even if the marijuana use was authorized under the Compassionate Use Act.

After the trial court and appellate court rejected his claims, Mr. Ross appealed his case to the California Supreme Court (the "Court").[9] The Court granted review on two basic issues:

**(1) Reasonable Accommodation of Disability:** Does an employer violate California's Fair Employment and Housing Act by refusing to accommodate or permit an employee's off duty use of marijuana to treat a disability?

**(2) Wrongful Termination in Violation of Public Policy:** If an employee is terminated for off duty use of marijuana to treat a disability, can the employee bring a claim for wrongful termination in violation of public policy?

**The Court's Decision**

***Reasonable Accommodation***
California's Fair Employment and Housing Act ("FEHA") requires an employer to provide reasonable accommodation for the known disability of an employee, unless the employer demonstrates that such accommodation would cause undue hardship to its operations.[10] Mr. Ross alleged that he has a disabling back condition, and that his only requested accommodation was not to be fired for using medical marijuana at home to treat his disability. In response, RagingWire argued that FEHA does not require employers to accommodate illegal drug use, and that Mr. Ross's drug use was illegal under federal law even if it was allowed under California law.

The Court concluded that Mr. Ross could not state a claim under FEHA based on RagingWire's refusal to accommodate his use of medical marijuana. In reaching this conclusion, the Court explained that FEHA does not require employers to accommodate the use of illegal drugs, and that marijuana use is still illegal under federal law. The Court also emphasized that the Compassionate Use Act did not render medical marijuana a "legal" drug in California, but merely provided a limited

immunity against criminal prosecution under California law. As the Court explained, the Compassionate Use Act "do[es] not speak to employment law," but only to criminal liability.[11] The Court also observed that it would be "impossible" for California law to transform marijuana into a legal drug: "No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law."[12]

Going a step further, the Court also indicated that any attempt to legislate new employment protections for California medical marijuana users may be unavailing:

> The Compassionate Use Act does not eliminate marijuana's potential for abuse or the employer's legitimate interest in whether an employee uses the drug. Marijuana, as noted, remains illegal under federal law because of its "high potential for abuse," its lack of any "currently accepted medical use in treatment in the United States," and its "lack of accepted safety for use . . . under medical supervision."[13]

In sum, the Court not only held that existing California law allows an employer to terminate an employee for medical marijuana use, but implied that California cannot legislate around federal law to require employers to tolerate medical marijuana use.

***Public Policy and Privacy Claims***

As a separate claim, Mr. Ross asserted that RagingWire violated fundamental public policy by terminating his employment because of his medical marijuana use. He asserted that his termination violated several statutory and constitutional provisions: (1) FEHA, which prohibits disability discrimination and requires reasonable accommodation of disabilities; (2) the Compassionate Use Act, which allows the use of medical marijuana; and (3) the California Constitution and U.S. Constitution, which guarantee the right of privacy.

The Court rejected each of these arguments by Mr. Ross. First, as described above, the Court determined that FEHA does not require an employer to accommodate the use of marijuana, which remains an illegal drug under federal law. Second, the Court explained that the Compassionate Use Act does not "articulate any policy concerning marijuana in the employment context, let alone a fundamental public policy requiring employers to accommodate marijuana use by employees."[14] Third, the Court rejected Mr. Ross's argument that RagingWire violated his right of privacy by penalizing him for using the medical treatment recommended by his physician. The Court found that this theory "merely restate[s] the argument that the Compassionate Use Act gives plaintiff a right to use marijuana free of hindrance or inconvenience, enforceable against third parties," an argument the Court had already rejected. Since Mr. Ross had failed to establish a fundamental public policy requiring accommodation of an employee's medical marijuana use, his wrongful termination claim also failed.

**Practical Implications for California Employers**

The *Ross* decision provides long awaited clarification that California employers are not required to accommodate or permit marijuana use by their employees, even medical marijuana use that may be covered by the Compassionate Use Act. The Court also reaffirmed that California law allows employers to "require preemployment drug tests and take illegal drug use into consideration in making employment decisions."[15] Overall, this decision confirms that an employer's interest in conducting pre-employment drug screening overrides any privacy interest that a job applicant may have in off-duty use of marijuana, even if the marijuana use is permitted by the Compassionate Use Act.

***

*This alert will be published in the forthcoming* **BNA Privacy & Security Law Report,** *Volume 7, No. 4 (Jan. 28, 2008).*

---

**Footnotes:**

**[1]:** Christine Lyon is a partner in the Palo Alto office of Morrison & Foerster LLP, where she specializes in privacy and employment law. Ms. Lyon would like to thank Boris Reznikov, a summer

associate at Morrison & Foerster LLP during the summer of 2007, for his assistance in monitoring this case.

**[2]:** *Ross v. RagingWire Telecommunications, Inc.*, No. S138130, 2008 Cal. LEXIS 784 (Cal. Jan. 24, 2008). A copy of this decision is available at http://www.courtinfo.ca.gov/cgi-bin/opinions.cgi?Courts=S.

**[3]:** Under the Compassionate Use Act, medical marijuana is not "prescribed" but is "recommended" by a physician either orally or in writing. As a result, an individual does not need to produce a formal prescription to verify his or her status as a qualified medical marijuana patient.

**[4]:** Cal. Health & Safety Code § 11362.5(d) ("Section 11357 [of the Health & Safety Code], relating to the possession of marijuana, and Section 11358 [of the Health and Safety Code], relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.").

**[5]:** Cal. Health & Safety Code § 11362.5(c).

**[6]:** See *Gonzales v. Raich,* 545 U.S. 1 (2005).

**[7]:** *Ross v. RagingWire,* 132 Cal. App. 4th 590 (2005).

**[8]:** *Id.* at 132 Cal. App. 4th 590, 603.

**[9]:** Mr. Ross's case attracted significant attention from organizations supporting medical marijuana, from employee advocacy groups, and from employer advocacy groups. Protection and Advocacy, Inc. and Equal Rights Advocates; the American Pain Foundation, American Medical Women's Association, Lymphoma Foundation of America, American Nurses' Association, California Nurses' Association, AIDS Action Council, National Women's Health Network, Doctors of the World-USA, and Gay Men's Health Crisis; and Western Electrical Contractors Association filed amici curiae ("friends of the court") briefs in support of Mr. Ross. Five California legislators who authored the Medical Marijuana Program Act also filed an amicus curiae brief in support of Mr. Ross. The Pacific Legal Foundation and Santa Clara Valley Transportation Authority filed amici curiae briefs in support of RagingWire.

**[10]:** Cal. Gov't Code §12940(m).

**[11]:** *Ross*, 2008 Cal. LEXIS 784, at *12.

**[12]:** *Ross* at *8.

**[13]**: *Id.* at *11 (quoting 21 U.S.C. § 812(b)(1) and *Gonzales v. Raich*, 545 U.S. at 14).

**[14]:** *Ross* at *23.

**[15]:** *Ross* at *3. Despite this favorable decision, employers should remain mindful of California's limitations on employee drug testing. California law allows employers to require candidates to complete a pre-employment drug screening as a condition of hire. (This is the type of drug test that alerted RagingWire to Mr. Ross's marijuana use.) In contrast, California law strictly limits an employer's ability to require drug testing of current employees. In most cases, an employer must be able to establish a reasonable suspicion of actual drug use by a current employee, in order to require that employee to submit to drug testing. The Ross decision does not affect the current standards for drug testing in California.