

Management Alert



Massachusetts Supreme Judicial Court Rules That Employers May Need To Accommodate Off-Duty Medical Marijuana Use

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Seyfarth Synopsis: On July 17, 2017, the Massachusetts Supreme Judicial Court held that an employer could be liable under the Massachusetts Anti-Discrimination Act for disability discrimination by declining employment based on an individual's off-duty medical marijuana use. This landmark decision runs contrary to the majority of courts in other states that have considered similar questions, given that marijuana continues to be an illegal drug under federal law. Massachusetts employers with drug testing programs and drug-free workplace policies will need to reassess their policies and consider reasonably accommodating individuals' off-duty medical marijuana use as a result of this decision.

Marijuana use and possession are illegal under federal law. Like heroin, marijuana is a Schedule I substance under the Controlled Substances Act, meaning it has no accepted medical use and it has a high potential for abuse. Doctors cannot lawfully prescribe marijuana to patients under federal law. Notwithstanding, on July 17, 2017, the Massachusetts Supreme Judicial Court (SJC) held that employers may have to allow employees to engage in off-duty use of marijuana for medical purposes. In *Barbuto v. Advantage Sales and Marketing*, the SJC reasoned that tolerating off-duty medical marijuana use may be a "reasonable accommodation" of a disability under the Massachusetts anti-discrimination statute.

Cristina Barbuto, a woman diagnosed with Crohn's disease and Irritable Bowel Syndrome, accepted an offer for an office job with Advantage Sales and Marketing. According to Barbuto's complaint, the company sent her for a drug test. Barbuto told the company that she would test positive for marijuana because she uses it to treat her loss of appetite due to her medical conditions. She noted that she would never use marijuana during or before work. A supervisor responded that Barbuto's marijuana use "should not be a problem." After Barbuto completed her first day of work, however, the company terminated her employment for testing positive for marijuana, stating "we follow federal law, not state law." Among other things, Barbuto's complaint alleges that the company (1) discriminated against her on the basis of her disability in violation of the Massachusetts Fair Employment Practices Law ("Anti-Discrimination Law"); (2) violated the Massachusetts law that authorizes qualified individuals to use marijuana for medical reasons, An Act for the Humanitarian Medical Use of Marijuana ("Medical Marijuana Act"); and (3) terminated her employment in violation of public policy.

The company moved to dismiss Barbuto's claims. It argued that Barbuto's discrimination claims must fail because she was not a "qualified" handicapped person. The company maintained that the only accommodation Barbuto requested--use of marijuana--is a federal crime, and therefore was facially unreasonable. The company also argued that it terminated her employment not because of her handicap but rather because she failed a drug test that all employees must pass. Regarding Barbuto's Medical Marijuana Act claim, the company argued that the law does not provide a private right of action, and that it merely decriminalizes medical marijuana use. Relying on similar logic, the company argued that Barbuto's public policy claim must fail. It asserted that the Medical Marijuana Act expresses no clear public policy that would forbid an employer from terminating an employee. The trial court agreed with the company and dismissed these claims.

The SJC disagreed with the trial court's conclusion that employers need not tolerate medical marijuana use as a reasonable accommodation under the Anti-Discrimination Law. The SJC held that marijuana's illegality under federal law does not make it per se unreasonable to allow its off-duty medical use as an accommodation under the Massachusetts Anti-Discrimination Law. According to the SJC, the "only person at risk of Federal criminal prosecution for her possession of medical marijuana is the employee." An employer has no risk of criminal prosecution by permitting off-duty use of medical marijuana, which many states deem to have an accepted use in treating certain medical conditions. The SJC also concluded that, even if accommodating medical marijuana use were facially unreasonable, "the employer here still owed the plaintiff an obligation under [the Anti-Discrimination Law], before it terminated her employment, to participate in the interactive process to explore with her whether there was an alternative, equally effective medication she could use." Indeed, the SJC held that the failure to explore alternative accommodations alone is enough to support a handicap discrimination claim.

The SJC also rejected the company's attempt to rely on its neutral drug testing policy. The SJC reasoned that "where a handicapped employee needs medication to alleviate or manage the medical condition that renders her handicapped, and the employer fires her because company policy prohibits the use of this medication, the law does not ignore the fact that the policy resulted in a person being denied employment because of her handicap." In effect, the SJC refused to distinguish between *Barbuto's* disabilities and the treatment for the loss of appetite that she experiences because of them.

Notably, the SJC limited its ruling. It held--consistent with the language in the Medical Marijuana Act--that employers have no obligation to accommodate on-the-job use of marijuana. The SJC also observed that its ruling "does not necessarily mean that the employee will prevail in proving handicap discrimination." The SJC stated that the company could present evidence at summary judgment or trial to show that *Barbuto's* use of medical marijuana would impose an undue hardship. As examples, the SJC mentioned that an employer could prove that medical marijuana use would impair an employee's performance, create an "unacceptably significant" safety risk, or violate the employer's "contractual or statutory obligations." The SJC also noted that the recent legalization of marijuana for recreational purposes in Massachusetts was irrelevant to the issues on appeal.

The SJC agreed with the trial court's conclusions that (1) there is no private right of action under the Medical Marijuana Act, and (2) the Medical Marijuana Act does not give rise to a public policy claim. The SJC reasoned that while the Medical Marijuana Act decriminalizes medical marijuana use, it is silent concerning whether an individual can sue an employer under the Act. The Massachusetts Legislature was aware of its ability to create a private right of action, but it did not do so. The SJC further held that it would not recognize a public policy claim given the statutory action available under the Anti-Discrimination Law.

The *Barbuto* decision departs from federal law regarding disability discrimination and the decisions from most courts in other states that have addressed similar claims. Employers need not tolerate off-duty use of medical marijuana as an accommodation under the Americans with Disabilities Act ("ADA"). Under the ADA, an individual who uses illegal drugs is not a "qualified" disabled person because marijuana is illegal under the federal Controlled Substances Act, as noted above. Relying on this rationale, at least in part, courts in other states have ruled largely in favor of employers. In *Barbuto*, the SJC interpreted Massachusetts law to reach a different conclusion.

Because of the *Barbuto* decision, employers should audit their drug testing, hiring, and accommodation policies. At a minimum, Massachusetts employers should engage in the interactive process before taking adverse action based on an applicant or employee failing, or making it known that he or she will fail, a drug test due to off-duty medical marijuana use. Proactive employers may be able to avoid exposure and should consult with counsel before taking action.

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