

Court case debates question of off-duty marijuana use

By John Ingold, Denver Post

A case pending before the Colorado Court of Appeals could have a big impact on whether employers will be able to fire workers who smoke marijuana off duty.

The case concerns a former Dish Network telephone operator and medical-marijuana patient who was fired after testing positive for pot, even though there was no evidence he was impaired on the job. The operator, Brandon Coats, says it is against state law to fire someone for doing something off duty that is legal.

While Coats' case concerns medical-marijuana law, it is drawing extra attention after the passage of Amendment 64, which legalized marijuana use for everyone age 21 and older in Colorado. Some employers said during Amendment 64's campaign that they worried that the measure would prevent them from enforcing workplace drug policies that prohibit any marijuana use at all.

What Coats' case may answer: Does it?

"These are things that employers are definitely concerned about," said Vance Knapp, an attorney for the Denver firm Sherman & Howard who specializes in employment law. "For policy reasons, we want to make sure we have a safe workplace. And obviously, that has to be balanced against employees' rights in Amendment 64."

Previous cases have found that medical-marijuana patients do not have a right to cannabis under Colorado law. Coats' case, though, asks a different question.

Colorado's Lawful Off-Duty Activities Statute prevents employers from firing workers because of the legal things those employees do outside the office – such as smoking cigarettes, for instance – as long as those activities do not conflict with the employees' work. Coats' case is the first to challenge whether that protection extends to marijuana use that is legal under Colorado law but illegal under federal law.

Coats' attorney, Michael Evans, argues in his brief to the Colorado Court of Appeals that taking a narrow reading of the law would mean Colorado's roughly 100,000 medical-marijuana patients "would likely face immediate termination or become unemployable."

"It should be broadly and liberally construed to effectuate its purpose, which is to protect employees from unfair or discriminatory employment practices when they are in full compliance with state law," Evans writes in the brief.

But attorneys for Dish Network argue that marijuana's federal status makes it ineligible for protection under the Lawful Off-Duty Activities Statute.

"All use of marijuana is illegal under federal law," the attorneys write in their brief to the appeals court. "Accordingly, using medical marijuana is not a 'lawful activity.'"

In countering employers' concerns, Amendment 64's backers point to language in the measure that says: "Nothing in this section is intended ... to affect the ability of employers to have policies restricting the use of marijuana by employees."

Knapp, though, doesn't see that passage as crystal clear when it comes to off-duty use.

"I think there is some wiggle room," he said.

Still, Knapp expects the Court of Appeals – which has not indicated when it will rule on the case – to side with Dish Network.

“As long as it’s illegal under federal law,” he said of marijuana, “it cannot, by definition, be lawful.”