Even Without New Reform Legislation, New Jersey Employers May Have to Accommodate Medical Marijuana Use

By Vanessa M. Kelly / Apr 08, 2019

New Jersey employers may have to accommodate employees who are treating with medical marijuana. In *Wild v. Carriage Funeral Home*, a panel of New Jersey’s Appellate Judges held that simply because New Jersey’s Compassionate Use of Marijuana Act does not mandate accommodation, employers may still have accommodation obligations imposed by other law, including New Jersey’s broad Law Against Discrimination (LAD). This decision departs from two New Jersey federal court cases holding the opposite. It also serves as a wake-up call to employers who thought the accommodation issue was settled until amended legislation is enacted changing the law. Recent pending changes to the Compassionate Use Act and new legislation permitting recreational marijuana did not pass. But, as *Wild* has revealed, the failed legislation might not be the death knell of a requirement to accommodate an employee’s off-duty medical marijuana use.

In *Wild*, an employee appealed from the dismissal of his claims under the LAD arising from his employment termination. After a work-related motor vehicle accident, where he was found not at fault, he disclosed to the medical team treating him in the Emergency Room that he had a license to possess medical marijuana to alleviate the side effects of cancer treatment. The physician treating him in the ER determined that he was not under the influence, but did not order a blood test. His employer would not permit him to return to work without post-accident blood work. *Wild* acquiesced and was tested later that evening.

*Wild* was subsequently terminated. His supervisor told him the lab tests showed he had drugs in his system. Corporate later advised him in a letter that he was terminated because he failed to disclose the use of medical marijuana that may have had an impact on his ability to perform his duties and as such, according to policy, *Wild* should have disclosed the use.

*Wild* sued claiming that his employer discriminated against him on the basis of his disability, cancer, and that it refused to accommodate his off-duty use of medical marijuana as part of his treatment regime. Relying upon language in the Compassionate Use statute that “nothing” in the Act “requires” an employer to accommodate a medical marijuana user, the trial court dismissed the LAD claims as failing to state a viable claim. In overturning this decision, Presiding Judge of the Appellate Division Clarkson Fisher, Jr. wrote: “It would be ironic indeed if the Compassionate Use Act limited the Law Against Discrimination to permit an employer’s termination of a cancer patient’s employment by discriminating without compassion.”

The Appellate Court reconciled the “no requirement” language in the Compassionate Use Act with the LAD. It held that the Compassionate Use Act was not met to create new rights, or displace existing employment rights. There was no indication that the Compassionate Use Act meant to amend the LAD as it pertained to the use of medical marijuana. As such, the Appellate Court overruled the dismissal of the complaint and the case has been remanded back to the trial court where it will proceed and Plaintiff will have an opportunity to show he suffered discrimination.

*Wild v. Carriage Funeral Home* is an unpublished decision and did not address the ultimate test of whether there was discrimination or a failure to accommodate the medical marijuana use. However, this decision indicates that New Jersey’s judiciary may view the use of medical marijuana as something that “may” need to be accommodated. Recent cases in other states show similar philosophical leanings. In Arizona, a federal court found Walmart’s dismissal of an employee who tested positive for the presence of marijuana metabolites as wrongful where the employee used medical marijuana off-duty. Another federal court in Connecticut found that withdrawing an offer to an applicant who tested positive for marijuana violated the state’s discrimination laws. That employee used medical marijuana off duty for post-traumatic stress. In Massachusetts, employers are required by statute to accommodate the medical use of marijuana.

Amidst this changing judicial and legislative backdrop, New Jersey employers are well advised to tread carefully when seeking to discharge an employee for similar use.

If you have questions or would like more information, please contact Vanessa Kelly (vkelly@clarkhill.com, (609) 785-2926) or any member of our Labor & Employment group.