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CONFLICTING COURT DECISIONS ON MEDICAL MARIJUANA AND PENDING LEGISLATION ON RECREATIONAL USE OF MARIJUANA

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New Jersey adopted the Compassionate Use Medical Marijuana Act (CUMMA) in 2009, making New Jersey the fourteenth state to permit the use of marijuana for medical purposes. Like all such state laws, CUMMA created an exception to the laws criminalizing the production, sale, purchase, possession and use of marijuana. A limited category of qualified patients and their primary caregivers, with proper written authorization from their treating physicians, may purchase and utilize limited amounts of marijuana for medical purposes. Organizations licensed by the State, known as "alternative treatment centers," are the sole authorized providers of medical marijuana. CUMMA affords registered patients with an affirmative defense against criminal prosecution and shields qualified users and suppliers from civil and administrative remedies. However, CUMMA expressly warns that "[n]othing in [CUMMA] shall be construed to require … an employer to accommodate the medical use of marijuana in any workplace." *N.J.S.A.* 24:6I-14.

In stating expressly that New Jersey employers have no obligation to accommodate medical marijuana use, the legislature was likely guided by the decision of the Supreme Court of California in *Ross v. Ragingwire Telecommunications, Inc.,* 42 Cal. 4th 920 (2008). In that case, the Supreme Court of California held that employers are not required to accommodate employees who use medical marijuana, and that employees may lawfully be terminated for testing positive for medical marijuana in a workplace drug test. Noting that California employers, like New Jersey employers, are not required to accommodate the use of illegal drugs, the *Ross* Court held that California's "Compassionate Use Act" did not "eliminate marijuana's potential for abuse or the employer's legitimate interest in whether an employee uses the drug."

Until this past year, however, no court interpreting New Jersey law had directly grappled with this question. Then, on August 10, 2018, the United States District Court for the District of

New Jersey decided *Cotto v. Ardagh Glass Packing, Inc.,* Civil No. 18-1037, 2018 WL 3814278 (D.N.J. 2018). Citing cases such as *Ross,* the federal court held that New Jersey employers are not required to excuse medical marijuana users from workplace drug tests.

But this victory was short-lived. On March 27, 2019, the Superior Court of New Jersey, Appellate Division, issued its decision in *Wild v. Carriage Funeral Holdings, Inc., et al*. The appellate court reversed the dismissal of a complaint filed by a cancer patient who claimed that he had been terminated by his employer after the employer learned that the employee had been using marijuana for medical purposes. The employee had raised a viable claim of disability discrimination that should have been allowed to proceed.

FIRST THE GOOD NEWS: **THE *COTTO* DECISION**

The *Cotto* case involved a forklift operator who injured himself by hitting his head on the roof of a forklift. He was instructed that he needed to pass a breathalyzer and urine test in order to return to work. The operator responded that he takes several medically prescribed drugs, including medical marijuana, for a back and neck injury he incurred prior to his employment. Because of these medications he felt that he could not pass a drug test. The employer would not allow the operator to return to duty until he tested negative for marijuana. The operator thereupon brought suit under CUMMA and the New Jersey Law Against Discrimination (NJLAD) alleging disability discrimination and essentially seeking to have the return-to-duty drug test waived as a "reasonable accommodation" for his disability. The employer, after first removing the case from state to federal district court, moved to dismiss the complaint for failure to state a viable legal claim. The federal district court agreed.

The court first pointed out that the operator's claims were based not on his disability, but on his use of medical marijuana as a means of treating the disability. "Distinguishing a treatment from a disability can present some analytical difficulties … [b]ut not so here." The "departure point is the current federal prohibition of marijuana," which justified the employer's willingness to accept the operator's use of prescription medication while objecting to his use of marijuana.

The court then turned to CUMMA and its express provision disclaiming any obligation for employers to "accommodate the medical use of marijuana in any workplace." *N.J.S.A.* 24:6I-14. CUMMA "specifically excludes employers from its scope." Noting that no New Jersey court had yet addressed the CUMMA employer exclusion, the court turned to decisions interpreting similar medical marijuana statutes in California, (including the *Ross* decision), Colorado, New Mexico and Michigan. "Unless expressly provided for by statute, most courts have concluded that the decriminalization of medical marijuana does not shield employees from adverse employment actions." The court then reasoned:

> This Court predicts that the New Jersey judiciary would reach a similarly obvious conclusion: the LAD does not require an employer to accommodate an employee's use of medical marijuana with a drug test waiver. Although no court has expressly ruled on this question, New Jersey courts have generally found employment drug testing to be unobjectionable in the context of private employment. In *Vargo v. Nat'l Exch. Carriers Ass'n, Inc.*, 376 N.J. Super. 364, 383 (App. Div. 2005), the court noted that "where an employer was presented with a positive drug test result for a prospective employee, there was nothing improper or unlawful in the employer's perceiving the prospective employee as a user of illegal drugs." *See also Matter of Jackson*, 294 N.J. Super. 233, 236 (App. Div. 1996) (affirming

> decision removing firefighter from his job on the basis that an "employer is not required to assume—or hope—that the employee will limit alcohol and other drug consumption to off-duty hours, or that the effects of drugs will be dissipated by the time the work day begins"); *Small v. Rahway Bd. of Educ.*, Civ. No. 17-1963, 2018 WL 615677, at *4 (D.N.J. Jan. 26, 2018) (finding that applicant for custodial position who failed drug test "was not otherwise qualified to perform the essential functions of the custodial job" under the ADA). And as we have seen, nothing in CUMMA or LAD disturbs this regime.

The federal court concluded, "Ardagh Glass is within its rights to refuse to waive a drug test for federally-prohibited narcotics."

Notably, the *Cotto* decision appears not to have involved any federal drug testing mandate, such as those applicable to commercial driver's license holders. Had the case involved drug testing mandated by federal law, the matter would have been much simpler: federal law requirements would pre-empt any purportedly contrary state law. In *Cotto*, however, the employer appeared to be following its own drug-free workplace policy. The *Cotto* decision thus appeared to affirm that New Jersey employers can refuse to excuse medical marijuana users from drug testing requirements, and can remove medical marijuana users from employment if they produce positive test results.

NOW THE BAD NEWS: THE *WILD* DECISION

Wild involved a funeral director who had been diagnosed with cancer and prescribed marijuana under New Jersey's Compassionate Use Medical Marijuana Act. His employer allegedly learned of the employee's use of medical marijuana after an off-duty automobile accident had injured the employee. The employee alleged that marijuana played no role in the accident. The employee was terminated shortly thereafter. The employee claimed he was first told that his employer had been unable to "handle" his marijuana use and that his employment was being terminated "because they found drugs in [his] system." The employee alleged that no positive drug test result had ever been produced or reported to his employer. The employee alleged that he was later told that he had been terminated allegedly because he failed to disclose his use of medication that might adversely affect his ability to perform his job duties.

The defendants moved to dismiss the case based on *N.J.S.A.* 24:6I-14, which states that nothing in the Compassionate Use Act would "require… an employer to accommodate the medical use of marijuana in any workplace." Although the trial court agreed with the defendants, the appellate court reversed. The allegations of the employee's complaint did not suggest that he had been using marijuana for medical purposes *in the workplace*. The employee instead alleged that his marijuana use was *entirely off duty*. The employee was therefore permitted to argue that his termination based on his alleged purely off-duty use of marijuana constituted an act of disability discrimination. And this was sufficient to allow the employee's claim to proceed. The court noted:

> While defendants may argue [that] termination was based on plaintiff's inability to perform the tasks required or because his inability to pass a drug test may jeopardize [the employer's] licensing – all potential responses to a *prima facie* discrimination claim that would then be subject to allegations of pretextuality – we cannot ignore that this case is only at the pleading stage; our only role is to search with liberality

the [complaint] for a fundament of a cause of action without searching the pleading for proof of allegations.

The holding in *Wild* does not mean that an employee who utilizes marijuana for medical purposes is immune from termination, or that this particular employee's claim that his employer was required to accommodate his medical marijuana use will necessarily succeed. The case stands for the proposition that an employee who is terminated solely because he uses medical marijuana off duty – in the absence of any evidence of on duty use or impairment – will not have his claim of disability discrimination barred at the initial pleading stage. As the *Wild* Court suggested, the employer may be able to defeat the employee's claim if the employer can demonstrate that even off-duty marijuana use renders the employee unable to perform his job duties, or that the employee's inability to pass a drug test would jeopardize the employer's legitimate business interests such as causing the employer to lose its license to operate. Further, *Wild* did not address whether an employer is barred from terminating a medical marijuana user who tests positive for marijuana while on duty, suggesting that *Cotto* remains good law – for now.

THE EFFECTS OF PENDING LEGISLATION ON A DRUG-FREE WORKPLACE

While *Cotto* and *Wild* represent judicial developments, the New Jersey Legislature has also been active. Since 2018 eleven pieces of proposed legislation have been reviewed by lawmakers that would affect the way in which employers will be permitted to deal with employees who use marijuana.

The two bills that observers considered to be the most likely candidates for passage this year are S.2702 and S.2703. These are two of seven bills designed to allow the "recreational" use of marijuana for adults under a strict regime of regulation and taxation. All of these bills are similar, and the relevant language of S.2702 and S.2703 is found in all but one of the five other "recreational" marijuana bills. S.2702 and S.2703 therefore warrant the closest attention.

Each bill contains the same language pertaining to marijuana in the workplace. On the one hand, employers would remain free to prohibit marijuana use and intoxication during work hours, and to prohibit the use, consumption, sale, transfer, transportation, possession, display or growing of marijuana in the workplace. On the other hand, employers would be prohibited from refusing to hire, terminating, or taking adverse action against employees or applicants because of their use or non-use of "marijuana items" – unless the employer "has a rational basis for doing so which is reasonably related to the employment, including the responsibilities of the employee or prospective employee."

Under this provision, off-duty marijuana use would effectively become a "protected category" that an employer generally would not be able to take into consideration in making decisions involving hiring, firing or terms and conditions of employment. However, employers would be offered a "safety valve" that would allow off-duty marijuana use to be taken into account if the employer can articulate a "rational basis" that is "reasonably related to employment." This language would appear to grant employers significant latitude. However, it still represents a major change from current law that affords off-duty recreational marijuana use no employment protection.

S. 2702 and S. 2703 also address drug testing for marijuana. The presence of cannabinoid metabolites in the bodily fluids of an employee who is using marijuana in a manner permitted by either bill *cannot be used as a basis to deny employment or otherwise penalize the employee*, unless

federal law mandates otherwise or the employer would lose a federal contract or funding. This provision would effectively bar employers from drug testing for marijuana use except in those cases in which federal law, a federal contract or federal funding requires such testing. This is clearly a major change in law that will inhibit New Jersey employers from enforcing marijuana-free workplaces, even if they are acting on a "rational basis" that is "reasonably related to employment."

Notably, both S.2702 and S.2703 contain provisions allowing compliance with federal law pertaining to marijuana use, including marijuana use by employees, and both purport not to "amend or affect in any way any State or federal law pertaining to employment matters."

S.2702 goes further to address medical marijuana use. First, S.2702 would amend the CUMMA by deleting the employer accommodation exclusion. Next, it would impose new limitations on employers in dealing with medical marijuana users. It would become unlawful to take adverse action against an employee who is a medical marijuana user *solely* because the employee is a registered medical marijuana cardholder *or* because the employee produced a positive drug test for marijuana. The employer can defend itself by establishing by a preponderance of evidence that "the lawful use of medical marijuana has impaired the employee's ability to perform the employee's job responsibilities," defined as the employee manifesting "specific articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position."

If an employee or applicant tests positive for marijuana, the employer must provide the person with written notice of his or her opportunity to present a legitimate medical explanation for the result. The person has three business days either to submit a legitimate medical explanation, or to request a confirmatory retest of the original sample at his or her own expense. A medical marijuana registry card or authorization may be used as evidence of a legitimate medical explanation.

Employers would not be required to tolerate possession or use of medical marijuana during working hours, and would not be required to take any action that would violate federal law, a federal contract, or a condition of federal funding. Thus, employers who are required by federal law to test for marijuana use and take corrective action against those who test positive would be exempt from the provisions protecting medical marijuana users.

These provisions of S.2702 mirror the provisions of A.1838, a stand-alone bill that would amend CUMMA but not address "recreational" marijuana use. Along similar lines, A.3535 would prohibit any employer that receives funding from the New Jersey Economic Development Authority from taking any adverse action against an employee or applicant based on marijuana use or a positive drug test unless (1) failure to take adverse action would cause the employer to lose a monetary or license-related benefit under state or federal law; (2) the employee ingested or possessed marijuana during work hours or while on work premises; (3) the use of marijuana causes the employee to become an actual threat of harm or danger to persons or property; or (4) marijuana use makes the employee incapable of performing an essential job duty.

The number and extent of this pending legislation reveals a strong desire among many legislators to provide marijuana users with employment protection. Although marijuana reform appears to be dead for the balance of this legislative year, tt is reasonable to assume that at least one of these proposals will ultimately become law.

Employers need to carefully monitor legislative developments in this area and be prepared to adjust to a brave new world in which marijuana use will join, at least in some respects, race, sex, disability and pregnancy as a protected category.

It is also worth remembering that these state law developments take place against the background of a federal law that continues to outlaw marijuana use for *any* purpose. New Jersey may soon be placing employers in a position in which they will be required to turn a blind eye to employees who are, in fact, violating federal criminal law. The words of the Ninth Circuit Court of Appeals in *United States v. McIntosh,* 833 F.3d 1163, 1179, n.5 (9th Cir. 2016), still ring true:

> Nor does any state law "legalize" possession, distribution, or manufacture of marijuana. Under the Supremacy Clause of the Constitution, state laws cannot permit what federal law prohibits. U.S. Const. art VI, cl. 2. Thus, while the {federal Controlled Substances Act} remains in effect, states cannot actually authorize the manufacture, distribution, or possession of marijuana. Such activity remains prohibited by federal law.

About the Author: Stephen E. Trimboli, Esq. founding partner at Trimboli & Prusinowski, LLC has been recognized for his expertise by numerous organizations, including the National Council on Alcoholism and Drug Dependence, the National Public Employer Labor Relations Association and the New Jersey Association of Counties. Stephen was this year's recipient of the *Drugs Don't Work in NJ! Founder's Award* for his work with us and his dedication in assisting the New Jersey business community in maintaining a drug-free workplace.