Washington Healthcare News®
wahcnews.com
Articles, Interviews and Statistics for the Healthcare Executive

Medical Marijuana and the Workplace

By Jim Shore
Partner
Stoel Rives LLP

Legal issues involving medical marijuana continue to generate controversy, while posing complicated legal and philosophical questions for healthcare employers. State legislative efforts or voter initiatives (including a pending Washington State initiative) occur frequently around the country, backed by supporters seeking to regulate, legalize or decriminalize marijuana use and/or broaden medical marijuana users' workplace rights.

Washington is one of 17 states currently authorizing some form of medical marijuana use. However, with regard to workplace rights, last year the Washington Supreme Court ruled in *Roe v. TeleTech Customer Care Management* that Washington's Medical Use of Marijuana Act ("MUMA") does not protect medical marijuana users from adverse hiring or disciplinary decisions based on an employer's drug testing policy.

Jane Roe (who used a pseudonym because medical marijuana use remains illegal under federal law) sued TeleTech for terminating her employment after she failed a drug test required by TeleTech's zero-tolerance substance abuse policy. She alleged that she had been wrongfully terminated in violation of public policy and MUMA because her marijuana use was "protected" by MUMA. The trial court granted summary judgment in TeleTech's favor, and Roe appealed all the way to the Supreme Court. The Supreme Court ruled 8-1 in TeleTech's favor, holding that MUMA provides an affirmative defense to state criminal prosecutions of qualified medical marijuana users, but "does not provide a private cause of action for discharge of an employee who uses medical marijuana, either expressly or impliedly, nor does MUMA create a clear public policy that would support a claim for wrongful discharge in violation of such a policy." The Court's holding applies regardless of whether the employee's marijuana use occurred while working or while off-site during non-work time. While the *TeleTech* case did not involve a disability discrimination or reasonable accommodation claim under Washington's Law Against Discrimination, the Court did note that marijuana remains illegal under federal law regardless of what the State of Washington does, and that it would be incongruous "to allow an employee to engage in illegal activity" in the process of finding a public policy exception to the at-will employment doctrine. Moreover, the Court noted that the Washington State Human Rights Commission acknowledges that "it would not be a reasonable accommodation of a disability for an employer to violate federal law, or allow an employee to violate federal law, by employing a person who uses medical marijuana."

The Supreme Courts of California, Oregon and Montana have similarly ruled for employers, as has at least one federal trial court. But many unionized healthcare employers

have collective bargaining agreements ("CBA") covering some or all of their employees. Depending on the circumstances (e.g., CBA language, past practice with analogous issues, principles of "just cause" discipline, and an arbitrator's tendencies), the *TeleTech* decision might be applied differently in a labor arbitration. Indeed, one Washington State arbitrator used "just cause" principles to overturn an employer's termination of a warehouse worker who failed a drug test due to medical marijuana use. Regardless, unionized employers can still take advantage of the *TeleTech* decision if they take certain steps and are consistent in their application of zero-tolerance drug testing policies.

Sound reasons exist for any healthcare employer to have zero-tolerance policies and a substance abuse testing program, such as quality patient care, government contracting requirements, federal or state laws, workplace safety, productivity, health and absenteeism, and third-party liability. Given the continued efforts by advocacy groups to "push the envelope" of medical marijuana laws into the workplace, it is important for healthcare human resource professionals to closely monitor legislative and legal developments. To best protect themselves, healthcare employers should review their existing policies to make sure that they comply with the law, and that they prohibit "any detectable amount" of drugs that are illegal under state or federal law, as opposed to merely prohibiting being "under the influence." Employers should also ensure that all human resources personnel and drug testing labs know how to handle medical marijuana issues as they arise. Healthcare providers that authorize medical marijuana use for their patients should also weigh whether choosing to not make a medical marijuana exception to their drug testing policies will raise an institutional inconsistency. Particularly in a unionized workplace, this could give rise to an issue that might have emotional appeal to some arbitrators.

Jim Shore is a partner of Stoel Rives LLP, where he represents healthcare providers in all aspects of employment law and labor relations. Jim represented the employer in Roe v. TeleTech Customer Care Management. Contact Jim at jmshore@stoel.com or 206-386-7578.