Alert

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COZEN O'CONNOR

Pennsylvania Commonwealth Court Denies Medical Marijuana Accommodation for Nursing Student

In a first-of-its-kind decision issued on October 29, 2020, the Pennsylvania Commonwealth Court held that Pennsylvania's Medical Marijuana Act (MMA) did not require a nursing school to accommodate a student's use of medical marijuana under the Pennsylvania Human Relations Act (PHRA), the Pennsylvania Fair Educational Opportunities Act (PFEOA), or the MMA itself. The practical effect of the decision is that the plaintiff, Holly Swope, a medical marijuana user, could be required by Harrisburg Area Community College (HACC) to undergo and successfully pass a drug test as a condition of her participation in HACC's nursing program without running afoul of Pennsylvania law.

HACC operates a nursing program and requires all candidates to submit to an annual urinalysis drug screening. Any candidate who tests positive for the presence of a controlled substance is removed from the nursing program. Swope's complaint with the Pennsylvania Human Relations Commission (PHRC) alleged that, after informing HACC's director of nursing that she had been prescribed medical marijuana for her post-traumatic stress disorder and irritable bowel syndrome, and requesting an accommodation for its continued use, her request was denied and she was informed that she would be required to undergo a drug test in 90 days. Swope alleged that she needed the reasonable accommodation of being permitted to take her legally prescribed medical marijuana and that HACC violated the PHRA and PFEOA by denying this accommodation. HACC filed a motion to dismiss for legal insufficiency, which the PHRC denied. An interlocutory appeal was taken to the Commonwealth Court.

In rejecting the PHRC's argument that HACC was required to accommodate Swope's lawful use of medical marijuana, the court's analysis began with the plain language of the PHRA and PFEOA. The court explained that the Federal Controlled Substances Act, which makes marijuana a Schedule I controlled substance, "is expressly referenced in PHRA and PFEOA, and both statutes incorporate its provisions and prohibitions." More specifically, the court noted, both the PHRA and PFEOA exclude from their definitions of "handicap or disability" the illegal use of a controlled substance under federal law. Thus, the court found, neither statute expressly requires the accommodation of medical marijuana use.

In finding that the enactment of the MMA also did not require that HACC provide the accommodation, the court found, first, that even assuming the MMA's direction to employers should be applicable to schools, the plain text of the MMA did not require an accommodation for medical marijuana **use**. Rather, the court found, the MMA prohibits discrimination by employers against individuals based on their "status" as certified users of medical marijuana, and expressly provides "that employers *are not required to provide an accommodation* to employees on their premises, *nor are employers prohibited from disciplining* employees who are under the influence of medical marijuana on work premises[.]" Additionally, the court emphasized that, under the MMA, users of medical marijuana "may be prohibited by an employer from performing any duty which could result in a public health or safety risk while under the influence of medical marijuana" and such a "prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the [medical marijuana] patient." This provision, the court found, would clearly apply to intensive care unit nurses or other nurses who are under the influence of medical marijuana while on the job or in training.

At bottom, the court concluded, "[e]ven if [Swope] was an employee, HACC would apparently not be required to provide an accommodation under these circumstances, as Swope is training to be a nurse, which implicates a potential public health or safety risk." By the same token, the court explained, the MMA does not contain any language referring to post-secondary students, further

Benjamin L. Shechtman

Member

bshechtman@cozen.com
Phone: (215) 665-2046
Fax: (215) 665-2013

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bolstering its conclusion.

The analysis of the Commonwealth Court decision may portend a similar result in employment cases. Despite the fact that the decision expressly limited the holding to post-secondary students such as Swope, the language of the PHRA upon which the court focused its opinion also applies to employers and employees.

The case represents a departure from some of the more recent holdings of courts in other jurisdictions addressing the intersection of medical marijuana use and reasonable accommodation in the workplace. Moreover, the PHRC has already requested re-argument and reconsideration of the decision by the Commonwealth Court *en banc*, and a request for review to the Supreme Court may be forthcoming. This continues to be an evolving area of the law, and employers and educational institutions alike should remain mindful of their non-discrimination obligations and consult with counsel regarding any request for the accommodation of medical marijuana usage.
