NAMSDL Case Law Update

September 28, 2017

In This Issue

This issue of *NAMSDL Case Law Update* focuses on eight recent court decisions involving marijuana laws and the use of marijuana, including three decisions from the U.S Court of Appeals for the Tenth Circuit and others from highest courts in Colorado, Maryland, and Massachusetts. The topics addressed in this issue include suits to enjoin enforcement of Colorado's marijuana legalization measure, alleged employment discrimination caused by terminating an employee for a failed drug test, investigation by the Internal Revenue Service into tax deductions taken by a marijuana business, and a police officer's frisk of vehicle occupants based solely on the smell of marijuana. Within this *Update,* cases are divided by the type of court (federal or state) and then listed in approximate descending order of appellate level.

CASES IN THIS ISSUE

Fourth Corner Credit Union vs. Federal Reserve Bank of Kansas City, U.S. Court of Appeals for the Tenth Circuit, Case No. 16-1016, 861 F.3d 1052, June 27, 2017.

Justin L. Smith, et al. vs. John W. Hickenlooper, U.S. Court of Appeals for the Tenth Circuit, Case No. 16-1095*; Safe Streets Alliance, et al. v. John W. Hickenlooper, et al.*, U.S. Court of Appeals for the Tenth Circuit, Case No. 16-1048, 859 F.3d 865, June 7, 2017.

The Green Solution Retail, Inc. & Kyle Speidell v. United States of America, et al., U.S. Court of Appeals for the Tenth Circuit, No. 16-1281, 855 F.3d 1111, May 2, 2017.

Cristina Barbuto vs. Advantage Sales and Marketing, et al., Massachusetts Supreme Judicial Court, Case No. SJC-12226, 78 N.E.3d 37, July 17, 2017.

The People of the State of Colorado v. Austin Lente, Supreme Court of Colorado, Case No. 15SA331, --- P.3d ----, 2017 WL 2633534, June 19, 2017.

Rocky Mountain Retail Management, LLC v. City of Northglenn, Supreme Court of Colorado, Case No. 15SA215, 393 P.3d 533, April 24, 2017.

Joseph Norman, Jr. v. State of Maryland, Court of Appeals of Maryland, Case No. 56, Sept. Term, 2016, 156 A.3d 940, March 27, 2017.

Green Cross Medical, Inc. v. John V. Galley, Court of Appeals of Arizona, Case No. 1CA-CV16-0019, 395 P.3d 302, April 18, 2017.

-Continued

Federal Cases

Fourth Corner Credit Union vs. Federal Reserve Bank of Kansas City, U.S. Court of Appeals for the Tenth Circuit, Case No. 16-1016, 861 F.3d 1052, June 27, 2017. A more detailed summary of this case is located in previous issues of *NAMSDL Case Law Update*. The plaintiff, Fourth Corner Credit Union, is a credit union doing business in Colorado that intends to provide banking services to compliant state-licensed cannabis and hemp businesses. The Federal Reserve Bank of Kansas City ("FRB-KC") denied Plaintiff a master account on the basis that to do so would violate federal laws regarding marijuana. In July 2015, Plaintiff filed suit against FRB-KC in Colorado federal court, asserting that Defendant's grant of a master account is not a discretionary function but rather a mandatory one if the requesting entity is eligible to apply for federal deposit insurance. Defendant moved to dismiss the case against it for failure to state a claim, arguing that Colorado's grant of a credit union charter to Plaintiff violates federal law and that Plaintiff's requested relief would force Defendant to further or assist an illegal purpose. Prior to a ruling by the district court, Plaintiff amended its Complaint to assert that it would only serve marijuana-related businesses if doing so were "authorized by state and federal law." In January 2016, the district court dismissed the Complaint against the Defendant on the basis that the court could not use its equitable powers of relief to facilitate criminal activity, which would be the case if it were to rule in favor of the Plaintiff. In reaching this conclusion, the district court believed that Plaintiff's amended complaint was a promise to follow only its own understanding of the law, and not necessarily to obey the district court's pronouncement of the law. Plaintiff appealed the decision to the U.S. Court of Appeals for the Tenth Circuit. On appeal, in a split decision issued in June 2017, each of the three Tenth Circuit judges who heard the case reached a differing decision, discussed in three separate opinions. One judge agreed with the district court's dismissal of the complaint with prejudice. A second judge would vacate the dismissal and remand the case with instructions to dismiss the complaint without prejudice on grounds that the issue is not ripe for adjudication. The third judge would reverse the dismissal of the amended complaint. The net effect of the differing conclusions of the judges was for the Tenth Circuit as a whole to vacate the district court's decision and remand the case for dismissal without prejudice. It is clear from the three opinions that at least two judges agreed that FRB-KC could not have granted a charter to Plaintiff to serve marijuana-related businesses due to the federal law prohibition on marijuana.

Justin L. Smith, et al. vs. John W. Hickenlooper, U.S. Court of Appeals for the Tenth Circuit, Case No. 16-1095*; Safe Streets Alliance, et al. v. John W. Hickenlooper, et al.,* U.S. Court of Appeals for the Tenth Circuit, Case No. 16-1048, 859 F.3d 865, June 7, 2017. A more detailed summary of these consolidated cases is located in previous issues of *NAMSDL Case Law Update* and *NAMSDL News*. In the *Smith* matter, six Sheriffs of Colorado counties and six Sheriffs of counties in neighboring states filed suit in Colorado federal court in March 2015 against the Governor of Colorado seeking an injunction against the application and enforcement of Colorado's marijuana legalization measure. The *Smith* Plaintiffs argued that Colorado's marijuana laws conflict with and impede execution of the federal Controlled Substances Act ("CSA") and international treaties, and federal law and federal policy preempts them. Similarly, in the *Safe Streets* matter, three other plaintiffs filed suit in the same federal court against sixteen parties, both private and state, including the Governor of Colorado. The *Safe Streets Plaintiffs* alleged that the Defendants violated their rights under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and that federal law preempts the Colorado constitutional amendment allowing the personal use of marijuana. In January 2016, the district court dismissed the state defendants from the *Safe Streets* case, reasoning that the CSA does not create a private right of action to preempt state law and, therefore, Plaintiffs cannot maintain a claim against them.

-Continued

Likewise, in February 2016, the district court granted the *Smith* Defendant's motion to dismiss on the basis that neither the CSA, the International Conventions, nor the Supremacy Clause give rise to a private right of action to enforce federal law regarding marijuana. Plaintiffs in both cases appealed the rulings to the U.S. Court of Appeals for the Tenth Circuit, which consolidated the cases for the appeal. In April 2016, following the U.S. Supreme Court's declination to exercise jurisdiction in the case of *Nebraska and Oklahoma vs. Colorado*, the states of Nebraska and Oklahoma filed a Motion to Intervene in the *Safe Streets* case on the basis that the Tenth Circuit would decide matters of critical importance to each of them before either could conduct a civil case in the district court.

In a lengthy opinion issued in June 2017, the Tenth Circuit affirmed the district court's decision in the *Smith* matter, and affirmed in part and reversed in part the district court's decision in *Safe Streets*. First, the Tenth Circuit concluded that the *Safe Streets* Plaintiffs "plausibly pled": (1) that the marijuana growers in their case violated RICO's prohibited activities; (2) injury to their property in the form of "recurring emissions of foul odors" and "diminution in value of their property;" and (3) that the Defendants' actions proximately caused the alleged injuries. Accordingly, the court reversed the district court' dismissal of the *Safe Streets* Plaintiffs' RICO claims as they pertained to these particular injuries, thereby allowing continued trial activity on those counts. Next, the Tenth Circuit affirmed the district court's dismissal of the *Safe Streets* Plaintiffs' federal law preemption claims. Here, the court concluded that Plaintiffs failed to allege "any substantive rights in [CSA] § 903 or elsewhere in the CSA by which they can enforce the CSA's preemptive effects." Moreover, the court noted, "Article III courts will not . . . 'entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws.'" Third, the Tenth Circuit affirmed the district court's dismissal of the *Smith* Plaintiffs' "purported causes of action in equity to enforce the CSA's preemptive effects, but in the absence of any claimed injury to their federal substantive rights." Using a similar analysis as in the *Safe Streets* matter, the court stated simply "[a] private plaintiff has no substantive rights under, and cannot enforce, [CSA] § 903." Finally, the Tenth Circuit denied the motions to intervene made by Nebraska and Oklahoma. Reviewing the States' desire to "protect their avowed interests in enjoining the enforcement" of Colorado's legalization measure, the court ultimately concluded, "Nebraska and Oklahoma's controversy is against Colorado." Observing that the U.S. Supreme Court has "original and exclusive jurisdiction of all controversies between two or more States," the Tenth Circuit determined that the States could not join the case at issue.

The Green Solution Retail, Inc. & Kyle Speidell v. United States of America, et al., U.S. Court of Appeals for the Tenth Circuit, No. 16-1281, 855 F.3d 1111, May 2, 2017. The Internal Revenue Service ("IRS") is auditing the tax returns of a Colorado-based marijuana dispensary to determine if it should apply Section 280E of the Tax Code, which forbids the taking of certain tax deductions by businesses that traffic in controlled substances under federal law. As part of the investigation, the dispensary and one of its owners, collectively the Plaintiffs, sued to enjoin the IRS from investigating its business records. In response, the government moved to dismiss the case for lack of subject matter jurisdiction. In doing so, the government asserted that Plaintiffs' claim for injunctive relief is foreclosed by the Anti–Injunction Act ("AIA"), which "bars suits 'for the purpose of restraining the assessment or collection of any tax,'" and Plaintiffs' claim for declaratory relief is barred by the Declaratory Judgment Act ("DJA"), which prohibits declaratory judgments in certain federal tax matters. A federal district court agreed with the government and dismissed the case with prejudice. Plaintiffs appealed to the U.S. Court of Appeals for the Tenth Circuit. On appeal, the Plaintiffs asserted that a 2015 U.S. Supreme Court decision (*Direct Marketing*) overturned Tenth Circuit

-Continued

precedent that the AIA bars "activities leading up to, and culminating in . . . assessment," and instead applies only where a "lawsuit restrains—meaning in some degree stops—the assessment or collection of a tax." In a decision issued in May 2017, the Tenth Circuit disagreed, and affirmed the district court. According to the court, the differences between the Tenth Circuit's line of cases addressing the AIA and the *Direct Marketing* case, which dealt with a different federal act, "are significant" and include the words to which the term "restrain" applies in each statute. Accordingly, the Tenth Circuit held that "we can hardly say that *Direct Marketing* so undermined the authority of [the Tenth Circuit cases] in this context that we must retreat from its holding." The Tenth Circuit also rejected two other contentions by Plaintiffs: (1) the IRS acts outside of its scope of authority when it investigates whether a taxpayer traffics in controlled substances; and (2) the AIA does not apply where the application of Section 280E is at issue because Section 280E is a "penalty," and not a tax. In the court's opinion, there is no requirement that the U.S. Department of Justice undertake an investigation prior to the application of Section 280E, and thus the IRS's obligation to deny or approve tax deductions "falls squarely within its authority under the Tax Code." As for Plaintiffs' characterization of Section 280E as a penalty, the Tenth Circuit found no legal support for it, stating "[t]he disallowance of a deduction is not an exaction imposed as punishment."

State Cases

Cristina Barbuto vs. Advantage Sales and Marketing, et al., Massachusetts Supreme Judicial Court, Case No. SJC-12226, 78 N.E.3d 37, July 17, 2017. A more detailed summary of this case is located in previous issues of *NAMSDL Case Law Update*. In September 2015, the Plaintiff, a Massachusetts woman, filed suit against her brief former employer for discriminatory employment practices after the employer terminated her for failing a pre-employment drug test. Plaintiff alleged she failed the test because of her off-premises use of marijuana, as recommended by a Massachusetts physician to treat her Crohn's disease pursuant to Massachusetts law. In May 2016, prior to trial, a state trial court dismissed five of Plaintiff's six causes of action, including three pertaining to "handicap discrimination," leaving only a claim that her employer interfered with her right to privacy by requiring drug testing via urinalysis. Plaintiff voluntarily dismissed her remaining cause of action and appealed the decision. In November 2016, the Massachusetts Supreme Judicial Court granted Plaintiff's motion for direct appellate review, thereby allowing the state's highest court to review the matter straight from the trial court. The Supreme Judicial Court framed the legal question at issue as "[w]hether the termination of an employee's employment based on her lawful use of medical marijuana outside the workplace violates [Massachusetts law] or is otherwise wrongful."

In an opinion issued in July 2017, the Supreme Judicial Court affirmed in part and reversed in part the trial court's decision, thereby adding the handicap discrimination claims back into the case. In deciding that Plaintiff sufficiently alleged handicap discrimination to defeat the motion to dismiss, the court first concluded that Plaintiff "adequately alleged that she has a physical impairment that substantially limits one or more major life activities and therefore is a 'handicapped person'" under Massachusetts law. Next, the court held that the accommodation requested by Plaintiff—
the off-premises use of marijuana at the conclusion of some work days— is facially reasonable. In reaching this conclusion, the court stated "[w]here, in the opinion of the employee's physician, medical marijuana is the most effective medication for the employee's debilitating medical condition, and where any alternative medication whose use would be permitted by the employer's drug policy would be less effective, an exception to an employer's drug

-Continued

policy to permit its use is a facially reasonable accommodation." The court also found support in the text of Massachusetts' marijuana law, which provides "that patients shall not be denied 'any right or privilege' on the basis of their medical marijuana use." Here, the court continued, where Plaintiff is a handicapped person under the law, this includes "a statutory 'right or privilege' to reasonable accommodation." The court rejected the employer's assertion that the federal prohibition on marijuana makes accommodating Plaintiff's use unreasonable by itself, stating instead that it is unconvinced that public policy warrants such a result and noting that only the Plaintiff (and not the employer) is at risk of criminal prosecution for off-premises use. Moreover, the court added, even if the accommodation is unreasonable, the employer "owed the plaintiff an obligation . . . before it terminated her employment, to participate in the interactive process to explore with her whether there was an alternative, equally effective medication." The court was careful to observe that the decision did not mean that the Plaintiff would successfully prove discrimination at trial. Although the court revived Plaintiff's three claims related to handicap discrimination, it affirmed the trial court's dismissal of counts implying a private cause of action under the Massachusetts medicinal use of marijuana law and wrongful termination in violation of public policy. According to the court, neither the explicit text of the Massachusetts law nor the informational guide about the marijuana law provided to voters provided any indication that the law contained a private right of action. As a result, the court held "[h]ere, where a comparable cause of action already exists under our law prohibiting handicap discrimination, a separate, implied private right of action is not necessary to protect a patient using medical marijuana from being unjustly terminated for its use."

The People of the State of Colorado v. Austin Lente, Supreme Court of Colorado, Case No. 15SA331, --- P.3d ----, 2017 WL 2633534, June 19, 2017. A Colorado man, the Plaintiff, caused a fire at his house while he attempted to extract hash oil from marijuana using butane. The State charged Defendant with a number of crimes, including processing or manufacturing marijuana without a license under C.R.S.A. § 18-18-406(2)(a)(I). The statute does not define either "processing" or "manufacturing." Defendant moved to dismiss the charge related to marijuana, asserting that his actions constituted the "processing . . . [of] marijuana plants," which is legal for persons age 21 or older to do in Colorado, pursuant to the state constitutional amendment allowing certain personal, non-medical uses of marijuana (Amendment 64). A state trial court agreed with the Defendant that C.R.S.A. § 18-18-406(2)(a)(I) is unconstitutional as applied to him and dismissed the marijuana charge. The State appealed the decision directly to the Colorado Supreme Court, as is allowed by law. On appeal, the Supreme Court reversed the decision. As a first step, the court looked to see if either "processing" or "manufacturing" had an established meaning under the Colorado Controlled Substances Act ("CCSA") at the time of Amendment 64's adoption. The court concluded that under the CCSA, "manufacturing" means "extraction or chemical synthesis." Next, the court determined that the language of the personal use section of Amendment 64 "suggests it protects only mechanical or physical processes, like chopping and drying, rather than chemical processes, like extraction." As support for this conclusion, the court observed that the personal use section addressed the processing of "marijuana plants," not "marijuana." Accordingly, the court held that "under Amendment 64, making hash oil by extraction is manufacturing, not processing." Finally, the court rejected Defendant's argument that the criminal statute is overbroad or vague. Two of the seven justices of the court dissented from the majority, believing that "the statutory scheme was so vague that an ordinary person would not have known that it proscribed hash-oil extraction via butane."

-Continued

Rocky Mountain Retail Management, LLC v. City of Northglenn, Supreme Court of Colorado, Case No. 15SA215, 393 P.3d 533, April 24, 2017. A business entity, the Plaintiff, filed an application with a Colorado city (the "City") to operate a medical marijuana center. The City denied the application because the City already had multiple operating marijuana centers and Plaintiff did not demonstrate that the proposed center would fill a community need. The City's code contains a provision, nearly identical to one in Colorado state law, that "permits the local licensing authority to consider the 'number, type, and availability' of existing medical marijuana facilities before approving or denying an application for a local license." Plaintiff sought judicial review of the City's denial from a state trial court. A state trial court found the City's code provision to be unconstitutionally vague and the denial to be "arbitrary and capricious." The City appealed the decision, and the Supreme Court of Colorado took direct review of the matter because the constitutionality of an ordinance was at issue. On appeal, the Supreme Court reversed the trial court's decision and allowed the denial to stand. The court first found that the City code provision at issue is not unconstitutionally vague. In the Supreme Court's opinion, the trial court's order "appears to conflate the danger of arbitrary or discriminatory enforcement created by impermissibly vague laws . . . with the allegedly arbitrary application of an otherwise clear law." In this instance, the City's ordinance provides sufficient notice, in the form of specific factors, to applicants regarding the information the City will consider in an application. The Supreme Court then concluded, "the City's decision to deny [Plaintiff's] license was supported by substantial evidence when the record is considered as a whole." Where the City reviewed such substantial evidence and "adequately explained its consideration of that evidence in written findings," the court would not hold that the City made an arbitrary or capricious decision.

Joseph Norman, Jr. v. State of Maryland, Court of Appeals of Maryland, Case No. 56, Sept. Term, 2016, 156 A.3d 940, March 27, 2017. A law enforcement officer, after smelling marijuana from a stopped vehicle and asking the occupants to exit for a vehicle search, frisked each of the occupants for a weapon. The frisks uncovered no weapons, but the officer found additional marijuana in the pockets of one occupant, the Defendant. The Defendant moved to suppress the evidence on grounds of an unconstitutional search. Earlier in 2017, in the case of *Robinson v. State of Maryland* (discussed in the February 23, 2017 issue of *NAMSDL Case Law Update*), Maryland's highest court held that the odor of marijuana provides a law enforcement officer with probable cause to search a vehicle in a state where possession of less than 10 grams of marijuana is not a criminal offense. This case presents the following related question: does the smell of raw marijuana coming from a car stopped for a traffic violation alone provide a sufficient basis to subject all vehicle occupants with a "pat down" or "*Terry* frisk?" After an extensive review of court decisions in Maryland and other jurisdictions, the Court of Appeals of Maryland concluded in a March 2017 decision that the answer is "no." In the court's words, "for a law enforcement officer to have reasonable articulable suspicion to frisk one of multiple occupants of a vehicle from which an odor of marijuana is emanating, the totality of circumstances must indicate that the occupant in question is armed and dangerous. An odor of marijuana alone emanating from a vehicle with multiple occupants does not give rise to reasonable articulable suspicion that the vehicle's occupants are armed and dangerous and subject to frisk." As a result, the court remanded the case with instructions to grant Defendant's motion to suppress the evidence. The court explicitly noted, however, that evidence recovered from the vehicle is not tainted and remains admissible under *Robinson*. Two judges dissented from the majority, believing that the officer had "a reasonable, articulable suspicion that [Defendant] was armed and dangerous." In June 2017, Defendant filed a request with the U.S. Supreme Court to hear the matter on a discretionary basis. The U.S. Supreme Court's decision on the request is expected in late September 2017, although the grant of such review is unlikely.

-Continued

Green Cross Medical, Inc. v. John V. Galley, Court of Appeals of Arizona, Case No. 1CA-CV16-0019, 395 P.3d 302, April 18, 2017. A corporate entity, the Plaintiff, entered into a lease with a landlord, the Defendant, to operate a marijuana dispensary at a particular location. Two weeks after the lease started, the Defendant revoked the lease and Plaintiff filed a breach of contract suit against the Defendant. Before the trial court, Defendant asserted the lease was illegal and unenforceable. The trial court agreed, holding that the lease violates the CSA and state laws against the "production of marijuana and conspiracy to sell or transfer marijuana." Plaintiff appealed. In an opinion issued in April 2017, the Arizona intermediate appellate court reversed the decision. The appellate court first held that the lease does not violate Arizona law for several reasons. The court began by observing that Arizona's medical marijuana law "protects the rights of [compliant] dispensaries to enter into leases and contract." Moreover, while the law does not explicitly specify that landlords receive immunity from criminal prosecution for leasing property to authorized marijuana dispensaries, the court refused to read the law "in a manner that would lead to an absurd result," whereby dispensaries receive immunity when operating in compliance with the law, but their respective landlords do not. The court also emphasized that Arizona law does not require a landlord to rent property to a proposed dispensary, but where one chooses to do so, he is "not free to rescind his contractual commitments without facing potential monetary liability." Likewise, the court held that the federal prohibition on marijuana does not invalidate the lease. As in other states, before an Arizona court determines that a contract is unenforceable because it violates a statute, "the court must consider the policy behind the statute and whether voiding the agreement will result in a disproportionate forfeiture, unjust enrichment, windfalls, and deterrence of illegal conduct." In the court's opinion, "enforcing the lease at least for purposes of a damages action is appropriate" as it would enforce the right of contract for dispensaries or applicants, would deter wrongful breaches of leases with persons complying with state law, and would avoid unjust enrichment by parties seeking to terminate the lease after gaining the benefit.

Research is current as of September 25, 2017. In order to ensure that the information contained herein is as current as possible, research is conducted using nationwide legal database software and individual state legislative websites. Please contact Jon Woodruff at 703.836.6100, ext. 100 or jwoodruff@namsdl.org with any additional updates or information that may be relevant to this document. This document is intended for educational purposes only and does not constitute legal advice or opinion. This project was supported by Grant No. G1599ONDCP03A, awarded by the Office of National Drug Control Policy. Points of view or opinions in this documents are those of the author and do not necessarily represent the official position or policies of the Office of National Drug Control Policy or the United States Government.