

## Massachusetts SJC Extends Job Protections to Medical Marijuana Users

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In a landmark decision, the Massachusetts Supreme Judicial Court (“SJC”) ruled on Monday that an employee who is fired for testing positive for marijuana due to her lawful off-duty use of medical marijuana can pursue a claim of handicap discrimination against her former employer. With the ruling, Massachusetts has become the first state to afford such job protections to workers who lawfully use medical marijuana. Moreover, the ruling essentially precludes Massachusetts employers from adopting blanket drug-free workplace policies.

The SJC’s decision in *Barbuto v. Advantage Sales and Marketing, LLC, et al.* stems from the claims of a sales employee who suffers from Crohn’s disease. To treat symptoms associated with her condition, the employee lawfully used medical marijuana several evenings a week pursuant to a written certification from her doctor authorizing the use. Nevertheless, after she tested positive for marijuana on her employer’s mandatory drug test, her employer fired her, citing the fact that marijuana use is illegal under federal law. The plaintiff sued in Superior Court, asserting claims under Massachusetts’ anti-discrimination law (G.L. c. 151B) and the statute authorizing medical marijuana use in Massachusetts (the “Act”), as well as claims for wrongful termination in violation of public policy and invasion of privacy. After the Superior Court dismissed all but her invasion of privacy claim, the plaintiff appealed and the SJC granted direct appellate review.

Reversing the Superior Court, the SJC held that the plaintiff could pursue a claim of handicap discrimination. According to the SJC, where an employee’s doctor determines that medical marijuana is the most effective medication for the employee’s debilitating medical condition, exempting the employee from the employer’s drug policy to permit the employee to use medical marijuana is a facially reasonable accommodation under c. 151B. In so holding, the SJC interpreted the prohibition on depriving a lawful medical marijuana user of any “right or privilege” contained in the Act to include the right to a reasonable accommodation under c. 151B. The SJC noted that this language distinguishes the Massachusetts statute from similar statutes passed in other states where medical marijuana users have not been afforded job protections. Additionally, because the Act states employers do not have to accommodate on-premises medical marijuana use, the SJC reasoned, it implicitly recognizes that permitting off-premises use may be an accommodation employers must make under c. 151B.

The SJC rejected the employer’s argument that accommodating off-duty marijuana use was unreasonable because it violates federal law. According to the SJC, the fact that an employee’s possession of marijuana violates federal law does not make an employer’s accommodation of off-duty marijuana use per se unreasonable. The employee is the one who is violating federal law, and accommodating off-duty use would not require employers to violate the law. Moreover, allowing the federal ban on marijuana to trump state law authorizing medical marijuana use would ignore the will of Massachusetts voters, who approved the use of medical marijuana by an overwhelming margin.

Even if accommodating off-duty medical marijuana use was facially unreasonable, the SJC found the plaintiff would have a claim under c. 151B. Under c. 151B, employers have an obligation to engage in an interactive process to identify a reasonable accommodation for a handicapped employee. Here, the employer had failed to fulfill this obligation by terminating the employee without engaging with the plaintiff to explore alternative medical treatments that would not violate their drug policy.

Despite its holding, the SJC was careful to point out that employers are not required to accommodate off-duty medical marijuana use in all situations. As with any accommodation, employers are not required to tolerate off-duty use if doing so would impose an undue hardship on the employer’s business. The SJC recognized, for example, that the accommodation may pose undue hardship where the accommodation would result in impaired employee performance, an unacceptably significant safety risk, or the violation of an employer’s contractual or statutory obligation. Also, the SJC recognized that the subsequent legalization of recreational use of marijuana in

Massachusetts had no impact on its decision, as the case concerned medical marijuana use, which was already legal when Massachusetts voters approved the legalization of recreational marijuana.

The SJC upheld the dismissal of the employee's other claims. The SJC refused to imply a private right of action under the Act where employees had a remedy under c. 151B. Similarly, the SJC passed on the opportunity to recognize a separate cause of action for wrongful termination in violation of public policy where an employee is terminated for her lawful medical marijuana use because the employee already has a cause of action for handicap discrimination.

With the *Barbuto* case, Massachusetts has become the first state to recognize job protections for users of medical marijuana. Prior to the ruling, many assumed that the federal prohibition on marijuana use permitted employers to ban employees from using marijuana even in their off-hours, particularly in the absence of express language in the Act protecting users. The *Barbuto* decision essentially precludes Massachusetts employers from maintaining blanket drug-free workplace policies. For employers who drug test employees, this means that they can no longer refuse to hire applicants or terminate employees simply because they test positive for marijuana. If an employee is lawfully using medical marijuana while off-duty, employers must engage in an interactive process with the employee to determine whether the employer has obligation to accommodate the use under c. 151B. Moreover, because proving undue hardship is a high burden for employers to meet, employers will be required to accommodate off-duty marijuana use by their employees in many cases.

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