MASSACHUSETTS LAWYERS WEEKLY

Volume 44
Issue No. 5
Sept. 21, 2015

Can worker fired for pot use sue?

By Brandon Gee
brandon.gee@lawyersweekly.com

Tamsin R. Kaplan

Plaintiff hopes Massachusetts will buck trend in other states

The question of whether employees lawfully can be fired for using medical marijuana has been met with a resounding "yes" in other states.

Plaintiffs' lawyers and medical marijuana advocates nonetheless hope that unique features of Massachusetts law will turn the tide in the Bay State.

In the first lawsuit of its kind in Massachusetts, Christina Barbuto alleges California-based Advantage Sales & Marketing wrongfully fired her for using marijuana legally obtained to treat Crohn's Disease.

Despite allegedly informing the employer that she would test positive for marijuana on a required drug test, Barbuto was fired after a successful first day on the job for failing the test. According to Barbuto's Suffolk Superior Court complaint, she had explained to company officials that she used medical marijuana occasionally in the evenings to boost her appetite and maintain a healthy weight and would never use it before or during work. Those officials allegedly indicated her use of marijuana would not be an issue before reversing course.

"Ms. Barbuto has a medical certification from Massachusetts that allows her to lawfully use marijuana for medical purposes," said Barbuto's lawyer, Matthew J. Fogelman of Newton's Fogelman & Fogelman. "It helps her significantly. She is not impaired at work, not intoxicated at work in any way, shape or form. It's no different than someone who might have a glass of wine before bed, or a sleeping pill at night to help them sleep."

Chief Legal Officer Tania King of Advantage Sales & Marketing, which has offices in Massachusetts, did not respond to phone and email messages. No lawyers have entered appearances on behalf of Advantage in the Suffolk Superior Court case, according to online court records.

At first glance, Barbuto appears to face an uphill climb, said Tamsin R. Kaplan, a management-side employment lawyer at Davis, Malm & D'Agostine in Boston.

"For the most part, the employers have prevailed in these cases," Kaplan said. "A very gross generalization of all of those outcomes is the courts are looking at the federal law … and saying private employers have no obligation to employ someone who is essentially a criminal."

On that basis, for example, the Colorado Court of Appeals disposed of a claim made under a law that prohibits discrimination against employees who engage in "lawful activity" off work premises during non-working hours in *Coats v. Dish Network*.

In *Emerald Steel Fabricators v. Bureau of Labor and Industries*, the Oregon Supreme Court ruled that the federal Controlled Substances Act preempted the state's medical marijuana law.

In *Ross v. Ragingwire Telecommunications*, the California Supreme Court held that the state's medical marijuana law provided only a limited exception to criminal law and declined to find that a provision stating that employers weren't required to accommodate on-the-job medical marijuana use implied that they must permit off-the-job use.

Unique circumstances

As in states such as California and Washington, the Massachusetts Medical Marijuana Act does not explicitly protect employees from adverse employment decisions. In the only direct reference to employment, it states that "nothing in this law requires any accommodation of any on-site medical use of marijuana in places of employment."

But there are other provisions that Barbuto hopes to hang her hat on, most notably one stating, "Any person meeting the requirements under this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions."

"I believe that language could make a difference," Kaplan said. "Is your right to be employed a 'right' or 'privilege?' It may be that the courts look at the prohibition … and expand it to the employer-employee relationship. It's an analysis that could bear fruit in Massachusetts."

Joseph D. Elford, a San Francisco lawyer and medical marijuana advocate who represented the plaintiff in *Ross v. Ragingwire* before the California Supreme Court, agreed.

"Because Massachusetts law explicitly provides that medical marijuana patients should not be denied any privileges or rights because of their status as medical marijuana patients, whereas California law does not have such a provision, we are hopeful that there will be a different outcome in this case," Elford said.

He also noted that the "ball has advanced" in recent years as negative attitudes about marijuana have diminished. California was the first state to legalize medical marijuana, something 22 other states have done since.

As a result, courts may be less receptive to arguments based on conflicts with federal law.

"I have clients who feel very strongly that marijuana is illegal and they shouldn't be

required to have an employment relationship with someone who is breaking the law if they know about it," Kaplan said. "That argument has won the day in cases around the country, but I don't expect it to continue to win the day."

Fogelman called the federal law argument a "red herring," noting that Advantage does not have federal contracts or receive federal funds.

"That might be a different story," he said. "But there's no federal law that prohibits Advantage Sales & Marketing from employing Ms. Barbuto. *She* may be violating federal law … but that's really irrelevant."

Fogelman's co-counsel, Adam D. Fine of Denver-based Vicente Sederberg's Boston office, said the issue boils down to a preemption analysis, and that, from the employer's perspective, there is no "positive conflict" with federal law.

"They're saying that, 'We know Ms. Barbuto violated federal law, therefore we're going to follow federal law,'" Fine said. "We would submit that it certainly is not physically impossible for the employer to comply with federal law. I think it would be different if there was something that said an employer under federal law cannot hire anyone who has tested positive for marijuana. Then we would be preempted."

Fogelman and Fine are encouraged that Attorney General Maura T. Healey said this summer that her office would be looking into the potential for medical marijuana discrimination in the workplace. They also are confident about claims they have brought under Massachusetts' anti-discrimination law and privacy act, in addition to the medical marijuana act.

"They subjected her to termination instead of allowing her to treat her medical condition," Fogelman said in reference to the discrimination claim. "Providing that accommodation would not impose a hardship on Advantage Sales & Marketing."

Barbuto also contends that it was an invasion of her privacy to be tested for drugs in the first place. Her lawyers note the Supreme Judicial Court's decision in *Webster v. Motorola*, in which the court ruled that drug screening is only reasonable when an employer's legitimate business interests or safety and health concerns outweigh an employee's privacy interests. Barbuto was hired to do product demonstrations and marketing at grocery stores.

Civil litigator Michael L. Mason of Cambridge's Bennett & Belfort has studied the issue and believes "if there's a case that has a chance, this looks like a good candidate."

Kaplan, meanwhile, has advice for employers — who may not be thrilled to receive it.

"I've been advising my employer clients grappling with this to be very careful and make sure there is some legitimate safety concern related to the job functions of the employee in question," she said. "Blanket mandatory drug testing may be problematic."

And, in the event medical marijuana use is discovered, Kaplan recommends employers "focus on the actual performance of the employee and their contributions to the work environment and your success as a company."

"I think that's probably the safer way to go as this law develops," she said. MLW