

# Insight

IN-DEPTH DISCUSSION

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## Massachusetts Supreme Judicial Court Creates Employer Obligation to Accommodate Employees Using Medical Marijuana

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On July 17, 2017, the Massachusetts Supreme Judicial Court unanimously held that an employee may pursue a disability discrimination claim under state law against her former employer for failing to accommodate the employee's use of medical marijuana. This is the first decision by any state's highest court to recognize a duty to accommodate medical marijuana users at work.

### The Conflicting Web of Marijuana Laws

In 2012, Massachusetts voters approved a law titled "An Act For The Humanitarian Medical Use of Marijuana" (the "Medical Marijuana Act"). As a result of the Medical Marijuana Act, Massachusetts is one of the many states that permit limited use and possession of marijuana for medical treatment for qualifying patients.

Under the federal Controlled Substances Act, however, marijuana is categorized as a Schedule I controlled substance, meaning it has no recognized medical value and a high potential for abuse. Moreover, federal criminal law makes the use and possession of marijuana a crime, and physicians are prohibited from prescribing marijuana for medical use. In addition, other federal statutes impose obligations on employers to ensure employees do not possess or use marijuana in the workplace. For example, the Drug Free Workplace Act requires federal contractors and federal grant recipients to make a good-faith effort to maintain a drug-free workplace by adopting policies prohibiting employees from using illegal drugs (including marijuana) in the workplace. Further, more than eight million private sector workers in the transportation industry are subject to drug-testing requirements imposed by the U.S. Department

of Transportation, and others are subject to drug-testing requirements imposed by entities such as the Department of Defense and the Nuclear Regulatory Commission, which prohibit all marijuana use, regardless of whether it occurs at work.

In light of these federal laws, until the Massachusetts Supreme Judicial Court's decision in *Barbuto v. Advantage Sales & Marketing, LLC*, SJC-12226, all of the state supreme courts that have addressed the issue have held that employers are not required to accommodate an employee's use of medical marijuana.<sup>1</sup>

## Plaintiff's Claims Against Her Employer

In her complaint, the plaintiff alleged that, after she accepted a job offer, her new employer informed her that she was required to take a drug test. The plaintiff then told her new supervisor that she would test positive for marijuana because, pursuant to the Medical Marijuana Act, her physician had provided her with a written certification that allowed her to use marijuana as a treatment for her Crohn's disease. She also told her new supervisor that she did not use marijuana on a daily basis and that she would refrain from using it before or at work. In response, the supervisor stated that the plaintiff's lawful medical use of marijuana would not be an issue.

After working for one day, her drug test results were returned, and as the plaintiff predicted, she had tested positive for marijuana. Her new employer then terminated her employment. When the plaintiff objected that her use of medical marijuana was permitted by Massachusetts law, the company's human resources representative responded by stating "we follow federal law, not state law."

The plaintiff subsequently sued her former employer for, among other things, violating Massachusetts' anti-discrimination law (known as "Chapter 151B") and the Medical Marijuana Act. She claimed that her former employer engaged in disability discrimination, thereby violating Chapter 151B, by failing to accommodate her medical marijuana use. The plaintiff's former employer moved to dismiss these claims, arguing that her requested accommodation – the continued use of medical marijuana – was not reasonable because it remains a federal crime. The trial court agreed and dismissed the plaintiff's discrimination claims.

## The Supreme Judicial Court's Decision

On appeal, the Supreme Judicial Court, Massachusetts' highest appellate court, overturned the trial court's dismissal of the plaintiff's Chapter 151B claims. In framing the issue, the court noted that the plaintiff's complaint adequately alleged that she (a) had a disability (Crohn's disease), (b) experienced an adverse employment action (termination), and (c) was capable of performing the essential functions of her job with an accommodation (a waiver of the company's policy declining to hire anyone who fails a drug test). Having adequately alleged a claim of disability discrimination, the court concluded that dismissal was improper – "if the accommodation she alleges is facially reasonable."

The court went on to state that, in light of the Medical Marijuana Act, as a matter of state law, "the use and possession of medically prescribed marijuana by a qualifying patient is as lawful as the use and possession of any other prescribed medication." In addition, the court noted that the Medical Marijuana Act itself states that patients may not be denied "any right or privilege on the basis of their medical marijuana use," and reasoned that an employee's right to a reasonable accommodation under Chapter 151B was one use such "right or privilege."<sup>2</sup> Further, the court noted that the Medical Marijuana Act expressly states that it does not require employers to permit the use of medical marijuana in the workplace and concluded that this limitation

<sup>1</sup> See, e.g., Rod M. Fiegel and Nancy N. Delogu, [California Employers No Longer Holding Their Breath: Applicants Using Medical Marijuana May Be Denied Employment](#), Littler Insight (Jan. 24, 2008).

<sup>2</sup> The California Supreme Court previously rejected claims that medical marijuana users are protected by that state's law against handicap discrimination. The Massachusetts Supreme Judicial Court distinguished that case from the plaintiff's case by noting that the Medical Marijuana Act, unlike the California law, contained language prohibiting the denial of "any right or privilege on the basis of" medical marijuana use.

“implicitly recognizes that the off-site medical use of marijuana might be” a reasonable accommodation under Chapter 151B.

The court went on to state that just because the plaintiff’s “possession of medical marijuana is in violation of Federal law does not make it per se unreasonable as an accommodation.” In refusing to defer to federal law, the court noted that in 1970, when marijuana was added to Schedule I of the Controlled Substances Act, marijuana had no accepted medical use. Since that time, however, the majority of states have adopted laws permitting the medical use of marijuana.<sup>3</sup> Thus, according to the court, “[t]o declare an accommodation for medical marijuana to be per se unreasonable out of respect for Federal law would not be respectful of the recognition of Massachusetts voters, shared by the legislatures or voters in the vast majority of States, that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions.” The court also noted, in a footnote, that the employer had waived the argument that conflict between Massachusetts and federal law requires the conclusion that an employee’s use of medical marijuana is facially unreasonable, although that argument was successful in defeating a disability discrimination claim in Oregon.<sup>4</sup>

Moreover, the court noted that even if the plaintiff’s requested accommodation was unreasonable, Chapter 151B required her employer to engage in the interactive process with her to explore whether another form of accommodation was possible.

Notably, although the court permitted the plaintiff’s disability discrimination claims to proceed, the court affirmed the trial court’s dismissal of her claims under the Medical Marijuana Act and for common law wrongful termination, finding that the Medical Marijuana Act itself did not create a private right of action against employers.

### **When is Accommodating a Medical Marijuana User Reasonable?**

The Barbuto decision represents a major change for employers in Massachusetts. As a result of the court’s decision, employers in Massachusetts cannot outright deny a request to accommodate medical marijuana users, regardless of a facially neutral drug-testing policy, and instead must engage in the interactive process.

The court provided guidance on evaluating requests for accommodation. Notably, the court observed that employers may still prohibit employees from coming to work under the influence of marijuana or from using marijuana at the workplace. Moreover, employers are not required to accommodate an employee’s recreational use of marijuana. Significantly, the court encouraged employers to start the interactive process by confirming with the employee’s physician that medical marijuana is the most effective medication, and that any alternative medication permitted by the employer’s drug policy would be less effective.

If so, the court noted that under Chapter 151B an employer may nevertheless reject a proposed accommodation if it poses an “undue hardship.” The court then identified circumstances that might establish an undue hardship defense, such as where the continued use of medical marijuana would:

- “impair the employee’s performance of her work,”
- “pose an unacceptably significant safety risk to the public, the employee, or her fellow employees,” or
- “violate an employer’s contractual or statutory obligation, and thereby jeopardize its ability to perform its business.”

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<sup>3</sup> However, the federal agency responsible for reclassifying drugs for purposes of the Controlled Substances Act declined to reclassify marijuana because of concerns about abuse and confirmed its illegal status as recently as August 10, 2016, a fact not noted by the Supreme Judicial Court. See <http://www.npr.org/2016/08/10/489509471/dea-rejects-attempt-to-loosen-federal-restrictions-on-marijuana>.

<sup>4</sup> *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 Or. 159 (2010).

Thus, employers may be able to decline to place medical marijuana users in safety- or security-sensitive roles, in roles where their performance would be compromised, or in roles subject to the federal Drug Free Workplace Act. Workers who are subject to federal drug and alcohol testing requirements, such as those adopted by the U.S. Department of Transportation, cannot place medical marijuana users in those roles that explicitly prohibit medical marijuana accommodation, but may be asked to consider alternative accommodations, such as placing qualified workers in another role.

## **Conclusion**

Although the decision in *Barbuto* could encourage similar lawsuits in other jurisdictions, *Barbuto* does not have any precedential value outside of Massachusetts. Thus, it is important to recognize that courts in other states may continue to conclude that workers' use of medical marijuana need not be accommodated if the employer elects otherwise. Because of the complex, evolving, and sometimes contradictory nature of the laws governing the use of marijuana and marijuana products, we recommend that employers work with experienced employment counsel to ensure their policies, and the implementation of those policies, comply with all applicable laws.