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SJC: Employers may have to accommodate off-duty medical marijuana use

In a landmark ruling, the Supreme Judicial Court of Massachusetts has recognized a potential claim for disability discrimination for not hiring and/or terminating a person who uses medically prescribed marijuana off-duty, but tests positive for drug testing.

The SJC in *Barbuto v. Advantage Sales and Marketing, LLC* determined that Massachusetts employers may have to allow employees to take medical marijuana off-duty as a "reasonable accommodation" under the state's anti-discrimination statute. The July 17, 2017, decision explores the novel issue through the traditional matrix of burdens in disability discrimination cases: The plaintiff must make out a prima facie case (i) that he or she is a qualified employee suffering from a recognized disability and/or handicap (in *Barbuto*, it was Crohn's disease); (ii) that adverse employment action was taken against him or her because of his/her disability; and (iii) the discrimination caused damages (G.L. c. 151B, section 4 (16)).

The SJC rejected the employer's contention that since federal law prohibits possession of marijuana, an accommodation that would permit the plaintiff to continue using it for medical purposes was per se unreasonable. The SJC also rejected the employer's argument that because the employer believed such an accommodation (continued use of medically prescribed marijuana) was facially unreasonable to accommodate, it owed the plaintiff no obligation to participate in an interactive process.

The court ruled that an exception to an employer's drug policy to permit use of medical marijuana is a facially reasonable accommodation where, in the opinion of the employee's physician, medical marijuana is the most effective medication for the employee's disabling medical condition, and any alternative medication whose use the would be permitted by the employer's drug policy would be less effective.

In the wake of the court's decision in *Barbuto*, employers should review their drug testing and hiring policies. The SJC determined that employers are required to engage in an interactive dialogue to find out from an employee's treating physician if any other equally effective medications can address the disability. An employer may show that even after engaging in the

interactive process, if an employee can take no other effective medication, that the hiring of the employee (or continued employment of the employee) constitutes an “undue burden” on the employer to accommodate the employee with medical marijuana.

Where no other equally effective alternative exists, the employer bears the burden of proving that the employee’s use of the medication imposes an undue hardship to the employer’s business. The employer must make a reasonable accommodation for the disability and treatment plan, but Massachusetts law does *not* require “any accommodation of any on-site medical use of marijuana in any place of employment.” St. 2012, c. 369, section 7(D). Thus, a policy prohibiting such drug use at work would likely be upheld.

Despite the ruling in *Barbuto*, employers will still likely be permitted to decide not to hire or terminate someone who operates a motor vehicle or operates machinery where another person’s personal safety may be at issue. Thus, for example, if the employee is a limousine driver or bus driver transporting children to school, there would not be a claim to terminate the employee if the applicant fails his/her drug test and there are no other jobs available. As the SJC notes on page 20 of the [decision](#): “We recognize that transportation employers are subject to regulations promulgated by the United States Department of Transportation that prohibit any safety-sensitive employee subject to drug testing under the department’s drug testing regulations from using marijuana. *See* 49 CFR sections 40(b), 40.11(a) (2001). *See also* DOT ‘Medical Marijuana’ Notice, U.S. Dept. of Transp. (Updated: June 20, 2017), <https://www.transportation.gov.odapc/medical-marijuana-notice> [https://perma.cc/FY24-SEMZ].” The decision does not alter the law on proper drug testing.

Should you have questions on the applicability of *Barbuto*, contact your Todd & Weld LLP employment attorneys to understand your rights and responsibilities.