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Bias Ruling Casts Doubt On Blanket Workplace Pot Bans

By **Vin Gurrieri**

Law360, New York (July 18, 2017, 9:21 PM EDT) -- Massachusetts' highest court ruled Monday that employers can be held liable for disability discrimination if they fire an individual for using legally prescribed marijuana, an interpretation attorneys say could spread to other states and force employers to consider making exceptions to drug-free policies to accommodate workers' medical needs.

The Massachusetts Supreme Judicial Court ruled that plaintiff Cristina Barbuto **can pursue claims** under the state's handicap discrimination law accusing her former employer Advantage Sales & Marketing LLC of illegally firing her because she used medical marijuana to treat Crohn's disease.

More specifically, the appellate court held that the use of medically prescribed marijuana is just as lawful as the use of any other prescription medication — even though it is illegal under federal law — and that such use away from an employer's premises could constitute a reasonable accommodation under certain circumstances if an employer can't show it would cause them undue hardship.

"This ruling is saying you can't just hide behind the illegality of [marijuana] under federal law and consider whether it's the best accommodation [for an employee]," said Rachel Schumacher, a partner at Akerman LLP who is a member of the firm's regulated substances practice. Schumacher also noted that employers will have to engage in the interactive process with employees and go "beyond not liking marijuana in the workplace" to show that an accommodation allowing for off-site medical marijuana use presents an undue burden.

Justin F. Keith, a Boston-based shareholder at Greenberg Traurig LLP, said that while it's too soon to tell if other states will adopt a standard similar to the one the SJC adopted, that possibility is likely given the sheer number of states that have medical marijuana laws and the fact that only a relative handful of courts in those states have addressed the issue, adding that plaintiffs in those states "will certainly point" to the SJC's decision.

"Employers would be well-served to treat [accommodation] requests the same way they treat requests for any other potential disabilities," Keith said. "Where an employer is considering hiring an employee who has a medical marijuana card and uses medical marijuana, there is no longer any bright line to say that because of federal issues regarding marijuana, the employer can refuse to hire that person. Employers faced with hiring applicants or continuing to employ medical marijuana users must engage in the interactive process."

As part of its ruling, the SJC noted that Barbuto's employer wrongly never engaged in that

process, choosing instead to fire her after her first day of work based on the fact she failed a drug test, even though Barbuto had already informed the company she was going to fail that test because she is a medical marijuana user.

But the SJC also made certain qualifications to its central holding that employees could sue for discrimination if an adverse action were taken against them because of their medical marijuana use.

In particular, the appellate court pointed out that employers aren't legally obligated to tolerate on-site marijuana use by employees, that its ruling doesn't apply to safety-sensitive jobs like transportation employees or federal contractors that are required to adhere to federal drug-free workplace laws, and that there is no implied statutory private cause of action under the state's medical marijuana law.

The appellate court also noted that Barbuto's case presented different circumstances than a 2008 California Supreme Court decision cited by Advantage Sales that rejected an employee's challenge under California's handicap discrimination law to a termination based on the employee's use of medical marijuana.

Unlike Massachusetts' medical marijuana law, the panel said California's medical marijuana law did not contain language protecting medical marijuana users from the denial of any right or privilege.

Matthew J. Fogelman of Fogelman & Fogelman LLC, an attorney for Barbuto, told Law360 that the Massachusetts SJC went further than just about any other court in the country when it said a company can't simply fire a medical marijuana patient for failing a drug test.

"No court has gone this far without a medical marijuana law specifically saying that an employer can't discriminate based on the results of a drug test," Fogelman said. "Some of these people are very sick, like cancer patients and those with Crohn's disease, but they can work, want to work and can perform the essential functions of their job. They just need their medication. Hopefully, this [ruling] removes some of the stigma around marijuana use."

Schumacher said that although the ruling technically applies only to employers in Massachusetts, its impact may be felt in the other 28 states that have medical marijuana laws, particularly those that already include language in their statutes that either affirmatively require employers to accommodate workers' off-site use of marijuana for medicinal purposes or language that prevents discrimination against workers for such use.

As examples, Schumacher said New York, Minnesota and Maine have specific language in their state statutes that impart those requirements.

"This [decision] can be important in those states," Schumacher said, adding that businesses should look at granting such accommodations "as a reality of doing business" as laws and conditions surrounding the medical benefits of cannabis evolve.

But if employers start rethinking their drug-free workplace policies and at least open the door to granting more waivers to those policies for medical marijuana users, attorneys say there are numerous considerations they need to keep in mind to make sure they are going about the process correctly.

Robert Kaitz, an employment and litigation attorney at Boston-based Davis Malm & D'Agostine PC, said employers who are facing a situation where an employee's medical marijuana use is governed by a state anti-discrimination law must consider first whether the user has a handicap — meaning they are substantially limited in a major life activity — and whether it is a qualified handicap that warrants an accommodation.

The employer must also evaluate whether the off-site use of marijuana will prevent the worker from performing the essential functions of their job, he said.

Thompson Coburn LLP partner Arthur F. Silbergeld said that while employers in Massachusetts and elsewhere should continue enforcing their drug-free policies, including pre-employment drug screening and post-accident drug testing, they need to leave room in their policy for "rare exceptions" where an accommodation may be warranted.

Silbergeld also said employers who grant such accommodations should make sure they inform their general liability insurance carrier and their workers' compensation carrier so that the insurers can't subsequently deny liability if a claim is made.

"It needs to be an extremely well-documented exception if [an employer] is going to make one," Silbergeld said. "The limitations [of any accommodations] need to be spelled out in both the [employer's] policy and its decision on whether to accommodate [an employee]," Silbergeld said.

Those parameters may include telling an employee that their medicinal marijuana use can't impact their performance and that they will be monitored more closely to make sure that's the case, according to Silbergeld, who also cautioned that any monitoring policy should also be tailored to protect the worker's privacy.

"Other employees shouldn't find out from the employer what condition an individual has or the medications that led to the accommodation," Silbergeld said.

--Editing by Philip Shea and Aaron Pelc.