

New Jersey Federal Court Finds That Employee Medical Marijuana Use Need Not Be Accommodated at Work

In an unpublished, non-precedential, first-of-its-kind decision in New Jersey, a federal district court held that New Jersey employers are not required to accommodate an employee's use of medical marijuana under the New Jersey Compassionate Use Medical Marijuana Act (CUMMA). The court in *Cotto v. Ardagh Glass Packing, Inc.* granted the employer's motion to dismiss the plaintiff's claims of disability discrimination, failure to accommodate, and retaliation that the plaintiff had asserted under CUMMA and the New Jersey Law Against Discrimination.

The plaintiff, Daniel Cotto, was a forklift operator hired by Ardagh in 2011. His complaint alleged that he took medical marijuana for previously sustained neck and back injuries and had presented documentation demonstrating that it was safe for him to perform his duties while taking prescription medical marijuana. Following a leave of absence due to a work-related injury, Cotto was advised of the company's requirement that he pass a drug test in order to return to work. After Cotto objected, presented his medical marijuana documentation, and requested an exemption from the drug testing requirement, Ardagh placed him on an indefinite suspension until he could pass a drug test.

The court framed the issue as to whether passing a drug test was an essential function of the job. First, the court explained that despite New Jersey's limited departure from the blanket prohibition of marijuana under federal law, CUMMA provides that "[n]othing in this act shall be construed to require ... an employer to accommodate the medical use of marijuana in any workplace." Finding that this provision neither supported nor invalidated Cotto's claims, the court took note of prior court decisions from California, Colorado, Michigan, and New Mexico, and found that, "[u]nless expressly provided for by statute, most courts have concluded that the decriminalization of medical marijuana does not shield employees from adverse employment actions." Deeming its decision "a narrow one," the court held that passing a drug test was an essential function of Cotto's job, and that, consequently, Ardagh was "within its rights to refuse to waive a drug test for federally-prohibited narcotics." For the same reasons, the court found, Cotto could not state a failure to accommodate or retaliation claim.

There remains a question of whether courts in Pennsylvania will follow the reasoning of *Cotto* in applying Pennsylvania law. Similar to New Jersey's CUMMA, a provision in Pennsylvania's 2016 Medical Marijuana Act (act) provides, "[n]othing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment." 35 P.S. § 10231.2103(b). The act, moreover, "in no way limit[s] an employer's ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position." *Id.* Finally, the act provides, "[n]othing in this act shall require an employer to commit any act that would put the employer or any person acting on its behalf in violation of Federal law." *Id.*

While the Pennsylvania act contains similar employment provisions to CUMMA, it remains to be seen whether Pennsylvania courts will follow the reasoning of *Cotto* with regard to employee drug testing requirements. Although the court did not acknowledge this authority in its opinion, in Arizona, Delaware, Massachusetts, Minnesota, Connecticut, and other states, refusing to hire or firing a medical marijuana patient simply because of a positive drug test has been found to violate these states' medical marijuana laws. As such, while *Cotto* provides guidance for New Jersey employers, those in Pennsylvania and other states should exercise caution and consult with counsel when faced with similar issues.



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Cozen O'Connor's Labor & Employment attorneys are available to provide counsel and guidance on the issues discussed in this Alert.

DISCLAIMER: Marijuana is still classified as a Schedule I controlled substance by the U.S. Drug Enforcement Agency, and as such it remains a federal crime to grow, sell and/or use marijuana. Any content contained herein is not intended to provide legal advice to assist with violation of any state or federal law.