

State's high court uses hazy reasoning in medical pot ruling (op-ed, Register Guard, April 25, 2010).
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Last week the Oregon Supreme Court issued a decision dealing a blow – albeit not a fatal one – to Oregon's Medical Marijuana Act. The case concerned an employee who was fired after telling his employer he was an authorized user of medical marijuana. The specific question before the Court was whether the employer had to try to accommodate the employee and his medical circumstances. Oregon's employment discrimination statute obligates employers to accommodate people with medical disabilities unless the accommodation would impose an "undue burden" on the employer. The employer in the case did not even consider accommodation: he simply fired the employee.

The employee sued, and the employer responded by claiming he had no obligation to accommodate him: under Oregon's employment discrimination statute, said the employer, there is no obligation to accommodate "illegal drug use"; and the employee's drug use was illegal under the Federal Controlled Substances Act. That was true; but the employee's drug use was perfectly legal under Oregon's own Medical Marijuana Act (he was a duly registered medical marijuana user). Moreover, Oregon's employment discrimination statute states that drug use is not "illegal" if it is authorized by Oregon law. Accordingly, the Oregon Supreme Court was called to decide whether Oregon's authorization of the medical use of marijuana was "preempted" – that is, made null – by the Federal Controlled Substances Act, thereby rendering the employee's drug use "illegal."

The Federal Constitution, which governs the relationship between the federal government and the states, contains a "supremacy clause" – a clause asserting the supremacy of federal law vis-à-vis states' law. In cases of conflict between state law and federal law, federal law prevails, and the conflicting state law becomes "without effect" (it is "preempted"). Such an arrangement is essential for the effectiveness of federal law.

The Oregon Supreme Court concluded that since Oregon's medical marijuana law "affirmatively authorized the very conduct that federal law prohibited" – that is, the use of medical marijuana – the Oregon law is "an obstacle to the enforcement of federal law" and is therefore preempted. And since Oregon's authorization of the use of medical marijuana was preempted, the employee's use of marijuana was "illegal drug use" and the employer had no obligation to accommodate him.

However, the Court did not invalidate the part of the Oregon Medical Marijuana Act that exempts medical users of marijuana from criminal liability. That section of the Oregon statute cannot be preempted, said the Court, because Congress cannot force a state to criminalize conduct it does not wish to criminalize.

But if Oregon was free to declare the medical use of marijuana legal, how come the Court found the medical use of marijuana to be “illegal drug use” under Oregon’s own employment discrimination statute? After all, as noted above, that statute excludes from its definition of illegal drug use any drug use that is “authorized under...state...law.”

The Oregon Supreme Court’s explanation reads as sheer sophistry: while those provisions that decriminalize the use of medical marijuana cannot be preempted, those provisions do not “authorize” the use of medical marijuana; they only exclude such use from criminal liability. Hmmmm.... These are the sort of distinctions that give lawyers a bad name.

Perhaps what the Court meant to say was that any attempt by Oregon to bar employment discrimination against people who use medical marijuana would be preempted as well. Perhaps. But that claim would require a different analysis than the one offered by the Court, and is, in any case, rather doubtful.

When a state statute that expands civil liberties is struck down by the state’s own Supreme Court on the ground that it conflicts with a much-criticized federal statute that restricts people’s freedom, that Court had better employ sound and convincing reasoning. That was not the case with this opinion.

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