

# Experts see trends favoring cannabis patients in workplace discrimination cases

Did you miss the New Jersey Supreme Court oral arguments last week on a workplace discrimination case involving a medical marijuana patient?

If you did and want to watch them for yourself, click [here](#).

Otherwise, NJ Cannabis Insider will break it down for you, with some educated guesses from legal experts on the likely outcome.

You may recall the facts from issue 63 from Biachi Law attorney [David Bruno's analysis](#) or when I wrote about it in [Issue 76](#), cancer patient Justin Wild who lost his job as director of the Feeney Funeral Home in Ridgewood in 2016. Wild did not tell his employer he had enrolled in the state's medicinal marijuana program until after he was taken to the hospital following a car wreck. (Wild was not under the influence at the time of the accident, nor was the accident his fault.)

His employer required he undergo a pee test and he failed, as expected. Terminated from his job, Wild sued under the state's law against discrimination.

A lower court dismissed Wild's lawsuit, saying the Compassionate Use Medical Marijuana Act that created the medical marijuana program in 2010 did not provide any workplace protections for registered patients.

Then last spring, an Appellate Court reversed the decision, writing that the state's law against discrimination protected Wild because his cancer classified him as a disabled person. And his [doctor lawfully recommended Wild use medical marijuana](#) for the pain.

"It would be ironic indeed if the Compassionate Use Act limited the Law Against Discrimination to permit an employer's termination of a cancer patient's employment by discriminating without compassion," Appellate Court Judge Clarkson Fisher Jr. wrote.

Feeney's parent company, Carriage Funeral Holdings, appealed the appellate ruling to the state's highest court, which held oral arguments Feb. 4. Steven J. Luckner, attorney for Carriage Holdings, argued his client did not discriminate against Wild because of his illness. They fired him for ingesting a drug that remains illegal under federal law.

"Does he have to choose between taking something that could relieve his pain and is legitimately permitted in the state against being fired for having it in his system?" Justice Walter Timpone asked.

"It's a choice — whether it's a Hobson's choice or not — it's still a choice. Obviously there are other medicines he can take that are not illegal," Luckner replied.

"But this isn't illegal," Timpone said. "It's medical marijuana and its approved by the Legislature."

Justice Barry Albin noted the funeral home did not accuse Wild of being impaired on the job.

"He took it at home and it did not adversely affect his ability in any way," Albin said. "Why isn't there a legitimate claim that your client discriminated against the plaintiff based upon his disability, cancer?"

Luckner disagreed with the premise of Albin's question. "You are conflating the treatment with the disability. He was terminated for the marijuana. I don't think you can take those two and lump them together."

"He tested positive for an illegal drug," Luckner added. "The jurisprudence in this state for decades has been if an employee tests positive for an illegal substance, the employer could fire or decline to hire."

It's important to note that since the appellate division ruling last spring, Gov. Phil Murphy signed the Jake Honig Compassionate Use Medicinal Marijuana Act. Registered patients now have workplace protections under the new law enacted in July.

The state Supreme Court has the latitude to consider the impact of the new law, even though it wasn't in effect when Wild lost his job, said **Kenneth Rosenberg**, a partner at Fox Rothschild in Morristown who counsels businesses on compliance with workplace laws.

“Instinct tells me the Supreme Court will find employers have an obligation to accommodate medical marijuana patients under the state Law Against Discrimination and the Jake Honig amendment,” Rosenberg said.

These protections are not absolute, Rosenberg said. Federal contractors won't be obligated to make accommodations for employees who can't pass a drug test because marijuana is still illegal under federal law. Employees won't be permitted to come to work under the influence, particularly if they are in a “safety-sensitive” line of work, like train conductors, forklift operators or medical professionals, he added.

**Maxine “Mickey” Neuhauser**, an employment lawyer for Epstein Becker Green in Newark, also said she likes Wild's chances here.

“The courts in New Jersey are disinclined to dismiss cases before there has been any discovery on the merits,” she said. “Right now, it's a pure legal question of whether an employee who uses medical marijuana can be discharged because using marijuana is a federal offense. That is the only question before the court.”

Between the appellate ruling, the passage of the Jake Honig law and the track record of the state's Workers Compensation program of paying for medical cannabis for patients injured on the job, Neuhauser said she sees a “trend” that favors patients.

“I can see the court saying the only issue here is state law.”

If the court upholds the appellate decision, Wild's case can proceed to trial.

— *Susan K. Livio* / *NJ.com*

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