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Despite Contrary Law in Other States, New Jersey Employers Not Required to Accommodate Medical Marijuana Use

The medical and recreational marijuana use laws sweeping the country have resulted in a great deal of uncertainty for employers—especially those who have adopted a zero-tolerance drug policy and require drug testing under various circumstances, including pre-employment and when reasonable suspicion of impairment exists. New Jersey employers can, at least for now, breathe a sigh of relief based on a recent federal court decision holding that they are not required to accommodate employees' medical use of marijuana by waiving a mandatory drug test.

By way of background, in 2010, New Jersey enacted the Compassionate Use Medical Marijuana Act (CUMMA), which decriminalized the use of medical marijuana for qualifying patients. Several New Jersey courts dodged the issue of whether employers must accommodate employees' use of medical marijuana under the New Jersey Law Against Discrimination (NJLAD) by dismissing similar claims on procedural grounds. A New Jersey federal district court, however, recently addressed the issue in *Cotto v. Ardagh Glass Packing, Inc*. In this case, an employee suffered a neck and back injury and was prescribed various medications for pain management, including marijuana. Several years later, he was hired as a forklift operator at the defendant employer. When he thereafter injured himself at work when he hit his head on the roof of his forklift, the employer did not allow him to return to work until he passed a drug test.

The employee sued, asserting claims of disability discrimination, discrimination based on perceived disability, failure to accommodate and retaliation under the NJLAD. The crux of his claim was that his employer had discriminated against him by refusing to waive the drug testing requirement and that, in doing so, had failed to reasonably accommodate him. The employee did not claim that his employer discriminated against him based on his disability, but rather that it refused to accommodate his use of medical marijuana.

While the court accepted the employee's argument that he was qualified to perform his work as a forklift operator and that he suffered from a known disability (i.e., neck and back pain), it found he was not able to perform the essential functions of his job due to his unwillingness to meet a condition of his employment (i.e., pass a drug test). The court predicted that if faced with such an issue, a New Jersey state court would hold that the NJLAD "does not require an employer to accommodate an employee's use of medical marijuana with a drug test waiver." In support of its "prediction," it noted that "courts have generally found employment drug testing to be unobjectionable in the context of private employment" and that neither CUMMA nor the NJLAD require the employer to waive its requirement that employees pass a drug test. Significant to the court's decision was the fact that the employee's claims were premised on his use of marijuana, or in the court's view, the conduct resulting from treatment of the disability, rather than the disability itself. It ruled that NJLAD only prohibits discrimination based upon a disability, not upon conduct resulting from a disability.

As to CUMMA, the court noted it was intended to decriminalize the use of marijuana for qualifying patients, not to prohibit adverse employment actions. Important to the court's decision was the fact that use and/or possession of marijuana for any purpose is still a crime under the federal Controlled Substances Act. Thus, in the court's view, the employer was "within its rights to refuse to waive a drug test for federally prohibited narcotics." The court also dismissed the employee's failure to accommodate claim for similar reasons.

This decision departs from recent rulings in other states. For example, in *Barbuto v. Advantage Sales & Mktg,* the Massachusetts Supreme Judicial Court held that an employee who was discharged because she tested positive for using medical marijuana could sue her employer for handicap discrimination under the Massachusetts anti-discrimination law. It

also held that, despite marijuana's status as an illegal drug under federal law, employers may be required to permit employees to use medical marijuana as a reasonable accommodation under state law, unless the employer can prove that doing so constitutes an undue hardship. As reported in "Connecticut Federal Court Finds Employer Liable for Refusing to Hire Medical Marijuana User," in *Noffsinger v. SSC Niantic Operating Co.,* a federal court recently ruled in favor of an employee on her discrimination claims brought under Connecticut's Palliative Use of Marijuana Act (PUMA) and stemming from an employer's refusal to hire her based on a positive drug test result. The court held that the employer's obligations under the Drug Free Workplace Act and the False Claims Act did not exempt it from PUMA's employment protections. It also rejected the employer's argument that PUMA only prohibited discrimination based on an individual's status as a qualified patient and not on the patient's actual use of medical marijuana, reasoning that such an interpretation would nullify the statute's purpose and express protections. In contrast to CUMMA, Connecticut's Palliative Use of Marijuana Act contains specific employment protections for qualifying patients. Similarly, New York's medical marijuana use law deems qualified patients to be disabled under the state's anti-discrimination laws, which may trigger accommodation requirements.

This decision provides important guidance to New Jersey employers managing the impact of employee marijuana use. It is important to note, however, that the court limited its decision to the facts before it, a New Jersey state court could disagree with this decision and the New Jersey legislature could act to amend the law to include specific employment protections, as found in other state laws. Since marijuana use laws are rapidly changing, employers must stay vigilant and consult with counsel when confronted with such issues.

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