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## Mass. Justices Say Medical Marijuana Users Can Sue For Bias

By **Vin Gurrieri**

Law360, New York (July 17, 2017, 9:08 PM EDT) -- Massachusetts' highest court ruled Monday that employees can sue for disability discrimination if they are fired or otherwise punished for using medical marijuana, reviving the case of an advertising employee who was fired after failing a mandatory drug test.

The Massachusetts Supreme Judicial Court ruled that plaintiff Cristina Barbuto can pursue claims accusing her former employer Advantage Sales & Marketing LLC of handicap discrimination by firing her because of her medical marijuana use.

In its ruling, the Massachusetts justices said that patients like Barbuto who legally use marijuana for medical purposes can haul their employers into court if they are fired from their jobs because they tested positive. The panel also said that allowing for the use of medical marijuana could potentially be a reasonable accommodation for an employee's disability if that employee has been legally prescribed marijuana.

"Under Massachusetts law ... the use and possession of medically prescribed marijuana by a qualifying patient is as lawful as the use and possession of any other prescribed medication," the decision said. "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."

But the state high court added that there is no implied statutory private cause of action under the state's medical marijuana act and that Barbuto failed to state a claim for wrongful termination in violation of public policy, affirming the lower court's dismissal of those claims.

Massachusetts voters approved a ballot initiative in 2012 allowing medical marijuana use. That statute stated that there should be no punishment under state law for patients who qualify for the medical use of marijuana.

In 2014, Barbuto accepted an entry-level position with Advantage Sales. When a company representative subsequently left Barbuto a message telling her that she had to take a mandatory drug test, Barbuto told the representative that she would test positive for marijuana since she has Crohn's disease and had been medically prescribed marijuana to treat it.

Barbuto also explained that her physician's written certification made her a qualifying medical marijuana patient under Massachusetts law, and added that she didn't use

marijuana daily and wouldn't consume it before work or at work.

She typically used marijuana in small quantities at home two or three times per week, according to court documents. Barbuto also said she had been able to maintain a healthy weight since she started using marijuana, which she hadn't been able to do previously.

The supervisor told Barbuto that her medicinal use of marijuana "should not be a problem," and later told her that others at ASM confirmed that it was a nonissue.

About a week after Barbuto failed her drug screening as anticipated, she completed a training program, was given a uniform and assigned a supermarket location where she would promote the products of ASM's customers, and completed her first day of work.

But that night, Barbuto got a call from Joanna Meredith Villaruz, ASM's human resources representative, who told her she was fired for testing positive.

Villaruz, who is a named defendant in Barbuto's September 2015 suit, told Barbuto that ASM did not care if she used marijuana to treat her medical condition because "we follow federal law, not state law."

Barbuto's subsequent six-count complaint included claims for handicap discrimination, interference with her right to be protected from handicap discrimination, and denial of the "right or privilege" to use marijuana lawfully as a registered patient to treat a debilitating medical condition in violation of the state's medical marijuana act, and violation of public policy by terminating the plaintiff for lawfully using marijuana for medicinal purposes.

In her complaint, Barbuto alleged that she is a "handicapped person" because she suffers from Crohn's disease and that she is a "qualified handicapped person" because she is capable of performing the essential functions of her job with a reasonable accommodation: a waiver of ASM's policy to not employ anyone who tests positive for marijuana.

In overturning the dismissal of her suit, the state high court rejected ASM's argument that Barbuto didn't adequately allege that she is a "qualified handicapped person" because the only accommodation she sought — her continued use of medical marijuana — is a federal crime and therefore is an unreasonable request on its face.

"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," the panel said. "The only person at risk of federal criminal prosecution for her possession of medical marijuana is the employee. 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."

The high court also noted that even if an accommodation for the use of medical marijuana were unreasonable, ASM still had an obligation to engage Barbuto in an interactive process to figure out if another medicine that was allowed under the company's drug policy would work just as well to treat her medical issues.

But just because Barbuto can pursue claims of handicap discrimination doesn't necessarily mean she will prevail on those claims, the appellate court said, noting that ASM will have a chance to show that her use of medical marijuana is not a reasonable accommodation because it would impose an undue hardship on the defendants' business.

"We're pleased that the court ruled in our favor with regard to two of the plaintiff's claims," said Michael Clarkson, counsel for the defendants. "We are disappointed with the reversal and remand of the remaining claim. We have not yet had the opportunity to litigate the plaintiff's remaining claim on the merits, but we are confident that our client acted in

accordance with the law. We are weighing our options."

Matthew J. Fogelman of Fogelman & Fogelman LLC, an attorney for Barbuto, told Law360 that he and his client are "very gratified" by the decision and that Barbuto in particular "feels validated since this is something she's been struggling with for a couple of years."

"It's an important ruling that will help many marijuana patients who should not have to choose between treating a health condition and keeping their job," Fogelman said.

Barbuto is represented by Matthew J. Fogelman of Fogelman & Fogelman LLC and Adam D. Fine of Vicente Sederberg LLC.

The defendants are represented by Michael K. Clarkson and M. Tae Phillips of Ogletree Deakins Nash Smoak & Stewart PC.

The case is Cristina Barbuto v. Advantage Sales & Marketing LLC and Joanne Meredith Villaruz, case number SJC-12226, in the Massachusetts Supreme Judicial Court.

--Editing by Mark Lebetkin.

*Update: This story has been updated to include comment from both parties.*

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