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Court Says Employer Cannot Refuse to Hire Based on Medical Marijuana Use

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A Connecticut federal district court has found an employer liable for discrimination for failing to hire a medical marijuana user based on a drug test.

Prior to the September 5 decision in *Noffsinger v. SSC Niantic Operating Co., d/b/a Bride Brook Nursing & Rehab. Ctr.,* No. 3:16-cv-01938, 2018 U.S. Dist. LEXIS 150453 (D. Conn. Sept. 5, 2018), it was widely believed that if an employer is subject to the federal Drug-Free Workplace Act ("DFWA"), they do not have to accommodate the use of medical marijuana.

Perhaps not. In *Noffsinger,* the Plaintiff suffered from PTSD after having a car accident. To treat her PTSD, doctor prescribed her marijuana in the evenings, and plaintiff registered as a qualifying patient with the state.

Plaintiff was recruited to be the director of recreational therapy at Defendant's nursing home. Her interview was successful, and she was offered the position subject to the completion of pre-employment screenings. During the pre-employment screenings, Plaintiff disclosed that she took prescription medical marijuana and underwent a drug test. After Plaintiff tested positive for marijuana, Defendant rescinded its job offer.

Plaintiff subsequently filed suit under Connecticut's medical marijuana law, which contains an anti-

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discrimination provision that bars an employer from refusing to hire a person solely because of the person's status as a qualifying medical marijuana patient. *See* Conn. Gen. Stat. § 21a-408p(b)(3).

In a prior decision in the same case, the court refused to dismiss the Plaintiff's claim, rejecting the Defendant's arguments that the Connecticut statute was preempted by three federal statutes, the Controlled Substances Act, the Americans with Disabilities Act, and the Food Drug and Cosmetics Act. The court there said the "mere fact of 'tension' between federal and state law" was not enough to establish preemption. The court noted that the Controlled Substances Act did not make it illegal to employ a marijuana user, nor purport to regulate employment practices. The court said the ADA provides that an employer may prohibit the illegal use of drugs *at the workplace*, but noted that this case did not involve drug use at the workplace. Further, the court found that the ADA's savings clause, allowing states to enact greater protections than the federal government, was counter to Defendant's arguments. Finally, like the Controlled Substances Act, the court said the Food, Drug and Cosmetics Act did not purport to regulate employment.

The case proceeded and the court entered judgment on the employment discrimination claim for the Plaintiff, without a trial. In the decision granting judgment on that claim, the court rejected the Defendant's argument that it was barred from hiring the Plaintiff due to the DFWA. The court found that the DFWA does not require drug testing and plaintiff was not in violation of the statute because her illegal drug use was outside of the workplace.

Noffsinger has significant implications for employers in states like New York that have laws which prohibit discrimination against certified medical marijuana users. In New York, employers can no longer rely on federal law when making

employment decisions, and must develop employee policies in line with current state law.

While *Noffsinger* will not have the same immediate ramifications for employers in states such as Florida and Colorado that do not have anti-discrimination provisions in their medical marijuana statues, we recommend that employers in states with medical marijuana laws take a close look at their state's statutes and provide clear guidance to their employees as to what their policies are regarding the use of medical marijuana, both during hiring and employment.

Akerman attorneys are available to answer any further inquiries regarding this case, as well as provide guidance as to how employers may want to consider revising their existing policies.