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MEDICAL MARIJUANA UPDATE

BARBUTO v. ADVANTAGE SALES AND MARKETING, LLC, SJC-12226

Decided July 17, 2017

Summary

In *Barbuto v. Advantage Sales and Marketing, LLC,* SJC-12226 (July 17, 2017), the SJC held that a qualifying medical marijuana patient employee terminated for a positive marijuana test may bring handicap discrimination claims against his or her employer under G.L. c. 151B. The SJC also held that no implied, statutory cause of action exists under the state's Medical Marijuana Act and that the plaintiff failed to state a viable claim for wrongful termination in violation of public policy. The Court articulated that an employee's off-site, off-hours medical marijuana use is not a "facially" or "per se" "unreasonable" accommodation simply because medical marijuana remains illegal under federal law.

The SJC reversed the Superior Court's dismissal of the employee's discrimination claims, remanding those claims to the Superior Court for disposition on a motion for summary judgement or at trial. The Court outlined the many factors requiring consideration by the lower court, including business and safety concerns, but also recognized that its decision does not undermine the obligation of employers receiving federal funding, such as schools, to comply with the Drug-Free Workplace Act.

Factual and Procedural Background

In *Barbuto v. Advantage Sales and Marketing, LLC,* 148 F.Supp.3d 145 (D. Mass. 2015), the U.S. District Court for the District of Massachusetts remanded a case involving the

termination of a registered medical marijuana user[1] for a failed drug test to Superior Court, finding that the threshold requirement for removal to federal court had not been established. The Superior Court granted the employer's motion to dismiss on all but one (invasion of privacy) claim raised by the employee in *Barbuto v. Advantage Sales and Marketing, LLC*, Suffolk Superior Court No. 1584CV02677. Direct appellate review of the dismissed claims was allowed,[2] with the case being transferred from the Appeals Court to the Supreme Judicial Court. (SJC-12226, entered November 17, 2016).

On July 17, 2017, the SJC reversed the Superior Court's dismissal of the plaintiff's handicap discrimination related claims. The SJC's decision affirmed the Superior Court's dismissal of the plaintiff's claims of an implied private cause of action under the state's Medical Marijuana Act and wrongful termination in violation of public policy.

Discussion

Barbuto is a case of first impression in Massachusetts, a state that legalized recreational marijuana subsequent to the case being filed. The SJC cautions in its decision that many factors must be considered before a court may find that an adverse employment action violated state handicap discrimination law. Among them, courts must determine whether an employee suffers from a qualifying impairment that substantially interferes with life activities, whether an alternative treatment method exists, whether the employee's medical marijuana use interferes with essential functions of the job or imposes an undue hardship on the employer's business, and whether the use poses an unacceptable safety risk to the employee, fellow employees or the public.

The Court's analysis includes a caveat particularly impacting public schools, in expressly recognizing that federal grant recipients are obligated to comply with the Drug-Free Workplace Act regardless of state medical marijuana laws. The Drug-Free Workplace Act, 41 U.S.C. §§

[1] The Plaintiff, Cristina Barbuto, is a registered medical marijuana patient who used marijuana at home to treat Crohn's Disease, a qualifying medical condition. Ms. Barbuto disclosed to her private employer that she was a medical marijuana patient prior to taking a mandatory drug test. Her supervisor informed her that it would not be a problem. Ms. Barbuto was terminated after her first day working in a marketing position, due to her marijuana positive test result. The employer's human resources representative told Ms. Barbuto that she was being terminated for the positive test result, despite her use being for medical treatment, because the company followed "federal law, not state law."

[2] The privacy claim was stayed, pending appeal.

8102(a), 8103(a) (2012), imposes an obligation on employers receiving federal funding to "make a 'good faith effort . . . to maintain a drug-free workplace.'" The Drug-Free Workplace Act also prohibits any employee of a federal funds recipient employer from using marijuana in the workplace. In contrast, the state's Act for the Humanitarian Medical Use of Marijuana, St. 2012, c. 369, specifically states that neither employers nor schools are required to accommodate on-site medical marijuana use under the Act, but does not include any prohibition on employers' or schools' accommodation of on-site medical marijuana use.

Conclusion

While the plaintiff in *Barbuto* is an employee of a private, non-school employer, the case is relevant to districts which may contemplate an adverse employment action based on off-site, off-hours medical marijuana use. There are of course substantial differences between a private workplace and a public school educating minor students. As this area of the law evolves, districts must engage in a balancing act to avoid discrimination claims without jeopardizing student safety, the educational process, or federal funding.