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CLIENT ALERT

MASSACHUSETTS SUPREME JUDICIAL COURT ALLOWS HANDICAPPED EMPLOYEES TO USE MEDICINAL MARIJUANA

On July 17, 2017, the Massachusetts Supreme Judicial Court (“SJC”) in [Barbuto v. Advantage Sales and Marketing, LLC.](#), ruled that an employer may not fire an employee for testing positive for marijuana in violation of its drug testing policy if that employee has a legitimate medical need for medical marijuana.

Facts

Cristina Barbuto began working at an entry-level position with Advantage Sales and Marketing (“ASM”) in late summer 2014. Ms. Barbuto suffered from Crohn’s Disease and was prescribed medical marijuana by her doctor. Even though Ms. Barbuto was using marijuana consistent with the [Medical Marijuana Act of 2012](#), and only after work hours and off-site, she was still terminated on her first day of work because she tested positive for marijuana.

The SJC Decision

Ms. Barbuto argued that because she was handicapped, Massachusetts anti-discrimination law required ASM to provide her an accommodation allowing her marijuana use. ASM argued that because possession of marijuana is still considered a controlled substance under federal law, any accommodation for marijuana use is automatically unreasonable and therefore not required.

In a unanimous decision, the SJC ruled that patients with a legitimate medical need for marijuana consistent with the Medical Marijuana Act can sue for handicap discrimination when their employer does not offer an accommodation.

The SJC explained that using medically prescribed marijuana is the same as using any other medication prescribed by a doctor and thus employers are required to provide a reasonable accommodation for its use. The SJC also rejected ASM’s argument that federal law makes any accommodation unreasonable, noting that accepting this argument would have the effect of ignoring the voters of Massachusetts as well as “the vast majority of States” who have voted to allow the use of medical marijuana.

Implications for Employers

Massachusetts employers may need to re-evaluate their drug testing policies. If an employee is qualified to perform a job, and has a legitimate need for medical marijuana, the employer has an obligation to provide a reasonable accommodation. This means that employers must engage in an

“interactive process” with employees by working with them to find an accommodation, possibly including waiving positive drug test results.

The Barbuto decision does not require employers to accommodate employees where medical marijuana use would impose an “undue burden” on that employer. For example, an employer who relies on federal grants that would be threatened if its employees were to use marijuana does not need to accommodate those employees because to do so would threaten the employer’s business. Moreover, employers with “safety-sensitive” positions, such as those in the transportation industry, are not required to make accommodations for those positions because of the potential risk to the public.

The Barbuto decision also emphasized (1) that employers do not have any duty to accommodate the use of marijuana in the workplace, and (2) that the decision does not apply to the newly legalized use of recreational marijuana.

For any questions about the Barbuto decision and other discrimination or employment issues, please contact Attorney Paul Holtzman (PHoltzman@kb-law.com) or Attorney Jill Brenner Meixel (JMeixel@kblaw.com) at (617) 482-7211.