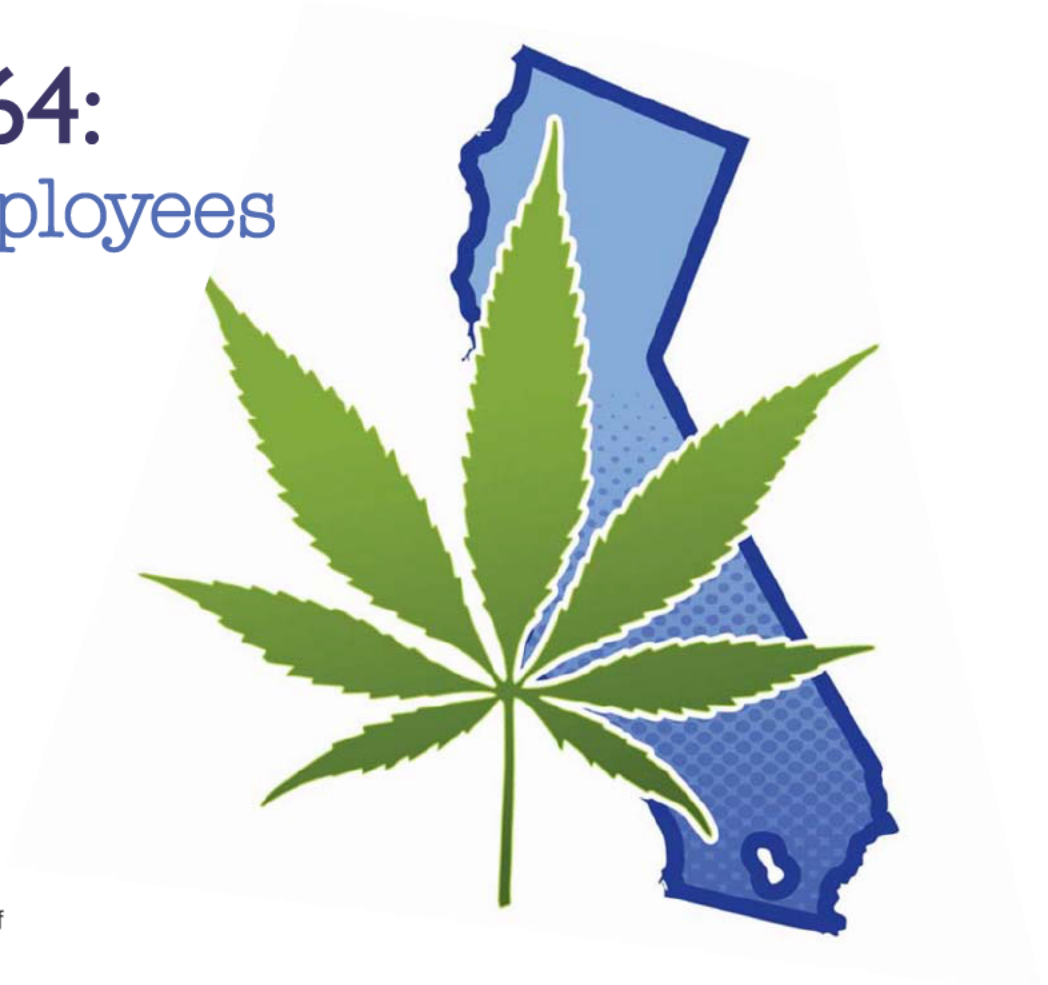
Post Prop 64:
Keeping Employees off the Grass

By Amy I. Huberman



CALIFORNIA LAWS PROTECT several employee characteristics, but an employee's use of marijuana is not one of them—even if recreational cannabis use has now been legalized for adults over 21, thanks to the recent passage of Proposition 64, the Adult Use of Marijuana Act (AUMA).

Due to current licensing requirements for marijuana product businesses, legalized recreational sales won't begin until January 1, 2018. Any employees in California who are using cannabis now are either obtaining marijuana illegally, have a prescription for medicinal use, or are growing their own for personal consumption.

Whether an employee's use is illegal or legal, employers still have the power to define company drug policy, refuse to hire or train candidates, or terminate at-will employees for their use of cannabis.

State and federal laws put employers in a bit of a bind because of the stark difference in the two branches' policing of marijuana. California's Compassionate Use Act of 1996[1] provides prescription marijuana users protections from certain criminal charges, including possession of the drug. The federal government, however, still considers marijuana a Schedule 1 drug (among the most dangerous and addictive), and therefore, illegal.[2]

As a result, the dilemma Californians now face is not limited to our state, as 28 others and the District of Columbia have taken steps to either decriminalize cannabis possession, allow medicinal use, greenlight recreational use for adults, or all of the above.

Over the last several years, the courts have forged a clear path through the weeds—they have generally been unwilling to force employers to accommodate employees who break federal law.

In 2008, the California Supreme Court held in *Ross v. RagingWire*[3] that an employer may lawfully terminate an employee who tests positive for marijuana, even if the marijuana use is for lawful medical purposes under California law.

In the *RagingWire* case, plaintiff Gary Ross suffered chronic pain due to injuries sustained while serving in the U.S. Air Force and was designated a qualified, disabled individual under the California Fair Employment and Housing ACT (FEHA). He had a valid physician's prescription for medical marijuana, which he obtained when traditional methods of treatment failed to alleviate his pain.

When Ross underwent new employee drug testing and tested positive for marijuana metabolites, his employer, RagingWire, terminated him. Ross claimed the employer violated the FEHA, failed to make reasonable accommodations for his disability, and terminated him wrongfully and in violation of public policy. California's Supreme Court disagreed with all of the plaintiff's claims, stating:

> *The Compassionate Use Act . . . simply does not speak to employment law. Nothing in the act's text or history indicates the voters intended to articulate any policy concerning marijuana in the employment context, let alone a fundamental public policy requiring employers to accommodate marijuana use by employees. Because the act articulates no such policy, to read the FEHA in light of the Compassionate Use Act leads to no different result.*[4]

In *Shepherd v. Kohl's Department Stores, Inc.*,[5] the federal court offered a different analysis in its unpublished order. Although the federal court, Eastern District of California, ruled in favor of the employer on most issues including the plaintiff's arguments regarding FEHA violations, the court found for the plaintiff on other claims.

In this case, Justin Shepherd was a material handler who was diagnosed with acute and chronic anxiety in 2011, when he received a physician's recommendation for medical marijuana. The following year, Kohl's updated its company policy to state that "employees in California and certain other states would not be discriminated against in hiring, firing or other employment actions, if the employee had a valid medical marijuana use recommendation."[6]

Continuing to use cannabis, Shepherd strained his back at work in 2014, and while seeing a medical provider for a worker's compensation claim, agreed in writing to submit to a drug test. When drug testing showed positive results for marijuana's active ingredient, delta-9-tetrahydrocannabinol (THC), plaintiff was suspended and then later fired.

Shepherd filed seven causes of action, three of which alleged violations under FEHA, plus invasion of privacy under the state's constitution, wrongful termination in violation of public policy, breach of implied contract, and defamation. Kohl's filed a motion for summary judgment.

Regarding the FEHA claims, the district court relied heavily on *RagingWire*, but also said:

> *To the extent plaintiff attempts to argue around the holding in RagingWire by asserting his FEHA claim is based on defendant's failure to follow its own policies, the court is unpersuaded. . . Plaintiff presents no authority, and this court has found none, suggesting a cognizable FEHA claim can be based simply on an employer's failure to abide by policies not required by FEHA. While the failure to abide by its own policies may be a breach of an implied in-fact contract, for the reasons discussed below, refusing to accommodate an employee's marijuana usage does not violate FEHA.*[7]

As to Shepherd's invasion of privacy claim, the court also found for the employer—Kohl's company policy, it said, reserved the right to require employees to submit to drug testing when involved in worker's compensation matters. But in regards to Shepherd's claims of breach of contract and fair dealing, and allegations of defamation, the court agreed with the plaintiff.

Kohl's company policy included two provisions addressing marijuana use by employees. One provision stated, in part, that employees or applicants "will not be discriminated against should they test positive for marijuana components or metabolites." Another provision states the same, but then adds that nothing shall prevent the employer "from imposing discipline for any employee who used, possessed or was impaired by marijuana at any Kohl's location or in the performance of Kohl's business."[8]

Here, a reasonable jury could conclude from the defendant's policies and the plaintiff's testimony that the parties agreed, subsequent to his 2006 acknowledgment of the at-will nature of his employment, that plaintiff would not be discriminated against for his medicinal marijuana use, since he was a registered medical marijuana cardholder.[9]

The court, therefore, denied defendant's motion for summary judgment as to the plaintiff's causes of action for breach of an implied contract and the covenant of good faith and fair dealing. In other words, a genuine dispute of material fact still existed.

The court found that the defendant employer acted with malice (with a "reckless disregard for the truth") when it terminated Shepherd, in relation to his defamation claim. Kohl's sent Shepherd an "Associate Counseling Form" stating that he had violated three company policies: "(1) [R]eporting to work in a condition unfit to perform your duties or under the influence of alcohol, illegal non-prescription drugs or other intoxicants or controlled substances. Using, consuming or selling illegal non-prescription drugs, alcohol or other intoxication or controlled substances on Company property; (2) Violating safety rules pertaining to specific work areas; and (3) Acting in conflict with the Interest of Kohl's."[10]

Shepherd provided evidence that marijuana metabolites can be found in a user's system 30 days after use, though impairment would only last a few hours. In addition, he testified at his deposition that he had not used marijuana several days prior to his work injury.

The court found that a genuine dispute of material fact still existed and that a reasonable jury could find that Shepherd was not unfit to work and that the statements in the "Associate Counseling Form" were made with a "reckless or wanton disregard for the truth."[11]

Beyond California Dreamin'

Employers whose workforce includes employees outside of California need not fret; courts tend to take a pro-employer stance in other states as well when it comes to marijuana use.

For example, Colorado residents have been legally using marijuana for medical purposes since 2000 and recreationally since 2012. But this past June, the state's Supreme Court ruled in favor of Dish Network[12] rather than for the former employee suing for wrongful termination under Colorado's lawful activities statute,[13] which "generally makes it an unfair and discriminatory labor practice to discharge an employee based on the employee's 'lawful' outside-of-work-activities."[14]

Plaintiff Brandon Coats was a quadriplegic who was confined to a wheelchair as a teenager. He obtained a license for medical cannabis use in 2009 to treat muscle spasms. The court noted that Coats used marijuana in his own home after working hours.

Despite establishing those facts, the Colorado Supreme Court upheld the trial and appellate court decisions, finding that "Coats's use of medical marijuana was unlawful under federal law and thus not protected by §24–34–402.5.[15]

In Washington State, plaintiff Jane Roe was prescribed marijuana for symptoms related to severe migraine headaches. Roe's use of medicinal marijuana relieved the symptoms associated with her migraines and allowed her to work and care for her children.

Roe only used the marijuana at home. She was offered a position at TeleTech, contingent on the results of a reference and background check and a drug screening. Informed of the company's drug policy, Roe notified the company of her medical marijuana use. After her drug screen came back positive, she was terminated.

Roe then sued TeleTech for wrongful termination in violation of the Medical Use of Marijuana Act. On summary judgment, the Washington State Supreme Court held that the state's Medical Use of Marijuana Act did not regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use.[16]

Hazy Shades of Drug Testing

If courts across the country are hesitant to protect medical marijuana users, it's a pretty good bet they won't protect the recreational users either.

While termination of employees never comes without risks, it does not appear that terminating an employee for marijuana use, and exercising their new

found right under Proposition 64, will violate the FEHA or other employment laws.

In addition, as long as employers have drug testing policies in place, an employer can still require an employee it reasonably believes is under the influence at work to submit to a drug test. But the *Shepherd* case raises a predicament. Because cannabinoids are fat soluble, they tend to stay in the user's body for longer periods of time than other drugs or alcohol. Current drug testing methods for cannabis include urinalysis, hair analysis or saliva tests, which can detect THC for several weeks after use according to the National Institute on Drug Abuse.[17]

Given that one employee could have a cocktail or two during lunch every day and, depending on the individual, return to work perfectly sober, while another employee smokes half a joint every two weekends and carries cannabinoids in their system for weeks afterwards—drug testing begins to look a little unfair.

It may be time for employers to consider eliminating drug testing altogether, except for employees whose duties affect their own or others' safety, i.e., operators of heavy equipment, emergency services workers, delivery personnel, etc., or those whose industries require drug testing by federal law.

Marijuana Laws Still "*Young, Wild & Free*"

California became the first state to legalize medical marijuana in 1996, while Colorado became the first to legalize its recreational use in 2012.

Despite two decades of prescription use and four years of recreational use, the laws still remain murky when it comes to employment matters.

The courts, as seen above, have been cutting a clear way forward for employers. But actual legislation had remained ephemeral until California's Proposition 64. AUMA amends parts of California Health & Safety Code[18] and specifically states:

> *Nothing in Health & Safety Code § 11362.1 shall be construed or interpreted to amend, repeal, affect, restrict or preempt:*
> *(e) Laws providing that it would constitute negligence or professional malpractice to undertake any task while impaired from smoking or ingesting marijuana or marijuana products.*
> *(f) The rights and obligations of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace, or affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees, or prevent employers from complying with state or federal law.*

Employers should proceed with caution; hiring, firing or imposing discipline should always be handled with care, as we saw in the Shepherd case. As a result, employers are recommended to do the following:

- Review existing policies and practices regarding medicinal and recreational drug use.
- Consider whether or not drug testing is really necessary for all positions.
- Train management to spot signs of drug or alcohol impairment vs. signs of allergies, flu symptoms, etc.
- If an employee seems to be under the influence at work, is smoking marijuana during breaks, or violating company drug policy in any way, consider documenting the policy violations with written notices to the employee in question, before termination.

Though the historic trend from the bench has been to side with the employer in wrongful termination for marijuana cases, that may soon shift. There's no indication the federal government will move cannabis from its Schedule 1 list in the near future, but more and more states are decriminalizing medicinal and recreational marijuana, with some others, like New York and Nevada, now requiring employers to accommodate registered medical marijuana user employees.

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[1] *California Health & Safety Code §11362.5.*
[2] Drug Enforcement Agency, https://www.dea.gov/druginfo/ds.shtml (last visited December 5, 2016).
[3] *Gary Ross v. Ragingwire Telecommunications, Inc.*, 70 Cal.Rptr.3d 382 (2008).
[4] *Id.* at 392.
[5] *Shepherd v. Kohl's Department Stores, Inc.* (E.D. Cal. 2016) WL 4126705.
[6] *Id.* at p. 1.
[7] *Shepherd*, WL 4126705 at p. 4.
[8] *Id.*
[9] *Id.* at p. 10.
[10] *Shepherd*, WL 4126705 at p. 10.
[11] *Id.*
[12] *Brandon Coats v. Dish Network, LLC*, 350 P. 3d 849 (2015).
[13] Colorado's Revised Statutes §24-34-402.5
[14] *Brandon Coats*, 350 P.3d at 850.
[15] *Id.* at 853.
[16] *Roe v. TeleTech Care Management (Colorado)* LLC, 171 Wash.2d 736 (2011).
[17] *Nat'l Inst. of Drug Abuse* (August 2016), https://www.drugabuse.gov/publications/research-reports/marijuana/what-are-marijuana-effects.
[18] *Submission of Amendment to Statewide Initiative Measure—Control, Regulate and Tax Adult Use of Marijuana Act, No. 15-0103* (December 7, 2015), https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20(Marijuana)_1.pdf.

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