

Federal Judge Clears the Haze for New Jersey Employers in the Weeds with Medical Marijuana Users

08.20.2018

States across the country, including New Jersey, continue to legalize medical marijuana, but it remains an illegal substance under federal law, and employers' confusion continues to bud. The complication that employers have – especially in states such as New Jersey with expansive disability protections under the New Jersey Law Against Discrimination (“NJLAD”) – is that any employee who is using marijuana for a medicinal purpose under the New Jersey Compassionate Use Medical Marijuana Act (“NJCUMMA”), likely would be considered to have a disability and thus be protected under the NJLAD.

One way an employer can be considered under NJLAD to have discriminated against a disabled individual is by failing to offer him/her a reasonable accommodation. While the NJCUMMA explicitly states that a reasonable accommodation would not include allowing an employee to use marijuana at work, the statute is not so blunt on the topic of workplace drug testing. Does NJLAD require that employers accommodate a medical marijuana user by waiving the requirement that he/she pass a drug test for federally-prohibited narcotics? Issuing a dose of relief to employers who feared that NJCUMMA would set their drug test requirements ablaze, a New Jersey federal judge recently ruled that the answer is no.

In Cotto v. Ardagh Glass Packing, Inc., et al., the plaintiff worked for about 5 years as a forklift operator for a glass packaging company. In 2016, he injured his head on the job and was placed on light duty work. He was subsequently asked to take a drug test before returning to work as a condition of continued employment. He informed his employer that he would test positive for medical marijuana, which he was legally prescribed to treat a neck and back injury that occurred in 2007. Seeking an accommodation, the plaintiff requested that his employer waive the requirement that

he pass a drug test for marijuana. Apparently, the plaintiff had told the employer upon hire that he was prescribed medical marijuana. After his employer refused to waive the requirement that he pass a drug test before returning to work, he sued for disability discrimination based on a failure to accommodate.

Judge Robert B. Kugler of the U.S. District Court for the District of New Jersey held that the NJCUMMA does not require an employer to waive its requirement that employees pass a drug test for illegal drugs. Addressing the issue as one of first impression in New Jersey, Judge Kugler relied on the current federal prohibition on marijuana. He also relied on the express language of the NJCUMMA, which provides that legal medical marijuana users shall not be subject to criminal or civil penalties related to their use of the drug, but expressly excludes employers from its scope, as follows: "Nothing in this act shall be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace." N.J.S.A. § 24:61-14. Judge Kugler also observed that most courts outside New Jersey have concluded that, unless their state statute's language explicitly provides otherwise, the decriminalization of medical marijuana does not shield employees from adverse employment actions related to their use of the drug.

Last year, in Barbuto v. Advantage Sales and Marketing, LLC, the Supreme Court of Massachusetts was faced with a similar set of facts: an employee suffering from Crohn's disease who was legally prescribed medical marijuana under Massachusetts' medical marijuana statute, sought a waiver of her employer's policy barring from employment those who test positive for marijuana. Like the NJCUMMA, Massachusetts' statute also explicitly states that employers are not required to accommodate any on-site medical marijuana use. The employer in Barbuto argued that because the only accommodation the employee sought – her continued use of medical marijuana – is a federal crime, it was facially unreasonable. The Barbuto Court disagreed, noting that such an argument respects federal law alone and ignores Massachusetts voters' and legislators' recognition of marijuana as an acceptable method to treat debilitating medical conditions. The Court further held that, even if an accommodation of continued use of medical marijuana were facially unreasonable, the employer still had a duty to engage in the interactive process and explore with the employee whether there was an alternative accommodation that would allow her to work, such as allowing her to use the drug off-site during non-working hours.

Cotto concerned the reasonable accommodation request of waiving a drug test while Barbuto involved the reasonable accommodation request of using marijuana off-site

during non-work hours. The parties and judge in Cotto seem to have gone out of their way not to cite or distinguish Barbuto, so while New Jersey employers now have clarity about drug testing, they remain dazed and confused as to whether allowing an employee to use medicinal marijuana off-site during non-work hours would be a legitimate reasonable accommodation.

In addition, employers should understand that their knowledge that an employee uses the drug almost invariably imputes knowledge that an employee suffers from a protected disability. The Cotto case concerned employer conduct resulting from an employee's treatment, not the employee's disability, as the plaintiff admitted that his employer knew about his disability for years and never discriminated against him until he was asked to take the drug test. However, in the absence of such favorable facts, employers should take caution not to make employment decisions based solely on their knowledge that an employee is a medical marijuana user.

For more information about the interplay between the decriminalization of medical marijuana and disability discrimination law, 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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