Employment Law

Is Medical Marijuana Use Becoming a Protected Class Under State Laws?

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Few topics these days are blazing as brightly as the issue of medical marijuana. In April 2016, Pennsylvania became the 24th state to legalize the use of marijuana for medicinal purposes. Used to treat an enumerated list of "serious medical conditions" including epilepsy, multiple sclerosis and cancer, Pennsylvania lawmakers have emphasized the scientific research supporting the improvements made in patients suffering extreme and debilitating symptoms.

Aside from the documented health benefits, and after the state of Colorado raked in a total of $8.76 million in medical marijuana tax revenue in a single year ($200 million total when including tax revenue from the state's reported $1 billion in recreational marijuana sales), it is easy to see the appeal of Pennsylvania's relatively new medical marijuana legislation, known as "Act 16 of 2016." This past Tuesday, June 20, Pennsylvania state Sen. Daylin Leach announced the award of permits to 12 applicants permitting the cultivation and processing of medical marijuana as "a huge day for patients and for the people of Pennsylvania." After six months, so long as the growers can demonstrate that their facilities are operational, they may proceed to grow medical marijuana. Yes, Pennsylvanians, legalized pot is (finally) here.

The question for employers throughout the commonwealth will be how to draft and implement policies affecting employees who use cannabis for medicinal purposes. In the workplace, states that have legalized the use of medical marijuana are divided into two categories: states where employers have a duty to accommodate and states where the relevant laws are either silent or expressly exempt employers from providing accommodations to medical marijuana users.

Section 2101(b)(2) of Act 16 of 2016 suggests that Pennsylvania falls into the latter category: "Nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment. This act shall in no way limit an employer's ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position."

At first blush, this type of provision seems to contravene, if not thwart, the very purpose of Act 16. Most employers familiar with the Americans with Disabilities Act (ADA) understand that reasonable accommodations must be given to employees with disabilities. Typically, any one of the conditions

Pennsylvania has deemed treatable by medical marijuana would be considered a disability under the ADA. Why then does Act 16 not require employers to accommodate the use of marijuana in the workplace as a medical treatment for those conditions? The answer is simple. Weed, even if used for medicinal purposes pursuant to state law, is considered by the Controlled Substances Act as a Schedule I drug making it illegal under federal law. See *Barber v. Gonzales,* 347 U.S. 637 (1954). Moreover, the ADA excludes persons currently engaged in the "illegal use of drugs" from the definition of an "individual with a disability."

Thus, it would seem to follow that refusing to accommodate an employee or disciplining one for medical marijuana use "on the property or premises of any place of employment" would be just fine. This is particularly true when the employee's medical marijuana use would violate the employer's drug policy. Well, don't vape so fast. The Superior Court of Rhode Island in a decision handed down last month addressed this very issue in *Callaghan v. Darlington Fabrics and the Moore*, C.A. No. PC-2014-5680 (R.I. Sup. Ct. May 23, 2017).

In *Callaghan*, Christine Callaghan notified her would-be employer, Darlington Fabrics, that she was both a medical marijuana cardholder and medical marijuana user. Darlington Fabrics informed Callaghan that, because she would be unable to pass a pre-employment drug test, the company could not hire her. Callaghan then brought suit alleging employment discrimination under Section 21-28.6-4(d) of the Rhode Island Hawkins-Slater Act. The act prohibits employers from refusing to employ "a person solely for his or her status as a medicinal marijuana cardholder." The Rhode Island statute authorizing the use of medical marijuana is in pari materia with Act 16 in Pennsylvania.

Darlington Fabrics argued that Callaghan was not refused a job because of her status as a cardholder, but rather solely for her use of medical marijuana, relying on Rhode Island's Civil Rights Act (RICRA) which bars protection of an "employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." The court rejected Darlington Fabrics' argument, deeming it to be "incredulous" on the grounds that the Rhode Island General Assembly would hardly make a distinction between cardholders and users of medical marijuana. Furthermore, the court found that Darlington Fabrics' reliance on RICRA was unconvincing, as any connection between RICRA and the Hawkins-Slater Act was too attenuated and frustrated the purpose of the law, finding in favor of Callaghan.

Much like the Rhode Island state civil rights law, the Pennsylvania Human Relations Act (PHRA) similarly excludes from the definition of disability "current, illegal use of or addiction to a controlled substance ..." 43 P.S. Sections 951(p.1)(3). Both states define "drugs" and "controlled substances" as those prohibited by the Controlled Substances Act which, as previously noted, includes medical marijuana. For all intents and purposes, the Rhode Island medical marijuana and civil rights laws are identical to Act 16 and the PHRA here in Pennsylvania.

Therefore, using the *Callaghan* rationale, were a Pennsylvania employee to be denied a job, disciplined or terminated for the use of medical marijuana in violation of an employer's drug policy, even with the existence of the PHRA's illegal drug exemption, it is likely that the employee would be protected by Act 16. While this potential outcome would be great for disabled employees who benefit from medical marijuana, uncertainty still abounds until marijuana is no longer considered a controlled substance under federal law or is otherwise protected by the ADA. After all, what is the point of getting a medical marijuana card if you are still going to be punished by your employer for using it? •

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