Massachusetts Medical Marijuana Users Can Sue For Failure to Accommodate a Disability

By Robert N. Dare / Aug 03, 2017

In *Barbuto v. Advantage Sales and Marketing* (ASM), the Massachusetts Supreme Judicial Court recently ruled that employees can sue employers for failure to accommodate a disability if they are terminated or otherwise disciplined for using prescribed medical marijuana outside working hours.

ASM hired Cristina Barbuto in late summer 2014. ASM required new employees to take a drug test. Barbuto informed ASM that she would test positive for marijuana because her physician prescribed marijuana to treat her Crohn's disease. She claimed that she was a qualifying medical marijuana patient under Massachusetts' medical marijuana law. Barbuto tested positive for marijuana on the drug test. After completing her first day of work, ASM terminated Barbuto for the positive drug test.

Barbuto filed a six-count complaint in Massachusetts state court. Barbuto claimed three separate counts of handicap discrimination under Massachusetts' law, denial of the "right or privilege" to use marijuana under Massachusetts' medical marijuana act, violation of public policy and invasion of privacy. The lower court dismissed Barbuto's handicapped claims finding that her request for accommodation, using medical marijuana outside of work, was "per se unreasonable." The court also dismissed her medical marijuana act and public policy claims for failure to state causes of action. Barbuto appealed.

Reversing the lower court, the Massachusetts Supreme Judicial Court observed that under the state's medical marijuana act, the use and possession of medically prescribed marijuana by a qualifying patient are as lawful as the use and possession of any other prescribed medication. Accordingly, the court explained, "where, in the opinion of the employee's physician, medical marijuana is the most effective medication for the employee's debilitating medical condition, and where any alternative medication whose use would be permitted by the employer's drug policy would be less effective, an exception to an employer's drug policy to permit its use is a facially reasonable accommodation." The court added that ASM would have the opportunity to show that Barbuto's use of medical marijuana was not a reasonable accommodation because it would impose an undue hardship on ASM's business.

The court also affirmed the lower court's dismissal of the claim that Barbuto's termination violated Massachusetts' medical marijuana statute. The court held that the statute did not create a cause of action for employees who are prescribed marijuana by their doctor.

This case is particularly significant because it is the first court decision in the country where a court held that an employer may have to accommodate an employee's off work use of medically prescribed marijuana under a state's disability anti-discrimination statute. Other courts, that have addressed this issue, have found that their states' medical marijuana statutes do not support a finding that allowing the use of prescribed medical marijuana outside of work is a reasonable accommodation to an employee's disability. These courts rely on the wording contained in the states' medical marijuana statute and the fact that marijuana is still a Schedule I controlled substance under federal law.

Employers should ensure that they are familiar with their state's medical marijuana statutes:

- *Arizona*. Employers can prohibit an employee's use of or being under the influence of marijuana while in the workplace. "Unless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, terminating or imposing any terms or conditions of employment or impose any term or condition of employment or otherwise penalize a person based on either the person's status as a cardholder or registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment."
- *California*. Its medical marijuana law does not require an employer to accommodate the use of medical marijuana.
- *Delaware*. Its statute provides that an employer may not discriminate against a person in hiring, termination, or any other term or condition of employment, or otherwise penalize a person, if the discrimination is based upon the person's status as a registered qualified medical marijuana user, or registered qualified user's positive drug test for marijuana, unless the employee used, possessed, or was impaired at work.
- *Michigan*. The employer is not required to accommodate an employee's disability by allowing the use of prescribed marijuana outside of work.
- *Nevada*. Its medical marijuana law requires employers to attempt "to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana if the employee holds a valid registry identification card, provided that such reasonable accommodation would not (a) pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or (b) prohibit the employee from fulfilling any and all of his or her job responsibilities."
- *New Jersey*. Its law states that employers need not accommodate marijuana use in the workplace, but is silent on off-duty medical use.
- *Pennsylvania*. Its law prohibits employers from discriminating against employees because of their status as medical marijuana cardholders, but only addresses the implications of a positive drug test for a limited set of safety-sensitive job duties.
- *West Virginia*. The employer is not required to accommodate an employee's disability by allowing the use of prescribed marijuana outside of work.

Given the unsettled state of the law regarding medical marijuana, we recommend that where an employer is asked to accommodate an employee whose doctor has prescribed marijuana to treat a medical condition, the employer should consult with counsel to determine what its state's medical marijuana statute and anti-discrimination statute mandate. In light of *Barbuto*, employers outside of Massachusetts should continue to pay close attention to any interpretations or developments related to their state's medical marijuana laws. As previously noted, the Massachusetts court is alone in their decision, but

medical marijuana, and specifically its employment-related implications, is an emerging and evolving area of law.

If you have any questions about your employment-related obligations under medical marijuana laws, please contact Rob Dare at (313) 965-8816 | rdare@clarkhill.com, or another member of the Clark Hill's Labor and Employment Law practice group.