Federal Court Holds Federal Law Does Not Preempt Connecticut Law Prohibiting Discrimination Against Lawful Users of Marijuana

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Courts are continuing to challenge precedent that, until recently, had given employers broad discretion in firing or refusing to hire individuals who test positive for marijuana. In July 2017, the Massachusetts Supreme Judicial Court ruled that state law requires an employer to accommodate an employee's use of medical marijuana. *See Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (2017). A similar holding has now come at the federal level: in *Noffsinger v. SSC Niantic Operating Co. LLC*, No. 3:16-cv-01938 (JAM), 2017 U.S. Dist. LEXIS 124960 (D. Conn. Aug. 8, 2017), a Connecticut federal district court found that federal law does not preempt Connecticut's Palliative Use of Marijuana Act ("PUMA"), which protects employees and job applicants from employment discrimination based on their lawful use of medical marijuana. *Id.* at *21. In addition, the Court held that PUMA, despite lacking an express statutory enforcement mechanism, provides employees and job applicants with an implied private right of action with respect to the law's anti-discrimination prohibition. *Id.* at *24.

In 2015, plaintiff Katelyn Noffsinger was prescribed medical marijuana to treat her post-traumatic stress disorder ("PTSD"). She registered with the Connecticut Department of Consumer Protection and began taking Marinol (a.k.a. dronabinol), a synthetic form of marijuana, every night before bed. *Id.* at *4. In July 2016, Ms. Noffsinger was recruited for a position with defendant Bride Brook. She subsequently informed the company of her use of Marinol as a "qualifying patient" under PUMA to treat her PTSD. Nevertheless, Bride Brook rescinded her job offer after learning that she had tested positive for cannabis in her pre-employment drug test. *Id.* at *5-6. In August 2016, Ms. Noffsinger sued the company in Connecticut Superior Court, alleging a violation of PUMA's anti-discrimination provision. The case was removed to federal court on the basis of diversity jurisdiction and Bride Brook filed a motion to dismiss, arguing that Ms. Noffsinger's PUMA claim was preempted by three federal statutes: the Controlled Substances Act ("CSA"), Americans with Disabilities Act ("ADA"), and Food, Drug, and Cosmetic Act ("FDCA").

Surprisingly, the Court found no federal preemption of PUMA. First, the Court observed that while "the CSA makes it a federal crime to use, possess, or distribute marijuana," it neither prohibits employing marijuana users nor attempts to regulate employment practices. *Id.* at *10-11. The Court distinguished this case from *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industry*, 230 P.3d 518 (Or. 2010), in which the Oregon Supreme Court found that the CSA preempted Oregon's medical marijuana statute. *Noffsinger*, 2017 U.S. Dist. LEXIS 124960, at *12-13 (noting that, unlike PUMA, Oregon's medical marijuana statute lacked a "provision explicitly barring employment discrimination"). Second, the Court explained that while the ADA contains "an illicit-drug-use exception" to its protections, it does not authorize employers to take adverse employment actions based on an employee's illicit drug use *outside* of the workplace. *Id.* at *17. (Neither the Court nor the parties addressed the fact that Marisol may be prescribed under the CSA as a Schedule III drug. Thus, while Ms. Noffsinger's state-law discrimination claim was also potentially actionable under the ADA, the Court's decision might have limited value in future cases involving Schedule I or II drugs.) Third, the Court concluded that even though PUMA

permits drug use that the Food and Drug Administration has not approved, it does not conflict with the FDCA's goals. *Id.* at *21 ("[T]he FDCA does not purport to regulate employment."). Finally, the Court determined that an implied private right of action exists under PUMA's anti-discrimination prohibition. *Id.* at *25 ("[W]ithout a private cause of action, [PUMA] would have no practical effect, because the law does not provide for any other enforcement mechanism.").

Bride Brook has indicated it will appeal the decision to the Court of Appeals for the Second Circuit. Still, *Noffsinger* marks the first time a court has found that marijuana's status as an illegal drug under federal law does not bar a plaintiff's state-law discrimination claim. The decision may have a dramatic impact on employers in states that provide affirmative employment protections for authorized medical marijuana users. Therefore, *Barbuto* and *Noffsinger* may signal a shift toward affording greater protections to employees who use medical marijuana under state law, forcing employers to reevaluate their zero-tolerance workplace drug policies and drug-testing programs.