CLIENT ALERTS & INSIGHTS

Medical Marijuana User's Disability Discrimination Claim Survives Employer's Motion to Dismiss in Massachusetts

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In a decision that is the first of its kind, the Supreme Judicial Court of Massachusetts reversed the dismissal of a state law disability discrimination claim arising from an employee's request for a reasonable accommodation in the form of a waiver of the employer's drug policy. (*Barbuto v. Advantage Sales & Mktg.*, LLC, Mass. No. SJC-12226, 2017 Mass LEXIS 504 (July 17, 2017)). This decision is the first time a court has held that state medical marijuana laws protect employees who use medical marijuana as a treatment for a disability, despite the requested accommodation being illegal under federal law. Here, the complaint alleged that the employee's Crohn's disease resulted in her inability to maintain a healthy weight without the use of medical marijuana. The employee was terminated for failing a drug test even though she told the employer of her medical marijuana use. In response to the resulting lawsuit, the employer moved to dismiss by arguing the employee failed to state a claim of handicap discrimination for two reasons: (1) she could not be a "qualified handicapped person" because the accommodation she sought, use of medical marijuana, must be *per se* unreasonable because it is illegal under federal law; and (2) even if she could be a "qualified handicapped person," she was terminated for failing a drug test that all employees must pass, not because she was disabled.

Under Massachusetts state law, the use and possession of medically prescribed marijuana by a qualifying patient is lawful and medical marijuana users are protected from the denial of any right or privilege. Therefore, the court rejected the employer's first argument because "[w]here, 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." *Id.* at *13-14. The employer's second argument was rejected because "even if the accommodation of the use of medical marijuana were facially unreasonable (which it is not), the employer here still owed the plaintiff an obligation under G. L. c. 151B , § 4 (16), before it terminated her employment, to participate in the interactive process to explore with her whether there was an alternative, equally effective medication she could use that was not prohibited by the employer's drug policy." *Id.* at *16. Thus, the employee's claim of handicap discrimination survived a motion to dismiss where the employer terminated her without engaging in the interactive process. As this case progresses on the merits, it remains to be seen if the employee will be able to overcome the employer's anticipated argument that her requested waiver would cause an undue hardship to its business.

This case has potential implications for employers outside of Massachusetts. The Americans with Disabilities Act (ADA) provides that illegal drug use as defined by federal law does not require an

accommodation. Therefore, under federal law, an employer is not required to accommodate a disabled employee using medical marijuana even when the employee's condition falls under the ADA and the employee requests an accommodation in the form of a waiver of the drug policy. As illustrated by *Barbuto*, notwithstanding federal drug laws, now that nearly ninety percent of states have legalized marijuana, employers should be aware that such state laws may affect an employer's blanket enforcement of its drug policies.

For more information about this topic, please contact a member of Benesch's Labor & Employment Practice Group.

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