

Federal Illegality Be Damned - Employer Compulsory Reimbursement For Employee-

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In *Hager v. M & K Construction*, 2020 WL 21890 (App. Div. Jan. 13, 2020), the New Jersey Appellate Division issued the second of its recent, pro-employee, medical marijuana decisions, the other being *Wild v. Carriage Funeral Holdings, Inc.*, 458 N.J. Super. 416 (App. Div. 2019), *certif. granted*, 238 N.J. 489 (July 11, 2019).

The *Wild* appellate panel held a funeral director-cancer patient treating with medical marijuana, fired after failing a drug test, could at least at the pleading stage assert a claim for disability discrimination under the New Jersey Law Against Discrimination (NJLAD). The New Jersey Supreme Court granted certification and heard argument on the case on February 4, 2020. The *Wild* appeal is significant because the trial court had dismissed the case for failure to state a claim on the grounds that New Jersey's then medical marijuana statute did not require an employer to accommodate marijuana use (the current version of the statute does contain employment protection for medical marijuana use) and a New Jersey Federal Court judge in *Cotto v. Ardagh Glass Packing, Inc.*, 2018 WL 3814278 (D.N.J. Aug. 10, 2018), in earlier dismissing an NJLAD claim by a forklift operator who could not pass a drug test because of medical marijuana use, had predicted that a New Jersey court would find that the NJLAD does not require an employer to accommodate an employee's use of medical marijuana with a drug test waiver.

This is the backdrop for *Hager*, where the Appellate Division affirmed the order of a workers' compensation judge requiring an employer to reimburse its employee for the costs of medical marijuana treatment -- a decision contrary to that reached by the Maine Supreme Court in *Bourgoin v. Twin Rivers Paper Co.*, 187 A.3d 10 (Me. 2018), the other most recent workers' compensation-medical marijuana decision by an appeals court or higher. Unlike *Bourgoin*, *Hager* found no conflict between requiring reimbursement of workers compensation-medical marijuana costs and the federal Controlled Substances Act (CSA), because reimbursement does not require an employer to possess, manufacture or distribute marijuana -- the conduct illegal under the CSA. Nor would it be aiding and abetting the employee in the commission of a federal crime, because the employer "is never in possession of the marijuana" and "cannot aid and abet a completed crime." The *Hager* panel also noted that the "federal attitude towards marijuana is equivocal. M & K has not demonstrated any intention by the federal government to enforce the CSA in any state that has decriminalized medical marijuana." *Bourgoin* and other opinions have rejected this argument as conflating likelihood of enforcement with legality.

It is hard to distinguish cases like *Bourgoin* from *Hager* on legal, doctrinal grounds. The facts are largely analogous. Maine is an adult-use marijuana state; one might think its judiciary would therefore be more inclined to rule for employee, medical marijuana use protection. New Jersey, on the other hand, is a medical-marijuana use only state. Yet, *Hager* required an employer to reimburse for medical marijuana treatment, and *Bourgoin* did not. *Hager* follows two prior New Jersey workers' compensation decisions requiring employer reimbursement of employee medical marijuana costs, *Watson v. 84 Lumber*, Claim Petition No. 2009-15740, decided December 15, 2016, and *McNeary v. Freehold Twp.*, Claim Petition No. 2008-8094, decided June 28, 2018. Neither administrative level decision was appealed.

Take Away

The *Hager* and *Wild* appellate decisions reflect the trend in New Jersey, and the Northeast as a whole, towards increased employment protections for employee medical marijuana use. Marijuana use will continue to normalize and increasingly be viewed akin to alcohol use. These decisions are reminders for employers, particularly those with multi-state operations, to review their workplace policies regarding medical marijuana use during work and off-work hours.