Ten Minutes in the Weeds of Employer Considerations: Medical Marijuana After *Barbuto*

Debra Dyleski-Najjar, Esquire
NAJJAR EMPLOYMENT LAW GROUP, PC

60 State Street, Suite 700
Boston, MA 02109

869 Turnpike Street, Suite 209-211
North Andover, MA 01845

2018 Work Related Injuries Workshop
April 30-May 1, 2018

Outline:

I. *Barbuto's* Guidance on Workplace Accommodation
   - The Interactive Dialogue
   - Assessing Reasonable Accommodation
   - Impairment?
   - Undue Hardship?
   - Off Duty Use v. On-site Possession

II. Case Law Post *Barbuto*

III. Accommodation Considerations for Medical Marijuana

IV. Best Practices

Barbuto v. Advantage Sales: Disability Analysis

2018 Work Related Injuries Workshop
April 30-May 1, 2018

Barbuto v. Advantage Sales

- The Massachusetts Supreme Judicial Court (SJC) issued its decision in Barbuto v. Advantage Sales & Mktg., LLC, 477 Mass. 456 (2017) on July 17, 2017.
- Barbuto is the first Massachusetts case to interpret the Massachusetts Medical Marijuana Act as it relates to employment.
- The plaintiff's claims were dismissed by the Superior Court, and the SJC took direct appellate review.
- MCAD filed an amicus brief in support of the plaintiff's arguments under the handicapped discrimination act.

Facts

- Christine Barbuto was offered and accepted an entry level position, then told she would need to take a drug test.
- Barbuto told her supervisor that she would test positive for marijuana, and he said it "should not be a problem."
- Barbuto suffered from Crohns disease, was a qualified medical marijuana patient, used marijuana in small quantities at home 2-3 times a week to maintain her weight, and did not consume it before work or at work.
- Barbuto completed training and worked few days.
- HR Rep called to terminate her employment. Employer had a zero tolerance drug policy and followed "federal law, not state law."

Question before the SJC

- **Question**: Whether a qualified patient who has been terminated from employment because she tested positive for marijuana as a result of her lawful medical use of marijuana has a civil remedy against her employer?
- **Holding 1**: The plaintiff may seek a remedy through claims of handicap discrimination in violation of G.L. c. 151B.
- **Holding 2**: There is no private cause of action under the medical marijuana act, and the plaintiff failed to state a claim for wrongful discharge.

What went wrong for the employer?

The "Interactive Dialogue"

The Court stated:

> "[E]ven if the accommodation of the use of medical marijuana were facially unreasonable (which it is not), the employer still owed the plaintiff an obligation under G.L. c. 151B, s 4(16), before it terminated her employment, to participate in the interactive process to explore with her whether there was an alternative, equally effective medication she could use that was not prohibited by the employer's drug policy."

Analytical Framework

Barbuto: State Law Handicap Discrimination Unlawful

- Under M.G.L. c. 151B, §4(16), it is an unlawful employment practice:
  - For any employer, . . ., to dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business.

A Plaintiff's Prima Facie Case

1. "Handicapped person" M.G.L. c. 1 (19)

   "a physical or mental impairment that substantially limits one or more major life activities."

2. "Qualified Handicapped Person" capable of performing essential functions with or without reasonable accommodation.
3. Requested a facially reasonable accommodation, "feasible under the circumstances."

Burden of the Employer

- To engage in the interactive dialogue with the employee to "identify the precise limitations resulting from the handicap and potential reasonable accommodations that could overcome those limitations."
- NEED A MEDICAL OPINION!!!!!
- *If no equally effective alternative*, employers bears the burden to prove undue hardship in refusing to reasonably accommodate the medical needs of the handicapped employee.

Zero Tolerance Policy: Failed Because no Interactive Dialogue

- The SJC stated that employers with zero tolerance drug policies must still "engage in an interactive process with the employee to determine whether there were equally effective medical alternatives to the prescribed medication whose use would not be in violation of its policy."
- If no effective alternative exists, it is the employer's burden to prove that the employee's use of marijuana would cause an undue hardship on the employer's business.
- The SJC rejected Advantage Sales' argument that Ms. Barbuto's request to use medical marijuana was an unreasonable accommodation *per se* because marijuana is illegal (Schedule I) under federal law.

Court's Reasoning

- Court noted that medical marijuana is legal under Massachusetts law, and that an exception to the employer's drug policy is a facially reasonable accommodation where the employee's physician has determined that marijuana is the most effective medication for the employee's condition and any alternative would be less effective.
- The Court cited the Medical Marijuana Act which provides that any person that meets the requirements of the Act shall not be "denied any right or privilege" on the basis of their medical marijuana use.
- The Court further reasoned that the Act does not require "any accommodation of any on-site *use* of medical marijuana in any place of employment," which implicitly recognized that off-site medical marijuana use may be a permissible accommodation.

Employer Burden on Remand to the Trial Court

- "*Our conclusion does not mean that plaintiff will necessarily prevail in proving handicap discrimination*".
- "Undue Hardship," the Employer's Burden to show:
  - Impair the employee's performance;
  - Pose an "unacceptably significant" safety risk to the public, the employee, or her fellow employees.
- The court also recognized that an employer may show undue hardship if use of marijuana would violate employer's contractual or statutory obligations and thereby jeopardize its ability to perform its business.
  - For example: "Safety Sensitive" employees under a federal contract or the Employer is a recipient of federal grants that must comply with the Federal Drug Free Workplace Act

Case Law After Barbuto: The Slippery Slope

Brown v. Woods Mullen Shelter

- Suffolk Superior Court issued a decision interpreting Barbuto on August 28, 2017. (Brown v. Woods Mullen Shelter, 34 Mass. L. Rptr. 416 (Super. Ct. 2017)).
- Brown, a homeless man, was expelled from the Woods Mullen Shelter because he was *in possession* of lawfully prescribed medical marijuana.
- Brown was self represented and brought claims for negligence, negligent infliction of emotional distress and unspecified "civil rights" violations.

Brown v. Woods Mullen Shelter

- All claims were dismissed *except* for Brown's claim relating to violation of his civil rights.
- The court found the pleaded facts to state a potentially viable claim for relief under the Massachusetts Civil Rights Act ("MCRA").
- This case involved a challenge the shelter's zero tolerance policy on drug possession at the shelter.

Claim Under MCRA

- To establish a claim under the MCRA, a plaintiff "must prove that (1) [his] exercise or enjoyment of rights secured by the Constitution or laws of either the United States or the Commonwealth, (2) have been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by threats, intimidation or coercion."
- Court found Mr. Brown's complaint to suggest that the defendant's conduct interfered with Mr. Brown's right, as a medical marijuana patient, to *possess* this now lawful substance in a public place (even if he could not use or be impaired at the shelter).

Medical Marijuana Act and MCRA

- Court noted that while the MA Medical Marijuana Act does not
  - "require any accommodation of any on-site medical use of marijuana in any place of employment, school bus or on school grounds, in any youth center, in any correctional facility, or of smoking marijuana in any public place,“
- The Act is silent regarding the “mere *possession* of medical marijuana in a public place, or even the *use* of medical marijuana in a public place if such use does not entail smoking.”

Possession in a Public Place

- "Under the *inclusio unius* doctrine of statutory construction, the Act would appear to require the accommodation of medical marijuana patients in their right to possess and/or use without smoking the substance in public places."
- Furthermore, the shelter may have violated Mr. Brown's constitutional right to equal protection of the law because the shelter policy prohibiting marijuana allegedly distinguished between two classes of medically debilitated individuals: (a) those who treat their condition with prescribed marijuana, and (b) those who treat their condition with other forms of prescription medication.

Accommodation Best Practices

Accommodation Obligation

- Employers must engage in the interactive dialogue with all handicapped employees.
- Off-duty medical marijuana may have to be accommodated, as long as use of medical marijuana does not cause an undue hardship for the employer.
- Brown suggests possession also must be accommodated, if the employer allows other controlled drugs in the workplace.
- Lack of clear guidance on "impairment."

Best Practices

- Review "Zero Tolerance" drug policies, and consider amending them in accord with the Barbuto decision.
- Review Job Descriptions: Assure essential functions (which may include cognitive ability) are clearly stated.
- Understand the "interactive dialogue" and how to engage in the dialogue.
- An employer will NEVER WIN an accommodation analysis without a medical opinion on what accommodations will allow the employee to safely perform the essential job functions.
- Train HR, Supervisors and Managers about the "interactive dialogue".
- Keep abreast of research regarding "impairment."
- Know what your MRO tests for and how it is reported.
- Keep an eye on recreational marijuana developments.
- Get results of pre-employment drug screens BEFORE the employee commences employment.

QUESTIONS????

NAJJAR EMPLOYMENT LAW GROUP, P.C.

- **Debra Dyleski-**Najjar founded the Najjar Employment Law Group, P.C. in April, 2008 as a labor, employment and benefits boutique law firm providing top quality legal advice, as well as litigation expertise, for employers to keep employers ahead of the curve. Ms. Najjar is a graduate of Boston University School of Law, third in her class, and a magna cum laude graduate of Wellesley College. She is admitted to practice in the state and federal courts of Massachusetts, Maine and New Hampshire as well as the United States Supreme Court. Ms. Najjar is a fellow of the College of Labor and Employment Attorneys, a certified member of the American Society of Pension Professionals and Actuaries, AV rated by Martindale Hubbell, and recognized as a New England Super Lawyer over ten consecutive years. Over her 30 plus year career, Ms. Najjar has advised many employers regarding workplace accommodations and successfully defended ADA claims before state and federal agencies as well as in the courts. www.nelgpc.com