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# MMA Includes a Private Right of Action for Discrimination and Retaliation

The MMA explicitly prohibits employers from discriminating or retaliating against individuals solely on the basis of their status as a certified medical marijuana user.

By **Jeffrey Campolongo** | December 05, 2019



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In April 2016, Pennsylvania became the 24th state to legalize the use of marijuana for medicinal purposes. Pennsylvania's medical marijuana legislation, known as the Medical Marijuana Act (MMA) provides access to medical marijuana for patients with a serious medical condition through a safe and effective method of delivery that balances patient need for access to the latest treatments with patient care and safety.

The MMA allows individuals who suffer from one of 17 enumerated serious health conditions to obtain medical marijuana from a limited number of authorized dispensaries. These conditions include autism, cancer, HIV/AIDS and PTSD, among others. In order to purchase medical marijuana, an individual must obtain a certification from their medical provider and be issued an identification card from

the Pennsylvania Department of Health. Medical marijuana can only be sold to authorized users in pill, oil, topical gel/cream, tincture or liquid form, or in a form that can be vaporized. Currently, it may not be sold in dry leaf plant form.

The MMA explicitly prohibits employers from discriminating or retaliating against individuals solely on the basis of their status as a certified medical marijuana user. Employers are not required to permit the use of medical marijuana on their premises as an accommodation for a disability, nor are they restricted in the ability to discipline employees for being under the influence of medical marijuana at work if the employee's job performance falls below the standard of care "normally accepted for that position."

Section 2103(b)(1) of the act provides that "no employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against any employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana." This language would seem to create a claim to enforce one's rights under the MMA. The act is silent, however, with respect to whether a private cause of action exists for the enforcement of Section 2103(b)(1). A recent decision from Lackawanna County examined and determined that there is an implied right of action under the statute, see *Palmiter v. Commonwealth Health Systems*, Lackawanna County C.C.P. Docket No. 19-CV-1315 (Nov. 22, 2019).

Pamela Palmiter was hired as a medical assistant on Jan. 9, 2017. Since the time she was hired she advised her employer that she was authorized to use medical marijuana for various medical conditions including chronic pain, chronic migraines and fatigue, according to the court opinion. While her employer was in the process of being acquired by another company, Palmiter claims that she was told she would be "grandfathered in" related to her use of medical marijuana off

the job site. At various other times throughout her employment, Palmiter alleged that her employer told her that her use of medical marijuana would be “fine” and that she would keep her job and her seniority.

Two years later, Palmiter applied for a promotion as a certified medical assistant and underwent a medical exam at the employer’s request. Palmiter disclosed her use of medical marijuana and provided the employer with a certification from a physician that approved her for medical marijuana to treat her medical conditions. Within weeks Palmiter was told that she could not work for the employer because of the results of her drug test. The present lawsuit ensued.

In her lawsuit, Palmiter alleged that she disclosed to her employer that she was certified to use medical marijuana under Pennsylvania law, she applied for a new position and was told she must submit to a drug test; she told the drug testing facility that she used medical marijuana and provided a copy of her certification card to her employer; and the employer told her she was not allowed to return to work. Palmiter alleged that the foregoing actions were discriminatory and constitute a violation of Section 2103(b)(1). Palmiter also brought claims for wrongful discharge in violation of public policy, breach of contract and invasion of privacy.

Palmiter’s employer, Commonwealth Health, filed preliminary objections seeking dismissal of all claims, including the Section 2103(b)(1) claim. Commonwealth Health argued that no private right of action exists and that there is nothing in the text or the legislative history of the act to warrant the creation of an implied cause of action. As further proof, Commonwealth Health pointed to the fact that the Department of Health is authorized to issue civil penalties for violations of the MMA, a point strongly indicative of the legislature’s intent to foreclose private enforcement.

The opinion examined each of the sections of the MMA for historical and statutory context. In so doing, the court noted that Section 2103, unlike the other miscellaneous provisions in Chapter 21 of the act, does not grant any state agency or commission the power to enforce or regulate the licensing, employment and custody litigation protections. While virtually every other chapter confers specific powers upon the department relative to registered practitioners, centers, users and the like, Section 2103 is bereft of the same type of regulatory authority. This scheme, according to the opinion, evinces a legislative intent to empower the department to exercise regulatory control over those people and entities that have affirmatively opted to take part in the medical marijuana program and to submit to its administrative jurisdiction. This would include applicants, users, doctors, medical facilities.

Private employers like Commonwealth Health, on the other hand, are not parties that have voluntarily decided to participate in the medical marijuana program and therefore do not subject themselves to regulation by state agencies. By definition this means that such state agencies, including the Department of Health, do not have exclusive authority to enforce Section 2103(b)(1)'s anti-discrimination and anti-retaliation provisions. If the General Assembly intended to restrict an employee, who has been wrongfully discharged simply for being a certified medical marijuana user, to an administrative remedy under the MMA, the legislature could have vested the proper state agency with that enforcement authority under Section 2103. It did not do so, according to the opinion.

The court also examined the legal landscape outside of Pennsylvania to consider whether a private right of action exists. Following the lead from cases in Connecticut, Rhode Island Delaware, and Arizona the court considered a three-prong test that looked at the legislative intent. Without a private cause of action, the anti-discrimination clause would have no practical effect, the court noted. See,

e.g., *Noffsinger v. SSC Niantic Operating, LLC*, 273 F. Supp. 3d 326 (D. Conn. 2017); *Bulerin v. City of Bridgeport*, (Conn. Super. 2019); *Smith v. Jensen Fabricating Engineers*, (Conn. Super. 2019); *Callaghan v. Darlington Fabrics*, (R.I. Super. 2017); *Chance v. Kraft Heinz Foods*, (Del. Super. 2018); and *Whitmire v. Walmart Stores*, 359 F. Supp. 3d 761 (D. Ariz. 2019).

In sum, the court found that an implied right of action exists because there is no indication of any legislative intent in the MMA to deny a wrongfully discharged employee a private cause of action under Section 2103(b)(1). The MMA imposes an affirmative obligation on employers to refrain from discharging or discriminating against an employee solely based upon the employee's status as a certified medical marijuana user. This case should put to rest the notion that private enforcement is foreclosed. While other issues remain, for example, who the civil penalty gets paid to, whether an award of back pay and reinstatement is a remedy, and whether counsel fees can be reimbursed, the right to pursue a claim appears to be well grounded.

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