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Julie A. Bruch
O'Halloran Kosoff Geitner & Cook, LLC, Northbrook

Allowing Employee Medical Marijuana Use Can Be a Reasonable Accommodation

On July 17, 2017, the Massachusetts Supreme Judicial Court ruled that Massachusetts' general anti-discrimination law, which is almost identical to the Illinois Human Rights Act, requires employers to reasonably accommodate their employee's off-site use of medically prescribed marijuana *and* prohibits employers from terminating employees solely because they use medical marijuana outside the workplace. *Barbuto v. Advantage Sales & Mktg., LLC*, 477 Mass. 456 (Mass. 2017). The Illinois Compassionate Use of Medical Cannabis Pilot Program Act, better known as the Illinois Medical Marijuana Law, went into effect on January 1, 2014. *See* 410 ILCS 130/1. At that time, Illinois was the twentieth state to de-criminalize marijuana for medical purposes. Now, 29 states and the District of Columbia have legalized marijuana for medical purposes and another 12 states have legislation pending to legalize medical marijuana. Four of the 29 states and the District of Columbia went further and legalized recreational marijuana. While the trend is to allow the use of marijuana for medical purposes, marijuana is still a Schedule 1 drug under the federal Controlled Substances Act, making the use, sale, and possession of marijuana illegal under federal law. 21 U.S.C. § 812.

For the past several years, states that legalized medical marijuana struggled with how to incorporate the use of medical marijuana into employee handbooks and personnel policy manuals prohibiting the use of illegal drugs. Some employers implemented a "don't ask, don't tell" policy to avoid the conflict. Others recognized the employee's right to use medical marijuana outside the workplace but disciplined, or even terminated, those employees when they tested positive for drugs. Under the Illinois Compassionate Use of Medical Cannabis Pilot Program Act, an employee's status as a registered qualifying patient (or caregiver) is protected. 410 ILCS 130/25. As such, an employer cannot discriminate against a qualifying patient or caregiver by asking about such status on job applications or during interviews and cannot refuse to hire or otherwise discriminate based on a prospective and current employee's status as a registered qualifying patient or caregiver. 410 ILCS 130/40.

Under the Americans with Disabilities Act, however, status as a registered qualifying patient or caregiver is not protected. 42 U.S.C. § 12114. Furthermore, an "individual with a disability *does not include* those who are currently engaging in the illegal use of drugs." 42 U.S.C. § 12114 (c)(4). In Illinois, certain employees are banned from participating in the Compassionate Use of Medical Cannabis Pilot Program and obtaining a medical marijuana card. For example, employees in fire protection, law enforcement, EMS, probation officers, bus drivers, and CDL holders. 410 ILCS 130/30(a)(9), (19).

CDL holders are subject to the U.S. Department of Transportation's Drug and Alcohol Testing Regulation—49 C.F.R. Part 40—which does not authorize the use of Schedule I drugs, including marijuana, for any reason. This regulation applies to employees in safety-sensitive positions such as school bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit employees, fire service employees, armed security personnel, ship captains, pipeline emergency response personnel, and nuclear power plant operators. 49 C.F.R. Part 40.

The Massachusetts Supreme Judicial Court Ruling

In *Barbuto v. Advantage Sales & Mktg., LLC*, Christina Barbuto filed suit against her employer in Massachusetts claiming a violation of the state's anti-discrimination law. *Barbuto*, 477 Mass. at 458-59. Barbuto suffers from Crohn's Disease and was prescribed medical marijuana to counter the effects of the disease. *Id.* at 458. She used it two to three times a week at home in small quantities. *Id.* Originally, her supervisor told her that the use of medical marijuana should not be a problem. *Id.* However, her employer later fired her when she tested positive for marijuana and refused to make an exception for her because marijuana use is illegal under federal law even though it was allowed under state law. *Id.*

The court found that where an employee is handicapped because she suffers from a debilitating medical condition that can be alleviated or managed with medication, the employer generally should not interfere with the employee taking such medication or to terminate an employee for taking that medication. *Id.* at 462-63. If the employer had a drug policy prohibiting the use of such medication, even where lawfully prescribed by a physician, the employer would have a duty to engage in an interactive process with the employee to determine whether there were equally effective medical alternatives to the prescribed medication whose use would not be in violation of its policy. *Barbuto*, 477 Mass. at 463.

The employer argued that because the prescribed medication is marijuana, which is illegal to possess under federal law, an accommodation that would permit Barbuto to continue to be treated with medical marijuana is per se unreasonable. *Id.* at 464. The court disagreed, stating that where, 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.* A qualified handicapped employee has a right not to be fired because of her handicap, and that right includes the right to require an employer to make a reasonable accommodation for her handicap to enable her to perform the essential functions of her job. *Id.*

The fact that the employee's possession of medical marijuana is in violation of federal law does not make it per se unreasonable as an accommodation. *Id.* at 465. The only person at risk of federal criminal prosecution for possession of medical marijuana is the employee. *Id.* An employer would not be in joint possession of medical marijuana or aid and abet its possession simply by permitting an employee to continue his or her off-site use. *Barbuto,* 477 Mass. At 465. The failure to explore a reasonable accommodation alone is sufficient to support a claim of handicap discrimination provided the plaintiff proves that a reasonable accommodation existed that would have enabled her to be a "qualified handicapped person." *Id.* at 466.

The court did recognize that at summary judgment or trial, the defendants may offer evidence to meet their burden to show that Barbuto's use of medical marijuana is not a reasonable accommodation because it would impose an undue hardship on the defendant's business or that the continued use of medical marijuana would impair the employee's performance of her work or pose an "unacceptably significant" safety risk to the public, the employee, or her fellow employees. *Id.* at 467. Alternatively, an undue hardship might be shown if the employer can prove that the use of marijuana by an employee would violate an employer's contractual or statutory obligation, and thereby jeopardize its ability to perform its business. *Id.*

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 and Federal government contractors and the recipients of federal grants are obligated to comply with the Drug Free Workplace Act which requires them to make "a good faith effort . . . to maintain a drug-free workplace," and prohibits any employee from using a controlled substance in the workplace. *Id.* at 467-68.

Practical Takeaways

In light of this decision, employers should beware of blanket zero-tolerance policies on drug use or positive drug tests. An employer should consider whether it can reasonably accommodate an employee's use of medical marijuana when: 1) the marijuana is used off-site, and 2) medically certified as necessary for the employee to perform essential functions of her job. An employer need not accommodate if the employee's use of marijuana: 1) poses a significant safety risk, or 2) will cause undue hardship if the employer is forced to violate contractual or statutory obligation such as regulations regarding safety-sensitive jobs. Employers should not terminate an employee solely because of positive drug test without considering possible ADA implications, though an employer need not accommodate on-site use.

About the Author

Julie A. Bruch is a partner with *O'Halloran Kosoff Geitner & Cook, LLC*. Her practice concentrates on the defense of governmental entities in civil rights and employment discrimination claims.

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