

APRIL 3, 2019 | DISCRIMINATION, HARASSMENT & RETALIATION

N.J. Court Opens Door for Employees to File Disability Discrimination Claims for Adverse Employment Actions Related to Medical Marijuana Use



Several states have taken steps toward legalizing marijuana in some form. However, these laws differ in many respects and raise interesting questions for employers, especially as they relate to off-duty conduct.

While some states such as Arizona, Delaware, and Minnesota provide specific statutory protections for employees that have a valid prescription for medical marijuana, there has been an increase in litigation under state disability discrimination laws for failure to accommodate an employee's use of marijuana to treat a disability. The lingering question remains whether an employer's decision to take an adverse action against an employee for using medical marijuana outside the workplace is protected under the Americans with Disabilities Act ("ADA") or a state's disability discrimination statute, or under public policy. To date, the majority of courts have ruled that, absent statutory protections, employers remain free to set their own drug policies and to discipline or terminate employees who violate those policies, even in jurisdictions where the use of medical marijuana is legal.

Recently, however, the Superior Court of New Jersey Appellate Division issued an opinion finding that an employee who is terminated for failing a drug test for using medical marijuana outside the workplace may file a disability discrimination claim under the New Jersey Law Against Discrimination ("NJLAD"). See *Wild v. Carriage Funeral Holdings*, Case No. A-3072-17T3 (N.J. Super. Ct. App. Div. Mar. 27, 2019).

The state court's decision was a major shift from a federal court opinion issued roughly seven months earlier.

The U.S. District Court for the District of New Jersey had previously dealt with this issue and held that the NJLAD does not require an employer to waive a drug test requirement as a condition of continued employment, even if the employee was disabled and prescribed medicinal marijuana. See *Cotto v. Ardagh Glass Packaging*, 2018 U.S. Dist. LEXIS 135194 (D.N.J. Aug. 10, 2018) (holding that neither the NJLAD or the New Jersey Compassionate Use of Medical Marijuana Act (“NJCUMMA”) compels an employer to waive its requirement that employees pass drug tests, even those that include testing for marijuana). In stark contrast to that decision, however, the New Jersey Appellate Division ruled in favor of the employee, leaving open the possibility that an employee who is fired for off-duty use of medicinal marijuana to treat a disability may have a claim under the state’s disability discrimination law.

In this most recent case, Plaintiff Justin Wild worked for Carriage Funeral Holdings, Inc. (“Carriage”) as a funeral director in Ridgewood, New Jersey. Mr. Wild had been diagnosed with cancer and legally prescribed medical marijuana under the NJCUMMA. In May 2016, Mr. Wild was involved in a car accident while he was working and subsequently failed a drug test that Carriage required he take prior to returning to work. Carriage terminated Mr. Wild for failing the drug test. At the trial court, Carriage successfully dismissed Mr. Wild’s disability discrimination claim. The trial court determined that the NJCUMMA “does not contain employment-related protections for licensed users of medical marijuana” and that the adverse employment action was taken due to a positive drug test and a violation of Carriage’s drug policy.

However, the appeals court determined that Wild sufficiently pled the elements of a *prima facie* case for disability discrimination, reversed the lower court’s decision to dismiss, and remanded the case for further proceedings. The Appellate Division held that there was no conflict between the NJLAD and the NJCUMMA. The NJCUMMA states that “[n]othing in this act shall be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace.” The court held that this language “can mean only one thing: the [NJCUMMA] intended to cause no impact on existing employment rights.”

Moreover, the court explained that the NJCUMMA neither created new employment rights nor destroyed existing employment rights – and it expressed no intent to alter the NJLAD. The court stated that “[i]t would be ironic indeed if the Compassionate Use Act limited the Law Against Discrimination to permit an employer’s termination of a cancer patient’s employment by discriminating without compassion.” The court elaborated that Wild did not seek to circumvent the NJCUMMA because he was not asking for an accommodation to use medical marijuana “in any workplace.” Instead, he was seeking a reasonable accommodation for his legal use during “off-work hours.” In other words, while the NJCUMMA shouldn’t be construed to require an accommodation, it does not mean such a requirement might not be imposed for off-duty-use under the NJLAD.

While the decision did not address the merits of the case, as it was analyzed at the Motion to Dismiss stage, it did open the door to fashion disability discrimination claims under the NJLAD after being terminated for testing positive for marijuana. Employers should monitor the developments in this case to see how the New Jersey courts interpret medical marijuana use under the state’s anti-discrimination law, and whether off-duty use could be considered a reasonable accommodation.

Employers should nonetheless be vigilant in dealing with employees seeking an accommodation for off-duty use of medicinal marijuana. If an employee is terminated solely for legal, off-duty use of medicinal marijuana – not present impairment – it could give rise to costly litigation.

Furthermore, employers should tread carefully when deciding not to hire an employee or to terminate an employee for testing positive for marijuana, especially if the employee has been legally prescribed medical marijuana to treat a disability. Many drug tests do not test for present impairment of drugs, including marijuana. Thus, prior to making any employment decision, employers should ensure that there is adequate evidence of workplace impairment or other performance issues. Ultimately, this issue remains far from settled in courts throughout the country. Even if a state's medical marijuana law does not provide employment protections, employers should pay close attention to judicial opinions related to off-duty-conduct and use of medical marijuana under state disability discrimination laws.