

EMPLOYMENT LAW ALERT
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**HANDICAPPED EMPLOYEES CAN USE MEDICAL MARIJUANA OFF-SITE
UNDER MASSACHUSETTS ANTI-DISCRIMINATION LAW**

On July 17, 2017, the Massachusetts Supreme Judicial Court (SJC) determined that Massachusetts law permits the off-site use of medical marijuana by handicapped employees, provided that this accommodation does not unduly burden the employer.

THE FACTS

Cristina Barbuto, the plaintiff, was hired by the defendant company, pending successfully passing a drug test mandated by company policy. The company fired Barbuto after she failed the company's mandatory drug test due to the presence of marijuana. Barbuto explained that she used medical marijuana off-site at night to treat symptoms associated with Crohn's Disease, to no avail.

SJC'S LEGAL ANALYSIS

The SJC held that Barbuto could pursue a claim under the Massachusetts anti-discrimination laws (codified as G.L. c. 151B) because there was evidence that she was a "qualified handicapped person" who was entitled to reasonable accommodation when requested. The SJC rejected the company's argument that because the accommodation sought was illegal under federal law, it was facially unreasonable and defeated her claim of handicap discrimination. It also rejected the company's claim that the company could enforce, without exception, a uniform drug-free company policy. Since the medical marijuana act expressly protected "any right or privilege" of a medical marijuana user, the SJC held that the right to reasonable accommodation under G.L. c. 151B was one such right contemplated by the medical marijuana act. The inclusion of this language in the medical marijuana act, moreover, distinguished it from other states' laws that omitted similar language, and where courts in those states had held that employers were not obligated to accommodate an employee's marijuana use.

The SJC left open the question of whether Barbuto's requested accommodation—to permit off-site use of medical marijuana—would impose an "undue hardship" on the company. Under Massachusetts law, an employer is not required to provide an employee with an accommodation that would impose an undue hardship on the company. The SJC clarified that an employer's violation of a statutory or contractual obligation that prevents employment of any worker who uses marijuana is not reasonable and would constitute an undue hardship on the employer. The Court cited federal contractors who must maintain drug-free workplace policies as one such example of an employer who may suffer an undue burden if forced to accommodate an employee's off-site medical marijuana use.

While Barbuto can pursue a claim under G.L. c. 151B, the SJC rejected other claims arising from her termination. It found that the medical marijuana act did not create a private right of action for an employee and likewise rejected Barbuto's claim that her termination violated public policy.

IMPLICATIONS

Massachusetts is unique among states that have legalized medical marijuana in that its employers must now accommodate the off-site use of medical marijuana unless it imposes an undue hardship on the employer. If the employee is handicapped and can be accommodated without undue hardship to the employer, even if the accommodation includes the toleration of the off-site use of medical marijuana, then the employer must (1) engage in an interactive process with the employee; and (2) provide the employee with reasonable accommodation. Whether exempting a handicapped employee from a company-wide drug policy constitutes a reasonable accommodation will require a case-by-case analysis. Undue hardship may exist in the case of safety-sensitive positions, where employees are impaired at work or where the employer has a statutory or contractual obligation that precludes employment of employees who test positive for marijuana.

Employers retain full authority to enforce drug-free workplaces and to discipline employees for on-site medical marijuana use. *Barbuto* expressly distinguishes off-site and on-site medical marijuana use. The decision has no applicability to recreational marijuana, which was legalized in November 2016.

CONTACT

Please contact a member of our [Employment Law Practice](#) to discuss the impact of this new law on your company's policies and practices.

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