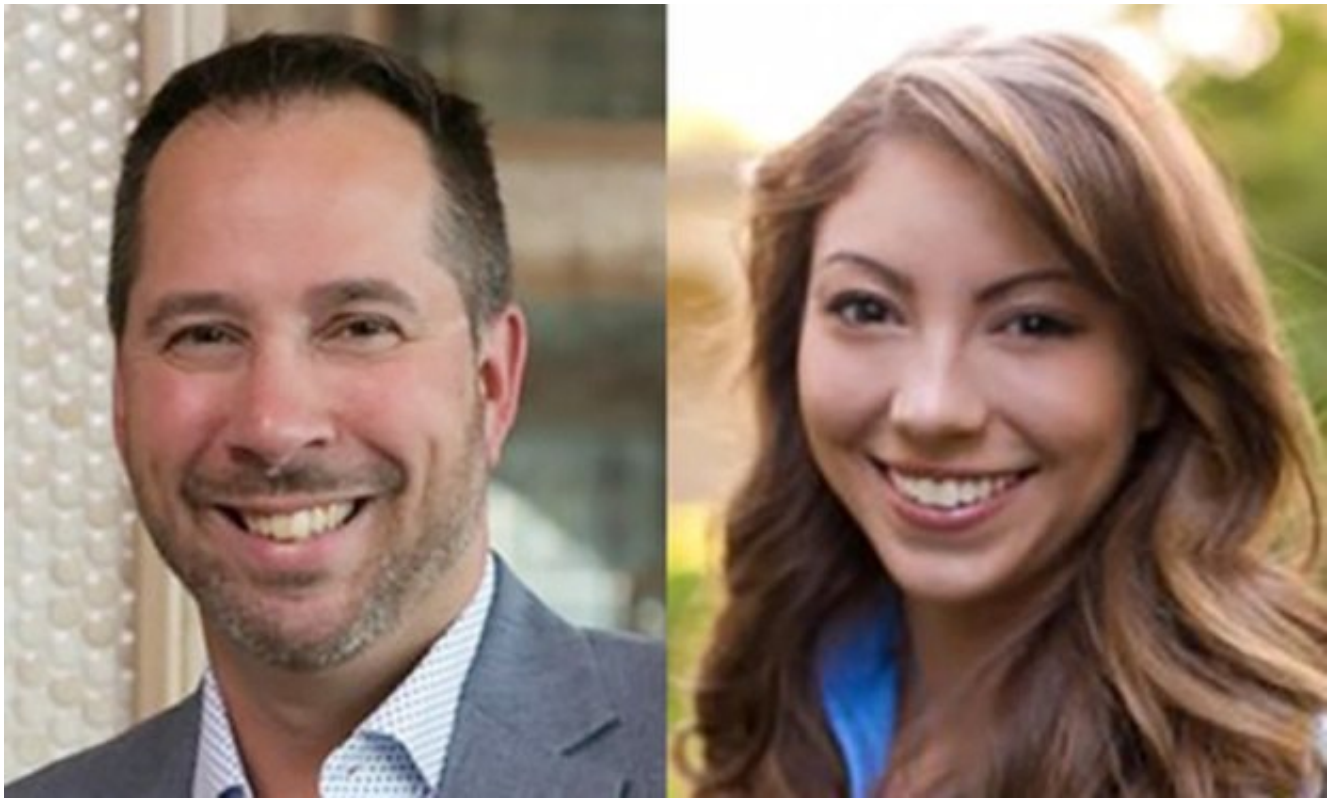
Medical Pot Users Have Private Right of Action for Discrimination Under Act 16

Although the Pennsylvania Medical Marijuana Act bars employers from taking adverse action against employees who can legally purchase medical marijuana, there is no such protection for those who decide to actually use it.

By **Jeffrey Campolongo and Emily Wisniewski** | October 23, 2020



Jeffrey Campolongo, left, and Emily Wisniewski, right.

In the past seven months, the number of dispensary visits made by medical marijuana patients each week in Pennsylvania has increased by upwards of 70%. The foregoing statistic should hardly come as a surprise with many of us experiencing the quarantine-induced anxiety of a COVID-struck world. With anxiety being one of the most cited reasons for needing treatment, about 230,000 Pennsylvanians are now registered and have been issued cards that allow them to buy medical marijuana. But what happens

to those 230,000 Pennsylvanians when they begin to return to work and to those who already have? Although the Pennsylvania Medical Marijuana Act bars employers from taking adverse action against employees who can legally purchase medical marijuana, there is no such protection for those who decide to actually use it. Fortunately, Pennsylvania courts may be on their way to clarifying how the seemingly conflicting sections of the Medical Marijuana Act can operate in harmony following the recent decision of *Hudnell v. Thomas Jefferson University Hospitals,* 2:20-cv-01621 (E.D. Pa. Sept. 25, 2020)

Shortly following the fourth anniversary of Pennsylvania's Medical Marijuana Act or MMA (also sometimes referred to as Act 16), the U.S. District Court for the Eastern District of Pennsylvania found in favor of an employee who asserted that there is an implied private right of action under the law's employment discrimination section. In *Hudnell v. Thomas Jefferson University Hospitals,* hospital security analyst Donna Hudnell was prescribed medical marijuana to ease the chronic back pain that limited her ability to perform manual tasks, walk and sleep. Following an accident that further exacerbated her injuries, Hudnell requested a leave of absence and underwent spinal surgery. After Hudnell's medical leave ended, Thomas Jefferson required her to take a drug test before returning to work. When Hudnell's drug test returned positive for marijuana, she was terminated from employment. Following her termination, Hudnell filed suit against Thomas Jefferson under the MMA's Section 2031(b)(1) which bars employers from discriminating against employees "solely on the basis of such employee's status as an individual who is certified to use medical marijuana." Thomas Jefferson moved to dismiss Hudnell's suit, asserting that the only remedy for employees under the act is to seek relief from the Pennsylvania Department of Health. The court disagreed with Thomas Jefferson's argument, however, finding that an anti-discrimination provision with no private right of action would have no practical effect.

If the *Hudnell* decision is feeling like a case of deja vu, your eyes are not deceiving you. Back in 2016, this column discussed the potential implications of a medical marijuana discrimination case out of Rhode Island: *Callahan v. Darlington Fabrics*. In *Callaghan*, Darlington Fabrics informed plaintiff Christine 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 the Rhode Island Hawkins-Slater Act that prohibits employers from refusing to employ "a person solely for his or her status as a medicinal marijuana cardholder." Ultimately, the Rhode Island Superior Court found that the Hawkins-Slater Act contained an implied private right of action for medical marijuana cardholders. Sound familiar? Citing *Callaghan*, the decision in *Hudnell* was no different.

Even with the issue of the existence of a private right of action now settled, *Callaghan* remains valuable as the law in Pennsylvania develops. While the *Hudnell* decision stopped at the issue of the private right of action, the court in *Callaghan* went further. In *Callaghan*, Darlington Fabrics argued that Callaghan was not refused a job because of her status as a cardholder, but rather for her inability to pass a mandatory pre-employment drug screen. The court rejected Darlington Fabrics' argument on the grounds that every medical marijuana patient could be screened out by a facially-neutral drug test. Moreover, the court found Darlington Fabrics' suggestion that a medical marijuana cardholder might never use medical marijuana to be incredulous.

Immediately following the MMA's anti-discrimination provision, Section 2031(b)(1), is Section 2031(b)(2) which states that "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 …" This provision would allow the for the argument that an employee was not terminated for his or her status as a cardholder, but rather for being under the influence of medical marijuana at work. The problem with this argument is, as the court in *Callaghan* made clear, it would be nonsensical to expect medical marijuana cardholders to abstain from using the marijuana they have been legally prescribed.

Recently, efforts are being made by companies such as Hound Labs in the race to create a marijuana breathalyzer test. There is currently no accessible way to test whether an employee is under the influence of medical marijuana other than a traditional drug test. Marijuana is detectable for up to 90 days in hair, anywhere between three days to a month or longer in urine, up to 48 hours in saliva, and up to 36 hours in blood. However, the effects of marijuana typically last for only one to three hours. An employee, just like Hudnell or Callaghan, could use medical marijuana before bed as a sleep aid and be fired the next day for failing to pass a drug test despite not being under the influence of the herb.

On a slightly unrelated note, the *Hudnell* case punctuates the importance of the courts and the role of an independent judiciary. While it may not be unusual for a court to find an implied right of action in a statute, some have argued that the courts should not weigh in on such issues. Originalism, they argue, militates toward strict interpretation of the four corners of the statute. No exceptions. It would seem for the 230,000 or so medical marijuana users in Pennsylvania such a narrow, unyielding view would leave them without recourse.

Jeffrey Campolongo *is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters.*

Emily Wisniewski *is a 2018 graduate of Villanova University's Charles Widger School of Law where she was a member of the Student Bar Association and the Moot Court Board. She has both plaintiff and defense experience in labor and employment law litigation.*
