

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES EDWARD BARBER JR.,

Plaintiff,

V.

ALBERTO GONZALES, as United States Attorney General, et al.,

Defendants.

NO. CV-05-0173-EFS

ORDER DENYING PLAINTIFF'S MOTION
FOR RECONSIDERATION AND MOTION FOR
DISTINCTION FROM GONZALES V. RAICH

Before the Court is Plaintiff James Edward Barber Jr.'s Motion for Reconsideration and Motion for Distinction from *Gonzales v. Raich*, (Ct. Rec. 8). Previously, the Court entered an Order Dismissing Case, (Ct. Rec. 6), finding Plaintiff failed to state a federal cause of action in light of *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).¹ Plaintiff seeks

¹ The Supreme Court in *Gonzalez* held Congress' Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana, even if such cultivation and use was in compliance with California's Compassionate Use Act of 1996, because the use, growing, and sale of marijuana is an activity that substantially affects interstate commerce and Congress preempted the regulation of marijuana when it enacted the Controlled Substances Act ("CSA").

ORDER-- 1

1 relief from the judgment, apparently under Federal Rule of Civil
2 Procedure 60(b)(6), contending his case is distinguishable from *Gonzales*
3 because he is alleging Defendants' actions, while arguably consistent
4 with the provisions of the Controlled Substances Act, are unlawful under
5 the Americans with Disabilities Act. Plaintiff asserts Congress
6 intended to limit the application of the Controlled Substances Act to
7 non-disabled individuals who engage in unlawful use of drugs and, thus,
8 Congress intended the Americans with Disabilities Act to protect
9 individuals utilizing drugs for medical purposes. After reviewing
10 Plaintiff's motion, the Americans with Disabilities Act, and the
11 Controlled Substances Act, the Court concludes dismissal was proper and
12 denies Plaintiff's motion.

13 The Americans with Disabilities Act ("ADA") provides protections
14 for qualified individuals with a disability. 42 U.S.C. § 12101 *et seq.*
15 However, the ADA specifically provides: "the term 'individual with a
16 disability' does not include an individual who is currently engaging in
17 the illegal use of drugs, when the covered entity acts on the basis of
18 such use." 42 U.S.C. § 12210(a). The term "illegal use of drugs" is
19 defined as:

20 the use of drugs, the possession or distribution of which is
21 unlawful under the Controlled Substances Act [21 U.S.C.A. §
22 801 *et seq.*]. Such term does not include the use of a drug
23 taken under supervision by a licensed health care
24 professional, or other uses authorized by the Controlled
25 Substances Act [21 U.S.C.A. § 801 *et seq.*] or other provisions
26 of Federal law.

27 42 U.S.C. § 12210(d)(1) (*emphasis added*). In turn, "drug" is defined as
28 "a controlled substance, as defined in schedules I through V of section

1 202 of the Controlled Substances Act [21 U.S.C.A. § 812]." *Id.* at
2 (d) (2).

3 At first glance, § 12210(d)(1) appears to support Mr. Barber's
4 position that he had a right under the ADA to possess medical marijuana
5 if prescribed by a Washington physician. However, the structure of the
6 second sentence of § 12210(d)(1) requires the use of the drug taken
7 under the supervision of a licensed health care professional be
8 consistent with the Controlled Substances Act. The sentence reads "[the
9 term illegal use of drugs] does not include the use of a drug taken
10 under supervision by a licensed health care professional, or other uses
11 authorized by the Controlled Substances Act or other provisions of
12 Federal law." *Id.* at 12210(d)(1) (citations omitted) (emphasis added).
13 Accordingly, the physician-supervised drug use must be an authorized
14 drug use under the Controlled Substances Act or other provisions of
15 Federal law. In other words, it is immaterial whether such drug use is
16 authorized by state law.

17 The Controlled Substances Act does not allow for medical marijuana
18 use unless under a strictly regulated research program. 21 U.S.C. §§
19 822-23, 844(a), & 872; see *Seeley v. Wash.*, 132 Wash. 2d 776, 782-83
20 (1997) (discussing the federal registration requirements for marijuana).
21 Mr. Barber did not assert he was participating in such a program, but
22 rather merely that he had a prescription, lawful under Washington law,
23 to possess and use marijuana for medical purposes. Section 829 of Title
24 21 specifies under which circumstances prescriptions may be dispensed
25 for Schedule II-V controlled substances. However, it does not pertain
26 to marijuana, a Schedule I controlled substance. 21 U.S.C. §§
27

1 812(c)(c)(10) & 829. For these reasons, the Court finds Mr. Barber's
2 use of marijuana was an "illegal use of drugs" as defined by the ADA
3 and, thus, the Defendants did not violate the ADA when they took action
4 against Mr. Barber on the basis of his marijuana use, regardless of
5 whether Washington law allowed such use. In addition, the purpose of
6 the ADA is not to expand the scope of permissible drug use, but rather
7 to eliminate the discrimination against individuals with disabilities
8 who lawfully utilize prescription medicines in connection with their
9 disability. 42 U.S.C. § 12101(b). Accordingly, given that Mr. Barber
10 admits he was actively using marijuana when the Defendants took the
11 alleged action against him, a federal claim under the ADA does not exist
12 because the term "individual with a disability" does not include an
13 individual who is currently engaging in the illegal use of drugs, when
14 the covered entity acted on the basis of such use.

15 For the reasons given above, **IT IS HEREBY ORDERED:** Plaintiff's
16 Motion for Reconsideration and Motion for Distinction from *Gonzales v.*
17 *Raich*, (Ct. Rec. 8), is **DENIED**.

18 **IT IS SO ORDERED.** The District Court Executive is directed to
19 enter this Order and forward a copy to Plaintiff.

20 **DATED** this 1st day of July, 2005.
21

22 S/ Edward F. Shea
23 EDWARD F. SHEA
24 UNITED STATES DISTRICT JUDGE

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