Medical Marijuana – A Landlord's Peril

by Terence P. Carney

A prospective tenant applies to rent a vacant unit from you. Everything on the application looks good. A credit check comes back favorable. You are all set to enter into a lease agreement. Just before signing, the applicant advises you that he has a medical condition that requires his using marijuana to relieve his pain. He produces for you a valid medical certificate signed off by a licensed physician. Do you have to accommodate this "disability" and rent him the unit?

A long-time tenant comes to you and advises that he has been dealing with chronic pain for years. The tenant has been good, consistently paying his rent on time and causing no problems or disturbances. The tenant recently obtained a medical certificate allowing him to smoke marijuana to deal with his chronic pain. You are concerned that if you allow this that other tenants will become aware of his smoking marijuana and will either also begin smoking marijuana on the property or complain that his smoking marijuana is creating a danger and nuisance at the property. Can you evict the tenant if he decides to smoke marijuana on the premises?

The question posed by these two scenarios is whether California requires a landlord to rent or to continue to rent to a tenant knowing the tenant will smoke marijuana on the premises as a result of having obtained certification from a licensed physician justifying its use. Under California's Compassionate Use Act of 1996, a person who uses marijuana for medical purposes on a physician's recommendations is immune from certain state criminal charges. Furthermore, a landlord under the Fair Employment and Housing Act cannot discriminate in renting property based on a disability and must, in most circumstances, provide a reasonable accommodation to a tenant for a known disability. In contrast, however, federal law continues to prohibit the possession or use of marijuana, making it illegal. Additionally, most leases state the premises are to be drug-free and/or non-smoking.

A tenant will claim that a landlord's failure to allow the use of medically-approved marijuana on the premises in a reasonable manner violates his rights under the Fair Employment and Housing Act because marijuana usage has been deemed legal by California upon the express recommendation of a physician. The state law does not, however, completely legalize marijuana. Federal law supersedes any state law. Marijuana usage under federal law is still illegal, though under the Obama Administration, not being prosecuted.

While there has been no specific California case that has ruled on this precise issue, the California Supreme Court has ruled that California employers do not have to accommodate an employee's disability by allowing them to use medical marijuana at home. The California Supreme Court held that medical marijuana usage is not a fundamental right or a public policy of California that will be enforced in the employment arena. Furthermore, the California Fair Employment and Housing Act does not require an employer to accommodate an employee for their medical marijuana usage.

Based on this decision, as it stands now, there is no legal basis for a tenant to demand a medical marijuana usage accommodation from a landlord. A landlord is well within their right to refuse to rent to someone based on this or to serve an existing tenant with a 3-day Notice to Perform or Quit for violating any anti-drug or non-smoking provision in the lease agreement. The question does remain what if the landlord feels compassion for an individual with chronic pain who has received the appropriate medical clearance. A landlord should be well advised that marijuana is still a controlled substance under federal law. A landlord should be well aware that marijuana is being cultivated on the property could be subject to having property seized by the federal government under civil forfeiture statutes. Even local ordinances could come down on the landlord if cultivation was prohibited under a local ordinance. A landlord should also be very wary of giving any consent, whether in writing or oral, to medical marijuana usage for fear of other tenants making such requests. Finally, a landlord might open himself up for complaints from other tenants that such usage was creating a nuisance and in violation of the property's rules and regulations.

In short, under existing law, a landlord does not have to accommodate a tenant's medical marijuana usage, even if that tenant has complied with the Compassionate Use Act. Although a landlord may be sympathetic to tenant's medical marijuana usage, in the long run it would be better to withhold such consent for fear of opening up additional problems.

No specific case has the same set of facts or potential perils. If this issue presents itself to a landlord, it is highly recommended that the landlord consult with an attorney prior to making a definitive decision. For now, however, there is no California case or statute requiring that a landlord provide this accommodation to a tenant.

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