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### **Labor and Employment Alert: Court Holds That Selling Medical Marijuana at Work Is Not Protected Conduct**

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#### **CLIENT ALERT | 4.26.2017**

Medical marijuana has been legal in Michigan since 2008, and more than 200,000 patients currently grow their own marijuana or obtain marijuana from 37,000 state-registered caregivers. In 2012, the Sixth Circuit Court of Appeals held that the Michigan Medical Marijuana Act (MMMA) does not impose restrictions on private employers, and so a private employer is free to discipline an employee for drug use even when the employee's use of marijuana is authorized under the MMMA. Recently, a district court in Michigan reaffirmed this holding in a case in which the employee who was a licensed medical marijuana caregiver was terminated for selling marijuana at work.

In *Henry v. Outback Steakhouse*, plaintiff Bobbie Henry (age 48) had worked at Outback for 17 years and was a licensed medical marijuana caregiver under the MMMA, which authorized her to grow and sell marijuana to her "patients." One of her patients was a coworker at Outback. Her restaurant's managers began investigating suspected drug use and sales in the restaurant and its parking lot by its employees; the investigation did not initially involve Henry. However, during the investigation, Outback heard from multiple employees that Henry was selling drugs to her coworkers. The restaurant's management team took this information to higher-level human resources and received authorization to terminate Henry along with five younger employees. After she was terminated, Henry sued for age discrimination under Michigan's Elliott-Larsen Civil Rights Act.

The district court found neither direct nor circumstantial evidence of age discrimination. In particular, the court explained that Outback had articulated a legitimate, nondiscriminatory reason for terminating Henry – her suspected distributing drugs to coworkers. And Henry, for her part, failed to show that this reason was a pretext for discrimination. As the court explained, Outback's management team conducted 15 interviews, received three reports that Henry was selling drugs on the premises, and involved high-level HR in the decision to terminate Henry. After she was terminated, Henry confirmed to Outback's management that she was selling drugs pursuant to her medical marijuana card, and, during the lawsuit, Henry admitted to selling

marijuana to her coworker in the Outback parking lot at least once. Thus, Outback had made a reasonably informed and considered decision before terminating Henry, and so had an “honest belief” that its reasons for terminating her were correct. Given this, the court concluded that no reasonable jury would find that Outback’s stated reasons for terminating Henry were a mere pretext for to discriminate against Henry based on age.

In so holding, the court rejected two arguments Henry raised concerning the MMMA. First, Henry argued that Outback did not have a written drug policy that applied to her. Outback’s Employee Handbook states, “The illegal use, sale, or possession of narcotics, drugs, or controlled substances while on the job or on Company property is strictly prohibited and is a dischargeable offense.” Though Henry had a MMMA marijuana card, the court explained that “state medical-marijuana laws do not, and cannot, supersede federal laws that criminalize the possession of marijuana,” and marijuana remains illegal under the federal Controlled Substances Act. Second, Henry contended that her marijuana sales to her coworker cannot be a basis for her termination because the coworker was her patient and the MMMA authorizes her to sell marijuana to her patients. The court rejected this argument because the MMMA “does not impose restrictions on private employers” and does not “provide protection against disciplinary actions” by an employer.

The *Henry* case highlights several important issues for employers regarding marijuana. First, although the MMMA does not protect employees from adverse employment actions for selling or using marijuana at work, employees are still protected against discrimination based on other protected characteristics. The outcome here may have been different had Outback terminated Henry (age 48) for selling drugs but not her under-40 coworkers. Second, employers should review their substance abuse policies to ensure they account for state-authorized medical and recreational marijuana use. And third, *Henry* illustrates how a thorough workplace investigation and partnership with human resources may establish a legitimate nondiscriminatory reason and defeat a claim of pretext. Contact your Vorys lawyer if you have questions about marijuana in the workplace.