IN THE SUPREME COURT OF THE STATE OF OREGON

ROBERT WASHBURN,	)	Supreme Court No. S52254
	)	
Plaintiff-Appellant,	)	
Respondent on Review,	)	CA No. A116664
	)	
v.	)	Multnomah County Circuit Court
	)	No. 0012-12516
COLUMBIA FOREST PRODUCTS, INC.,	)	
	)	
Defendant-Respondent,	)	
Petitioner on Review.	)	

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION, NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS, AMERICANS FOR SAFE ACCESS

Opinion Filed: January 12, 2005
Author of Opinion: Deits, J. pro tempore
Concurring Judges: Haselton, P.J., and Wollheim, J.
Dissenting Judges: None
Before: Haselton, Presiding Judge; Wollheim, J. and Deits, J. pro tempore

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing Brief of Amicus Curaie on October 25, 2005, by depositing the original thereof, together with twelve copies, with the United States Post Office in Portland, Oregon, sealed in an envelope with first class postage prepaid and addressed to:

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I further certify that I served the foregoing Brief of Amicus Curaie on Respondents on October 25, 2005, and the corrected Brief of Amicus Curaie on November 1, 2005, by depositing two true copies thereof with the United States Post Office in Portland, Oregon, sealed in an envelope with first class postage prepaid and addressed to:

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INTRODUCTION

Amici and their Concerns

The American Civil Liberties Union of Oregon Inc., (ACLU) is a nonprofit, nonpartisan, corporation dedicated to maintaining civil rights and liberties guaranteed or reserved to the people by the Oregon and the United States Constitutions. To that end, the ACLU has appeared in numerous cases in this and other Oregon courts as *amicus curiae* concerning civil liberties and civil rights generally. ACLU participated in drafting the Oregon Medical Marijuana Act (OMMA), and lobbied the 1999 and 2005 legislative sessions' amendments to the OMMA and testified before the 2005 legislature opposing a bill concerning the issue in the case at bar.

The National Organization for the Reform of Marijuana Laws (NORML), has long supported policies and legislation which permit seriously ill patients to use physician recommended cannabis therapeutically, without fear of arrest, prosecution or forfeiture. This support dates back to NORML's first assertion of the medical use of cannabis in a 1972 administrative petition seeking to enable doctors to prescribe cannabis by rescheduling it from Schedule 1 to Schedule 2 under the federal regulatory scheme. The NORML Board of Directors endorsed the Oregon Medical Marijuana Act prior to the November 1998 general election which enacted it, and the NORML Legal Committee member who is participating in this amicus brief helped draft the OMMA and lobbied the 1999 and 2005 legislative sessions' amendments to the OMMA and testified before the 2005 legislature opposing a bill concerning the issue in the case at bar.

Americans for Safe Access (ASA) is the largest national grassroots coalition working solely to protect the rights of patients and doctors to use marijuana for medical purposes. ASA's mission is to ensure safe, legal access to marijuana for all who are helped by it. ASA provides legal training for lawyers and patients, medical information for doctors and patients, media support for court cases, activist training to organizers, and rapid response to law enforcement problems. ASA works with local, state and national legislators on issues concerning medical marijuana patients. ASA's successful media and legal campaigns have resulted in important court precedents, new sentencing standards, and more compassionate community guidelines.

ACLU, NORML and ASA are concerned that the rights of Oregon Medical Marijuana patients be protected in the workplace.

ARGUMENT

I. Washburn is entitled to the protections of the Oregon Disability Act

A. The Oregon Disability Statute.

At issue in this case is ORS 659A(1)(a), the definition of the term "disabled person." Under that statute, "disabled person" means an individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment." ORS 659A.100(1)(a). The employer, Columbia Forest Products, Inc., has argued that Washburn is not a disabled person because his use of marijuana is a "mitigating measure" which alleviates Washburn's inability to sleep to the extent that

he should not be considered a disabled person.

The question then is whether or not mitigating measures should be taken into account before determining whether an individual is disabled. As discussed below, the early federal interpretations which were in effect at the time the Oregon statute was enacted, and the legislative history of the federal disability law, were clear in stating that such mitigating measures should not be taken into account in determining whether an individual was disabled.

The Oregon legislature also enacted a "lockstep" statute which provides that Oregon's disability law should be interpreted consistently with the federal law. However, as is also discussed below, that "lockstep" provision does not apply to the definition of "disabled individual," and, even if it did, it would be an unconstitutional delegation of authority to adopt future federal interpretations.

1. Constitutional prohibition.

ORS 659A.139 states: "ORS 659A.112 to 659A.139 shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act of 1990, as amended."

In our case, the relevant statute is ORS 659A.100(1)(a), the definition of "disability." That statute is *not* included in the ORS 659A.139 "lockstep" provision.

Even if ORS 659A.100(1)(a) were included in ORS 659A.139, it is well established that the Oregon legislature may not delegate its authority by adopting as the law of Oregon future laws of the United States. *Seale et al v. McKennon,* 215 Ore. 562, 572-73, 336 P.2d 340 (1959) (state law cannot incorporate future federal

regulations); *Hillman v. Northern Wasco County People's Utility District*, 213 Ore. 264, 323 P.2d 664 (1958). Therefore, even if this "lockstep" provision incorporated the relevant Oregon statute (which it does not), any new federal interpretations regarding similar Oregon statute could not apply to the Oregon statute.

2. At the time the Oregon statute was adopted, the interpretive guidance and statutory history indicated that disability would be determined without consideration of mitigating factors.

The Oregon Disability Act (ODA) became law in 1997. ORS 659A.100 et seq. At that time, the federal Americans with Disabilities Act of 1990 was interpreted by the Equal Employment Opportunities Commission and the U.S. Department of Justice. The EEOC, responsible for issuing regulations relating to Title I, 42 USC §12116, adopted Interpretive Guidance at the same time as its regulations. The interpretive guidance to the regulation defining the term "substantially limits," 29 C.F.R. §1630.2(j), provides, in relevant part: "The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, *without regard to mitigating measures such as medicines, or assistive or prosthetic devices.*" 29 C.F.R. pt. 1630, App., p.348 [*empahasis added].*

The regulations issued by the Department of Justice to implement Titles II and III of the ADA reached the same conclusion. 28 C.F.R. §35.104 and 28 C.F.R. §36.104 contain regulatory definitions of "disability." The accompanying analysis prepared by the Justice Department provided:

> The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modifications or auxiliary aids and services. For example, a person with hearing loss is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.
>
> 28 C.F.R. pt.35, App.A., p. 442 (1998); 28 C.F.R. pt.36, App.B, p.583 (1998).

The EEOC and Department of Justice interpretations were supported by legislative history.

The Senate Report on the ADA states:

> A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.... Moreover, whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.
>
> S. Rep. No. 101-116, at 23.

The report from the House Education and Labor Committee repeats this guidance virtually verbatim, then adds: "Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.: H.R. Rep. No. 101-485, pt.2, at 52. The report from the House Judiciary Committee also stated: "the impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations would result in a less-than-substantial limitation." H.R. Rep. No. 101-485, pt.3, at 28.

The U.S. Supreme Court rejected these interpretations in 1999, two years after the Oregon Disability Act was passed. *Sutton v. United Airlines*, 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999).

B. Oregon's Disability Statute, and its Explicit Provision for Broad Interpretation, Is Not Controlled by Precedent Involving the Federal ADA and its Judicially-Invoked Narrow Interpretation.

The rule promulgated in *Sutton* is irrelevant to the Oregon statute because Oregon law differs markedly from the Federal law, both in their text and in their dramatically disparate rules of interpretation. While the fed law is to minimize employer's burden where ever possible, Oregon's statute explicitly expands the rights of the disabled.

ORS 659A.103 provides:

> "(1) It is declared to be the public policy of Oregon to guarantee disabled persons the fullest possible participation in the social and economic life of the state, [and] to engage in remunerative employment * * * without discrimination.
>
> "(2) The right to otherwise lawful employment without discrimination because of disability where the reasonable demands of the position do not require such a distinction, * * * [is] hereby recognized and declared to be the right[] of all the

> people of this state. It is hereby declared to be the policy of the State of Oregon to protect these rights and *ORS 659A.100* to *659A.145* shall be construed to effectuate such policy."

As the Oregon Court of Appeals found in *Evans v. Multnomah County Sheriff's Office*, 184 Or App. 733, 57 P.3d 211 (2002), *rev. den.* 335 OR. 180; 63 P.3d 27; (2003), "[i]t is not possible to achieve consistency between an implicit federal policy mandating a narrow interpretation of the ADA and an explicit Oregon policy mandating a broad one." *Evans* at 743, 216.

C. Mitigating measures should not be taken into account when determining whether or not an individual is disabled.

Using proper, logical analysis, the court should first determine whether an individual's physical or mental impairment substantially limits that person in some major life activity. That is the plain reading of ORS 659A.100(1)(a). This first step in the analysis is simply to determine whether the individual has the type of medical condition contemplated by the legislature to be protected by the statute.

A second step in the analysis is whether the disabled individual is able to perform the job in question. The second step is implicit in ORS 659A.112 and 659A.115. At this stage of analysis, mitigating measures are appropriately considered in order to determine whether the disabled individual can perform the job.

When mitigating corrective measures are taken into account to determine whether an individual is disabled, the disabled individuals most likely to be qualified for a position would be excluded from legal protection, and, conversely, individuals who do not mitigate their medical condition would remain protected by law. The Oregon legislature could not have intended this absurd result, and the statutory/regulatory history of the ADA confirms this.

Washburn is disabled because he is substantially impaired in the major life activity of sleeping. His use of marijuana mitigates that impairment so that he is able to function and work. The employer's position, that he is not protected by the law because he is enabling himself to work, is contrary to the intent of the statute.

II. Washburn is entitled to the protections of the Oregon Medical Marijuana Act

D. Oregon law prohibits employers from discriminating against Oregon medical marijuana patients based solely on their off-site use of therapeutic cannabis because the exemption in ORS 475.340(2) of the OMMA for employer accommodation of medical marijuana applies only to employee use of medical marijuana on the actual work site.

Amici agree with both the Court of Appeals and with Washburn that the text of ORS 475.340(2) compels the conclusion that the exemption for employer accommodation is limited to on-site use. When this issue arose during the initiative campaign in 1998, proponents explained that employers, who are required by disability laws to build ramps and otherwise accommodate wheelchair bound workers, would not be required to construct 'medication stations' where workers could medicate in private and not in public view. *See*, ORS 475.316(1)(b) (limiting the exception from criminal prosecution by denying it to those who: '[e]ngage[] in the medical use of marijuana in a public place, as that term is defined in ORS 161.015, or in public view….').

Further evidence of legislative intent is found in co-chief petitioner Dr. Richard E. Bayer's testimony before the Oregon Senate's Rules Committee during its hearing on HB 2963[1], a copy of which is attached to this brief. Specifically, regarding the statute at issue here, Dr. Bayer testified:

> ORS 475.340 Section 1 (2) (a) should remain as the voters passed in 1998 with **in any workplace** remaining and [regardless of where the use occurs]; removed. Although the authors of the OMMA did not intend for the Act to require employers to accommodate the medical use of marijuana inside any workplace, the OMMA authors did intend medical marijuana to be accommodated like other medicines. That is why ORS 475.300 (1) states, " . . . marijuana should be treated like other medicines;" and the Oregon voters agreed.
>
> Emphasis in original.

E. Columbia Forest Products' *amici* misunderstand the role of the attending physician in the OMMA

The OMMA defines an attending physician thusly:

> "Attending physician" means a physician who has established a physician/patient relationship with the patient, is licensed under ORS chapter 677, who has primary responsibility for the care and treatment of a person diagnosed with a debilitating medical

[1] This bill, a copy of which is appended to this brief, would have changed the law consistent with the interests of Columbia Forest Products and its *amici*. Although it passed out of the House twice (once, prior to the hearing involving the above-cited testimony, and once as an amendment to SB1085, a comprehensive revision of the OMMA) it was twice defeated in the Senate and as a consequence never became law.

condition.

ORS 475.302(1)

The Department of Human Services (DHS) had promulgated an administrative rule to further explain the concept. ORA 333-008-0010(1) provides:

> For the purposes of OAR 333-008-0000 through 333-008-0090, the following definitions apply:
>
> (5) "Attending physician" means a physician who has established a physician/patient relationship with the patient, is licensed under ORS chapter 677, and who, with respect to a patient diagnosed with a debilitating medical condition:
>
> (f) Is primarily responsible for the care and treatment of the patient;
>
> (g) Is primarily responsible for recognized, medical specialty care and treatment of the patient;
>
> (h) Has been asked to consult and treat the patient by the patient's primary care physician; or,
>
> (i) Has reviewed a patient's medical records at the patient's request, has conducted a thorough physical examination of the patient, has provided a treatment plan and/or follow-up care, and has documented these activities in a patient file.

In addition to providing 'a treatment plan and/or follow-up care' the patient needs to see the physician annually to renew the registration, so that the physician can confirm in writing that the patient continues to suffer from a debilitating medical condition. *See*, ORS 475.309(7)(a)(B), so requiring.

This ought qualify medicinal cannabis as a drug 'taken under supervision by a licensed health care professional' as that phrase is used in 42 USC §12111(6)(A), excluding the therapeutic use of cannabis from the definition of 'illegal use of drugs.'

C. Columbia Forest Products and its *amici* misunderstand the import of the United States Supreme Court decisions regarding state medical marijuana laws.

In its merits brief, Columbia Forest Products asserts that '[a]fter the Supreme Court's decision in *Gonzales v. Raich*, ____ US ____, 125 S Ct 2195 (2005), it can no longer be doubted that even the purely intrastate cultivation, possession and use of marijuana for personal medical use is illegal under federal drug laws." Petitioner's Merit's Brief at 7. Their *amici* cite to *United*

States v. Oakland Cannabis Buyers' Cooperative and Jeff Jones, et. al., 532 US 483, 121 S Ct 1711, 149 L Ed 2d 722 (2001) for the proposition that a medical necessity defense is unavailable as against a prosecution under the federal Controlled Substances Act(CSA). Neither assertion is completely accurate.

In *Raich*, the limited holding is that application of SCA provisions criminalizing manufacture, distribution, or possession of marijuana to intrastate growers and users of marijuana for medical purposes does not violate the Commerce Clause. At least one commentator[2] has explained that all the Court did was remove this one defense (no commerce clause authority to enact) from the list of possible defenses to a federal prosecution under the CSA. Similarly, in the *Oakland CBC* case, the government had used the injunction power of the CSA to enjoin the distribution of therapeutic cannabis. The Ninth Circuit Court of Appeals reversed the injunction (190 F3d 1109 (1999) holding that the distributors had a medical necessity defense. The Supreme Court reversed the Ninth Circuit but, as the concurring opinion points out "Most notably, whether the defense might be available to a seriously ill patient for whom there is no alternative means of avoiding starvation or extraordinary suffering is a difficult issue that is not presented here." 532 US 483 at 501, 149 L Ed 2d 722 at 738.

In *Raich*, the Court expressly acknowledged that

> evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I. *See, e.g.,* Institute of Medicine, Marijuana and Medicine: Assessing the Science Base 179 (J. Joy, S. Watson & J. Benson eds. 1999) (recognizing that "[s]cientific date indicate the potential therapeutic value of cannabinoid drugs, primarily THC (Tetrahydrocannabinol] for pain relief, control of nausea and vomiting, and appetite stimulation"); see also *Conant v. Walters*, 309 F3d 629, 640-643 (C.A.9 2002)(Kozinski, J., concurring)(chronicling medical studies recognizing valid medical uses for marijuana and its derivatives).

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[2] Oregon Assistant Attorney General Steven Bushong (speaking for himself, and not on behalf of the Attorney General), Oregon State Bar Health Law Section Brown Bag Lunch CLE "Medical Marijuana Legal Update" Noon, August 3, 2005, 208 Multnomah County Courthouse, Portland.

125 S Ct at 2211, n. 37.

Acknowledging the therapeutic use of medicinal cannabis is the condition precedent to authorizing a medical necessity defense.

CONCLUSION

As Dr. Bayer explains in his testimony on HB 2963, off-site use of therapeutic cannabis does not necessarily equate with on- site impairment. Oregon employers ought not be able to defeat Oregon workers' rights as disabled people and as registered medical marijuana patients based solely on their choice of medicine.

For all the above-stated reasons and authority, *amici* ACLU, NORML and ASA respectfully request that this Court affirm the Court of Appeals' ruling reversing the trial court's issuance of summary judgment for Columbia Forest Products, and remanding the case to the trial court for trial on the merits.

Respectfully submitted this 25th day of October, 2005.

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