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Accommodating Medical Marijuana Users Does Not Mean They Can Cause a Nuisance To Other Residents

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Must California community associations accommodate medical marijuana use by residents even when it creates a nuisance for other owners/residents? We thought that the answer was pretty clear that even if a resident is legally using medical marijuana, their use cannot cause or create a nuisance which interferes with another resident's quiet enjoyment of their unit or home. Apparently, this is not so clear, as we have been told that some attorneys are telling their condo association clients that they can do nothing about marijuana use by a resident who possesses a doctor's recommendation.

Seriously?! We do not agree.

Marijuana use is still considered illegal under the federal Controlled Substances Act, and while legal in California, it should not be used as a shield when its use is causing a nuisance or is otherwise inappropriate and affecting other resident's rights to the quiet enjoyment of their unit. And we have heard that some of those that are smoking "weed" are not being all that sensitive about their neighbors, and when confronted, hold up their "recommendation" from a doctor that authorizes them to use medical marijuana. While there are no laws or cases that deal directly with this issue (at least not yet), we can consider the court rulings in employment termination cases where the terminated employees argued that their employer could not terminate their employment because of their medical marijuana use.

Consider, for example, the recent holding in *Casias v. Wal-Mart Stores, Inc.*, where a Michigan federal district court ruled that an employee who was terminated by Wal-Mart after testing positive for validly obtained medical marijuana stated no legal claims for wrongful discharge. The court in that case accepted Wal-Mart's argument that Michigan's medical marijuana law does not regulate private employment; rather, it merely provides a potential

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affirmative defense to criminal prosecution or other adverse action by the state.

By analogy, California's medical marijuana law does not address nuisances or the impact of the smoke on others; rather, it only provides a potential affirmative defense to criminal prosecution or other adverse action by the state.

A similar ruling is under review by the Washington State Supreme Court. The Washington Court of Appeals in *Roe v. Teletech Customer Care Management* affirmed a trial court's ruling and held 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 test policy. The Court of Appeals there stated that MUMA merely protects qualified patients and their physicians from state criminal prosecution related to the "authorized" use of medical marijuana.

In *Ross v. RagingWire*, the California Supreme Court ruled that it is not discrimination to fire an employee for using medical marijuana. The court held that employers in California do not need to accommodate the use of medical marijuana, even when users only ingest or smoke marijuana away from the workplace.

In *Johnson v. Columbia Falls Aluminum Company*, the Montana Supreme Court ruled, in an unpublished decision, that an employer is not required to accommodate an employee's use of medical marijuana under the federal ADA or the Montana Human Rights Act.

In *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries*, the Oregon Supreme Court ruled that because federal criminal takes precedence over Oregon's medical marijuana law, employers in Oregon do not have to accommodate employees' use of medical marijuana.

As there are many sound reasons as to why employers have zero tolerance policies and engage in drug testing of applicants and/or employees, there are also sound reasons why California condominiums, HOAs and other community associations can prohibit smoking of any type or kind (cigarettes, cigars, pipes and marijuana) if that use is interfering with other association residents' use and enjoyment of their units or homes. In other words, having the right to use medical marijuana is not a free pass to cause a nuisance (just like a helper dog cannot be allowed to bark incessantly, causing a nuisance).

If your condominium or homeowners association has received complaints about smoke wafting into other residents' units from a resident who is smoking medical marijuana (or cigarettes, cigars, and/or pipe), contact that resident and advise them that while the association has no issue with their medical drug use generally, it becomes an association issue when it creates a nuisance. The Board should advise the resident that they are either going to have to find a different place to smoke and if that does not work, then the Board will have to consider taking other steps to eliminate the nuisance, such as a hearing and fines, sending the owners a Request for Resolution requesting mediation, or if the smoke is a real serious problem, then perhaps suing the owner (and possibly their tenant if applicable pursuant to the association's CC&Rs) for an order prohibiting the nuisance.

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