

Medical marijuana or employment - a tough decision for some

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Of the more than 100,000 registered medical marijuana-using patients in Michigan, those who aren't covered by shrinking state and federal social safety nets or who aren't independently wealthy have a tough choice: Medical marijuana or employment, but not both.

Drafters of the Michigan Medical Marihuana Act of 2008 and state legislators didn't explicitly protect medical sufferers from employer policies that approach medical marijuana-using patients with the same zero-tolerance policy that's in place to deal with illegal drug use.

The choice was never on the table for Joseph Casias, a Battle Creek man fired from his management position at a Grand Rapids Walmart store for testing positive for having THC, which is found in marijuana, in his body.

Casias already had been using medical marijuana to deal with severe pain associated with sinus cancer and an inoperable brain tumor. Once legally registered through the Michigan Department of Community Health at the suggestion of his physician, Casias noticed immediate improvements to his pain levels and quality of life while using marijuana.

In 2009, he submitted to a blood test as a condition to return to work at Walmart after a medical leave of absence. Casias, the inventory control manager and store 2008 Associate of the Year, was immediately fired when his supervisors received the blood test results, which Casias and his attorneys say could not have indicated that he had used before or during his shift work at the store.

Despite being careful to consume medical marijuana after his shifts in the evening, Walmart's action was the same as if he had come back from a break after lighting up a joint at work.

Now he's the face of a broad struggle for medical marijuana user rights in Michigan which, until settled, will remain a potential pitfall that all working-class medical marijuana patients in Michigan could stumbled upon.

Class or case law

The Michigan Medical Marihuana Act does two things, or at least should, in very explicit language. On one hand, it protects employers, their employees and their customers from injury or other damages.

Medical marijuana users are not allowed to be under the influence of the drug “when doing so would constitute negligence or professional malpractice,” as is stated in the law.

There are also prohibitions against using or being under marijuana’s influence in public places or while operating vehicles or equipment, but there’s also an explicit protection for patients.

In Section 8 of the act, the heading reads: “Affirmative Defense and Dismissal for Medical Marihuana,” and goes on to state, in Section 8 (c)(1): “If a patient or a patient’s primary caregiver demonstrates that patient’s medical purpose for using marihuana pursuant to this section, the patient and the patient’s primary caregiver shall not be subject to the following for the patient’s medical use of marihuana ... disciplinary action by a business or occupational or professional licensing board of bureau.”

U.S. District Judge Robert Jonker, who presided over *Casias vs. Walmart* before it was up for consideration in the state appellate court, ruled in the retail giant’s favor.

“The Act provides a potential defense to criminal prosecution or other adverse action by the state,” Jonker said in his ruling.

He said the act “does not regular private employment” and “says nothing about private employment rights.”

Jonker concluded that he would have to alter Michigan’s at-will employment laws to include medical marijuana patients as a “new protected class in Michigan,” defined and protected similarly as those groups defined by race, age, sex, religion, national origin or disability status in the state’s employment law.

Dan Korobkin, one of four ACLU attorneys representing *Casias* in his currently ongoing bid to have his case appealed, disagrees with Jonker’s ruling.

“The very words of the statute say that you shall not be subject to any prosecution, arrest or disciplinary by a business in the act,” Korobkin said. “despite the act saying that the judge decided that the act doesn’t protect anyone from firing.”

Korobkin and his associates have enjoined the manager who fired *Casias* in the lawsuit in hopes of having the case heard in a state court, where state law might hold more weight than federal law.

In the case, Walmart's counsel states that the basis for the firing was the inclusion of medical marijuana on the Schedule 1 drug list maintained by the Drug Enforcement Agency.

More broadly, there are federal laws regulating drug enforcement policies at companies that perform more than \$100,000 worth of contract work for the federal government (the Drug-Free Workplace Act of 1988), as well as for transportation workers behind the wheels of trains, planes, trucks, subway trains, commercial naval vessels and buses (federal Department of Transportation safety guidelines).

Under those laws, a zero-tolerance policy toward marijuana is enforced, and Occupational Safety and Health Administration guidelines call for a safe work environment in general, which some employers may see fit to create by firing employees found with THC in their system.

But Korobkin says that the letter of the state's act honors those federal laws by prohibiting "abuse" of medical marijuana in those circumstances, recognizing its intoxicating effects on the user.

"You cannot come to work stoned, you cannot use at work, so since none of this is true than we think the act protects Joseph from being fired," he said. "It doesn't make any sense to allow for the use of medical marijuana if at the same time you can't make a living for your family while you're doing that."

Korobkin noted that Walmart didn't fire Casias because of a THC level that he tested for; in fact, the test results haven't even been entered as evidence in the case. No discovery procedure has been initiated in the case.

Walmart's attorneys have said that they fired Casias based on the test showing a positive result for THC, and they don't recognize the act. Their firing him was premised on the framework of Michigan's at-will employment law only and a corporate view at substances on the Schedule 1 drug list.

In addition to winning the next round in a state court and establishing case law that protects medical marijuana patients, Korobkin hopes that private sector employees will consider further revisions to how they operate, including the use of sophisticated drug tests that measure level on a range gradation rather than just presence of a substance as being either "on" or "off" in the test recipient's system.

"A urine test that picks up on and flags marijuana use in someone's system over the past few weeks may be good enough in a non-medical marijuana state, but in a state like Michigan where we believe you are not allowed to be fired simply for being a medical marijuana user, we feel that that test would not be sufficient," he said.

Prescription incognito

Until the Casias case or some action by the state legislature further alters the legal landscape for medical marijuana patients, discretion is advised.

Michigan Medical Marijuana Association Board member Michael Komorn, an attorney whose Southfield-based practice specializes in medical marijuana litigation, says that medical marijuana patients working side-by-side with coworkers who are prescribed opiates have to keep a low profile for now.

“A person who has been prescribed Oxycontin is not going to run into the same testing procedure problems,” Komorn said. “They’re not going to be told you can’t work here if you have a prescription.”

The Casias case wasn’t an unforeseen outcome of Michigan’s medical marijuana law as written to Komorn: “When the law first passed, this to me was one of the three areas that would need to be addressed.

“You’ve got the driving, you’ve got landlord-tenant or housing issues, and then you have employer-employee relations.

“For the last 70 years, we’ve been treating cannabis illegally in all circumstances, under any circumstances ... if it comes up in your blood, you have no excuse.”

Employers and unions noticeably didn’t change their employee rulebooks after 63 percent of voters said “yes” to the Medical Marihuana Act.

“I think that the employer community needs to recognize (the law) and take a more educated look at the effects of cannabis on their employees,” Komorn said, adding that until employers understand the effects of only trace levels of THC in an employee’s system they’re just “acting out of ignorance without any knowledge and just firing people because it’s cannabis.”

Firing the users of pharmaceutical drugs that are traditionally more socially accepted in this country would constitute violation of U.S. employment law as firing such an individual would be tantamount to discrimination against the disabled, Komorn said.

“There’s no employee manual that I know of that exists that if you have prescription medication in your system that’s lawfully prescribed, you’re still going to get fired or terminated,” he said. “Employers would open themselves up to lawsuits by discriminating against those people who are able to work or whose work is

adequate or satisfactory.”

The failure of the state to step in and extend that reality to medical marijuana users in Michigan is a huge oversight, in Komorn’s eyes.

“There’s an inherent contract that the patient gives the government (for which they are) going to expect in return certain things,” Komorn said. “That they’re going to get the card on time, that the card when they do get it is going to stand for the protections that are stated in the law, which is not happening, and that other institutions in the state are going to recognize this and the state is going to make sure that they do and take steps to protect those people so the state law is in fact implemented.”

With the state bringing in nearly \$10 million in licensing fees, Komorn says there’s no excuse for the state’s inaction to address ambiguity in the law regarding the relationships between medical marijuana patients and their employers.

In the meantime, Casias and others in the 14 states across the country whose citizens have legalized medical marijuana, will have to lead the way the hard way for the rest of the growing number of ill and injured U.S. citizens who find relief in medical marijuana use and still need to financially support themselves and their families.