

# WASHINGTON STATE HUMAN RIGHTS COMMISSION

## GUIDE TO DISABILITY and WASHINGTON STATE NONDISCRIMINATION LAWS

### Washington Non-discrimination Laws and the Use of Medical Marijuana



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## Washington Non-discrimination Laws and the Use of Medical Marijuana

### Summary

Washington's Medical Use of Cannabis Act, or Medical Marijuana Act, RCW 69.51A, provides an affirmative defense in a criminal proceeding for the use or possession of medical marijuana; essentially, the Act allows the use of marijuana if prescribed by a physician for a medical condition. As of 2014, Initiative 502 legalized the use and possession of small amounts of marijuana for recreational purposes in Washington state.

However, the federal Controlled Substances Act, 21 U.S.C.S. § 801 et seq., prohibits the possession of marijuana. Due to the federal prohibition of possession of marijuana, it would not be considered to be a reasonable accommodation of a disability under the Washington Law Against Discrimination, RCW 49.60, for an employer to violate federal law, or allow an employee to violate federal law, by employing a person who uses medical marijuana. There is a particularly strong case for this when the employee is employed by a law enforcement agency or employed in a role involving driving or the use of heavy machinery. This is true whether the employee was to use the marijuana at work, or during off-work hours.

Likewise, a housing provider would not be required under the Washington Law Against Discrimination to allow the use of medical marijuana in a housing unit, even as a reasonable accommodation for a disability. It is not reasonable to require a housing provider to permit criminal activity in a housing unit, and possession of marijuana is a violation of federal law. In addition, the Fair Housing Act does not protect current users of illegal drugs.

### Cases

In *Roe v. Teletech*, 171 Wash.2d 736 (2011), the Washington State Supreme Court held that the Washington State Medical Use of Cannabis Act does not regulate the conduct of a private employer or protect an employee from being discharged because of medical marijuana use. An employer can still enforce its drug use policy against the user of medical marijuana. In this case, an employee who used medical marijuana was discharged after a positive drug test.

In *Assenberg v. Anacortes Housing Authority*, 2008 U.S. App. LEXIS 5434 (2008), an unpublished opinion, the Housing Authority terminated a tenant's lease when it discovered that he was using medical marijuana in the apartment. The tenant argued that the Housing Authority was required to reasonably accommodate his disability under state non-discrimination law. However, the federal Fair Housing Act does not protect persons who currently use illegal drugs. The Court determined that requiring a public housing authority to tolerate the violation of federal law in its housing unit is not reasonable.

The United States Supreme Court found in *Raich v. Gonzales*, 545 U.S. 1 (2005) that Controlled Substances Act's prohibition of marijuana manufacture and possession, as applied to intrastate manufacture and possession for medical purposes under California law, did not to exceed Congress' power under Federal Constitution's commerce clause (Art. I, § 8, cl. 3). Federal agents had seized and destroyed cannabis plants used by a California resident for purposes of medical marijuana, even though her use was lawful under state law.

In *Barber v. Gonzales*, 2005 U.S. Dist. LEXIS 37411 (2005), a case from the Eastern District of Washington, the plaintiff argued that Congress did not intend to apply the CSA to disabled individuals who engaged in the lawful use of marijuana, because Congress intended the Americans with Disabilities Act to protect individuals who used drugs for medical purposes, and thus federal agents could not take action against him because of his use of marijuana in the context of Washington's Medical Marijuana Act. The court determined that the ADA did not protect individuals who are currently engaged in the use of illegal drugs, regardless of whether Washington law allowed such use.

In California, an employer terminated an employee when he tested positive for marijuana during a drug test. The employee argued that he was using medical marijuana as provided for under state law, and that when he was fired, his employer was discriminating against him based on disability and failing to accommodate his disability. In *Ross v. Ragingwire Communications*, 42 Cal. 4<sup>th</sup> 920 (2008), the court found that because the possession of marijuana is illegal under federal law, the employer could take the drug use into consideration when making an employment decision.

In *Washburn v. Columbia Forest Products, Inc.*, 340 Ore. 469 (2006) the Oregon Supreme Court reviewed an appeals court decision that determined that an employer violated state non-discrimination law when it terminated an employee who used medical marijuana. The Supreme Court overturned the appeals court decision by finding that the employee was not disabled under the Oregon statute. A concurring opinion addressed the issue of medical marijuana, and stated that state law cannot require what federal law prohibits, and that given the CSA, an employer has no binding state obligation to accommodate an employee's use of medical marijuana.

Based on these cases, and the fact that federal law prohibits the possession of marijuana, the Washington State Human Rights Commission has determined that the use of medical marijuana is not a reasonable accommodation for a disability; this applies in the areas of employment, housing, and public accommodation. If an individual does file a case involving a claim of failure to reasonably accommodate a disability due to the claimant's use of medical marijuana, or a claim of termination due to disability because of the results of a drug test, the investigation will most likely result in an immediate No Reasonable Cause Finding. This does not preclude an individual from filing a case in state or federal court.

If you need additional information, have additional questions, or wish to have training for your organization, please contact the WSHRC at 360-753-6770 or 800-233-3247 (TTY 800-300-7525). Additional information on this and other civil rights issues can be found on our website at [www.hum.wa.gov](http://www.hum.wa.gov). This document does not constitute legal advice; if you have a particular situation about which you need legal advice, you should contact your attorney.