

SJC Issues Important Ruling Concerning Employee Off-Duty Use of Medical Marijuana

On July 17, 2017, the Massachusetts Supreme Judicial Court (SJC), in a precedent-setting decision, ruled that an employer could be liable under the state's anti-discrimination statute for terminating the employment of an employee based on her off-duty use of medical marijuana. The decision is likely to have an immediate impact on public employers' policies concerning drug-testing and off-duty use of medical marijuana.

In Barbuto v. Advantage Sales and Marketing, (SJC-12226), the SJC held that allowing an employee to engage in off-duty medical marijuana use may be a "reasonable accommodation" of a disability under G.L. c. 151B, Massachusetts' anti-discrimination statute. Christine Barbuto, the plaintiff, was offered an entry-level position with the defendant employer. In accordance with the employer's policy, Barbuto was required to take a mandatory pre-employment drug test. Barbuto, who suffered from Crohn's disease, informed the employer that she regularly used medical marijuana and would test positive for that drug. She ensured company officials that she would not consume marijuana before or at work. Even though she was told by a supervisor that her marijuana use would not pose a problem, the company terminated her employment for testing positive for marijuana stating "we follow federal law, not state law."

In response to her firing, Barbuto initially filed a complaint with the Massachusetts Commission Against Discrimination (MCAD) and then subsequently removed her complaint to Superior Court where she alleged that the employer: (1) discriminated against her on the basis of her disability in violation of the state's Anti-Discrimination statute; (2) violated the recently-enacted Medical Marijuana Act; (3) terminated her employment in violation of public policy ("wrongful termination"); and (4) invaded her privacy in violation of G.L. c.214, §1B.

The Superior Court dismissed all of Barbuto's claims except her invasion of privacy claim. However, the SJC reversed the Superior Court's dismissal of Barbuto's discrimination claims, rejecting the defendant employer's argument that Barbuto's requested accommodation, i.e. off-site use of marijuana, was unreasonable because it violated federal law. In so ruling, the SJC reasoned that:

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 SJC also concluded that, even if accommodating medical marijuana use was not reasonable, the employer still owed the plaintiff an obligation, prior to terminating her employment, to participate in an interactive process with her to explore whether there was an alternative, equally effective medication she could use. The Court noted that “where a handicapped employee needs medication to alleviate or manage the medical condition that renders her handicapped, and the employer fires her because company policy prohibits the use of this medication, the law does not ignore the fact that the policy resulted in a person being denied employment because of her handicap.” Although the SJC ruled that Barbuto could proceed on her state handicap discrimination claim, it held that the Medical Marijuana Act (“MMA”) does not provide for a private cause of action and that there was no need to recognize a separate cause of action under the MMA where an adequate remedy, a claim for handicap discrimination, already exists under G.L. c.151B.

Despite overturning the dismissal of the handicap discrimination claim, the SJC emphasized that its ruling does not necessarily mean the employee will prevail in proving handicap discrimination. It stated that the defendant employer could still present evidence that the employee’s use of marijuana would impair her performance, create an “unacceptably significant” safety risk to the public, the employee or to other employees, or cause the employer to be in violation of its “contractual or statutory obligations and thereby jeopardize its ability to perform its business.” Although not applicable to Barbuto’s claims, the Court specifically observed, in apparent reference to this last point, that the U.S. Department of Transportation (DOT) maintains regulations that prohibit certain safety sensitive employees subject to DOT drug testing requirements from using marijuana. Thus, while the SJC allowed Barbuto’s handicap discrimination claim to proceed, it noted that the employer retained the ability to argue that allowing the employee’s requested accommodation to use medical marijuana while off-duty would pose an undue hardship on the employer’s business.

The SJC also noted that the recent legalization of marijuana for recreational purposes in Massachusetts was irrelevant to the issues on appeal.

Thus, the key takeaways from this decision are:

- 1) prior to taking employment action in response to an employee’s off-duty use of medical marijuana, employers must engage in an interactive process with the employee regarding such use;

2) allowing employees to engage in off-duty use of medical marijuana is considered a reasonable accommodation under the state anti-discrimination law, G.L. c.151B; and

3) employers may defend against a discrimination claim by arguing that off-duty use of medical marijuana would impose an undue hardship in that it would:

- (a) impair the employee's performance,
- (b) create an unacceptably significant safety risk to the public; the employee or to other employees; or
- (c) cause the company to be in violation of its contractual or statutory obligations, including DOT regulations, and thereby jeopardize its ability to perform its business.

If you have any questions concerning this decision or employees' off-duty use of medical marijuana in general, we encourage you to contact any member of the firm's Labor and Employment Practice Group at 617.556.0007.

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