

Nevada Supreme Court Rules That Recreational Use of Marijuana Is Not Protected Off-Duty Conduct

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In Nevada, employees terminated for off-duty use of marijuana do not have a right of action under NRS 613.333, which creates a private right of action for an employee who is discharged for engaging in the “lawful use” of products while off the clock and off the employer’s premises. This is because, while state law may make marijuana or cannabis use lawful, courts will not narrowly interpret statutory language of “lawful use” to mean “lawful under state law even if illegal under federal law.” Colorado’s Supreme Court previously reached a similar decision, and we expect that jurisprudence in other states may follow suit in the absence of clear state legislation or change in federal law.

Earlier this month, the Nevada Supreme Court ruled that an employee’s off-duty use of recreational marijuana, which is lawful under Nevada law, is not protected under a law that prohibits employers from discharging employees from the off-duty use of lawful products, because marijuana is illegal under federal law. *Ceballos v. NP Palace, LLC d/b/a Palace Station Hotel & Casino*, No. 82791 (Aug. 11, 2022).

Danny Ceballos worked as a table games dealer at Palace Station for more than a year, with no performance or disciplinary issues. But toward the end of his shift on June 25, 2020, he slipped and fell in the employee breakroom. Palace Station security responded, first assisting Ceballos, then requiring him to submit to a drug test. The test came back positive for marijuana, and on July 16, 2020, Palace Station terminated Ceballos based on the positive test result. Ceballos sued, and the district court dismissed the complaint for failure to state a claim upon which relief can be granted.

Section 613.333 of the Nevada Revised Statutes (NRS) creates a private right of action in favor of an employee who is discharged from employment for engaging in “the lawful use in this state of any product outside the premises of the employer during the employee’s nonworking hours.” The question presented in the case was whether adult recreational marijuana use qualifies for protection under this statute.

According to the complaint in the case, Ceballos was not intoxicated or impaired during his June 25 shift; he did not use marijuana in the 24 hours before that shift; and he was at home, not at work, when he engaged in the recreational marijuana use that produced the positive test result. The

complaint also alleged facts establishing that Ceballos's marijuana use complied with Nevada's recreational marijuana laws.

Ceballos asserted two counts in his complaint. The first count asserted a claim for damages under NRS 613.333. This statute makes it an unlawful employment practice for an employer to:

Discharge ... any employee ... because the employee engages in the lawful use in this state of any product outside the premises of the employer during the employee's nonworking hours, if that use does not adversely affect the employee's ability to perform his or her job or the safety of other employees.

Nevada decriminalized adult recreational marijuana use by voter initiative effective January 1, 2017. NRS 678D.200(1) provides that adult recreational marijuana use "is exempt from state prosecution" so long as such use complies with the conditions stated in NRS Chapter 678D. Since the complaint sufficiently alleged facts establishing that the marijuana use that produced Ceballos's positive test result complied with NRS Chapter 678D, such use qualifies as "lawful" under Nevada state law. However, the court observed that marijuana possession remains illegal and federally prosecutable under the federal Controlled Substances Act (CSA).

Accordingly, the court had to decide what the phrase "lawful use in this state" means for purposes of NRS 613.333(1)—does it mean lawful under state law, or does it mean generally lawful, under both state and federal law?

Ceballos argued that, because NRS 613.333 was enacted in 1991, decades before Nevada decriminalized recreational marijuana use, the drafters did not think about the state-federal split that exists today as to marijuana. On this basis, he urged the court to infer an exception for federal illegality in NRS 613.333 and read lawful "in this state" to mean lawful "under Nevada state law." But the Court reasoned that this runs directly contrary to the general-terms canon, which holds that "the presumed point of using general words is to produce general coverage-not to leave room for courts to recognize ad hoc exceptions."

The Colorado Supreme Court confronted a similar issue in *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015). The statute considered in *Coats* made it an unfair employment practice to discharge an employee "due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours." Coats's employer fired him after he tested positive for marijuana on a random drug test, in violation of the employer's drug policy. Like Ceballos's marijuana use, Coats's marijuana use was legal under state law but illegal under federal law. Because "lawful activity" signifies an activity that is permitted by law, or, conversely, not contrary to or forbidden by law, the court held that the statute did not apply to Coats because his marijuana use, though legal under state law, was illegal under federal law.

According to the Court, "[n]othing in the language of the statute limits the term 'lawful' to state law. Instead, the term is used in its general, unrestricted sense, indicating that a 'lawful' activity is that which complies with applicable 'law,' including state and federal law. The Court, therefore, declined 'Coats's invitation to engraft a state law limitation onto the statutory language.'"

The second count of the complaint asserted a common-law tortious discharge claim. The court observed that "[a]n employer commits a tortious discharge by terminating an employee for reasons which violate public policy." Ceballos argued that his termination offended public policy in two ways. First, he maintained that "Nevada has a strong public policy interest in protecting the statutory rights

of its citizens” and that “[i]t is [his] statutory right, under NRS [Chapter] 678D, to engage in [marijuana] consumption pursuant to the chapter’s guidelines.” Second, he claimed that “Nevada has a strong public policy interest in ensuring its citizens are not denied the ability to support themselves and their families due to engagement in statutorily protected and completely lawful activities.”

The court held that the public policies Ceballos identified did not rise to the level required to establish a tortious discharge claim arising out of a presumptively at-will employment relationship. In Nevada, “tortious discharge actions are severely limited to those rare and exceptional cases where the employer’s conduct violates strong and compelling public policy.” This court has found a sufficient violation of “strong and compelling public policy” to justify a tortious discharge claim when an employer terminated an employee (1) “for refusing to work under conditions unreasonably dangerous to the employee,” (2) for refusing to engage in illegal conduct; (3) for filing a workers’ compensation claim,; (4) for reporting the employer’s illegal activities to outside authorities; and (5) for performing jury duty. The court reasoned that Ceballos’s claim differed fundamentally from the “rare and exceptional cases” discussed above.

According to the Court, the interplay between adult recreational marijuana use and employment law is one the Legislature has addressed in NRS 678D.510(1)(a) and, to a lesser extent, in NRS 613.132. Palace Station terminated Ceballos for failing a workplace drug test after engaging in adult recreational marijuana use before his shift. NRS 678D.510(1)(a) specifically authorizes employers to adopt and enforce workplace policies prohibiting or restricting such use. The court concluded as follows: “If the Legislature meant to require employers to accommodate employees using recreational marijuana outside the workplace but who thereafter test positive at work, it would have done so. It did not. It also did not extend the protections afforded by NRS 613.333 and NRS 613.132 to reach the circumstances giving rise to Ceballos’s termination.”

The court likely would have reached a different conclusion if the relevant language in the statute was limited to Nevada law, or if marijuana was legal under federal law. As more and more states enact laws like this in the absence of federal legalization or statutory language clearly indicating a state legislature’s intent to disregard the illegal status of marijuana under federal law, we can expect more cases that address these and related issues in the workplace.

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