Federal Discrimination Statutes and the Cannabis Industry: An Illegal Industry Still Subject to Federal Laws

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On its face, it appears to be counterintuitive: United States federal courts recognizing and enforcing workplace rights for employees working in an illegal industry. After all, we would not expect a judge to lend a sympathetic ear to the employee of an arms trafficker or an interstate fraud ring. However, this is just the case when it comes to the marijuana industry. In fact, recent federal cases and administrative actions make it clear that, although participants in the marijuana industry may be engaging in conduct deemed illegal under federal law, cannabis companies must still comply with federal discrimination laws.

Federal laws, such as Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act prohibit discrimination, harassment, and retaliation in the workplace. However, because the cannabis industry is still in its infancy, it should come as no surprise that there is a dearth of case law addressing how these laws will intersect in an industry deemed illegal under federal law. One of the earliest cases to address this issue is *Aichele v. Blue Elephant Holdings, LLC*.[1] In *Aichele*, the District Court of Oregon ruled that an employee who worked at a marijuana dispensary as a part-time budtender successfully stated a claim under federal law that, after she complained about sexual harassment and workplace safety, her employer's subsequent conduct and treatment of her in the workplace constituted adverse employment actions which were reasonably likely to deter her from complaining in the future, thereby establishing a case for retaliation. Instead of addressing the legality of the workplace in the first place, or the legality of plaintiff's own conduct by working in the state-legal-but-federally-prohibited marijuana industry, the *Aichele* court instead squarely focused on the factors a plaintiff must necessarily allege in order to set forth a case for retaliation under Title VII, and determined that the employee had successfully done so.

More recently, the Maryland District Court ruled in favor of an African American marijuana dispensary budtender who properly pled claims for race discrimination under Title VII and successfully defeated the defendant dispensary's motion for summary judgment in *Jones v. Blair Wellness Ctr., LLC*.[2] The *Jones* court, similar to the court's analysis in *Aichele*, focused on the factual and legal elements necessary to state a claim for discrimination in violation of Title VII and ignored entirely the underlying fact that the conduct both parties were engaged with – participating in that state's legal marijuana industry – was in violation of federal law.

In addition to Courts throughout the country enforcing a private person's right to be free from workplace discrimination and retaliation, agencies of the federal government, while maintaining that the sale and use of marijuana is illegal, have also demonstrated that these federal agencies will hold cannabis employers accountable for discrimination in the workplace. In September 2020, in *EEOC v. AMMA Investment Group, LLC*[3], the U.S. Equal Employment Opportunity Commission (EEOC) filed a complaint against a marijuana dispensary and its parent corporation on behalf of several current and former employees. The employees claimed that a manager of their employer, who made inappropriate sexual comments and engaged in inappropriate touching, engaged in sex-based discrimination in violation of Title VII by creating a sexually hostile workplace. The parties settled those claims in the *AMMA Investment Group* case, with the defendant agreeing, among other things, to pay $175,000 in damages and to provide discrimination and harassment training to its employees.

What these cases demonstrate is that, although marijuana still remains illegal under federal law, both the federal government and the federal courts do not exempt marijuana industry participants from compliance with federal discrimination statutes. Discrimination in the workplace can result in significant monetary penalties, and it is therefore important that cannabis employers have both compliant and well-documented policies and procedures in place to address workplace discrimination issues. This is especially important because most states have passed their own workplace discrimination laws which mirror the federal laws, meaning that claims could be brought against an employer at both the state and federal level for even a single instance of such misconduct.

The need for sound policies is further underscored by the fact that many states which have legalized the sale and use of marijuana (or are in the process of doing so) have also passed laws either recommending or requiring employers to provide sexual harassment and discrimination training for staff members. While these laws vary from state to state, some generally require annual or bi-annual interactive training administered by an educator with expertise in preventing harassment, discrimination, and retaliation. Cannabis employers should be cognizant of these laws and ensure they comply with all of these additional state requirements. Further, even if training is not legally required in a particular state, cannabis employers are well advised to take steps to ensure their employees are educated in this evolving area of law to further mitigate the potential for a discrimination lawsuit in both state and federal courts.

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[1] 3:16-cv-02204-BR, 292 F. Supp. 3d 1104 (D. Or. Nov. 13, 2017).

[2] Civil Action No. ADC-21-2606, 2022 U.S. Dist. LEXIS 66919 (D. Md. Apr. 11, 2022).

[3] Case No. 1:30cv2786 (D. Md. Sept. 24, 2020).

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