Accommodating a New Time

The Intersection of Medical Marijuana and Employee Disability Rights

By Chelsea M. Smialek

Marijuana has seen growing acceptance across the country as more states and localities legalize the substance for medicinal and even recreational use.[1] In Michigan, for example, the Michigan Medical Marihuana Act (MMMA)[2] legalized medical use of the substance to treat debilitating medical conditions,[3] while the relatively recent enactment of the Michigan Regulation and Taxation of Marihuana Act legalized its recreational use.[4] Acceptance notwithstanding, an employer may (reasonably) have a zero-tolerance, drug-free workplace policy.

But what happens when that policy collides with the Persons with Disabilities Civil Rights Act, MCL 37.1101 *et seq.*? Take, for instance, Suzanne, a dedicated employee of Employer ABC. She has a debilitating back condition that no medication, pill, or ointment has allowed her to adequately manage—that is, until her doctor recommended a marijuana-infused cream. Or consider Roger, an employee of Company X, who is overwhelmingly considered by his superiors to be an asset to the business. He has AIDS, but being allergic to most medications, has been unable to successfully manage his condition. His doctor also recommended medical marijuana.

Like many employers, Employer ABC and Company X have zero-tolerance, drug-free workplace policies and occasionally perform drug tests on employees. Suzanne and Roger each request an accommodation under the Persons with Disabilities Civil Rights Act, a waiver of those policies, so they may treat their conditions per their physicians' instructions after work hours and off work premises. Looking solely at Michigan law, one question Employer ABC and Company X must consider is whether the act requires such an accommodation. Will society tolerate the termination of employees who are following the medical advice of their doctors?

The Persons with Disabilities Civil Rights Act

The Persons with Disabilities Civil Rights Act mandates "'employment of the handicapped to the fullest extent reasonably possible.'"[5] It protects individuals from discrimination based on their handicapped status by prohibiting employers from considering a person's disability when making employment decisions,[6] thereby ensuring that "'all persons [are] accorded equal opportunities to obtain employment.'"[7] These protections require an employer to "accommodate a person with a disability for purposes of employment…unless the [employer] demonstrates that the accommodation would impose an undue hardship."[8]

"Disability," for purposes of the statute, typically does not include temporary medical conditions.[9]

Rather, it generally is defined as "[a] determinable physical or mental characteristic" that:

> substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.[10]

Examples of a qualifying disability include a serious heart condition and diabetes,[11] AIDS,[12] and severe back pain.[13] Of course, as the Persons with Disabilities Civil Rights Act indicates, to benefit from the statute, a disability cannot be "directly related to the employee's ability to perform the duties of her job."[14]

The Michigan Medical Marihuana Act

The MMMA explains that one reason for its enactment was to allow and protect the medical use of marijuana.[15] It notes that "[m]odern medical research…has discovered beneficial uses for marijuana in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions."[16] Passing the act, therefore, was an acknowledgement that changing the status of marijuana under Michigan law would promote the "health and welfare of its citizens" and have "the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana."[17]

To legally use medical marijuana under the MMMA, a person must have been "diagnosed by a physician as having a debilitating medical condition."[18] Similar to the conditions that qualify as a disability under the Persons with Disabilities Civil Rights Act, a debilitating medical condition can include AIDS or severe chronic pain.[19] Using medical marijuana to treat debilitating medical conditions is not limited to ingestion of the plant; it can include a multitude of activities, such as inhalation and application of marijuana-infused products.[20] Thus, an employee could test positive for marijuana simply by using a marijuana-infused cream to manage back pain.

Central to the discussion, the MMMA's immunity clause states:

> A qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution or penalty in any manner, or *denied any right or privilege*, including but not limited to civil penalty or *disciplinary action by a business* or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act…[21] (emphasis added).

Despite this clause, the act does not require "[a]n employer to accommodate the ingestion of marihuana *in any workplace* or any employee *working while under the influence* of marihuana"[22] (emphasis added).

With this language in mind, the relevant inquiry under the Suzanne/Roger hypotheticals is whether an employer is required to accommodate offsite, after-hours use of medical marijuana.

Analysis

Current guidance correctly advises that the plain text of the MMMA does not require an employer to accommodate the use of marijuana on work premises during working hours. This is consistent with conclusions reached by sister jurisdictions that have considered similar questions and held that their states' medical marijuana laws did not require an accommodation. The dissent in these cases, however, often found that nothing in those laws exempted an employer from accommodating offsite use.[23] Moreover, many plaintiffs trying to invoke the protection of a medical marijuana law have attempted to use the law to create a cause of action rather than find another basis to support a claim.[24] Indeed, even the Michigan Court of Appeals has had the opportunity to opine on this last point, holding that the MMMA "does not create affirmative rights,"[25] but neither it nor Michigan's Supreme Court has been tasked with deciding the question posed by the Suzanne/Roger hypotheticals.

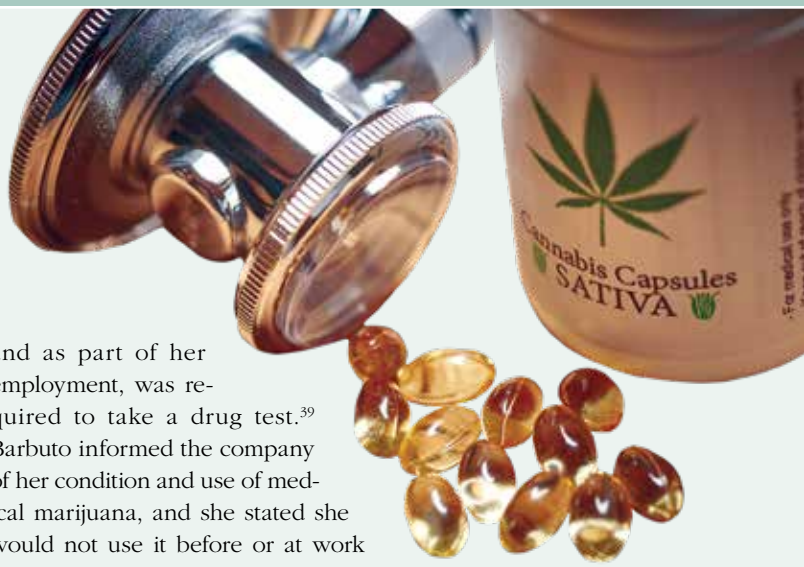
A review of recent decisions on this topic indicates that an accommodation for use of medical marijuana offsite during nonworking hours may be required if the right to that accommodation is required by a law separate from the MMMA.[26] In *Braska v Challenge Mfg Co*, the Michigan Court of Appeals was tasked with deciding whether an employee discharged for failing a drug test because of medical marijuana use is disqualified from receiving unemployment benefits under the

AT A GLANCE

The Persons with Disabilities Civil Rights Act protects disabled persons against discriminatory employment action and requires an employer to provide a disabled employee with a reasonable accommodation unless it can demonstrate that an accommodation would impose an undue hardship.

Following the enactment of the Michigan Medical Marihuana Act, it is possible that a disabled employee may be instructed by their physician to treat their disability with medical marijuana.

Although Michigan courts have not directly ruled on the issue, the Michigan Court of Appeals has suggested, and at least one court in a different jurisdiction has held, that an employer may have to accommodate the internal possession of marijuana, notwithstanding a drug-free workplace policy.



Michigan Employment Security Act.[27] Typically, an employee is disqualified from receiving unemployment compensation under the act when he or she has illegally injected or possessed a controlled substance on work premises, refused to submit to a drug test, or tested positive for controlled substances.[28] In concluding that an employee who is fired for failing a drug test because of the legitimate use of medical marijuana is still entitled to unemployment benefits, the Court explained that the MMMA "functions by granting immunity from arrest, prosecution, or penalty"[29] and supersedes other inconsistent laws penalizing an individual for using medical marijuana in accordance with the act.[30] Thus, because there was no evidence that the claimants in *Braska* had used or possessed marijuana on work premises or were working while under the influence, the Court found that the Michigan Employment Security Act did not disqualify them from benefits.[31] It determined that to hold otherwise would impose a penalty in contradiction of the MMMA's immunity clause.[32]

The *Braska* Court went further, going so far as to suggest that an employer's refusal to accommodate an employee's legitimate use of medical marijuana *off work premises during nonwork hours* by exempting that employee from a drug-testing policy may expose the employer to liability. When deciding *Braska*, the Court rejected the argument that unemployment benefits were not required because the MMMA does not require an employer to accommodate the use of medical marijuana.[33] It determined that the state's argument in that regard read the statutory provision "too broadly,"[34] stating:

> The provision does not state that an employer is not required to accommodate the *medical use* of marijuana, which includes internal possession, 333.26423(f). Rather, it states that nothing in the MM[M]A shall be construed to require "[a]n employer to accommodate the *ingestion* of marijuana *in any workplace* or any employee *working while under the influence* of marihuana." 333.26427(c)(2)[35] (emphasis in original).

The Court's language implies that, at least under the Persons with Disabilities Civil Rights Act, an employer may have a duty to accommodate internal possession of marijuana—which may result in a failed drug test—if that possession is the result of a legitimate medical use such as treating a disability. This implication has been preserved by the Court's recent decision in *Eplee v City of Lansing*, which held that the legal right protected by the MMMA's immunity clause is based on an entitlement separate from the immunity generally provided by the act.[36]

At least one jurisdiction has concluded that an employee who was terminated for testing positive for marijuana due to the lawful use of medical marijuana "may seek a remedy through claims of handicap discrimination."[37] In that case, the employee, Barbuto, suffered from Crohn's disease, for which she was approved to use medical marijuana.[38] Barbuto was offered a position with Advantage Sales and Marketing, and as part of her employment, was required to take a drug test.[39] Barbuto informed the company of her condition and use of medical marijuana, and she stated she would not use it before or at work or report to work while under the influence.[40] Barbuto's supervisor indicated that "'should not be a problem.'"[41]

Not surprisingly, Barbuto failed the drug test and was "terminated for testing positive for marijuana."[42] Barbuto filed a complaint against the company, asserting, among other things, handicap discrimination in violation of state law and the denial of the "right or privilege" to use marijuana lawfully as a registered patient.[43] Although the court held that the medical marijuana law did not provide an implied cause of action, it concluded Barbuto had stated a claim for handicap discrimination.[44] It determined that requesting a waiver of an employer's drug-free policy was a "facially reasonable" accommodation, and terminating an employee for violating that policy "effectively denie[d] a handicapped employee the opportunity of a reasonable accommodation, and therefore, [wa]s appropriately recognized as handicap discrimination."[45] Moreover, similar to the *Braska* decision, it stated that while Massachusetts law did not "require 'any accommodation of any on-site medical use of marijuana in any place of employment,'" that "limitation implicitly recognize[d] that the off-site medical use of marijuana might be a permissible 'accommodation.'"[46]

The court made several observations in reaching this conclusion. First, it acknowledged that use and possession of medically prescribed marijuana was lawful under the state's medical marijuana law.[47] Second, the court noted that the law expressly stated a patient "shall not be denied 'any right or privilege' on the basis of their medical marijuana use."[48] Third, the court, recognizing that a handicapped employee had a "statutory 'right or privilege' to reasonable accommodation" under the antidiscrimination law, concluded that denying an employee a reasonable accommodation for a handicap—which may require the use of medical marijuana—could constitute the denial of a "right or privilege."[49] The court was not swayed by the company's invocation of federal law, which still criminalizes marijuana.[50] In that regard, it noted that "[t]he only person at risk of [f]ederal criminal prosecution… is the employee."[51]

Nevertheless, while the *Barbuto* court held that an accommodation exempting an employee from a drug-testing policy was facially reasonable, it also acknowledged that Advantage

Sales and Marketing could demonstrate that waiving the policy would impose an undue hardship. By way of example, the court explained that an employer could prove that "continued use of medical marijuana would impair the employee's performance of her work or pose an 'unacceptably significant' safety risk," or that the employee's use of marijuana would violate "an employer's contractual or statutory obligation, and thereby jeopardize its ability to perform its business."[52] The court left open the door for employers to deny such an accommodation.[53]

Conclusion

What does this mean for Michigan employers? Although Michigan courts have not defined the scope of what a reasonable accommodation under the Persons with Disabilities Civil Rights Act may entail, *Eplee*—and more specifically, *Braska* and *Barbuto*—foreshadow the possibility that a court could require an employer to accommodate the use of medical marijuana to treat a disability off work premises during nonworking hours by providing a waiver to a drug-free policy. Until Michigan courts officially weigh in, absent precautionary measures to show that an employer has considered an employee's request for an accommodation like the one requested in the Suzanne/Roger hypotheticals, an employer could find itself in trouble if it refuses an accommodation and is unable to demonstrate an undue hardship. ■

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ENDNOTES

1. Even the FDA has approved the "first cannabis-based drug." Goldschmidt & Scutti, *FDA approves first cannabis-based drug*, CNN (June 25, 2018) <https://www.cnn.com/2018/06/25/health/fda-approves-first-cannabis-drug-bn/index.html> [https://perma.cc/RHK5-DHNT] (website accessed August 30, 2019).
2. Except where required, this article uses the more common spelling of "marijuana."
3. MCL 333.26424(a).
4. MCL 333.27951 *et seq*. This article does not address the impact recreational marijuana may have on an employment relationship, though it should be noted that MCL 333.27954(1)(i)(3) provides a clearer statement addressing an employer's rights than the MMMA.
5. *Petzold v Borman's Inc*, 241 Mich App 707, 714; 617 NW2d 394 (2000) and *Peden v City of Detroit*, 470 Mich 195, 203–204; 680 NW2d 857 (2004).
6. Tomazic, *Michigan Civil Jurisprudence* (Eagan: Thomson Reuters, 2019), Chapter 5, § 64 and *Petzold*, 241 Mich App at 713.
7. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999) (quoting *Stevens v Inland Waters, Inc*, 220 Mich App 212, 216 (1996)).
8. MCL 37.1102(2) and MCL 37.1210(1).
9. *Chiles*, 238 Mich App at 479.
10. MCL 37.1103(d)(i)(A).
11. *Demyanovich v Cadon Plating & Coatings, LLC*, 747 F3d 419, 433 (CA 6, 2014).
12. *Sanchez v Lagoudakis*, 458 Mich 704, 715; 581 NW2d 257 (1998).
13. *Olsen v Toyota Technical Ctr*, unpublished per curiam opinion of the Court of Appeals, issued December 27, 2002 (Docket No. 229543), p 11.
14. MCL 37.1103(l)(i).
15. MCL 333.26421 *et seq*.
16. MCL 333.26422(a).
17. MCL 333.26422(b)–(c).
18. MCL 333.26423(l).
19. See MCL 333.26423(b).
20. MCL 333.26423(h).
21. MCL 333.26424(a).
22. MCL 333.26427(c)(2).
23. E.g., *Ross v RagingWire Telecomm, Inc*, 42 Cal 4th 920, 924, 926, 934; 174 P3d 200 (2008) and *Roe v TeleTech Customer Care Mgmt (Colorado) LLC*, 171 Wash 2d 736, 742, 745–746, 762–763; 257 P3d 586 (2011).
24. E.g., *Roe*, 171 Wash 2d at 754.
25. *Eplee v City of Lansing*, ___ Mich ___, ___; ___ NW2d ___ (2019) (Docket No. 342404); slip op at 11 (the MMMA did not create a cause of action where conditional employment offer was rescinded for failing a drug test due to lawful use of medical marijuana).
26. *Braska v Challenge Mfg Co*, 307 Mich App 340, 361; 861 NW2d 289 (2014) and *Eplee*, slip op at 9–10.
27. *Braska*, 307 Mich App at 343.
28. *Id.* at 356.
29. *Id.* at 354.
30. *Id.* at 355.
31. *Id.* at 358.
32. *Id.* at 357–358.
33. *Id.* (citing MCL 333.26427(c)(2), which limits an employer's duty to accommodate the ingestion of marijuana to circumstances where ingestion would occur "in" the workplace or otherwise permit an employee to "work[ ] while under the influence").
34. *Id.*
35. *Id.*
36. *Eplee*, slip op at 9–10 (in *Braska*, the MESA, not the MMMA, gave rise to claimants' cause of action).
37. *Barbuto v Advantage Sales and Marketing, LLC*, 477 Mass 456, 457; 78 NE3d 37 (2017).
38. *Id.* at 458.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 459.
44. *Id.* at 457.
45. *Id.* at 462, 467.
46. *Id.* at 464–465.
47. *Id.* at 464.
48. *Id.* (quoting Mass Gen Laws ch 369, § 4 (2012)).
49. *Id.*
50. *Id.* at 465.
51. *Id.*
52. *Id.* at 467. But see *Ross*, 42 Cal 4th at 939 (KENNARD, J., concurring and dissenting) (contract requiring compliance with "federal drug-free workplace laws" is "concerned only with conduct at the *jobsite*") (emphasis in original).
53. *Barbuto*, 477 Mass at 467–468.