Matthew J. Fogelman

FOGELMAN & FOGELMAN

PHOTO BY MERRILL SHEA

When Christina Barbuto, a medical-marijuana user who lost her entry-level marketing job after flunking a drug test, met with Newton attorney Matthew J. Fogelman to discuss a potential disability discrimination claim, Fogelman said to himself, "This has SJC written all over it."

No court had previously tested the constraints of the state's 2012 marijuana law in an employment context, and with a sympathetic client it seemed like the perfect case to do so.

Barbuto suffered from severe appetite and weight loss from Crohn's disease, a "debilitating condition" under the medical-marijuana statute. She used marijuana to treat her symptoms, something she had apparently told her employer, Advantage Sales & Marketing. Not until after she accepted the job was she told she'd have to submit to a drug test.

According to Barbuto, when she warned her supervisor she wouldn't pass the test, she was told it wouldn't be an issue. But after her first day on the job, Advantage fired Barbuto for failing the test. HR allegedly told her that, regardless of medical reasons, "We follow federal law, not state law."

Fogelman thought his client had a legitimate handicap-bias claim under Chapter 151B. He also suspected his argument that Advantage broke the law by unreasonably failing to accommodate Barbuto's disability might not resonate with lower court judges.

He was right. A Superior Court judge dismissed *Barbuto v. Advantage Sales & Marketing, LLC*. But the SJC took up Barbuto's appeal on its own motion and last July found that she did, in fact, state a claim.

According to the court, declaring an accommodation per se unreasonable out of respect for federal marijuana law would be disrespectful to Massachusetts voters and legislators who recognized the plant's legitimate medical use.

"Before this case, an employer might fire an employee for testing positive for marijuana and the analysis would stop there," says Fogelman, who was assisted on the case by Quincy lawyer Adam D. Fine. "I don't think that was the correct approach, and I was extremely gratified to see that the SJC agreed with me."

***

Q. *Why is the decision important in a broad sense?*
A. The SJC has now very clearly said an employer can't just fire someone if they test positive for marijuana if they're using it for medical purposes, without engaging in an interactive process, without doing a deeper dive into why this person is using it, what their condition is, what kind of accommodation they're seeking, and whether the job is safety-sensitive, raising safety or public health concerns in any way.

It's really the same process that occurs when anybody asks for an accommodation. Is it reasonable? Would it pose an undue hardship to the employer? These are discussions employers should be having any time an accommodation is requested. And the court is saying [medical marijuana] is no different.

Q. *What was the most challenging aspect of the case for you?*
A. Though the tide is changing nationally, and I think it'll continue to change, there's still a stigma associated with marijuana. So I took this case not knowing if I was ever going to make any money on it, but it seemed like a worthy cause.

Also, marijuana is still illegal under federal law, so we knew we wanted to stay out of federal court. [Removal] was a challenge we had to overcome. We were able to get the case remanded back to state court by arguing we'd pled less than $75,000 in damages.

Q. *What was the most important factor behind the result you achieved?*
A. Arguing the case under Chapter 151B and framing it as such for the SJC, saying, "Look, this is a medication that a doctor is saying is the right one for a patient. Some very sick people are using it as medication: cancer patients, people with glaucoma, people in extreme pain. If a doctor is saying this is the right medication — and by the way, we're talking about people using it offsite and not coming to work impaired — why is that the business of the employer?" We framed it in a genuine way, and I think the court was responsive to that.

> "[A]n employer can't just fire someone if they test positive for [medical marijuana] without doing a deeper dive."

Q. *It's not hard to imagine employers looking at this decision with alarm. After all, they could see it as being punished for simply following federal law and expecting their employees to do so as well. What would you say to that?*
A. Employers have been engaging in these types of dialogues with employees for a long time. For example, we have an opioid crisis in Massachusetts and nationwide. But they're legal, and you have employees who may be using them for all kinds of things — like ADHD, depression and insomnia — and who take them responsibly and show up in the morning to do their job. They aren't impaired, and no one's any worse for the wear. I don't think this is any different.

Regarding federal law, [companies] that choose to do business in Massachusetts have to follow Massachusetts law, and federal laws on drugs don't preempt the field.

Q. *Couldn't this ruling open the door for state courts to ignore federal law in less benign ways, potentially disregarding federal protections for, say, reproductive rights, LGBT rights or voting rights out of respect for a state electorate?*
A. I don't view this as respect or disrespect for federal law. I think states do have the right to decide either by ballot initiative or regular legislation what people want in that state if the federal law doesn't preempt the field.

— Eric T. Berkman