

# Employers Can Be Liable for Failure to Reasonably Accommodate Employee's Medicinal Marijuana Usage

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**Employer Summary: For the first time, an appellate court has held that an employer must accommodate an employee's physician-authorized medicinal marijuana usage under a state disability discrimination statute. Employers in Maryland and the District of Columbia need to take care before disciplining employees based on off-duty medicinal marijuana usage as it is plausible that a court could find that employees are entitled to similar protections under the Maryland and D.C. medicinal marijuana laws.**

In the 21 years since California became the first American state to legalize medicinal marijuana usage, there has been a sea change in societal attitudes towards the drug. Fast forward to 2017, and the vast majority of states have now legalized medicinal marijuana with several states and the District of Columbia going even further to legalize recreational marijuana use in the absence of a prescription or medical need. A recent case from the highest court of Massachusetts suggests that the courts may be catching up in the area of employment discrimination to these societal developments, and could carry major implications for employers in Maryland and the District of Columbia.

In *Barbuto v. Advantage Sales and Marketing, LLC*, the Supreme Judicial Court of Massachusetts held that under Massachusetts' state anti-discrimination statute, if an employee is authorized to treat a disability with medicinal marijuana, employers must reasonably accommodate off-premises marijuana usage. This appears to be the first reported decision to impose such a duty. Previously, several federal and state courts had held that medicinal marijuana usage is not a reasonable accommodation because it remains illegal under federal law. In addition, the federal Americans with Disabilities Act expressly states that employers need not accommodate illegal drug use. As the Massachusetts case shows, however, state laws may impose different requirements than the federal ADA.

The *Barbuto* case involved an employee who was terminated from her job after one day for failing a drug test. The employee had been diagnosed with Crohn's disease for which she received a recommendation for medicinal marijuana from her physician. The employee alleged that she used marijuana only in small quantities at her home two or three times per week, and pledged that she would not use her prescribed marijuana before or at work. While the employee's supervisor initially indicated that her use of medicinal marijuana would not be a problem, the employee was later terminated after one day of work when her drug test reported positive for marijuana. The employee then sued her former employer.

The Massachusetts high court found that the employee's state law disability discrimination claim could go forward because it was not facially (i.e., under any and all circumstances) unreasonable for the employer to accommodate her medicinal marijuana usage outside of the workplace. Although Massachusetts courts typically find federal ADA case law persuasive in construing the Massachusetts state disability discrimination statute, the court here reached the opposite conclusion and held that marijuana's continuing status as a Schedule 1 drug under federal criminal law did not render the accommodation unreasonable where the vast majority of states, including the voters of Massachusetts, had recognized its medicinal value. Rejecting the employer's argument based on federal criminalization of marijuana, the court noted that the only person at risk of federal prosecution for the employee's off-premises medicinal marijuana usage was the employee herself, not the employer. The court further explained that Massachusetts' medicinal marijuana statute explicitly stated that patients could not be denied "any right or privilege" due to their medicinal marijuana usage, and reasoned that to deny an employee the right to receive reasonable accommodations and to not be fired due to her disability would contradict the statutory command.

The Massachusetts decision carries some important caveats. First, it appears that the employee had a legitimate need and a physician's authorization for the medicinal marijuana to treat a debilitating condition. Courts may be less sympathetic to employees whose disabilities can be accommodated by measures other than medicinal marijuana. In addition, the case did not involve the use or possession of marijuana in the workplace or the employee reporting to work under the influence of marijuana, and therefore should not affect the ability of employers to maintain a drug free workplace. Finally, the court left open the possibility that employers in specific fields – such as the transportation industry governed by strict DOT regulations – could establish that in a particular case accommodating off-site medicinal marijuana usage would impose an undue hardship.

This ruling could carry implications for employers in Maryland and the District of Columbia. The Maryland medicinal marijuana statute contains similar language to the Massachusetts statute that qualified patients may not “be denied any right or privilege, for the medical use of cannabis.” This language was crucial to the Massachusetts decision and was used by the court to distinguish the case from prior cases decided under statutes that did not contain a similar protection. The District of Columbia medicinal marijuana statute does not contain similar language, but D.C. employers should also be wary. The District has been at the forefront of marijuana legalization, permitting both medicinal and recreational use and prohibiting employers from drug testing for marijuana under certain circumstances. It is very plausible that a D.C. court, taking this public policy into consideration, could reach a similar result to the Massachusetts case.

Given the proliferation of legalized medicinal and recreational marijuana and this new precedent extending employee protections, employers should be wary of taking action against an employee based on that employee's off-duty medicinal marijuana usage. As with any disability accommodation matter, the employer must engage in a particularized and extensive interactive process to identify an alternative accommodation if it intends to deny the employee the accommodation of off-duty medicinal marijuana usage. If an alternative cannot be found, the employer must engage in a fact-specific analysis to determine precisely why the off-duty usage would be unduly burdensome to the employer. Because these decisions carry a significant risk of litigation, these analyses should be done in consultation with experienced legal counsel to ensure that any decision the employer makes will hold up in court.