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Massachusetts Supreme Judicial Court Rules Medical Marijuana User May Assert Disability Discrimination Claim

On July 17, 2017, the Massachusetts Supreme Judicial Court, in *Barbuto v. Advantage Sales and Marketing*, ruled that an employee fired for a positive drug test due to her lawful use of medical marijuana may assert a claim for disability discrimination under the Massachusetts employment discrimination statute. As described in a previous *GT Alert* “[What Does the Massachusetts Medical Marijuana Act Mean for Employers?](#),” Massachusetts law permits individuals with “debilitating medical conditions” to use medical marijuana (the Massachusetts Medical Marijuana Act).

The court’s opinion is significant as it is the first time an appellate court in any jurisdiction has allowed medical marijuana users to assert a state law disability discrimination claim. This decision will impact how employers in Massachusetts utilize drug testing when making hiring and discipline decisions.

Case Background

In the *Barbuto* case, an employee who suffered from Crohn’s disease lawfully used marijuana pursuant to a certification from her physician. After the employee was offered a job, she tested positive for marijuana. A human resources representative informed the employee that the company follows “federal law, not state law” and terminated the employee based on the positive drug test result. The employee filed suit in Massachusetts state court alleging, among other claims, violations of the Massachusetts disability law. The trial court allowed the employer’s motion to dismiss on the disability discrimination claim.

On appeal, the Supreme Judicial Court held that the employee had a civil remedy against her employer through a claim of handicap discrimination under the Massachusetts discrimination statute. The court grounded its holding in the language of the Massachusetts Medical Marijuana Act which declares that patients shall not be denied “any right

or privilege” on the basis of their medical marijuana use. And, according to the court, a handicapped employee in Massachusetts has a “right or privilege” to a reasonable accommodation. The court stated:

Where, as here, the company’s policy prohibiting any use of marijuana is applied against a handicapped employee who is being treated with marijuana by a licensed physician for her medical condition, the termination of the employee for violating that policy effectively denies a handicapped employee the opportunity of a reasonable accommodation, and therefore is appropriately recognized as handicap discrimination.

Federal Law Concerns

Notwithstanding state recreational and medical marijuana laws, marijuana is still classified as an illegal Schedule I drug under a federal law known as the Controlled Substances Act. The court in *Barbuto* acknowledged the “unusual” fact that “a qualifying patient in Massachusetts who has been lawfully prescribed marijuana remains potentially subject to Federal criminal prosecution.” However, according to the court, the federal illegality does not make use of medical marijuana unreasonable as an accommodation, as the only person at risk of criminal prosecution is the employee and not the employer. Moreover, according to the court, 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 legislatures or voters in the vast majority of States, that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions.”

Undue Hardship

The court’s decision recognizes that an employer may still offer evidence to show that an individual’s use of medical marijuana is not a reasonable accommodation because it would impose an undue hardship. An employer might prove an undue hardship where the use of medical marijuana 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, according to the court, an undue hardship might be established if the employer can prove that the use of marijuana by an employee would violate statutory or contractual obligations. The court specifically recognized that certain transportation employers are subject to regulations promulgated by the United States Department of Transportation that subject safety-sensitive employees to drug testing requirements, including testing for marijuana. The court also noted that federal contractors and recipients of federal grants are obligated to comply with the Drug Free Workplace Act.

Next Steps for Massachusetts Employers

Despite the *Barbuto* decision, Massachusetts employers are under no obligation to allow the use of medical marijuana in the workplace nor must they tolerate an employee coming to work while impaired. In addition, employers are not required to grant an accommodation of on-site use of medical marijuana in any place of employment.

In light of the *Barbuto* decision, Massachusetts employers should, however, consider reviewing and revising drug testing policies and procedures. In addition, employers should exercise caution in rejecting applicants or disciplining employees for a positive marijuana drug test where the individual is legally authorized to use medical marijuana.

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