Two Groundbreaking Cases End Long Run of Employer-Friendly Workplace Drug Testing Decisions

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Since the advent of wide spread workplace drug testing in the late 1980s, employers have been able to rely on court decisions upholding an employer's right to discipline or terminate an employee for testing positive for marijuana, an illegal drug under federal law, even if the use did not occur in the workplace. This line of cases extended to applicants for employment, as well. Employers could take comfort in knowing that as long as marijuana remained illegal under federal law, they could take adverse action in connection with a positive drug test, even in those states where marijuana is legal for medicinal or recreational purposes.

In a closely watched case, *Coats v. Dish Network*, LLC, 350 P.3d 849 (Colo. 2015), the Colorado Supreme Court upheld the termination of a quadriplegic employee who tested positive for marijuana, even though his off-duty use of marijuana to relieve leg spasms was state-licensed and thus, according to him, a "lawful activity." *Id.* at 7. The justices held that he could be fired "because [his] marijuana use was unlawful under federal law" and fell outside the protection of Colorado's medical marijuana statute. *Id.* at 20. The case highlighted the sharp divide between federal and state law, a divide that has grown even more pronounced since *Coats* was decided: while the U.S. Department of Justice has signaled its intent to crack down on marijuana users, twenty-nine states and the District of Columbia have legalized the use of medical marijuana.

Two recent cases break this twenty-year series of employer-friendly drug testing cases. First, in *Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (2017), the Massachusetts Supreme Judicial Court reversed and remanded a lower court's summary judgment dismissal of a lawsuit filed by Christina Barbuto, who was terminated for her off-duty use of medical marijuana. *Id.* at 471. Ms. Barbuto has a valid prescription for medical marijuana under the Massachusetts Humanitarian Medical Use of Marijuana Act to treat her Crohn's disease. Shortly after she started working at Advantage Sales and Marketing ("ASM"), she informed her supervisors about her medical marijuana use, who responded it "should not be a problem"; nevertheless, she was terminated at the end of her first week for failing a mandatory drug test. *Id.* at 458.

Bucking expectations, the Court held that Ms. Barbuto's claims for disability discrimination under the state's Fair Employment Practices Act could go forward. Notwithstanding ASM's policy prohibiting marijuana use, the Court observed that the company must engage in an open dialogue known as the "interactive process" to determine whether medical alternatives exist. *Id.* at 463. If no alternative exists, the burden of proving an inability to accommodate rests with the employer in cases where the employee has brought a handicap discrimination claim following her dismissal for the use of a prescribed medication. *Id.* Consequently, ASM has the burden to show that Ms. Barbuto's request for an accommodation for her off-site use of medical marijuana would cause an "undue hardship" to its business. *Id.* at 463, 467. However, the Court did affirm the dismissal of Ms. Barbuto's claims brought under the state's medical marijuana statute: nothing in its text suggests an individual can sue based on the claim that she was fired for her off-site use of medical

marijuana. *Id.* at 469-70. Regardless, this opinion could have wide-reaching effects, being the first instance where a state high court has ruled against an employer for firing an employee who tested positive for marijuana. More generally, the case reflects the duty of employers in Massachusetts to participate in the interactive process to accommodate qualified handicapped employees, unless the employers can make a showing of undue hardship.

Second, in *Callaghan v. Darlington Fabrics Corp.*, 2017 R.I. Super. LEXIS 88, No. PC-2014-5680 (R.I. Super. Ct. May 23, 2017), a Rhode Island Superior Court justice held that an employer could not deny employment to a job applicant licensed under the state's Hawkins-Slater Medical Marijuana Act ("Hawkins-Slater") to possess and consume medical marijuana solely because the applicant would not be able to pass a mandatory pre-employment drug test. *Id.* at *24. Christine Callaghan sued under Hawkins-Slater and the Rhode Island Civil Rights Act ("RICRA") after she was not hired for a paid internship position with Darlington Fabrics ("Darlington"). The decision granted her summary judgment against Darlington, recognizing an implied private right of action for qualified medical marijuana cardholders to sue employers for discrimination under Hawkins-Slater. *Id.* at *24-25. Ms. Callaghan's claims under RICRA also survived because she could demonstrate discrimination against a class of disabled people whose disabilities are best treated by medical marijuana. *Id.* at *33. ("Plaintiff is disabled under the terms of RICRA."). Finally, the Court found no preemption issue between Hawkins-Slater and federal laws such as the Drug Free Workplace Act of 1988, since Hawkins-Slater does not require employers to accommodate employee drug use in the workplace. *Id.* at *41. Darlington's counsel has indicated the company will appeal the decision to the Rhode Island Supreme Court. Depending on how the appeal proceeds, a positive drug test for marijuana may no longer be automatic grounds for Rhode Island employers to deny a job application or require a current employee to seek rehabilitation.

Although *Barbuto* and *Callaghan* are state law decisions and not binding on employers outside of Massachusetts and Rhode Island, all employers should be aware of this departure from previous decisions, which essentially gave employers free reign to fire or refuse to hire individuals who used marijuana in any context, without risk of liability for discrimination or wrongful termination. These two cases signal the need for employers to reexamine their substance abuse and drug testing policies. Prudent employers should consider treating marijuana use more like alcohol use: namely, when deciding whether to discipline an employee, employers should place less emphasis on the results of a positive drug test and greater emphasis on signs of impairment (i.e., evidence of the employee working while "under the influence").