States Diverge on Employment Law Protections for Medical Marijuana Users

Several courts have held that employees are not protected from termination or other adverse employment action for medical marijuana use, even in cases where they hold a medical marijuana card under state law, when they test positive in violation of their employer's drug policies.[i] Generally, those courts hold that, because marijuana use remains illegal under federal law, reliance upon state law permitting marijuana use does not protect the employee from adverse action.

But the tide may be turning. In a recent opinion handed down by the Massachusetts Supreme Court, *Barbuto v. Advantage Sales and Marketing, LLC*,[ii] the court held that employees may sue for disability discrimination when the employee constitutes a "qualified handicapped person," and suffers an adverse employment action even though they can perform the essential functions of their position with some form of accommodation. The key, according to the *Barbuto* court, is whether the accommodation (here, the use of medical marijuana) is facially reasonable.[iii] In other words, employers may be required to permit medical marijuana use as permitted by state law as a reasonable accommodation.[iv] Rejecting the rationale of the cases cited above (i.e., "it's illegal under federal law, so employers need not permit it"), the *Barbuto* court reasoned: "The fact that the employee's possession of medical marijuana is in violation of federal law does not make it per se unreasonable as an accommodation . . . The only person at risk of federal criminal prosecution for her possession of medical marijuana is the employee. An employer would not be in joint possession of medical marijuana or aid and abet its possession simply by permitting an employee to continue his or her off-site use."[v] While the court in *Barbuto* gave the plaintiff the green light to proceed with her disability discrimination claims, it rejected her claim that the Massachusetts medical marijuana statute created a private right of action for wrongful termination, and it did not opine on the merits of her particular case.

So what was the court's basis for departing from the general rule that employers can terminate employees who test positive for marijuana? The answer lies, at least in part, in the language of the 2012 Massachusetts voter-approved measure legalizing medical marijuana. That measure provides that medical marijuana patients may not be denied "any right or privilege" on the basis of their use of medical marijuana. Further, the court reasoned, in Massachusetts, disabled employees have a statutory "right or privilege" to reasonable accommodation. Therefore, employers cannot deny reasonable accommodation to employees based solely on their use of medical marijuana, and must participate in the interactive process when a physician concludes that "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 . . . ."[vi]

Some states, such as Arkansas, Connecticut, Delaware, Nevada, Maine, Minnesota, New York, Pennsylvania and Rhode Island, have included similar employee protections in their marijuana laws. Conversely, several other states have specified that employees are granted no employment-related protections, and many others are silent on the issue.[vii]

In Maine, which has incorporated both employee protections and employer protections into its medical and recreational marijuana laws, the state Department of Labor has recently taken the position that employers should stop testing employees and applicants for marijuana altogether.[viii] Maine's Marijuana Legalization Act specifies that employers are not required to accommodate the use or possession of marijuana in the workplace and are permitted to enact workplace policies restricting the use of marijuana by employees and punish those employees who are under the influence of marijuana in the workplace. However, the same Act also prohibits employers' refusal to employ individuals solely on the basis that the individual consumes marijuana outside the employer's property.[ix] The *Barbuto* opinion may have influenced the Department of Labor's stance; the language relied upon by the *Barbuto* court is very similar to that found in Maine's laws. The Maine Department of Labor has advised employers not to take adverse action against employees for failed drug tests, even if the employer has a state-sanctioned drug policy in place, until the courts clarify employers' rights and responsibilities.

There are other indications that some state courts are becoming more protective of employees who use marijuana. For example, in at least two cases, the New Mexico Court of Appeals has reversed workers' compensation judges, ruling that under New Mexico's Compassionate Use Act, medical marijuana can constitute "reasonable and necessary medical care" that must be covered by employers.[x]

What's the takeaway? It is incredibly important how a state's marijuana laws and implementing regulations are crafted; many states are enacting marijuana-permissive laws without fully considering and addressing these types of issues. Employers must ensure that they are up to speed on the rapidly changing panoply of state marijuana laws and their impact on employment issues. And while some state courts are becoming more protective of employees' use of marijuana, most federal courts remain unwilling to protect behavior that remains illegal under federal law. Therefore, employers who may end up litigating these issues should carefully consider the venue in which they will be heard.

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[i] *See, e.g., Coats v. Dish Network, LLC, 350 P.3d 849* (Colo. 2015); *Roe v. TeleTech Customer Care Mgmt.*, 257 P.3d 586, 597 (Wash. 2011); *Emerald Steel Fabs., Inc. v. Bureau of Labor and Indus.,* 230 P.3d 518 (Or. 2010); *Ross v. RagingWire Telecomm's*, 174 P.3d 200 (Cal. 2008).
[ii] No. SJC-12226, 2017WL3015716 (Mass. July 17, 2017)
[iii] *Id*. at *1.
[iv] *Id*. at *5.
[v] *Id*. at *6.
[vi] *Id*. at *5.
[vii] *Compare* COLO. CONST. art. XVIII, § 14(10)(b) ("Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place.") *with Ross v. RagingWire Telecomm's*, 174 P.3d at 203 ("Nothing in the text or history of [California's] Compassionate Use Act suggests the voters intended the measure to address the respective rights and duties of employers and employees.").
[viii] *See* **Extra burden expected in 2018 for Maine employers who test for marijuana**, Portland Press Harold: (July 24, 2017).
[ix] ME. STAT. tit. 7, § 2454(2)-(3).
[x] *See Maez v. Riley Industrial*, 347 P.3d 732 (N.M. Ct. App. 2015) (*citing Vialpando v. Ben's Automotive Svcs*., 331 P.3d 975 (N.M. Ct. App. 2014)); *but see Garcia v. Tractor Supply Co*., 154 F.Supp.3d 1225 (D.N.M. 2016) (finding the federal Controlled Substances Act preempted New Mexico's Compassionate Use Act and Human Rights Act, and thus, employers are not required to accommodate employees' use of medical marijuana).