

## HEALTH LAW

## Expert Analysis

# Medical Marijuana and Employment Discrimination

The jurisprudence that is developing in the wake of the legalization of medical marijuana by so many states is producing some very interesting court decisions addressing significant issues of first impression. In many of these cases, courts are faced with the continuing tension between state statutes legalizing marijuana for medical purposes, and federal laws that continue to criminalize its possession or use. A recent decision from the Supreme Judicial Court of Massachusetts points up some of these complexities. *Barbuto v. Advantage Sales & Marketing*, \_\_\_ N.E.3d \_\_\_, 2017 WL 3015716, Index No. SJC-12226, Supreme Judicial Court of Massachusetts, July 17, 2017.

### Background

Christine Barbuto applied for and was offered an entry-level position with Advantage Sales & Marketing, Inc. (ASM) in 2014. As part of the hiring process, she was told that she had to submit to a

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drug test. She informed the individual at ASM who would be her supervisor that she had Crohn's disease, a serious gastrointestinal condition, combined with irritable bowel syndrome, and that these had resulted in a serious weight loss problem. She disclosed to her prospective supervisor that her physician had certified her for medical marijuana under the 2012 Massachusetts law (Massachusetts St. 2012, ch. 369) that legalized medical marijuana, and that as a result, she had regained some weight. Ms. Barbuto also stated that she did not take her prescription marijuana on a daily basis and would not take it either before work or while on the job. The supervisor made inquiries within ASM and later informed Ms. Barbuto that her use of medical marijuana would not be an issue with ASM.

On Sept. 5, 2014 Ms. Barbuto submitted a urine sample as part of the drug test. On September 11, she

attended an ASM training program, was given a uniform and assigned a supermarket where she would promote ASM's products to customers. The next day, she completed her first full day of work. She did not use her medical marijuana at work and was not in an intoxicated state. That evening she received a call from a representative of ASM's Human Resources Department informing her that her employment was being terminated because she had tested positive for marijuana. She was told by the representative that at ASM "we follow federal law, not state law."

### Lawsuit

After filing and then withdrawing a charge of discrimination with the Massachusetts Commission Against Discrimination, Ms. Barbuto filed a lawsuit in Superior Court against ASM and the company's human resources representative. Her claims under state law included handicap discrimination, interference with her right to be protected from handicap discrimination, invasion of privacy, denial of the "right or privilege" to use medical marijuana lawfully under the state's medical marijuana

law, and violation of public policy by terminating her for her lawful use of medical marijuana.

After ASM unsuccessfully attempted to remove the case to federal court, it moved to dismiss the complaint in Superior Court. The court dismissed all counts except the invasion of privacy claim. Ms. Barbuto appealed to Massachusetts' highest court, the Supreme Judicial Court (SJC), which accepted her application for direct appellate review. In a unanimous decision, the SJC affirmed the dismissal of the counts in her complaint claiming an implied private cause of action under the state's medical marijuana law, and wrongful termination in violation of public policy, but reversed the dismissal of her claims for handicap discrimination.

The SJC first reviewed the state's handicap discrimination law (Massachusetts General Laws Ch. 151B, §4(16)), which makes it an unlawful practice to terminate or refuse to hire a person who claims to be a qualified handicapped person capable of performing the essential functions of the job with reasonable accommodation, unless the employer can demonstrate that the accommodation required would impose an undue hardship on the employer's business. The court noted that the state's medical marijuana law specifically characterized Crohn's disease as a "debilitating medical condition" for which a patient can be certified for medical marijuana use by a physician. The court concluded that Ms. Barbuto's medical

conditions, combined with her difficulty in maintaining a healthy weight, qualified her as a handicapped person.

ASM had argued that the accommodation Ms. Barbuto had sought, i.e., her continued use of medical marijuana, was facially unreasonable because marijuana use of any kind is still classified as a federal crime. ASM also argued that even if Ms. Barbuto qualified as a handicapped person, her employment was terminated because she failed

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a drug test that all employees are required to pass, not because of her handicap.

The court rejected these arguments:

...when an employee is handicapped because she suffers from a debilitating medical condition that can be alleviated or managed with medication, one generally would expect an employer not to interfere with the employee taking such medication, or to terminate her if she took it. If the employer, however, had a drug policy prohibiting the use of such medication, even where lawfully prescribed by a physician, the employer would have a

duty to engage in an interactive process with the employee to determine whether there were equally effective medical alternatives to the prescribed medication whose use would not be in violation of the policy.

The court continued:

Where no equally effective alternative exists, the employer bears the burden of proving that the employee's use of the medication would cause an undue hardship to the employer's business in order to justify the employer's refusal to make an exception to the drug policy reasonably to accommodate the medical needs of the handicapped employee.

The court noted that, under the Massachusetts medical marijuana law, 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. Accordingly, the court declared:

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 circumnavigated the federal prohibition by pointing out that the only person at risk of

criminal prosecution for possession of medical marijuana was the plaintiff, and that ASM would not be in joint possession of medical marijuana or aid and abet her possession simply by permitting her to continue her use of the drug off-site. Thus, the court reasoned, her possession of medical marijuana in violation of federal law did not make it per se unreasonable as an accommodation. Moreover, the court noted that nearly 90 percent of the states have enacted medical marijuana laws, thereby acknowledging that the substance, where lawfully prescribed by a physician, has a currently accepted medical use in the treatment of certain medical conditions.

The court did concede that an accommodation may not be necessary in all cases. It pointed out that, at trial, an employer might prove that an employee's continued use of medical marijuana would impair the employee's performance of her work or pose an unacceptable significant safety risk to the public, the employee or her fellow employees. The court cited other examples where accommodation would not be required, such as the regulations of the U.S. Department of Transportation that prohibit any safety-sensitive employee subject to mandatory drug testing from using marijuana, and the federal Drug Free Workplace Act that requires federal government contractors and grant recipients to make a good faith effort to maintain a drug free workplace, and prohibits any

employee from using a controlled substance.

Turning to the plaintiff's assertion of a private right of action, the court found that the medical marijuana statute, which was enacted not by the legislature but by a voter initiative, did not include such a provision either in the text of the law or in the "Information for Voters" guide prepared and distributed to regis-

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tered voters by the Office of Secretary of the Commonwealth prior to the vote. The court concluded that the absence of a private cause of action would not render the statute ineffective:

We will not imply a separate private cause of action for aggrieved employees under the medical marijuana act, where such employees are already provided a remedy under our discrimination law, and where doing so would create potential confusion.

The court similarly disposed of the plaintiff's claim of wrongful termination in violation of public policy, citing the availability of the cause of action for handicap discrimination.

### Analysis

The court's decision runs counter to a number of decisions by courts in other states that have legalized medical marijuana. Those decisions

have generally upheld an employer's right to terminate an employee for using marijuana based upon the fact that use or possession of marijuana in any form is still a federal crime.

As to the SJC's decision, it is important to understand that it only requires an employer to make an effort to accommodate an employee's off-site use of medical marijuana. The court left open the possibility that the employer would not have to make such an accommodation if the employer could establish that it would cause "an undue hardship to the employer's business," cause an impairment in the employee's work, or create a safety risk for the employee or other employees. The decision also does not require an accommodation for an employee's use of medical marijuana on-site or while otherwise on the job.

Each state's labor and employment discrimination laws are different, as are the laws of the states that have legalized marijuana for medical or recreational use. New York's medical marijuana law, the Compassionate Care Act (Assembly 6357E, Senate S7923, Laws of 2014), and those of several other states contain specific provisions banning discrimination against certified patients. Employers must be familiar with what they are or are not permitted to do vis-à-vis employees who are properly certified and using prescription marijuana outside of their workplace.