

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D22-375

SAMUEL E. VELEZ ORTIZ,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Appellee.

On appeal from the Public Employees Relations Commission.
Donna Poole, Chair.

June 21, 2023

ROBERTS, J.

This case comes to us on appeal after the Public Employees Relations Commission (PERC) affirmed Samuel Velez Ortiz's dismissal by his employer, the Florida Department of Corrections (the Department). The Department terminated Mr. Velez Ortiz after he tested positive for marijuana metabolites. Based on the nature of Mr. Velez Ortiz's job and the law, we affirm.

In May 2021, the Department asked Mr. Velez Ortiz to submit to a random drug test. Mr. Velez Ortiz complied. Upon being told that he had tested positive for marijuana, Mr. Velez Ortiz presented his Florida issued qualifying patient identification card. Because the Department had a strict policy against all marijuana use, which included medicinal marijuana, the Department notified

Mr. Velez Ortiz that it was terminating his employment.¹ Mr. Velez Ortiz requested a hearing and argued that he could not be terminated because he had a constitutional right to use medicinal marijuana when he was not working and that he had never worked while he was impaired. The hearing officer and PERC found the Department had the authority to terminate Mr. Velez Ortiz.

During oral argument, Mr. Velez Ortiz, through counsel, agreed that as a correctional officer, he was required to attend basic recruit training, which included firearms training, qualifying with a firearm once a year, access to firearms, and if it became necessary, such as during a prison riot, issuance of a firearm by the Department. These requirements are codified in Florida law. §§ 943.13(9), 943.13(11), 943.135(1), 943.17(1), Fla. Stat.; Fla. Admin. Code R. 11B-35.0021(1)(a). The law also requires all correctional officers to possess good moral character. § 943.13(4), (7), Fla. Stat. To possess good moral character, a correctional officer cannot engage in any activity that could give rise to a felony conviction even if he is never charged with the offense. Fla. Admin. Code R. 11B-27.0011(4)(a). These requirements lead us to believe Mr. Velez Ortiz cannot use medicinal marijuana and maintain his certification as a correctional officer even if Article X, section 29 of the Florida Constitution extends as far as he contends.²

Federal law makes it a felony for certain “prohibited persons” to possess a firearm. 18 U.S.C. § 924(a)(8) (2022). Among the activities that would cause someone to be classified as a prohibited

¹ The Department gave Mr. Velez Ortiz, along with two other employees who had used medicinal marijuana and tested positive for marijuana metabolites, the option of returning to work after he abstained from using marijuana for thirty days and obtained a note from his treating physician stating that he was no longer under the influence of medicinal marijuana. Unlike his coworkers, Mr. Velez Ortiz rejected this offer.

² We do not decide the extent of a qualified patient’s right to use medicinal marijuana. We only decide whether Mr. Velez Ortiz has a right to use medicinal marijuana while being employed as a correctional officer.

person is the unlawful use of a controlled substance under the Controlled Substances Act, 21 United States Code section 802. 18 U.S.C. § 992(g)(3). Marijuana is a schedule I drug under the Controlled Substances Act. 21 U.S.C. § 812(c)(10). Under the Act, Schedule I drugs are deemed to have “no medicinal purpose for treatment in the United States, have a high potential for abuse, and lack acceptable safety measures even when used under proper medical supervision.” 21 U.S.C. § 812(b)(1). Therefore, under the Act, there are no valid prescriptions for marijuana. Because marijuana may not be validly prescribed under federal law, mere possession of marijuana is a felony under federal law. *Gonzales v. Raich*, 545 U.S. 1, 14 (2005). Accordingly, the use of marijuana by a person who is in possession of a firearm is unlawful. The law does not require the use of marijuana to be contemporaneous to the possession of a firearm. *United States v. Banks*, 43 F.4th 912, 917 (8th Cir. 2022). It requires the unlawful use to have occurred recently enough to indicate that the individual is actively engaged in such conduct or that the person has used the drug for an extended period. *United States v. Carnes*, 22 F.4th 743 (8th Cir. 2022); *United States v. Tanco-Baez*, 942 F.3d 7, 15 (1st Cir. 2019); *United States v. Bowens*, 938 F.3d 790, 793 (6th Cir. 2019).

Because Mr. Velez Ortiz uses medicinal marijuana to treat his posttraumatic stress disorder, he is a regular user of marijuana. Although he can legally possess and use medicinal marijuana under state law, his use of it is illegal under federal law. Accordingly, he cannot lawfully possess a firearm. Each time he does, he is committing a felony. And each year, he is required to possess a firearm to qualify. As a result, he is violating his requirement to maintain good moral character, which is required to keep his correctional officer certification.

Because Mr. Velez Ortiz could not perform an important requirement of the job of corrections officer, training with and using firearms, without being in violation of federal law and causing other agency personnel to be in violation of federal law, his termination was lawful.

AFFIRMED.

RAY and M.K. THOMAS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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