

# Massachusetts High Court Reverses Dismissal of Disability Discrimination Suit Involving Medical Marijuana

By Dave Robinson on July 18, 2017



In a landmark decision published on Monday, July 17, 2017, the Massachusetts Supreme Judicial Court (SJC) ruled that medical marijuana use may constitute a reasonable accommodation, overturning an employer's termination of an employee for failing a drug test due to her use of medicinal marijuana. This is the first state court to require employers to consider whether the use of medical marijuana may constitute a reasonable accommodation (nearly 90% of all States, as well as the District of Columbia and Puerto Rico, permit some form of limited possession of marijuana for medical treatment). In so doing, the Court rejected the employer's argument that allowing the use of medical marijuana is per se unreasonable because possession of marijuana violates federal law.

## ***Barbuto v. Advantage Sales and Marketing, LLC***

In November 2012, Massachusetts voters approved the Massachusetts Medical Marijuana Act (the Act), which eliminated state and civil penalties for the medical use of marijuana for individuals suffering from a "debilitating medical condition." The Act also provides that "Any person meeting the requirements under this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions."

In late summer 2014, Cristina Barbuto accepted a position with Advantage Sales and Marketing (ASM). An ASM representative later informed her that she was required to take a mandatory drug test. Barbuto, who suffered from Crohn's disease, a "debilitating medical condition" under the Act, allegedly informed ASM that she would fail the test because she used marijuana for medicinal purposes as a qualified medical marijuana patient under the Act. Her supervisor allegedly assured Barbuto that her medicinal use of marijuana would not be a problem. However, after the test results came back positive for marijuana, ASM terminated Barbuto's employment for violating its drug use policy. Thereafter, Barbuto filed a disability discrimination claim against ASM.

The trial court dismissed the discrimination claim finding that employers are not required to accommodate marijuana use because it is illegal under federal law and such an accommodation is per se unreasonable. However, the SJC rejected this finding:

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 only person at risk of Federal criminal prosecution of medical marijuana is the employee.

...

To declare an accommodation for medical marijuana to be per se unreasonable out

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of respect for Federal law would not be respectful of the recognition of Massachusetts voters, shared by the legislatures or voters in the vast majority of States, that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions.

Accordingly, the SJC reversed dismissal of the disability discrimination claim, finding that dismissal was not appropriate at this early juncture.

It is important to note that while the SJC reinstated the case, it cautioned that such reversal does not necessarily mean that the claimant will prevail on her discrimination claim. The SJC reasoned that “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.” Additionally, the Court found that the use of medical marijuana could be prohibited where the employer’s statutory or contractual obligations require such a prohibition. For instance, companies subject to US Department of Transportation regulations are prohibited from allowing any safety sensitive employee from using marijuana.

The SJC found that regardless of whether the use of medical marijuana would impose an undue hardship on an employer, the employer is obligated to engage in the interactive process (i.e., discussing with employee other reasonably effective accommodations), as with all requests for disability accommodations. ASM’s immediate termination of Barbuto for failing the drug test without engaging in the interactive process could also be sufficient to support a disability discrimination claim.

#### ***What does this decision mean for employers in Massachusetts?***

As an initial matter, nothing in the *Barbuto* decision requires employers to allow non-medical use of marijuana, or to accommodate onsite medicinal use of marijuana. For instance, an employer may still terminate employees who use medicinal marijuana onsite or show up to work intoxicated from marijuana.

However, employers can no longer avoid accommodation requests for offsite medical marijuana use based on a drug-free workplace policy, and now must assess such requests for accommodation the same as any other request for an accommodation. Accordingly, it is imperative for employers to review their drug-free workplace policies, amend its policies and practices, and assess ahead of time as to whether accommodating medical marijuana use would create an undue hardship.

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