

## Employers Should Review Drug-Testing Policies Under New SJC Decision

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On July 17, 2017, the Massachusetts Supreme Judicial Court issued its opinion in *Barbuto v. Advantage Sales and Marketing, LLC*. On appeal of a motion to dismiss, the Court held that certified medical marijuana users who allege that they are capable of performing the essential functions of their jobs with reasonable accommodation and that they have suffered adverse employment action as a result of their medical marijuana use can state a claim for handicap discrimination under the Massachusetts Fair Employment Practices Act, G.L. c. 151B. In addition, the Court found that the Medical Marijuana Act does not provide a private right of action to a plaintiff for wrongful termination. The Court also declined to recognize a common law cause of action for wrongful termination in violation of public policy based on the protection of an employee's right to use marijuana for medicinal purposes.

The Court explicitly found that the Plaintiff had stated a claim that she was a "qualified handicapped person" under the statute. The employer attempted to argue that her request to be exempt from a mandatory drug test because she was a certified medical marijuana user was "facially unreasonable" because marijuana is still illegal under federal law. The Court disagreed, reasoning that the majority of states have passed laws allowing the use of medical marijuana and that an employer would not be subject to prosecution for an employee's use and/or possession of medical marijuana. The employer's policy of drug testing all new employees, and refusing to hire or terminating a new employee based on a positive marijuana test, did not save the policy from being potentially discriminatory under the statute. The Court emphasized that an employer must engage in an interactive process with an employee who suffers from a disability and requests an accommodation in order to determine whether that accommodation is reasonable and whether other alternatives exist.

Employers still have the right to prohibit on-site marijuana use as provided by the Medical Marijuana Act. And, many employers will be able, through discovery, to demonstrate that an employee's medical marijuana use could impose an undue hardship on the business (e.g., impaired employee performance, unacceptably significant safety risk to the public or other employees). However, it is now important to take steps to put into place or amend any drug testing and/or drug use policies to conform with the Court's holding in *Barbuto*. The attorneys in Peabody & Arnold's Employment Law and Litigation Practice can help draft or review drug-testing policies and are here to offer insight on how the Court's landmark decision will impact your business.