



SAFP Pharmacy Seminar Case Law Update:

“Just like sentencing a criminal, a substantively reasonable presentation...”

COL(RET) DAVID W. BOBB, RPH, MS, JD

PHARMLAW SOLUTIONS, LLC

JULY 14, 2020



Attendance Code

To obtain CPE credit for this activity, you are required to actively participate in this session. You will need this attendance code in order to access the evaluation and CPE form for this activity. Your CPE must be filed by **14 October 2020** in order to receive credit.



CPE Information and Disclosures

I, David W. Bobb “declare no conflicts of interest, real or apparent, and no financial interests in any company, product, or service mentioned in this program, including grants, employment, gifts, stock holdings, and honoraria.”



The Tennessee Pharmacy Association is accredited by the Accreditation Council for Pharmacy Education as a provider of continuing pharmacy education.



CPE Information

Target Audience: Pharmacists and Pharmacy Technicians

ACPE#:

0575-0000-20-092-L03-P

0575-0000-20-092-L03-T

Activity Type: Knowledge (Law)



Disclaimer

This program is not intended to be, and should not be viewed as legal advice, as it contains only general principles of law and my interpretations of court decisions. For specific circumstances, you are strongly urged to contact an attorney familiar with the laws of your state or jurisdiction. Likewise, it does not represent the official position of the Department of Defense or any Branches thereof, the Veterans Administration, US Public Health Service, US Coast Guard, Drug Enforcement Administration, United States Government, or any Agency or Department thereof. In short, it's simply my best professional opinion designed to help you...



And a quote...

“To me, a lawyer is basically the person that knows the rules of the country. We're all throwing the dice, playing the game, moving our pieces around the board, but if there is a problem the lawyer is the only person who has read the inside of the top of the box.” —Jerry Seinfeld



Learning Objectives

1. Define the term “Sophisticated Means” and how it is used to increase a perpetrator’s sentence for the commission of a crime.
2. State when the “Seller Shield” can be used by a pharmacist as a defense against a claim, and what the difference is between a product liability claim and a health care liability claim.
3. Describe how the increasing use of medical marijuana is impacting employer/employee relationships especially in regard to insurance claims.
4. Explain the concept of Associational Discrimination as covered under the Americans with Disabilities Act



Self-Assessment Question 1

- 1) The use of “Sophisticated Means” when committing a crime will lead to an increased sentence for the perpetrator. All of the following would be considered “Sophisticated Means” EXCEPT:
- A. Creating offshore accounts to funnel money
 - B. Asking a friend to help you commit a crime
 - C. Creating corporate shells
 - D. Employing a reverse distributor to avoid insurance audits



Self-Assessment Question 2

- 2) In Tennessee, a pharmacist could utilize the Seller Shield in which type of claim?
- A. Tennessee Health Care Liability case
 - B. Tennessee Products Liability case
 - C. Both A. and B. are correct
 - D. None of the above are correct



Self-Assessment Question 3

- 3) In the *Hager v. M&K Construction* medical marijuana case, the New Jersey court determined that:
- A. There is a conflict between the Controlled Substances Act and the New Jersey Compassionate Use Medical Marijuana Act
 - B. As part of a Workers Compensation claim, an employer must provide medical marijuana if prescribed for that patient
 - C. Reimbursing a workers compensation patient for the purchase of medical marijuana does not violate any state or federal laws
 - D. Both B. and C. are correct



Self-Assessment Question 4

- 4) Under the Americans with Disabilities Act, all of the following are true regarding associational discrimination EXCEPT:
- A. The ADA prohibits discrimination based on an employee's known relationship with a disabled person
 - B. The employee himself/herself must be disabled
 - C. The employer is not required to make accommodations for an employee to care for a disabled person, but it cannot hold the employee to a higher standard due to the association with a disabled person
 - D. All of the above are correct



Sophisticated Means

United States of America, Plaintiff-Appellee

v.

Ileana Rodriguez, Defendant-Appellant

No. 19-10095 Non-Argument Calendar

United States Court of Appeals, Eleventh Circuit

Florida

2020

What is the Sophisticated Means test and what effect does it have on sentencing?



Sophisticated Means

The Parties:

- Plaintiff, United States of America, Dept of Justice
- Defendant, Ileana Rodriguez – Pharmacy Technician, Owner of Aqua Pharma, and employee of Caribbean Pharmacy, Inc.

Questions:

- What is meant by the term Sophisticated Means?
- What impact does it have on sentencing for a crime?
- Did Rodriguez's conduct constitute Sophisticated Means?



Sophisticated Means

Discussion:

- Sophisticated Means – “Especially complex or especially intricate conduct pertaining to the execution or concealment of an offense”.
- Hiding assets or transactions
- Using fictitious entities
- Corporate shells
- Offshore financial accounts
- Rodriguez’s conduct
 - Paying patients and recruiters for fraudulent prescription referrals
 - Submitting claims to Medicare for drugs that were never dispensed
 - Selling the drugs to a reverse distributor to deceive insurance company audits

Held:

- Defendant’s conduct employed Sophisticated Means; her 121-month sentence stands



Proper Patient Counseling & the “Seller Shield”

Charles Huddleston Heaton, Jr., et al.

v.

Catherine L. Mathes, et al.

No. E2019-00493-COA-R9-CV

Court of Appeals of Tennessee, at Knoxville

Tennessee

2020

How do proper patient counseling, failure to warn, and the seller shield influence a health care liability claim?



Proper Patient Counseling & the “Seller Shield”

The Parties:

- Plaintiffs, Charles Huddleston Heaton, Jr. and Miki Heaton
- Defendants, Dr. Catherine Mathes, Cigna Home Delivery Pharmacy, Tel-Drug, Inc., Tel-Drug of Pennsylvania, LLC, and David Scott Dessender

Questions:

- This case is an appeal from the Circuit Court of Knox County
- What is the Seller Shield?
- Does the Seller Shield protect a pharmacist when a plaintiff files a health care liability claim?



Proper Patient Counseling & the “Seller Shield”

Discussion:

- “Seller Shield” – codified in the Tennessee Products Liability Act; provides that a products liability action cannot be maintained against a product's seller, other than the manufacturer, except in certain enumerated circumstances
- CHDP defendants argued they had no duty to warn the patient other than those provided by the manufacturer, so there should be no health care liability claim
- Interplay between TPLA and THCLA with the Seller Shield only applying to TPLA

Held:

- Affirm trial court’s denial of the CHDP defendants motion to dismiss. Costs of the appeal are borne by CHDP defendants.



Medical Marijuana

Vincent Hager, Petitioner-Respondent/Cross-Appellant,

v.

M&K CONSTRUCTION, Respondent-Appellant/Cross-Respondent

Docket No. A-0102-18T3

Superior Court of New Jersey, Appellate Division

New Jersey

2020

Must an employer pay for a patient's medical marijuana as part of a Worker's Compensation claim?



Medical Marijuana

The Parties:

- Plaintiffs, Vincent Hager (former employee of M&K Construction)
- Defendants, M&K Construction

Questions:

- Can a workers' compensation judge order an employer to reimburse its employee for the employee's use of medical marijuana prescribed for chronic pain following a work-related accident.
- Is there a conflict between the Controlled Substances Act and the New Jersey Compassionate Use Medical Marijuana Act?



Medical Marijuana

Discussion:

- M&K contends that it will violate the CSA if pays for medical marijuana because it will aid and abet Hager's possession of an illegal controlled substance
- NJ MMA – “Compassion dictates that a distinction be made between medical and non-medical uses of cannabis. Hence, the purpose of this act is to protect from arrest, prosecution, property forfeiture, and criminal and other penalties, those patients who use cannabis to alleviate suffering from qualifying medical conditions, as well as their health care practitioners, designated caregivers, institutional caregivers, and those who are authorized to produce cannabis for medical purposes”

Held: “Because we conclude the order does not require M&K to possess, manufacture or distribute marijuana, but only to reimburse petitioner for his purchase of medical marijuana, we discern no conflict between the CSA and MMA. Furthermore, M&K's compliance with the order does not establish the specific intent element of an aiding and abetting offense under federal law...Therefore, it is not excluded under the MMA from reimbursing the costs of medical marijuana.”



Discrimination and Civil Conspiracy

Rose Ann Karam, Plaintiff

v.

University of Arizona, et. al., Defendants

No. CV-18-00455-TUC-RCC

United States District Court, D. Arizona

Arizona

2019

Do the plaintiff's claims of defamation, discrimination, civil conspiracy, intentional infliction of emotional distress, retaliation, and hostile work environment rise to the level of an actionable offense?



Discrimination and Civil Conspiracy

The Parties:

- Plaintiff: Rose Ann Karam, pharmacy student at Univ. of Arizona
- Defendants: United States Air Force, Veterans Administration Health Care System, Univ. of Arizona Board of Regents, Banner Health, and Genoa Health

Questions:

- What is Civil Conspiracy?
- What are the elements of a Civil Conspiracy cause of action?
- Can Karam prove any of her claims?



Discrimination and Civil Conspiracy

Discussion:

- Conspiracy "requires that two or more individuals agree and thereupon accomplish `an underlying tort which the alleged conspirators agree to commit.'"
- Likewise, civil conspiracy under 42 U.S.C. § 1985(c) requires "the existence of a conspiracy to deprive the plaintiff of the equal protection of the laws; an act in furtherance of the conspiracy; and a resulting injury."
- The fact that staff members at both the VA and Davis Monthan avoided her, would not make eye contact, changed her assignments, and at times made snide remarks does not support her claim of civil conspiracy

Held:

- There are no facts that could lead a reasonable jury to conclude that Federal Defendants worked together or with others to discriminate against her or to commit a tort against her.



Associational Discrimination

Cynthia Fisher, Plaintiff

v.

Frontline National, Defendant

Docket No. 1:18-cv-00193-MOC-WCM

United States District Court, W.D. North Carolina, Asheville District

North Carolina

2019

Can a claim for discrimination under the Americans with Disabilities Act be based on “associational discrimination”?



Associational Discrimination

The Parties:

- Plaintiffs, Cynthia Fisher (pharmacist seeking employment with the Army)
- Defendants, Frontline National (Contractor)

Questions:

- What is Associational Discrimination?
- Can it give rise to a discrimination claim under the ADA?
- Has the plaintiff met the burden of proof necessary for the case to move forward?



Associational Discrimination

Discussion:

- In addition to protecting employees from discrimination based on the employee's own disability, the ADA also has an "association" provision that protects employees from discrimination based on their known relationship or association with a disabled person. This association provision applies regardless of whether the employee themselves is disabled.
- While the ADA does provide protection for those discriminated against based on their association with a person who is disabled or is perceived to be disabled, it does not provide protection for association with persons who simply have criminal records.
- Plaintiff does not, however, allege that her mother was disabled or, most importantly, that defendant either knew or perceived her mother as disabled

Held:

- Plaintiff's claims and proposed amendments are fatally defective and cannot be cured by further amendment, making dismissal with prejudice appropriate.



Discussion Case (Mt Carmel Hospital)

- ICU physician accused of murdering 25 of his patients by giving high doses of pain medication.
- All were end of life patients removed from life support at family's request; all received at least 500mcg. of fentanyl with some doses as high as 2,000mcg.
- Pharmacy and nursing personnel allowed these high doses to be prepared and administered
- Nearly two dozen nurses and the pharmacy management team were fired.
- In at least 24 cases someone manually overrode the automated medication dispensing systems to obtain the large doses.
- No hospital system in place to limit the dosing of fentanyl, just "informal parameters"
- 35 lawsuits have been filed, 10 settled for around \$13.5M, 25 still pending
- 9 of the fired nurses and 1 pharmacist have brought a suit against the hospital for wrongful termination



When Opportunity Knocks...

United States, Plaintiff

v.

Staley, Defendant

Docket No. 3:20-mj-1407-JBL

United States District Court, S.D. California

California

2020

COVID-19 Treatment Packs



When Opportunity Knocks...

The Parties:

- Plaintiffs, United States DOJ
- Defendants, Jennings Ryan Staley, MD – operator of Skinny Beach Med Spa

Questions:

- Does the marketing of a “COVID-19 Treatment Pack” constitute fraud?
- Claims to be a “100% cure” and “render customers immune to the virus for at least six weeks”
- Contains hydroxychloroquine, azithromycin, and “anti-anxiety treatments”
- Charges \$3,995 for a family of four and ships them using US Postal Service



When Opportunity Knocks...

Discussion:

- Undercover agent was told the medication was “a magic bullet”
- “Preventative and curative. It’s hard to believe. It’s almost too good to be true. But it’s a remarkable clinical phenomenon”.
- Physician was obtaining hydroxychloroquine powder from China (labeled as sweet potato extract) and making his own gelatin caps
- Offered to sell undercover agent alprazolam

Held:

- Physician charged with fraudulent marketing, arraigned, released on \$45,000 bail, travel restricted, and no contact with any of his victims...



Self-Assessment Question 1

- 1) The use of “Sophisticated Means” when committing a crime will lead to an increased sentence for the perpetrator. All of the following would be considered “Sophisticated Means” EXCEPT:
- A. Creating offshore accounts to funnel money
 - B. Asking a friend to help you commit a crime
 - C. Creating corporate shells
 - D. Employing a reverse distributor to avoid insurance audits



Self-Assessment Question 2

- 2) In Tennessee, a pharmacist could utilize the Seller Shield in which type of claim?
- A. Tennessee Health Care Liability case
 - B. Tennessee Products Liability Case
 - C. Both A. and B. are correct
 - D. None of the above are correct



Self-Assessment Question 3

- 3) In the *Hager v. M&K Construction* medical marijuana case, the New Jersey court determined that:
- A. There is a conflict between the Controlled Substances Act and the New Jersey Compassionate Use Medical Marijuana Act
 - B. As part of a Workers Compensation claim, an employer must provide medical marijuana if prescribed for that patient
 - C. Reimbursing a workers compensation patient for the purchase of medical marijuana does not violate any state or federal laws
 - D. Both B. and C. are correct



Self-Assessment Question 4

- 4) Under the Americans with Disabilities Act, all of the following are true regarding associational discrimination EXCEPT:
- A. The ADA prohibits discrimination based on an employee's known relationship with a disabled person
 - B. **The employee himself/herself must be disabled**
 - C. The employer is not required to make accommodations for an employee to care for a disabled person, but it cannot hold the employee to a higher standard due to the association with a disabled person
 - D. All of the above are correct



Closing Remarks

And so, I leave you with this...

"I don't think you can make a lawyer honest by an act of legislature. You've got to work on his conscience. And his lack of conscience is what makes him a lawyer."

—Will Rogers

Col(ret) David W. Bobb, RPh, MS, JD

PharmLaw Solutions, LLC

Phone: 210-284-8287, E-Mail: david.bobb@comcast.net



Attendance Code

To obtain CPE credit for this activity, you are required to actively participate in this session. You will need this attendance code in order to access the evaluation and CPE form for this activity. Your CPE must be filed by **14 October 2020** in order to receive credit.