

UPDATE: Massachusetts Medical Marijuana Patient Can Sue Employer for Discrimination

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On Monday, Massachusetts Supreme Judicial Court (“SJC”) issued a decision in [Barbuto v. Advantage Sales and Marketing](#), holding that an employee may sue her employer for handicap discrimination based on her status as a medical marijuana patient.

In *Barbuto*, the plaintiff employee was interviewed for a sales and marketing position, and disclosed that she used medical marijuana as prescribed by her doctor as treatment for Crohn’s disease. She was advised that her lawful use of marijuana would not be an issue, and was hired for the position. Her employment was then terminated after an employer-required drug test came back positive for marijuana. The Employment Law Observer previously reported on the [Superior Court decision](#), where plaintiff’s complaint for discrimination was dismissed for failure to state a claim.

The SJC overturned the Superior Court decision, finding the employee’s use of medical marijuana was not facially unreasonable as an accommodation for her handicap. The Court rejected the employer’s argument that the employee was not a qualified handicapped person because the only accommodation she sought, to continue using marijuana, was a federal crime and therefore facially unreasonable. The Court stated that the fact that the employee’s possession of marijuana is federally illegal does not make it per se unreasonable as an accommodation, because the only person at risk for federal prosecution was the employee. The Court went on to provide that where an employee is handicapped because of a debilitating illness that can be alleviated with medication, one would generally expect the employer not to interfere with the employee’s treatment regimen. If the treatment was prohibited by employer policy, as it was in this case, the employer would still be expected to engage in an interactive process to determine if there were treatment alternatives. If not, the employer would have the burden of showing that the employee’s use of medication imposed an undue hardship.

Similarly, the Court was not persuaded by the employer’s argument that the plaintiff was terminated because she failed to pass a drug test, not because of her handicap. The justices reasoned that where a company policy prohibiting use of marijuana is applied against a handicapped person who is being treated with marijuana for her

medical condition, termination for violating the employer's drug free policy effectively denies the employee the opportunity for reasonable accommodation.

Despite its holding, the Court noted that Massachusetts medical marijuana statute does not require any accommodation for on-site medical use of marijuana in any place of employment, and that the employee's right to pursue her claim did not necessarily mean she would prevail. On summary judgment or at trial, the employer would be able offer evidence that allowing plaintiff's use of medical marijuana imposed an undue hardship on its business, or that the employee's use of marijuana impaired her performance at work, or posed an unacceptably significant risk to the public.

In light of this decision, Massachusetts' employers seeking to enforce drug-free work policies should be aware of their obligation to engage in an interactive process regarding workplace accommodation with handicapped employees treating with medical marijuana. While some federal employers, such as employers subject to the Department of Transportation regulations, federal government contractors, and recipients of federal grants may be exempt from providing reasonable accommodation for medical marijuana use based on their requirement to comply with the federal Drug Free Workplace Act, employers in Massachusetts are unlikely to prevail on a motion to dismiss claims for discrimination in reliance on federal law alone.

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