

RESOLUTION 11-03-08

DIGEST

Civil Rights: Medical Marijuana Patients in the Workplace

Adds section 11362.787 to the Health & Safety Code prohibiting employers from discriminating against qualified medical marijuana patients.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

History:

No similar resolutions found

Reasons:

This resolution adds section 11362.787 to the Health & Safety Code prohibiting employers from discriminating against qualified medical marijuana patients. This resolution should be disapproved because it will expose employers to increased liability and inefficiencies resulting from having to hire marijuana users.

In *Ross v. RagingWire Telecommunications* [(2008) 42 Cal.4th 920], the Court held that California's Fair Employment and Housing Act ("FEHA") does not require an employer to accommodate an employee who uses medical marijuana. The Court found that the Compassionate Use Act ("CUA") did not speak to employment law and was instead intended to provide a defense to criminal liability for doctors and patients. Although the resolution seeks to protect medical marijuana users from discrimination in hiring, employers should not be forced to hire or keep in their employ those who use a drug that physically or mentally impairs their ability to carry out their job duties, thereby affording marijuana users more protection under the law than users of other prescribed medications.

According to the National Institute on Drug Abuse, workers who smoke marijuana are more likely to experience absences, tardiness, accidents, and workers' compensation claims – all adding to the employers' insurance premiums, already high costs of doing business in California, and exposure to litigation. Marijuana users who are impaired on the job may pose a safety risk to fellow workers and customers alike. Further, the use and possession of marijuana, whether or not pursuant to California law, remain Federal crimes.

In response to *Ross*, California Assemblyman Mark Leno authored legislation (AB 2279) aimed at protecting the employment of medical marijuana users in California. AB 2279 was approved by the full Assembly on May 28, 2008, and referred to the State Senate Judiciary Committee.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to add Health & Safety Code section 11362.787 to read as follows:

1 § 11362.787

2 (a) No person, because of another person’s status as a qualified medical marijuana
3 patient, may refuse to hire or employ the person or to refuse to select the person for a
4 training program leading to employment, or to bar or to discharge the person from
5 employment or from a training program leading to employment, or to discriminate against
6 the person in compensation or in terms, conditions, or privileges of employment, except as
7 provided in subdivisions (b) or (c) of this section.
8 (b) Subdivision (a) does not apply to any qualified medical marijuana patients who
9 is employed in a job position that directly affects the health or safety of others. Subdivision
10 (a) does not apply to qualified medical marijuana patients who use medical marijuana in
11 the workplace.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS:

Existing Law: Allows an employer to refuse to deny employment to a qualified medical marijuana patient. See *Ross v. Ragingwire Telecommunications, Inc.* (filed January 24, 2008) 2008 Cal. LEXIS 784 (accommodation of employee’s use of medical marijuana not required because nothing in the text of the Compassionate Use Act (SB 215) suggested the measure was intended to address the respective rights and duties of employers and employees).

This Resolution: Would preclude a blanket employment prohibition for qualified medical marijuana patients in this state, while preserving California employers’ rights to restrict such patients from working in positions that directly affect other peoples’ health and safety, and maintains employers’ rights to prohibit medical marijuana use in the workplace.

The Problem: Although California voters overwhelmingly approved the use of medical marijuana 12 years ago, (SB 215, the “Compassionate Use Act”, adding Health & Safety Code § 11362.5), the law does not protect employees who are qualified medical marijuana patients (as defined by Health and Safety Code § 11362.785) from being terminated or otherwise discriminated in their employment. Without such protections, qualified medical marijuana patients who both desire and have the ability to work are at risk of becoming unemployed, increasing pressure on California’s public assistance programs and workforce, while simultaneously reducing available tax dollars statewide.

IMPACT STATEMENT:

This resolution does not affect any other law, statute or rule.

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RESPONSIBLE FLOOR DELEGATE: Heather E. Borlase

COUNTERARGUMENT

SACRAMENTO COUNTY BAR ASSOCIATION

The most important, and irreconcilable, problem with this resolution is that marijuana use remains illegal under federal law, even for medical users, as the California Supreme Court recognized in the *Ross v. RagingWire Telecommunications* decision. Thus, California cannot, and should not, require employers to accommodate the use of illegal drugs by its employees, as the Supreme Court also so held in *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 883.

Secondarily, although it purports to preserve employers' rights to prohibit medical marijuana use in the workplace, the resolution appears to deny an employer the right to prohibit an employee from working under the influence of medical marijuana (which, for instance, could occur if the employee smoked marijuana before coming to work or on his/her lunch break). As the Supreme Court recognized in the *Ross v. RagingWire* case, an employer must be allowed to ensure that its employees' work performance and workplace conduct are not impaired by intoxicants. Nevertheless, this resolution would appear to make it unlawful for the employer to take action against "a qualified medical marijuana patient" who reported to work under any influence of marijuana. Importantly, the resolution also establishes protected status for medical marijuana users without requiring that the employee be able to show that his/her marijuana use does not, or will not, affect the employee's ability to perform the essential functions of his/her job.

Furthermore, the exception provided under proposed Health & Safety Code section 11362.787(b) is of little, if any, assistance to employers in meeting their statutory obligation to maintain a safe and healthy workplace. First, a job position that "directly affects the health or safety of others" is not defined. Second, under both state and federal law, California employers are generally prohibited from inquiring about a job applicant's or employee's disability or medical condition, which includes inquiry about prescription medications. Accordingly, an employer would not be able to screen out medical marijuana users from positions that "directly affect the health or safety of others" without subjecting all employees in such positions to drug testing, which is not legal in California under current law.

Finally, in proposed subdivision (a), the resolution also refers to exceptions provided in subdivision (c) of this section. However, no subdivision (c) is included, so it is unclear whether additional exceptions to the proposed statutory rule were intended.