Qualifying Medical Conditions: Employers' Duty Under the PMMA Hazy

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The list of qualifying "serious medical conditions" that make a patient eligible to participate in the Pennsylvania Medical Marijuana program continues to grow. After a recommendation by the Medical Marijuana Advisory Board, the state health department recently added anxiety disorders to the list of qualifying medical conditions under the Pennsylvania Medical Marijuana Act (PMMA). The addition of this mental health disorder significantly broadens the spectrum of potential patients and, in many cases, employees who could be prescribed medical marijuana and certified to carry a medical marijuana registration card. This addition will also significantly increase the likelihood that an employee of many Pennsylvania employers may now qualify for medical marijuana use. According to the National Institute of Mental Health, close to 20% of American adults suffer from an anxiety disorder, consisting of symptoms of persistent worry, inability to relax and difficulty concentrating. With the prevalence of this disorder among Americans, employers can no longer proceed under the assumption that employees using medicinal marijuana will be the exception.

While an employee's decision to self medicate with marijuana, without going through the necessities of the medical marijuana certification process in Pennsylvania, has been summarily rejected as a basis to support disability discrimination/retaliation claims by a federal judge in the Eastern District of Pennsylvania, *see Parrotta v. PECO Energy*, 363 F. Supp. 3d 577 (E.D. Pa. 2019), the same may not hold true if, in fact, an employee is certified to lawfully use medical marijuana in Pennsylvania because of a "serious medical condition." Employment discrimination claims based on the provisions in the PMMA are still working their way through the Pennsylvania courts. It is notable to recognize, however, that employees certified to use medical marijuana in other jurisdictions have found judicial support for their employment discrimination claims. In fact, courts in states with similarly structured medical marijuana statutes to the PMMA have uniformly rejected an employer's argument or reliance on federal law to provide a defense to an employer's decision to reject a candidate or terminate an employee because of a failed drug test related to medical marijuana use.

In *Noffsinger*, a federal district court in Connecticut held that express provisions in Connecticut's Palliative Use of Marijuana Act (PUMA) protected employees from discrimination, and the act was not preempted by the Controlled Substances Act (CSA) or the Americans with Disabilities

Act (ADA), *see Noffsinger v. SSC Niantic Operating*, 338 F. Supp. 3d 78 (D. Conn. 2018). In its decision, the court argued that employing a medical marijuana user did not force the employer to violate the Drug Free Workplace Act (DFWA). Furthermore, the court explained that the main objectives of the CSA were to conquer drug abuse and to control the trafficking of controlled substances; the court noted that the CSA does not make it illegal to employ a marijuana user, nor does it regulate employment practices in any manner. Similarly, the court rejected the employer's ADA preemption argument, explaining that the ADA only calls on employers to prohibit the illegal use of drugs in the workplace and, as such, it was not meant to regulate nonworkplace behavior, such as the use of medical marijuana. Finally, the *Noffsinger* court rejected the employer's argument that the DFWA prevented it from hiring a plaintiff (after a failed drug test) by explaining that the DFWA does not require drug testing, nor does it prohibit federal employers from hiring someone who uses drugs outside of the workplace. In fact, the court noted that the DFWA only requires federal contractors to make a "good faith effort" to maintain a drug-free workplace by taking certain measures to develop a policy regarding the use of illegal drugs in the workplace and establishing a drug-free awareness program. The court commented that the means to that end did not require the employer to utilize a zero tolerance drug testing policy in order to maintain a drug-free work environment. As such, the court granted summary judgment to the employee on her claim that she was discriminated against because she was a qualifying patient under PUMA.

Similarly both the Delaware and Rhode Island Superior Courts held that the CSA did not preempt their state's medical marijuana laws. In *Chance v. Kraft Heinz Foods*, No. K18C-01-056 NEP, 2018 Del. Super. LEXIS 1773 (Super. Ct. Dec. 17, 2018), where the defendant Kraft Heinz argued that the Delaware Medical Marijuana Act (DMMA) was preempted by the CSA, the court, citing *Noffsinger*, explained that the specific provisions of Delaware's law prohibiting employers from disciplining employees who use marijuana for medical reasons, and who may fail drug tests because of that use, are fully protected from discrimination. The court commented that the DMMA does not require employers to participate in any illegal activity prohibited under the CSA (i.e., unauthorized manufacturing, dissemination, dispensing or possession of a controlled substance), but instead prohibits them from discriminating based upon medical marijuana use. In *Callaghan v. Darlington Fabrics*, No. PC-2014-5680, 2017 R.I. Super. LEXIS 88 (Super. Ct. May 23, 2017) , which called for an interpretation of Rhode Island's Medical Marijuana Act, the court again rejected the defendant-employer's claim of CSA preemption and reinforced that the purpose of the CSA is "quite distant from the realm of employment and anti-discrimination law."

Based on the holdings from Connecticut, Rhode Island and Delaware, where the medical marijuana statutes include explicit language regarding employment discrimination much like the PMMA, Pennsylvania employers should proceed cautiously when faced with an employment-related decision triggered by the employer's Drug Free Workplace policy or drug testing policy. Invariably, the court decisions in these sister states will likely be

held out as persuasive authority as Pennsylvania courts begin to work through pending litigation pursuant to the PMMA. Employers in Pennsylvania should carefully consider their policies and procedures related to drug testing and whether a "zero tolerance" drug-free workplace policy should be enforced across the board when it comes to employees who are certified to use medical marijuana.

And though, pursuant to the PMMA, Pennsylvania employers do not have to accommodate an employee's use of medical marijuana "on the property or premises," and may discipline an employee for being under the influence while at work or when an employee's conduct falls below the accepted standard of care for a position, they should tread carefully when deciding to take an adverse employment action against someone in the medical marijuana program. In the end, employers in Pennsylvania are not without the means to discipline employees or manage the operations of their "safety sensitive" job positions; the Pennsylvania legislature did provide opportunities in the PMMA to allow employers to amend policies in a way that is fair to employees, compliant with the statute and feasible. Nonetheless, until employers in Pennsylvania have more definitive case decisions from which they can build legally binding policies and procedures related to the PMMA, they should exercise caution when handling employee issues involving a qualified patient under the PMMA.

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