Landlords and Marihuana

by Dan Magee, Class of ’11

Note: This article was written in spring 2011, before the more recent cases and other legal developments on the Michigan Medical Marihuana Act.

On November 4, 2008, Michigan voters approved the Michigan Medical Marihuana Act (“MMMA”). Several questions arise in the wake of this law concerning the rights of landlords who may be renting to tenants who have marihuana use cards and tenants who may be licensed to grow marihuana as “caregivers.” The “FAQ” section of the Michigan Department of Community Health’s (“MDCH”) website lists several questions regarding tenants’ rights, but the MDCH’s answer is essentially that the MMMA is silent on these issues and further advice should be sought from an attorney. This article attempts to address two of the basic questions concerning landlord-tenant rights in regard to the MMMA.

1. Can landlords prohibit any use of marihuana on leased premises?

In 1968, Congress passed the Fair Housing Act (“FHA”) as part of the much broader Civil Rights Act. 42 U.S.C. § 3601. The FHA of 1968 prohibited discrimination of a tenant for the tenant’s inclusion in a protected class. Id. While disability was not one of the enumerated protected classes in 1968, Congress amended the FHA in 1988 by adding “disability” to the list of protected classes. Congress defines a “disability” as “a physical or mental impairment which substantially limits one or more of a person’s major life activities.” 42 U.S.C. § 3602. According to the Supreme Court of the United States, determining which

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impairments constitute disabilities must proceed on a case-by-case basis and depends on how the specific impairment affects the individual in question. *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999) (quoting *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 473 (1999)). Thus, the same impairment may be a “disability” for some people, but not others.

The answer to the question thus turns on two sub-issues: a) whether people who use marihuana for medical purposes are “disabled,” and b) whether leases prohibiting the legal use of marihuana as treatment would be discrimination on the basis of this disability.

(a) Section three of the MMMA (MCL 333.26423) states that to be eligible for a medical marihuana card, patients must suffer from a debilitating medical condition, which means one or more of the following: cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, Crohn’s disease, agitation of Alzheimer’s disease, nail patella...cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including but not limited to those characteristic of epilepsy; or severe and persistent muscle spasms, including but not limited to those characteristic of multiple sclerosis.

Whether these impairments would be considered “disabilities” under the FHA would depend on how significantly they affected each individual person’s life. For example, while cancer would surely inhibit several, if not all, major life activities in its most advanced stages, an early form of cancer may have little affect on a person’s ability to perform major life activities. Thus, there is no broad answer as to whether these impairments would qualify as disabilities.

(b) The FHA does not absolutely prohibit denying disabled persons the ability to rent from a given landlord, it merely prohibits rejection on the basis of that disability. Accordingly, a potential tenant who was denied a lease for her legal use of marihuana would have to prove that she was discriminated against because of her disability. However, to allow a landlord to discriminate on the basis of a tenant’s treatment while prohibiting the landlord from discriminating on the basis of the tenant’s underlying impairment seems highly paradoxical and would completely undercut the effectiveness of the FHA.

To conclude, some qualifying impairments under the MMMA would be “disabilities” under the FHA while others would not. Differentiating between what would qualify as a disability may depend on the stage of the impairment. Because determining whether someone has a “disability” proceeds on a case-by-case basis and may change depending on the stage of the tenant’s impairment, landlords run the risk of violating the FHA with a lease provision that prohibits any use of marihuana on the premises. Landlords who do not want their tenants using marihuana in the leasehold would have to evaluate each prospective tenant’s impairment before the tenant signed the lease, and

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would have to constantly re-evaluate the tenant’s condition if it was the type that could progressively worsen.

2. Can landlords prohibit licensed caregivers from growing marihuana on leased premises?

In addition to issuing licenses to marihuana users, the MDCH distributes licenses for caregivers to grow marihuana for marihuana users. Some caregivers also have a prescription and license to use marihuana. At first, it may seem that landlords would be allowed to prohibit tenants who are solely caregivers, and not licensed users, from growing marihuana on leased premises because they are not disabled. However, the FHA states “it shall be unlawful...[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of...any person associated with that buyer or renter.” 42 U.S.C. § 3604 (f)(1) (limited in by Missouri case law on other grounds). As of this writing, very few courts have addressed this provision. The few cases that do interpret this provision mostly involve familial or romantic relationships. If forced to litigate the issue, the landlord would have to convince the trier that a lease provision prohibiting growing marihuana was not discrimination based on the caregiver’s connection to a disabled person. As before, there does not seem to be a definitive answer as to whether such an argument would hold up in court. A plain reading of § 3604 broadly suggests such discrimination would be unlawful.

To conclude, landlords who want to prevent the use or growth of marihuana in their premises by licensed users or caregivers essentially have two options. First, avoid any risk of litigation by allowing the legal use and growth of medical marihuana on their premises. Second, evaluate the circumstances of each potential tenant to determine whether the user or caregiver would qualify for protection under the FHA and take the risk of persuading a judge or jury at trial of the merits of their conclusion.

(Footnotes)

1 http://www.michigan.gov/mdch/0,1607,7-132-27417_51869-,00.html.
2 http://www.michigan.gov/mdch/0,1607,7-132-27417_51869_52140-,00.html.