Accommodating Medical Marijuana Users: A National Trend?

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Marijuana is a Schedule I drug under the federal Controlled Substances Act, and the use, sale and possession of marijuana remains illegal under federal law. In recent years, however, a majority of states (at last count, 29 states and Washington, D.C.) have passed measures that decriminalize medical or recreational marijuana use for state law purposes. In these jurisdictions, employers are now struggling to reconcile traditional zero-tolerance employee drug policies, based on federal standards, with the new reality of state-sanctioned marijuana use.

A new decision from Massachusetts' highest court addresses this tension. In Barbuto v. Advantage Sales and Marketing LLC, the Massachusetts Supreme Judicial Court concluded that the commonwealth's general anti-discrimination law requires Massachusetts employers to reasonably accommodate their employees' off-site use of medically prescribed marijuana, and prohibits Massachusetts employers from terminating employees solely because they use medical marijuana outside the workplace. Barbuto is the first state supreme court decision, in any jurisdiction, to apply general disability anti-discrimination protections to medical marijuana users.

The Barbuto decision, and recent, similar precedent from other jurisdictions, may indicate a judicial trend that provides greater workplace protections to marijuana users. This represents a new, potential compliance benchmark for employers with respect to workplace safety policies.

The Barbuto Decision: Background

In late summer 2014, Advantage Sales and Marketing (ASM) hired Cristina Barbuto for an entry-level sales and marketing position. In connection with the on-boarding of her employment, ASM informed Barbuto that it was committed to a drug-free workplace, and that she would be subject to a mandatory drug test. In response, Barbuto indicated that she was likely to fail the required drug test. She explained that she suffered from Crohn's disease; that her physician had provided her with a written certification that allowed her to use marijuana for medicinal purposes; and that, as a result, she was a qualified medical marijuana patient under the Massachusetts Medical Marijuana Act. She added that she did not use marijuana daily, and would not consume it before work or at work. ASM, however, declined to waive the drug test requirement for Barbuto.

In September 2014, Barbuto submitted to ASM's mandatory drug test, and tested positive for marijuana. As a result of the positive test, and consistent with its drug-free workplace policy, ASM terminated Barbuto's employment.

Thereafter, Barbuto filed a wrongful termination lawsuit against ASM, alleging various common law and statutory claims. Among those claims, Barbuto alleged that ASM had engaged in disability discrimination in violation of M.G.L. ch. 151B. Specifically, Barbuto alleged that ASM had failed to "reasonably accommodate" her Crohn's disease, and her prescribed off-duty use of marijuana as a treatment for that illness, when ASM refused to modify its drug testing requirement and terminated her employment.

In defense to Barbuto's claims, ASM argued that Barbuto did not qualify for anti-discrimination protection under Massachusetts law because her requested disability accommodation — an allowance to use medical marijuana — violated federal law, and therefore was per se unreasonable. Based on that reasoning, ASM argued that Barbuto's failure-to-accommodate claim was invalid, and subject to immediate dismissal without a trial. The Supreme Judicial Court rejected ASM's defense, concluding:

- "A qualified handicapped employee has a right under [M.G.L. 151B], not to be fired because of her handicap, and that right includes the right to require an employer to make a reasonable accommodation for her handicap to enable her to perform the essential functions of her job."
- "Under Massachusetts law, as a result of the [Medical Marijuana Act], the use and possession of medically prescribed marijuana by a qualifying patient is as lawful as the use and possession of any other prescribed medication. 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."
- "To declare an accommodation for medical marijuana to be per se unreasonable out of respect for Federal law would not be respectful of the recognition of Massachusetts voters, shared by the legislatures or voters in the vast majority of States, that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions."

Based on these conclusions, the Supreme Judicial Court ruled that Barbuto's off-site medical marijuana use did not per se disqualify her from protection under M.G.L. ch.151B. The court then remanded the case to the trial court to determine whether the specific fact circumstances of Barbuto's termination violated M.G.L. ch. 151B's reasonable accommodation standards.

Impact on Massachusetts Employers

The Barbuto decision provides Massachusetts employers with several directives with respect to medical marijuana use and the workplace:

- Massachusetts employers may not adopt blanket "zero tolerance" prohibitions on employee use of medical marijuana. Rather, employers must reasonably accommodate an employee's use of medical marijuana, when that use is: (a) off-site; and (b) medically certified as necessary for the employee to perform the functions of his or her job.
- Massachusetts employers need not accommodate every use of medical marijuana. As emphasized by the Supreme Judicial Court, M.G.L. ch. 151B imposes a reasonable accommodation standard. As such, a Massachusetts employer is not required to accommodate an employee's medical marijuana use if such use would "impose an undue hardship on [the employers' businesses]." As outlined in Barbuto, Massachusetts law does not require accommodation of an employee's medical marijuana use if such use "would impair the employee's performance of her work or pose an 'unacceptably significant' safety risk to the public, the employee, or her fellow employees … Alternatively, an undue hardship might be shown if the employer can prove that the use of marijuana by an employee would violate an employer's contractual or statutory obligation, and thereby jeopardize its ability to perform its business." For example, and as noted by the Supreme Judicial Court, the Barbuto decision does not require a Massachusetts employer to accommodate an employee's medical marijuana use, if such accommodation would violate federal U.S. Department of Transportation regulations that prohibit marijuana use by certain defined "safety-sensitive" employees.
- Massachusetts employers may not terminate or discipline employees solely because of their off-site medical marijuana use. A Massachusetts employer may not subject an employee to an adverse employment action because of that employee's off-site medical marijuana use, unless the use imposes an actual and undue hardship on that employer's business.
- Massachusetts employers may restrict on-site use of medical marijuana. The Barbuto decision stresses that the Medical Marijuana Act does not require "any accommodation of any on-site medical use of marijuana in any place of employment."
- Massachusetts employers are not (yet) required to accommodate off-site, recreational use of marijuana. The reasonable accommodation standards stated in Barbuto apply exclusively to medical marijuana use, outside the workplace. Barbuto does not discuss, or apply to, employer policies that prohibit employee use of recreational marijuana. That said, in Barbuto, the Supreme Judicial Court indicates a deference to the voter initiatives that have legalized the general use and possession of marijuana in Massachusetts.

These statements may indicate a future direction of judicial precedent that is inclined to limit employer policies that restrict employee use of recreational marijuana outside the workplace.

A National Trend?

Until recently, precedent suggested that employers were generally authorized to adopt zero-tolerance marijuana policies, and to discipline employees for on-site or off-site use, even in jurisdictions that had legalized medical or recreational use of marijuana. For example, prior to 2017, state supreme courts in Colorado and Washington state (two jurisdictions that have legalized both medical and recreational marijuana use) both dismissed complaints brought by medical marijuana users who had been terminated from their jobs for failing drug tests.

In May 2017, a Rhode Island superior court reversed this trend. In Callaghan v. Darlington Fabrics and the Moore Company, the court broadly interpreted Rhode Island's medical marijuana law to prohibit discrimination against medical marijuana users on the basis of their out-of-workplace medical marijuana use. This decision, coupled with Barbuto may indicate a thawing of past judicial reluctance to extend job protection rights to marijuana users.

How traditional employment laws interact with new marijuana use laws is a rapidly evolving area. In light of this emerging precedent, employers that do business in "legalized marijuana" jurisdictions are prudent to re-evaluate their drug-testing policies, and carefully consider employee accommodation requests related to medical marijuana use.

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