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Employers urged to re-examine drug policies after Massachusetts court ruling

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The muddied intersection between two federal laws and a state law in Massachusetts has legal experts advising employers to re-examine their drug-free workplace policies as the state's highest court recently issued a game-changing ruling related to medical marijuana.

The Massachusetts Supreme Judicial Court on July 17 ruled that Irvine, California-based Advantage Sales and Marketing L.L.C., which fired Cristina Barbuto after her pre-employment drug screening tested positive for marijuana use, could be sued under federal handicap discrimination statutes.

Overturning a lower court's ruling on appeal, the court rejected the former employer's argument that Ms. Barbuto's case could not fall under handicap discrimination pertaining to the Americans with Disabilities Act because possessing marijuana remains illegal under federal law.

Since 29 states and Washington, D.C., now permit the use of medical marijuana, legal experts are telling employers to consider the ruling's implications in both Massachusetts and elsewhere.

"The implications of this ruling are huge; this is really a watershed decision in Massachusetts," said Jeffrey Dretler, partner and labor and employment attorney in Fisher & Phillips L.L.P.'s Boston office. "What it means is essentially it is no longer OK in Massachusetts to have a zero-tolerance drug policy that you apply … without exception or looking at the individual value of the case."

"There's going to be lots of employers (that say) there is going to be a reevaluation of policies regarding drug testing; that it's time to reevaluate," said Anthony Califano, Boston-based partner in the labor & employment department of Seyfarth Shaw L.L.P.

The marijuana law, passed in 2012, "left a lot of questions unanswered" for employers, Mr. Dretler said.

One of those questions pertained to cases such as that of Ms. Barbuto, experts said.

Ms. Barbuto, who was hired to help market products, suffers from Crohn's disease, a gastrointestinal condition that causes severe weight loss. Per legal documents, she disclosed to her new employer that she would test positive for marijuana, which helps with her appetite and maintaining a healthy weight. Her employer, which required a pre-employment drug screening, allegedly told her not to worry and later fired her when her screening came back positive, according to court records.

At issue is that she needed medical marijuana for her disease, which the Massachusetts Supreme Judicial Court ruled fell under federal laws protecting workers with disabilities, requiring employers to provide accommodations. In Ms. Barbuto's case, the omission of the drug screen would have been the accommodation.

Chief Justice Ralph Gants wrote that the ruling "does not necessarily mean that (Ms. Barbuto) will prevail in proving handicap discrimination. The defendants at summary judgment or trial may offer evidence to meet their

burden to show that the plaintiff's use of medical marijuana is not a reasonable accommodation because it would impose an undue hardship on the defendants' business," according to court documents.

The ruling also stated that if a doctor concludes medical marijuana is the most effective treatment for an employee's debilitating condition, "an exception to an employer's drug policy to permit its use is a facially reasonable accommodation."

"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," Mr. Gants wrote in the unanimous six-judge panel ruling.

Ms. Barbuto's attorney, Matthew J. Fogelman of Newton, Massachusetts-based Fogelman & Fogelman L.L.C., praised the decision for all workers.

"Certainly in Massachusetts there is now protection for medical marijuana patients that did not exists before. ... People should not have to fear between treating their medical condition and having a job," he said. "Time will tell but certainly there is now this decision that other courts and other states can look to. It would be fantastic to see other states follow (the Massachusetts Supreme Court's) lead in (finding) that marijuana is a medication that helps people."

Meanwhile, the ruling also states that if an employee works in a field where safety is an issue or is mandated by federal law — such as the U.S. Department of Transportation requirements that workers be drug free — the accommodation rule would not apply.

"The defendants at summary judgment or trial may offer evidence to meet their burden to show that the plaintiff's use of medical marijuana is not a reasonable accommodation because it would impose an undue hardship on the defendants' business. ... For instance, an employer might prove that the continued use of medical marijuana would impair the employee's performance of her work or pose an 'unacceptably significant' safety risk to the public, the employee or her fellow employees," the ruling states.

Jill Kirila, Columbus, Ohio-based co-leader of the global labor & employment practice group for Squire Patton Boggs L.L.P., said the latest state ruling "bucks a trend" nationally as other courts have ruled that employers caught between state medical marijuana laws and federally illegal drugs can choose to maintain adherence to federal laws that list marijuana as a Schedule I drug alongside heroin and cocaine, which the federal government has deemed to have no medical value.

For example, in *Brandon Coats v. Dish Network,* Colorado's Supreme Court ruled in 2015 that employers can fire workers who use marijuana for medical reasons, even though it's legal in that state.

Mr. Coats is a quadriplegic with a doctor's authorization to smoke medical marijuana who was fired by Dish Network in 2010 after he failed a company drug test for marijuana, which has been legal in Colorado since 2000.

Mr. Coats testified that he never used the drug, nor was he under its influence, while at work; Dish Network did not dispute this, according to court records.

Meanwhile, some experts were quick to point out that the latest ruling entitles employers to engage in an "interactive process" with the employee, ensuring that there are no other effective treatments.

This presents a conundrum for employers who will have to weigh in on an employee's medical treatment, said Mike Clarkson, a shareholder in the Boston office of Ogletree, Deakins, Nash, Smoak & Stewart P.C., which represented Ms. Barbuto's employer.

Another issue is that potency and dosing for medical marijuana have not been effectively determined; all of which can lead to workplace safety issues when a person is prescribed medical marijuana and gets his or her product from a dispensary and not a pharmacy as with other drugs regulated by the U.S. Food and Drug Administration, he said.

Mr. Califano said this raises a "practical concern."

"There isn't an available means of testing for immediate intoxication," he said. "You can't tell how high somebody is. You can just tell that it is in their system.

"All of these thorny issues and the frustration that will come (with) having to accommodate I guess will have to be sorted out case by case; employers will have to get ready and figure out what they are going to do," he said.
