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# TRIAL NEWS

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**Special focus: employment law**

## **Beyond *TeleTech*: Reasonable accommodation for medical marijuana**

by James W. Beck & Andre Penalver

On June 9, 2011, Washington's Supreme Court ruled on whether the state's Medical Use of Marijuana Act (MUMA) provides a private cause of action against an employer who discharges an employee for medical marijuana use or whether MUMA creates a clear public policy that would prevent the discharge of such an employee. *Roe v. TeleTech*

*Customer Care Management (Colorado) LLC, \_\_\_P.3d\_\_\_*, 2011 WL 2278472 (Wash. 2011). In its 8-1 decision, the Court held for the employer, negating any private cause of action under the statute or any clear public policy tort for discharging an employee for medical marijuana use.

The decision, written by Justice Wig-gins, focuses narrowly on the provisions and the purpose of MUMA. The decision

does not address the issue of reasonable accommodation under either the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111(2), 12112(a), or Washington's Law Against Discrimination (WLAD), Chapter 49.60 RCW, although Justice Chambers' two-page dissent touches on the latter. For this reason, both the Court's decision and the facts of the case

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# Beyond *TeleTech*: Reasonable accommodation for medical marijuana

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leave open the possibility of reasonable accommodation for medical marijuana in other circumstances.

But first, the facts: Jane Roe suffered from debilitating migraines that caused chronic pain, nausea, blurred vision, and sensitivity to light. Although Ms. Roe did not exhaust all standard medical treatments, she did find relief through Dr. Orvald of The Hemp and Cannabis Foundation in Bellevue. Resp.'s Brief, at 47. There, her new doctor authorized her to use medical marijuana in compliance with MUMA. The marijuana worked: the headaches went away and without any side effects. *TeleTech*, 2011 WL 2278472, at \*1.

On October 3, 2006, TeleTech offered Roe a position as a customer service representative in Bremerton, contingent on passing a background check and drug screening. Roe informed TeleTech of her medical marijuana, but TeleTech required the test anyway. *Id.* On October 5, 2006, Roe began training with TeleTech. On October 10, TeleTech learned of Roe's positive test results. On October 18, TeleTech terminated Roe's employment. *Id.* at \*2.

Ms. Roe sued TeleTech for wrongful termination in Kitsap County Superior Court in February 2007. In her suit, she claimed that her termination violated MUMA and it violated a clear public policy that MUMA articulated. TeleTech countered that MUMA does not provide employment protections or a civil cause of action against a private party; in addition, federal law precluded MUMA's authorization of medical marijuana use. The superior court granted summary judgment for TeleTech, and the Court of Appeals affirmed the decision. *TeleTech*, 152 Wn. App. 388, 216 P.3d 1055 (2009).

In affirming the lower courts, the Court

language of MUMA is unambiguous—it does not regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use.” *TeleTech*, 2011 WL 2278472, at \*4. The Court went on to reason that even if ambiguous, there is nothing to support Roe's reading of the statute except for a declaration that MUMA's author drafted nearly ten years after the passage of the MUMA initiative, I-692. *Id.* at \*5. And as the Court further held, any articulation of a public policy mandate against termination for marijuana use is far from clear in MUMA's text, certainly not clear enough to overcome the at-will employment doctrine. *See id.* at \*8.

But the facts of *TeleTech* leave open the possibility of a different result under different circumstances. First, Ms. Roe's medical records reveal that she never exhausted all the conventional remedies for her migraines before visiting The Hemp Foundation. Resp.'s Brief, at 47. What is more, Ms. Roe accepted her position at TeleTech *on the condition* of passing her drug test, a test which she failed in her first week at work. If one viewed the test as a condition precedent, then Ms. Roe never really started work at TeleTech to begin with.

So what of a different case? What if Ms. Roe had worked twenty years at TeleTech before being diagnosed with glaucoma? What if she ran through all the conventional medicines before her optometrist referred her to The Hemp Foundation?

Under both the ADA and WLAD, an employer would have to provide reasonable accommodation to a qualified individual so long as that individual could still perform the essential functions of the job. Thus, if glaucoma requires the use of painkillers, then an employer would need to accommodate the use of painkillers by the employee so long as the employee could still perform his or her essential job

When prescription drugs have proven an increasingly potent source of addiction, accommodation for painkillers rather than medicinal marijuana may seem arbitrary. *See, e.g.*, Abby Goodnough, “Prescription Drug Abuse Sends More People to the Hospital,” in *The New York Times*, at A18 (Jan. 6, 2011) (“The number of emergency room visits resulting from misuse or abuse of prescription drugs has nearly doubled over the last five years . . .”).

But the obvious distinction lies in federal law where painkillers are legal and marijuana is not. This distinction finds some traction at the end of the *TeleTech* decision, in which the Court stated: “Holding that a broad public policy exists that would require an employer to allow an employee to engage in illegal activity would not be within [the directive of *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984),] to ‘proceed cautiously’

when finding a public policy exception to at-will employment doctrine.” *TeleTech*, 2011 WL 2278472, at \*11. In the future, defense counsel will likely argue that the logic in *TeleTech* would likewise apply to an ADA case in which an employee seeks the accommodation of an illegal activity.

The *TeleTech* decision does not directly answer our questions of reasonable accommodation under the ADA and WLAD claims. Real certainty will only come with future decisions.

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