

PUMA Provision Provides Powerful Position for Prospective Employee in Connecticut Medical Marijuana Case

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The magical mystery tour of medical marijuana-related employment litigation continued earlier this month with a decision out of the U.S. District Court for the District of Connecticut in the case of Noffsinger v. SSC Niantic Operating Co. LLC. In Noffsinger, District Court Judge Jeffrey Alker Meyer has issued two notable opinions since August 2017 – “Noffsinger I” on August 8, 2017 and “Noffsinger II” on September 5, 2018 – on the question of whether an employer violated the anti-discrimination provision of Connecticut’s Palliative Use of Marijuana Act (“PUMA”) when it rescinded a prospective employee’s job offer because she had tested positive for medically prescribed cannabis. The facts of Noffsinger should sound familiar to those acquainted with a recent article on this blog, “Federal Judge Clears the Haze for New Jersey Employers in the Weeds with Medical Marijuana Users,” regarding the decisions in Cotto v. Ardagh Glass Packing, Inc., et al. (NJ) and Barbuto v. Advantage Sales and Marketing, LLC (MA). The outcome of Noffsinger, however, proves to be quite unique and reinforces the notion that this is an emerging and unsettled area of the law.

Like many states around the country, Connecticut permits the use of medical marijuana for “qualifying patients” with certain debilitating conditions and affords these patients an exemption from criminal prosecution for such prescribed use. Connecticut is fairly unique, however, in that PUMA also includes a provision that explicitly prohibits discrimination against qualifying patients, stating in relevant part that “[n]o employer may refuse to hire a person . . . solely on the basis of such person’s . . . status as a qualifying patient . . .” Conn. Gen. Stat. § 21a-408p(b)(3). PUMA goes on to state that this provision does not operate to restrict an employer’s ability to prohibit the use of “intoxicating substances” or to discipline an employee for being under the influence of the same during work hours.

In Noffsinger, the plaintiff had accepted a job offer for a director of recreational therapy position at Bride Brook, a nursing facility in Niantic, Connecticut. During the pre-employment process, the plaintiff told Bride Brook's administrator that she took prescription marijuana as a registered "qualifying patient" under Connecticut's PUMA to treat her PTSD. Pursuant to her prescription, the plaintiff took one capsule of a synthetic form of cannabis each night and had done so while employed as a recreational therapist at her previous employer. However, following a routine pre-employment drug screening, Bride Brook informed the plaintiff that her offer had been rescinded due to a positive drug test result for cannabis. Three weeks later, plaintiff filed a complaint in which she asserted that Bride Brook, in rescinding her job offer due to the results of her drug test, had violated PUMA's anti-discrimination provision. Therefore, the issue raised in Noffsinger is what role, if any, PUMA's anti-discrimination provision has for individuals who have suffered adverse employment decisions because of their use of medical marijuana outside of the work place.

As noted above, Judge Meyer addressed this issue in two separate opinions. The first opinion, Noffsinger I, involved two important questions: 1) does federal law preempt PUMA's anti-discrimination provision, and, if not, 2) does this provision provide a basis for an individual to sustain a lawsuit against an employer for a claim of discrimination. Taking on the first question, Judge Meyer found that neither the federal Controlled Substances Act ("CSA") nor the Americans with Disabilities Act ("ADA") preempt PUMA's anti-discrimination provision. The judge found that the CSA does not make it illegal to employ a marijuana user and the ADA does not preclude a state from regulating employers who discriminate against employees who engage in the medicinal use of drugs in compliance with state law. Turning to the second question, Judge Meyer held that the anti-discrimination provision of PUMA does indeed provide a basis for individuals to sue an employer for a claim of discrimination. In effect, Noffsinger I cleared the way for the plaintiff to continue her lawsuit against Bride Brook, with the question remaining whether Bride Brook did indeed discriminate against her in violation of PUMA.

This remaining question was resolved in Noffsinger II with Judge Meyer holding that Bride Brook's conduct in rescinding the plaintiff's job offer did indeed constitute a violation of PUMA's non-discrimination provision. Specifically, the judge found that PUMA protects a qualifying patient for the use of medical marijuana outside working hours and in the absence of any influence during working hours. In light of this, Bride Brook's conduct was contrary to the plaintiff's right not to be the subject of discrimination because of her status as a qualifying patient under PUMA.

Casual onlookers may reasonably wonder what sort of magic pill allowed for the plaintiff to prevail in Noffsinger, while other courts have dismissed employment discrimination complaints involving adverse actions against qualifying medical marijuana patients, as was the case in Cotto (NJ). A key factor that makes the outcome in Noffsinger distinguishable from Cotto, or even from Barbuto (MA), is the text of Connecticut's PUMA itself. That PUMA explicitly states that employers shall not make adverse employment decisions against individuals solely based on their status as qualifying patients, this is a textual commitment to non-discrimination that is notably absent from many other state medical marijuana statutes, such as New Jersey's Compassionate Use Medical Marijuana Act ("NJCUMMA"). Likewise, at the time that the complaint was filed in Barbuto, the medical marijuana statute in Massachusetts also lacked an explicit non-discrimination provision.

Where does this leave the state of the law for employers in New Jersey? In a word, hazy. The diverse outcomes of Noffsinger, Cotto, and Barbuto, in addition to the proposals that are currently being debated in the New Jersey Legislature make it clear that this is an emerging and unsettled area of the law. Employers should be careful to have state-specific drug testing policies. Furthermore, employers need to proceed very carefully before taking adverse action against medical marijuana users.

To cope with these clouds of uncertainty, any employers dealing with issues involving medical marijuana should consult with their counsel. For more information, please contact Harris S. Freier, Esq. of the firm's Employment Litigation Practice Group, at hfreier@genovaburns.com, or Dina M. Mastellone, Esq., Chair of the firm's Human Resources Practice Group, at dmastellone@genovaburns.com, or 973-533-0777.

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