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*Washburn v. Columbia Forest Products*

In January, the Oregon Court of Appeals issued its first interpretation of Oregon's Medical Marijuana Act. However, of potentially greater significance to employers is the court's redefinition of "disability" under the state's disability discrimination statute.

Washburn was a millwright responsible for the maintenance of heavy equipment. He experienced muscle spasms and pain that inhibited his ability to sleep, so his doctor authorized his use of marijuana in accordance with Oregon's Medical Marijuana Act, which Washburn regularly smoked at bedtime to relieve pain and to sleep. Washburn tested positive for marijuana in a random workplace drug test, and his employment was terminated under the employer's zero-tolerance policy. Although Washburn requested a drug test to determine whether he was impaired at work, the employer refused, relying on standardized testing that identifies only whether an employee used marijuana during the previous two- to three-week period.

Washburn sued for disability discrimination. The employer argued that Washburn was not disabled, because his marijuana use was a mitigating measure such that he was not substantially limited in a major life activity, and alternatively that Oregon's Medical Marijuana Act does not require employers to accommodate medical marijuana users in the workplace. Washburn countered that he was disabled under Oregon law, and that the Medical Marijuana Act prevented discrimination against employees who use medical marijuana *outside* of work but who are not impaired *while* at work.

**Federal and State Disability Discrimination Laws**

Until this ruling, Oregon's disability discrimination statute substantively mirrored the federal Americans with Disabilities Act (the "ADA"). Both laws prohibit employers from discriminating against a qualified individual with a disability who can perform the essential functions of the position with or without reasonable accommodation. Both laws define a disabled person as one who is substantially limited in a major life activity, has a record of such impairment, or is regarded as having such an impairment. Under the ADA, the U.S. Supreme Court in *Sutton v. United Air Lines, Inc.* determined that the "substantial limitation" must still exist after taking into account any mitigating measures. That means, for example, that in order to be deemed "disabled" under the statute, an employee with poor vision must be substantially limited even while wearing corrective lenses. Up until the *Washburn* decision, the Oregon law was presumed to follow the same definition.

***Washburn* Changes the Definition of "Disability"**

In *Washburn*, the Oregon Court of Appeals ruled that the "lockstep" provision of the Oregon disability discrimination law, which calls for interpretation consistent with that of the ADA, does not apply to the definition section of the Oregon statute. The court then went on to define a "substantial limitation" under the Oregon statute without consideration of mitigating measures. Whether

Washburn was substantially limited in the major life activity of sleeping was for the trial court to decide, without considering his use of medical marijuana.

*Washburn* negates the application of federal court interpretations under the ADA to the definitions under Oregon's disability discrimination law. This decision raises the potential for litigation over other definitions under the Oregon law, including what constitutes a "major life activity," the boundaries of when an employee is "regarded as" impaired, or when an employee is deemed to have "a record of" such an impairment.

### **Oregon's Medical Marijuana Act**

The court also sided with Washburn regarding the Medical Marijuana Act. The appellate court held that the statute's exclusion of accommodation for "use" in the workplace does not foreclose the employer's duty to otherwise reasonably accommodate the employee, so long as he or she is not producing, possessing, delivering, or administering marijuana *in the workplace*. If an employee is substantially limited in a major life activity without mitigating measures, is qualified to perform the essential functions of the job, and is not a direct threat to himself or others, then the employer must consider reasonable accommodations for off-duty medical marijuana use. Note that not every medical marijuana user will be considered disabled under state or federal law. Moreover, the court did not resolve what accommodations may be reasonable for medical marijuana users, noting that in some instances, accommodating an employee's off-duty medical marijuana use may cause an "undue hardship," relieving the employer of its duty to accommodate.

### **HR Action Item: Engage in the Interactive Process; Review Your Substance Abuse Policy**

As always, disability claims must be considered on a case-by-case basis through an interactive process. However, after *Washburn*, Oregon employers should ensure that employees are evaluated for disability without reference to mitigating medication or corrective devices. If a qualified employee is substantially limited in a major life activity without mitigating measures, then the employer has a duty to provide reasonable accommodations that do not impose an undue hardship on the employer.

Employers should carefully review their practices to ensure that they engage in an interactive process with disabled employees who are authorized to use medical marijuana and, where appropriate, offer reasonable accommodation. After *Washburn*, it is unclear exactly what accommodations are reasonable for medical marijuana users. Oregon employers should review their substance abuse policies, which may require modification if the current standard is zero-tolerance. Employers with employees in other states with medical marijuana laws should consider whether it is prudent to undertake a similar review.

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