

Labor and Employment Alert
July 2017

**Massachusetts Supreme Judicial Court Issues
Landmark Ruling on Medical Marijuana in the
Workplace**

In a much anticipated ruling, the Massachusetts Supreme Judicial Court (“SJC”) issued a decision recognizing a potential claim for disability discrimination if an employer terminates or otherwise takes an adverse employment action against an employee who uses lawfully prescribed medicinal marijuana while off-duty. In short, this decision prohibits blanket restrictions on the off-duty use of marijuana and requires employers to engage in an interactive process to determine whether the off-duty use of lawfully prescribed medical marijuana may be a reasonable accommodation under Massachusetts anti-discrimination law, M.G.L. c. 151B.

Brief Overview

In *Barbuto v. Advantage Sales and Marketing, LLC*, the Plaintiff, Christina Barbuto, was offered an entry level position at Advantage Sales and Marketing (“ASM”) and was told that she was required to take a mandatory drug test as an incoming employee. Barbuto told an ASM representative that she would test positive for marijuana because she takes it medicinally, pursuant to the Massachusetts Medicinal Marijuana Act, in connection with her disability, Crohn’s disease. Barbuto did not use marijuana daily and told the employer that she would not use it before work or at work. Barbuto completed her first day of work at ASM but was subsequently told that she was terminated for testing positive for marijuana on her drug test.

Barbuto filed suit under M.G.L. c. 151B, among other causes of action, alleging that ASM failed to provide her a reasonable accommodation (allowing the off-duty use of medicinal marijuana). ASM argued that permitting an exception to its neutral drug policies prohibiting off-duty use of marijuana was “facially unreasonable” because such use violates federal law. The Superior Court ruled in favor of ASM and dismissed the discrimination claim.

The SJC reversed the Superior Court’s decision and held: “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 remanded the case for further proceedings

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Impact and Next Steps for Employers

The *Barbuto* decision affects all employers in Massachusetts. Employers should review their drug testing and hiring policies in light of this decision.

Effectively, the *Barbuto* decision requires employers to treat the use of lawfully prescribed medicinal marijuana like the off-duty use of other medication that is lawfully prescribed. Employers are now required to engage in an interactive process to determine whether the off-duty use of medicinal marijuana is a reasonable accommodation. Consistent with the Massachusetts Medicinal Marijuana Act, this decision does not require employers to permit the on-site use of medicinal marijuana.

Importantly, while the *Barbuto* decision suggests that the off-duty use of medicinal marijuana may be considered a reasonable accommodation for many non-safety sensitive positions, this determination must be made on a case by case basis. In addition, employers do not have to tolerate the off-duty use of medicinal marijuana if they can show that its use would be an “undue hardship” for them, as that term is defined under M.G.L. c. 151B. The SJC specifically noted that it may be an undue hardship if continued use of medicinal marijuana would impair an employee’s performance of her work or pose an “unacceptably significant” safety risk to the public, the employee, or fellow employees. The SJC also noted that it may be considered an undue hardship if allowing such use would violate an employer’s contractual or statutory obligations – for example, Department of Transportation regulations, or, the Drug Free Workplace Act’s requirements for recipients of federal grants.

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