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Digest: Ross v. RagingWire Telecommunications, Inc.

Brian S. Thomley

Opinion by Werdegar, J., with George, C.J., Baxter, J., Chin, J., and Corrigan, J. Concurring and Dissenting Opinion by Kennard, J., with Moreno, J.

Issue

Can an employee that is fired for his legal use of medical marijuana under the Compassionate Use Act¹ (Act) state claims for discrimination on the basis of a disability under the California Fair Employment and Housing Act (FEHA)² or for wrongful termination in violation of public policy?

Facts

Plaintiff Gary Ross had a chronic back condition that qualified him as disabled under the FEHA.³ In September 1999, he began to use marijuana on the advice of a physician to obtain relief from the constant pain.⁴ On September 10, 2001, he was employed by defendant, RagingWire Telecommunications, Inc., as a lead systems administrator.⁵ He was required to take a drug test as a condition of employment.⁶ He informed both defendant and the testing clinic that he used marijuana for medical purposes on his physician's advice.⁷ Nevertheless, on September 25, 2001, defendant terminated his employment when he tested positive for marijuana.⁸

Plaintiff alleged that defendant violated the FEHA by failing to make a reasonable accommodation for his disability and that his discharge violated public policy.⁹ The superior court sustained defendant's demurrer, without leave to amend.¹⁰ The court of appeal affirmed.¹¹ The California Supreme Court granted review.¹²

1 CAL. HEALTH & SAF. CODE § 11362.5 (2008).

2 CAL. GOV. CODE §§ 12900–12996 (2008).

3 *Ross v. RagingWire Telecomm., Inc.*, 174 P.3d 200, 203 (Cal. 2008).

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.* at 203.

Analysis

1. The FEHA

The FEHA both prohibits employers from discharging or refusing to hire a person because of a disability or medical condition and requires employers to make reasonable accommodations for the disability.¹³ The Act protects seriously ill patients from "criminal prosecution or sanction" for using marijuana prescribed to treat their conditions.¹⁴ Plaintiff thus argued that defendant violated the FEHA by failing to make a reasonable accommodation for his off-duty use of a drug that is legalized under state law.¹⁵

The Court observed that, in *Loder v. City of Glendale*,¹⁶ it implicitly recognized that the FEHA does not require employers to make reasonable accommodation for illegal drugs.¹⁷ In *Loder*, the Court held that an employer could, under a regulation adopted under the FEHA, condition an offer of employment on the results of a drug test.¹⁸ The Court reasoned that the employer has a legitimate concern for the documented problems resulting from employee drug abuse, such as excessive absences and diminished productivity.¹⁹

The Court then noted that, while the Act legalized medical marijuana under state law, the drug remains illegal under federal law.²⁰ The Court further noted that the Act merely exempts medical marijuana users from *criminal* liability and does not address the rights of employers and employees.²¹ Thus, the Court concluded, the Act does not require employers to accommodate use of drugs illegal under federal law.²² The Court also reasoned that the Act does not eliminate the employer's legitimate interest in employee use of marijuana or its potential for abuse.²³

2. Wrongful Termination in Violation of Public Policy

The Court then turned to plaintiff's claims that his discharge violated fundamental public policies supported by the the Act, the FEHA, and his right to refuse medical treatment under the privacy clause of the California Constitution.²⁴ The Court said that the Act does not articulate a policy requiring employers to accommodate employee use of marijuana.²⁵ Thus, the Court concluded, to read the FEHA in light of the Act leads to no different

13 CAL. GOV. CODE § 12940 (2008).

14 CAL. HEALTH & SAF. CODE § 11362.5(b)(1)(B) (2008).

15 *Ross*, 174 P.3d at 204.

16 927 P.2d 1200 (1997).

17 *Ross*, 174 P.3d at 204.

18 *Loder*, 927 P.2d at 1211.

19 *Id.* at 1222-23.

20 *Ross*, 174 P.3d at 205.

21 *Id.*

22 *Id.* at 206-07.

23 *Id.* at 205.

24 *Id.* at 208.

25 *Id.*

result.²⁶ Finally, the Court rejected defendant's constitutional argument because defendant had not interfered with plaintiff's right to medical treatment by preventing his access to the drug.²⁷

Holding

The Court held that plaintiff could not state a claim under the FEHA for unlawful discrimination in employment on the basis of a disability or a claim for wrongful termination in violation of public policy.²⁸

Concurrence and Dissent

Justice Kennard disagreed with the majority's conclusion that plaintiff had failed to state a cause of action under the FEHA.²⁹ He pointed out that the language of the Act protects users of medical marijuana from "criminal prosecution *or sanction*."³⁰ He reasoned that majority's interpretation defeated this purpose by allowing employees to impose the sanction of termination.³¹ This interpretation, he said, was "lacking in compassion"³² and leaves many who are seriously ill with a "cruel choice"³³ between unemployment or chronic pain.³⁴

Justice Kennard also pointed out that the FEHA provides that a reasonable accommodation includes "adjustment or modification of . . . policies."³⁵ He thus concluded that the FEHA may require an employer to adjust its policy on employee drug use.³⁶ He noted that nothing in the text of the FEHA suggests that an accommodation for conduct which is illegal under federal law is unreasonable.³⁷ He explained that the proper determination of whether an accommodation is reasonable is to balance its benefits to the employee with its burdens on the employer and other employees and to consider available alternatives.³⁸ Under this test, he said, accommodating the use of marijuana would cause no "undue hardship" on the operation of defendant's business.³⁹ Since this accommodation was reasonable, he concluded that plaintiff had stated a cause of action under the FEHA.⁴⁰

Justice Kennard also said that the *Loder* decision, on which the majority relied, upheld the employer's legitimate interest in determining whether

²⁶ *Id.*

²⁷ *Id.* at 209.

²⁸ *Id.* at 208–209.

²⁹ *Id.* at 209.

³⁰ *Id.* at 211 (quoting CAL. HEALTH & SAF. CODE § 11362.5(b)(1)(B) (2008) (emphasis added)).

³¹ *Id.*

³² *Id.* at 209.

³³ *Id.* at 211.

³⁴ *Id.*

³⁵ *Id.* at 212 (quoting CAL. GOV. CODE § 12926 (n)(1)–(2) (2008)).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 212–13 (quoting CAL. GOV. CODE § 12940(m) (2008)).

⁴⁰ *Id.* at 213.

employees are *abusing* drugs without a legitimate medical explanation.⁴¹ This decision, he said is thus not relevant because plaintiff was not challenging defendant's use of drug testing and because he had a legitimate medical explanation.⁴² Further, Justice Kennard said, there is no evidence that the legitimate use of medical marijuana poses the same risks of excessive absences and diminished productivity with which the Court in *Loder* was concerned.⁴³

Justice Kennard agreed with the majority, however, that plaintiff could not state a claim for wrongful discharge in violation of public policy.⁴⁴ He reasoned that state law policies that rest on the proposition that marijuana should be legal for medical purposes are not sufficiently fundamental or substantial as long as federal law prohibits the drug.⁴⁵

Legal Significance

This decision controversially limits the rights of individuals in California who use marijuana to treat chronic medical conditions. While the threat of criminal prosecution has been lifted, the spectre of denial of employment or termination remains. Many persons such as Gary Ross suffer from serious and chronically painful conditions for which marijuana may provide the only relief. This decision forces such persons into the Hobson's choice of suffering constant pain or the loss of their livelihood.

⁴¹ *Id.* at 213-14.

⁴² *Id.* at 214.

⁴³ *Id.* at 214.

⁴⁴ *Id.* at 215.

⁴⁵ *Id.* at 215-16.