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CIVIL RIGHTS—MEDICAL MARIJUANA RECOGNIZED AS FACIALLY REASONABLE ACCOMMODATION UNDER HANDICAP DISCRIMINATION CLAIM IN MASSACHUSETTS—BARBUTO V. ADVANTAGE SALES AND MKTG., LLC, 78 N.E.3D 40 (MASS. 2017).

Despite being outlawed by federal law, medical marijuana has gained increasing recognition for its medical benefits, as evidenced by the consistent rise of state statutes authorizing the use of medical marijuana for qualifying patients.\(^1\) Massachusetts has followed this legislative trend, and in 2012, voters approved the Medical Marijuana Act: An Act for the Humanitarian Medical Use of Marijuana (the “Act”).\(^2\) The Act states that “there should be no punishment under state law for qualifying patients . . . for the medical use of marijuana.”\(^3\) However, with the adoption of the Act also comes unanswered questions regarding the best practices to balance

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\(^1\) See 21 U.S.C. §§ 812(b)(1), (c) (2012) (banning all uses of marijuana, and categorizing it as schedule I drug); *see also* Gonzales v. Raich, 545 U.S. 1, 2 (2005) (maintaining under federal law medical marijuana recognized for having no acceptable medical uses). But see NAT’L CONFERENCE OF STATE LEGISLATURES, State Medical Marijuana Laws, Nat’l Conf. of St. Legislatures, http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last visited Mar. 3, 2019) (reporting thirty-three states allow “comprehensive public medical marijuana and cannabis programs.”). The District of Columbia, Puerto Rico, and Guam also have such programs. *Id.* Additionally, twelve other states allow use of “low THC, high cannabidiol . . . products” for medical reasons in limited situations or as a legal defense.” *Id.*

\(^2\) See An Act for the Humanitarian Medical Use of Marijuana, 2012 MASS. ACTS ch. 369 § 4 (establishing legal protection for medical cannabis patients, caregivers, physicians, medical professionals, cultivators, and providers). More specifically, the Act allows qualifying patients to access marijuana for medical purposes by lawful means and eliminates the risk of criminal penalties that qualifying patients, healthcare providers and suppliers might otherwise face under state law. *Id.* The Act defines a qualifying patient as a person who has been “diagnosed by a licensed physician as having a debilitating medical condition.” *Id.* § 2. The Act lists debilitating medical conditions that may be treated by medical marijuana. *Id.* These debilitating medical conditions may subsequently be considered conditions that could certify an employee as a “qualified handicap employee” under the Massachusetts General Laws. *Id.*; see also 105 MASS CODE REGS. §§ 725.004-.015 (2017) (implementing Act’s legal protections under Department of Public Health (“DPH”)).

\(^3\) See An Act for the Humanitarian Medical Use of Marijuana, 2012 MASS. ACTS ch. 369 § 4 (“qualifying patients shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for their medical marijuana use.”). On the other hand, the Act can only provide protections within its scope, and enumerates that the Act “does not provide immunity from prosecution under Federal law”, nor does it “limit the applicability of other law as it pertains to the rights of . . . employers, law enforcement authorities, or regulatory agencies.” *Id.*
governing law with the Act. Specifically, the Act presents issues in the employment context and the ways in which employers can respect the statutory rights given to medical marijuana patients, while also insulating themselves from liability. Employer’s concerns have arisen from the fact that the Act does not provide any protection to employers for regulating an employee’s use of medical marijuana, and is silent as to whether employers have an obligation to accommodate off-site use of the drug under Mass. Gen. Laws. ch. 151B. In short, Mass. Gen. Laws ch. 151B states that it is “unlawful practice” for an employer to dismiss an employee from employment, or refuse to hire any person alleging to be a qualified handicapped person, because of her handicap when the person is capable of performing the essential functions of the position involved with reasonable accommodation, “unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer’s business.” Essentially, the conflict for the employer lies in the reconciliation between the Act and Mass. Gen. Laws ch. 151B. Though the Act states that employers cannot deny medical marijuana users any “right or privilege,” and Mass. Gen. Laws ch. 151B provides that handicapped employees have a “right to reasonable accommodation,” it does not specifically address how


5 See Erica E. Flores, Accommodating Employee Use of Medical Marijuana, 99 MASS. L. REV. 72, 73 (2018) (providing protections to qualified patients but employers not insulated from civil liability under Act).

6 See MASS. GEN. LAWS ANN. ch. 151B §§ 1(16), 4(16) (LexisNexis 2017) (explaining qualified handicap employee has right not to be fired because of her handicap); see also Barbuto v. Advantage Sales & Mktg., LLC, 78 N.E.3d 37, 50 (Mass. 2017) (explaining handicap discrimination claim is established in implied legislative intent). Here, the court stated, “the drafters of the Act appear to have recognized the existence of a cause of action for handicap discrimination by specifically prohibiting ‘on-site’ medical marijuana use as an ‘accommodation.’” Id. Thus, the specific language prohibiting “on-site” use led to an implication that “off-site” use may be allowed. Id.

employers should regulate the use of drugs or medication for the employees. However, in \textit{Barbuto v. Advantage Sales & Mktg.}, a case of first impression, the Massachusetts Supreme Judicial Court ("SJC") attempted to clarify this grey area and addressed whether a qualifying patient, terminated from employment due to testing positive for her medically prescribed marijuana, has a civil remedy against her employer. This decision comes in light of the passing of the Act, and despite traditional interpretations of Mass. Gen. Laws. ch. 151B which have supported the idea that employers do not need to accommodate for medical marijuana. The SJC held that Barbuto was able to bring a state claim against her employer for both handicap and qualified handicap discrimination, and perhaps even more importantly held that Barbuto’s use of medical marijuana was facially reasonable as an accommodation.

The facts of the case explain that in the summer of 2014, the plaintiff, Christina Barbuto ("Barbuto"), was prescribed medical marijuana in compliance with Massachusetts law to treat a gastrointestinal condition, known as Crohn’s disease. While legally prescribed the medical marijuana, Barbuto accepted a job offer from Advantage Sales and Marketing, LLC ("ASM"). The position was contingent upon the satisfactory completion of a pre-employment drug test. However, before taking the drug test and beginning at ASM, Barbuto voluntarily disclosed to ASM that she used medical marijuana to treat her Crohn’s disease. The supervisor at ASM told Barbuto that her medicinal use of marijuana "should
not be a problem."\textsuperscript{17} Shortly after taking the drug test, Barbuto began her official first day working at ASM.\textsuperscript{18} Approximately one day later, ASM terminated Barbuto for testing positive for marijuana, explaining that the company did not care if Barbuto used medical marijuana to treat her medical condition because the company "follows[s] federal law, not state law."\textsuperscript{19}

In her initial complaint to the trial court, Barbuto asserted various claims, including invasion of privacy in violation of the Massachusetts Privacy Act, denial of her rights under the Act, and wrongful termination in violation of public policy.\textsuperscript{20} Additionally, Barbuto alleged that she was wrongfully terminated for handicap discrimination in violation of various provisions of Mass. Gen. Laws ch. 151B – arguing she was a "handicap

\textsuperscript{17} See id. at 40 (following disclosure of medical condition and drug test, Barbuto’s offer was accepted).

\textsuperscript{18} See id. at 39 (explaining Barbuto worked for one day at Stop & Shop to promote ASM’s customers’ products).

\textsuperscript{19} See id. at 41 (referencing Controlled Substance Act, (“CSA”), which qualified marijuana as Schedule I substance, despite medical use); see also 21 U.S.C. § 812 (1970) (listing five scheduled levels of federally prohibited substances). Under the Controlled Substance Act, marijuana is listed as a schedule I substance and is scheduled on the same level as heroin. \textit{Id}. The federal CSA prohibition is thus in contrast with the Act, which provides protection for Massachusetts prescribers and more importantly, patients who have been provided certain implied “rights or privileges” under the Act to use medical marijuana to treat their conditions. \textit{Id}; see also An Act for the Humanitarian Medical Use of Marijuana, 2012 MASS. AcTs. ch. 369 § 4 (“Any person meeting the requirements under this law shall not be penalized under Massachusetts law in any manner or denied any right or privilege, for such actions.”); see also Flores, supra note 5, at 2 (describing compliance with Act). However, even in compliance with the Act, Massachusetts residents and businesses are still in open defiance of federal law. \textit{Id}. On the other hand, residents and businesses have been able to operate under some level of security as Congress has forbidden the United States Department of Justice (DOJ) from interfering with state medical marijuana programs since 2014. \textit{Id}. Therefore, due to this contradiction between state and federal laws, there still remains many unanswered questions regarding how employers should operate under the Act in light of the CSA. \textit{Id}.


The complaint included six claims: (1) handicap discrimination, in violation of G. L. c. 151B, § 4 (16); (2) interference with her right to be protected from handicap discrimination, in violation of G. L. c. 151B, § 4 (4A); (3) aiding and abetting ASM in committing handicap discrimination, in violation of G. L. c. 151B, § 4 (5); (4) invasion of privacy, in violation of G. L. c. 214, § 1B; (5) denial of the “right or privilege” to use marijuana lawfully as a registered patient to treat a debilitating medical condition, in violation of the medical marijuana act; and (6) violation of public policy by terminating the plaintiff for lawfully using marijuana for medicinal purposes. The second and third claims were brought against Villaruz alone; the rest were brought against both ASM and Villaruz.

\textit{Id}. Initially Barbuto filed a discrimination charge against ASM and Villaruz with the Massachusetts Commission against Discrimination (“MCAD”), but later withdrew her MCAD charge in order to file a complaint in the Superior Court. \textit{Id}. 
person” suffering from Crohn’s disease and a “qualified handicap person” capable of performing the essential functions of her job, and was thus, entitled to a reasonable accommodation. 21 In response, after unsuccessfully attempting to remove the case to the United States District Court, ASM filed a motion to dismiss all counts of Barbuto’s complaint with the Superior Court on the basis that employers should not be expected to accommodate the federally prohibited use of a drug. 22 In its motion, ASM argued that the Act does not require “any accommodation of any-onsite employee use of marijuana[,]” and further rejected the implication that the Act required the reasonable accommodation to allow employees to use marijuana off-site, just because the Act and Mass. Gen. Laws ch. 151B did not specifically prohibit an employee’s off-site use of marijuana. 23 The Superior Court agreed with ASM’s argument and dismissed all of Barbuto’s claims except for her invasion of privacy claim, reasoning that the Act does not provide immunity from federal law and further rejected the assertion that Mass. Gen. Laws ch. 151B would extend far enough to require an accommodation for medical marijuana given its prohibited federal status. 24

21 See Barbuto, 78 N.E.3d at 41 (claiming ASM discriminated by not providing reasonable accommodation for Barbuto’s medical marijuana use). Barbuto asserted that medicating her condition with medically prescribed marijuana is a reasonable accommodation and would not impose undue hardship on ASM. Id.; see also MASS. GEN. LAWS ANN. ch. 151B § 1(16) (LexisNexis 2017) (explaining “reasonable accommodation” is not defined under Massachusetts General Law); see also MASS. GEN. LAWS ANN. ch. 151B §4(16) (LexisNexis 2017) (giving handicap employees right to accommodation if requested, provided no undue hardship imposed); Peabody Props., Inc. v. Sherman, 638 N.E.2d 906, 909 (Mass. 1994) (“A ‘reasonable accommodation’ is one which would not impose an undue hardship or burden on the entity making the accommodation.”); Godfrey v. Globe Newspaper Co., Inc., 928 N.E.2d 327, 333 (Mass. 2010) (mandating employer’s obligation to work with employee to determine if another accommodation is more reasonable); Mass. Bay Transp. Auth. v. Mass. Comm’n. Against Discrimination, 879 N.E.2d 36, 49 (Mass. 2008) (requiring employer to “participate in interactive process of determining [accommodation] at handicapped employees request”); see also Canfield v. Con-Way Freight, Inc., 578 F. Supp. 2d 235, 240 (D. Mass. 2008) (“[T]o establish a prima facie case of discriminatory discharge based on handicap under Massachusetts law, plaintiff must show, among other things, that he is a qualified handicapped person.”).


23 See id. at *2 (holding General Law ch. 151B may require employers to accommodate employee’s use of medical marijuana).

24 See id. (reasoning no requirement to accommodate to employee’s medical marijuana use under G.L.c. 151B.). The court further bolstered this decision by citing similar decisions in other states with similar medical marijuana laws; however, the facts of these cases vary from the case at hand. See Ross v. RagingWire Telecommom., 174 P.3d 200, 204 (Cal. 2008) (“No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law [21 U.S.C. §§ 812, 844 even for medical users.”]; Brandon Coats v. Dish Network, LLC, 350 P.3d 849, 852 (Colo. 2015) (stating licensed medical marijuana use is not “lawful activity” under Colorado employment discrimination law).
Barbuto responded by filing a notice of appeal regarding the dismissed claims, leading to the SJC’s direct appellate review. On appeal, Barbuto took the position that ASM should have accommodated her debilitating condition, by either: (1) not making her take the drug test, or (2) allowing her to fail the drug test without any adverse employment consequences. ASM rejected Barbuto’s claim, arguing that Barbuto failed to state a claim for handicap discrimination for two reasons: (1) she was not a “qualified handicap person” because her requested accommodation, the use of medical marijuana, was facially unreasonable due to marijuana’s federal prohibition; and (2) even if she was to be considered a “qualified handicap person,” she was terminated not because she was handicap, but because she failed a drug test that all employees were required to pass. The SJC found in favor of ASM’s argument and upheld the dismissal of Barbuto’s wrongful termination claim and implied a private right of action under the Act. However, the SJC reversed the dismissal of Barbuto’s claim under Mass. Gen. Laws ch. 151B and unanimously decided that Barbuto’s Crohn’s disease was a “handicap” and held that Barbuto’s proposed accommodation to use medical marijuana to treat her was “facially reasonable.”

The SJC also found that ASM should have engaged in the interactive process to find a reasonable accommodation for Barbuto. Thus, while Barbuto was...

25 See Barbuto, 78 N.E.3d at 40 (reviewing de novo on appeal whether qualifying patient may be terminated from employment).

26 See id. at 43 (asserting if handicap discrimination is appropriate then accommodation is necessary if facially reasonable); see also Godfrey v. Globe Newspaper Co., Inc., 928 N.E.2d 327, 334 (Mass. 2010) (explaining hesitation to set hard and fast rules for determining when accommodation is facially reasonable).

27 See Barbuto, 78 N.E.3d at 45 (explaining ASM arguments); see also Garcia v. Tractor Supply Co., 154 F.Supp.3d 1225, 1229 (D.N.M. 2016) (“Medical marijuana is not an accommodation that must be provided for by the employer.”); Coats v. Dish Network, LLC, 350 P.3d 849, 851 (Colo. 2015) (upholding employee’s termination due to medical marijuana consumption despite authorization as “lawful activity” within state); An Act for the Humanitarian Medical Use of Marijuana, 2012 MASS. ACTS CH. 369, §7(D) (providing Act does not require any employer to permit “on-site” marijuana use as accommodation).

28 See Barbuto, 78 N.E.3d at 45 (rejecting ASM’s argument that accommodation was unreasonable because continued marijuana use would be federal crime); see also Flores, supra note 5, at 2 (addressing quote) (“According to the court, the mere fact that marijuana remains illegal under federal law does not relieve employers from their obligations under state law—specifically, the obligation under Chapter 151B to engage in the interactive process and to provide reasonable accommodations for handicapped employees.”).

29 See Barbuto, 78 N.E.3d at 45 (explaining even if accommodation of medical marijuana was facially unreasonable, duty was still owed).

...
successful in her claims against ASM for handicap discrimination, the SJC held that she did not have an implied private right of action under medical marijuana law, or a claim for wrongful termination as a matter of public policy under the Act.\textsuperscript{30} In conclusion, the SJC established that if an employer’s tolerance of an employee’s use of medical marijuana was a facially reasonable accommodation, then the employer effectively would be denying this “right or privilege” provided for under both Mass. Gen. Laws ch. 151B and the Act.\textsuperscript{31} In turn, this decision established that a handicapped

\textsuperscript{30} See \textit{Barbuto}, 78 N.E.3d at 47 (rejecting Barbuto’s remaining claims that her termination was wrongful and violated public policy). The SJC reasoned they would not allow for these claims because they felt they had provided for a claim of right by providing a remedy under discrimination law, and allowing for additional claims could create confusion. \textit{Id.} at 50. (“[W]here a comparable cause of action already exists under our law prohibiting handicap discrimination, a separate, implied private right of action is not necessary to protect a patient using medical marijuana from being unjustly terminated for its use.”). \textit{Id.}

\textsuperscript{31} See \textit{id.} at 44 (correlating handicap employee denial of insulin is similar to employee denied medical marijuana). The SJC supported its reasoning by analogizing a scenario where an employer upheld a drug policy which prohibited the use of lawfully prescribed insulin by a physician to a diabetic, and further explained that the employer would still have a duty to engage in an interactive process with the employee to determine whether there was an equally effective medical alternative. \textit{Id.} at 47. “[W]here a handicapped employee needs medication to alleviate or manage the medical condition . . . and the employer fires her because company policy prohibits the use of this medication, the law does not ignore the fact that the policy resulted in a person being denied employment because of her handicap.” \textit{Id.; compare Garcia v. Tractor Supply Co., 154 F.Supp.3d 1225, 1229 (D.N.M. 2016) (“medical marijuana is not accommodation that must be provided by employer”) with Coats v. Dish Network, LLC, 350 P.3d at 851 (Colo. 2015) (discharging employee based on employee’s participation in “lawful activities” off-site during nonworking hours) and Ross v. RagingWire Telecomm., Inc., 174 P.3d 200, 204 (Cal. 2008) (finding California’s statute prohibiting handicap discrimination does not require employees to accommodate to illegal drugs). Deviating from the \textit{Ross} decision, the \textit{Barbuto} court concluded to provide an employee with a claim
employee in Massachusetts has a statutory “right or privilege” to a reasonable accommodation under the Act, which may now include reasonable accommodations for an employee’s use of prescribed medical marijuana.32

Prior to the passage of the Act, medical marijuana was strictly prohibited in Massachusetts, and possession of marijuana was a punishable felony.33 Medical marijuana is still prohibited under federal law, and a qualifying patient in Massachusetts who has been lawfully prescribed marijuana still remains subject to potential criminal penalties.34 However, states are able to authorize the legalization of marijuana under the Rohrabacher Blumenauer Amendment.35 Additionally, from 2013 to 2017,

32 See Barbuto, 78 N.E.3d at 45 (allowing accommodation for employee being treated with medical marijuana for debilitating condition). This requirement to accommodate does not extend to on-site use, as “on-site” use is federally prohibited. Id. “[T]he termination of the employee for violating that policy effectively denies a handicapped employee the opportunity of a reasonable accommodation, and therefore is appropriately recognized as handicap discrimination.” Id. at 47; see also Flores, supra note 5, at 76 (explaining medical marijuana is not reasonable when there are safety risks). The establishment of a medical marijuana accommodation does not mean that an employee will be instantly granted that right, as an employer may defeat the medical marijuana accommodation by proving that it is unreasonable, unduly burdensome to the employer’s business, would “impair the employee’s performance of her work,” create an “unacceptably significant safety risk”, or require the employer to violate a contractual or statutory obligation. Id.

33 See 21 U.S.C. § 842 (2018) (explaining CSA makes it illegal to manufacture, distribute, or possess controlled substances except as authorized); see also An Act for the Humanitarian Medical Use of Marijuana, 2012 MASS. ACTS ch. 369 § 7(F) (“[N]othing in this law requires the violation of federal law or purports to give immunity under federal law.”). However, the implication was that the off-site use of medically prescribed marijuana is lawful under state law. Id.

34 See Gonzales v. Raich, 545 U.S. 1, 27 (2005) (continuing to recognize medical marijuana as Schedule I drug, with “no acceptable medical uses”); see also MASS. GEN. LAWS ANN. ch. 151B § 1(16) (LexisNexis 2018) (finding no requirement for Massachusetts employers to accommodate to use of medical marijuana in workplace).

35 See H.AMDT. 748, 113th Congress (2013-14) available at https://www.congress.gov/amendment/113th-congress/house-amendment/748/text (providing text of Amendment). The Rohrabacher-Farr Amendment otherwise known as the Rohrabacher-Blumenauer Amendment, was signed into law by President Obama on December 16, 2014, and materially changed the legal landscape for the U.S. cannabis industry. Id. The Amendment states: “None of the funds made available in this Act to the Department of Justice may be used . . . to prevent such states from implementing their own state laws that authorize the use, distribution, possession, or cultivation of medical marijuana.” Id. Furthermore, the Amendment was renewed on September 28, 2018, and shall remain in effect through September 30, 2019. Id.; see also David Wenger, Risk of Federal Enforcement Actions Against State-Legal Cannabis Businesses Declines, NEW CANNABIS VENTURES (Jan. 10, 2019, 2:57 PM), https://www.newcannabisventures.com/risk-of-federal-enforcement-actions-against-state-legal-cannabis-businesses-declines/ (describing risks of cannabis industry).
individuals and companies complying with state legalized medical marijuana programs were able to seek protection from federal prosecution under the Cole Memorandum, which instructed prosecutors and law enforcement agencies to focus only on marijuana related activities outside of state-legal cannabis operations, with medical marijuana enforcement not being one of the specific priorities. However, on January 4, 2018, former Attorney General Jefferson Sessions rescinded the Cole Memorandum and issued a separate memorandum giving federal prosecutors the freedom to prosecute marijuana cultivation, distribution, and possession as they would any other federal crime. Nevertheless, since the Cole Memorandum was rescinded, not a single prosecutor has acted against the industry, and the decision to prosecute will continue to remain in the hands of the U.S. Attorneys. Additionally, it is likely the U.S. Attorneys will continue to refrain from taking action to prosecute especially in light of the support that medical marijuana legalization has received both from the public and under the Rohrabacher-Blumenauer Amendment. Therefore, even without the Cole Memorandum, the federal protection of the medical cannabis industry remains promising, and while there are no guarantees that federal enforcement may not come down on employers or individuals, the current regulatory landscape and progress towards federal legalization suggest that


there is little-to-no material risk of federal enforcement action against businesses or individuals who are compliant with state law.\textsuperscript{40}

With the federal law on marijuana geared toward state regulation, it is essential that employers, businesses, and individuals within Massachusetts understand the development of the Act and how it intersects and operates with Mass. Gen. Laws ch. 151B, and the federal law, as the innerworkings of these governing authorities proved to be a central issue in Barbuto.\textsuperscript{41} In Massachusetts, the Act defines a “qualifying patient” as “a person who has been diagnosed by a licensed physician as having a debilitating medical condition,” which by the terms of the statute, includes Crohn’s disease.\textsuperscript{42} In drafting the Act, the legislature included specific wording to explain that a qualifying patient shall be protected from “arrest or prosecution or civil penalty for the use of marijuana,” provided the patient complies with the conditions of the Act.\textsuperscript{43} In solidifying its intent to provide protection for medical marijuana patients, the legislature went a step further by inserting

\begin{footnotesize}
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  \item See Wenger, supra note 38 (explaining enforcement techniques); see also Jeremy Berke & Skye Gould, New Jersey lawmakers postponed a critical vote to legalize marijuana – here are all the states where it's legal, BUS. INSIDER (Mar. 26, 2019, 11:38 AM), https://www.businessinsider.com/legal-marijuana-states-2018-1 (outlining all states where marijuana initiatives have been taken).
  \item See An Act for the Humanitarian Medical Use of Marijuana, 2012 MASS. ACTS ch. 369 §2(K) (outlining conditions that are expressly permissible for treatment with medically prescribed marijuana). Additional conditions include: cancer, glaucoma, positive status for human immunodeficiency virus (HIV), acquired immune deficiency syndrome (AIDS), hepatitis C, amyotrophic lateral sclerosis (ALS), Crohn’s disease, Parkinson’s disease, multiple sclerosis and other conditions as determined in writing by a qualifying patient’s physician. Id.
  \item See An Act for the Humanitarian Medical Use of Marijuana, 2012 MASS. ACTS ch. 369 § 2(K) (“A patient possesses no more marijuana than is necessary for the patient’s personal, medical use, not exceeding the amount necessary for a sixty-day supply; and (b) [presents] his or her registration card to any law enforcement official who questions the patients . . . regarding the use of marijuana.”). Id. § 4a-b.
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language in the Act which states that medical marijuana patients shall not be
denied "any right or privilege" on the basis of their medical marijuana use.\textsuperscript{44}

Generally, once an employee has proven that they are a qualified
handicap person, they have an explicit right under Mass. Gen. Laws ch.
151(B) §4(a), not to be discriminated against solely because of their
handicap.\textsuperscript{45} That right includes the right to require an employer to make a
reasonable accommodation, such as an accommodation for a person's
medication, to enable the employee to perform the essential functions of their
job with the accommodation—provided the accommodation is reasonable
under the circumstances.\textsuperscript{46} The duty to provide reasonable accommodation
applies to all qualified handicap employees and is intended to reduce work-
related barriers related to an individual's handicap.\textsuperscript{47} Furthermore, the
employer need not provide the best accommodation available, or the
accommodation specifically requested by the individual with the handicap,
but merely a reasonable one.\textsuperscript{48} However, if the accommodation proposed

\textsuperscript{44} See id. §4 ("Any person meeting the requirements under this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions."). Thus, the choice to include this language implies that under the Act, patients shall not be denied "any right or privilege" on the basis of their medical marijuana. Id. Further, it is to be noted that the "right or privilege" language in this Act is unique from the language in other states, such as California, that explicitly chose to leave out this language. See Barbuto, 78 N.E.3d at 45 n.7 (distinguishing Massachusetts Act with California Supreme Court decision which denied employees' challenge under similar claims). The decision to include the language provided the SJC with a sound basis to reason that the legislature had the intent to protect medical marijuana patients in its conclusion. Id.

\textsuperscript{45} See MASS. GEN. ANN. LAWS ch. 151B §4(16) (LexisNexis 2017) ("A qualified individual with disability refers to those individuals with a disability who: (1) satisfy the general skill, experience, education and other job-related requirements, and (2) can perform the essential functions of the job, with or without reasonable accommodation."); see also Employment rights of people with disabilities, MASS.GOV. (2018), available at https://www.mass.gov/service-details/employment-rights-of-people-with-disabilities (explaining employment rights of people with disabilities). Essential functions are narrowly defined to include fundamental job duties. Id. "A job function is more likely to be 'essential' if it requires special expertise, a large amount of time, or if that function was listed in the written job description prepared before the employer advertised for or interviewed job applicants." Id.; see also Massachusetts Commission Against Discrimination, Guidelines: Employment Discrimination on the Basis of Handicap, Ch. 151B, § IX.A.3 (1998) (explaining handicap may limit major life functions including seeing, hearing, mobility, and working). Further, it is important to note that Massachusetts law uses the word "handicap" and the Federal Americans with Disabilities Act uses the word "disability", but the laws are very similar. Id.

\textsuperscript{46} See MASS. GEN. LAWS ch. 151B §4(B) (LexisNexis 2017) (defining reasonable accommodation). "Reasonable accommodation" refers to an employment-related modification that an employer must make in order to ensure equal opportunity for an individual with a disability to (1) apply for and test for a job; (2) perform essential job functions; and (3) receive the same benefits and privileges as other employees. Id.


\textsuperscript{48} See id. (providing scope of employers reasonable accommodation).
by the employee appears unduly onerous, the employer has an obligation to at least have a conversation with the employee to determine whether another accommodation is possible.49

Moreover, within Massachusetts, an employer may not dismiss from employment or refuse to hire "any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation" unless the accommodation would impose undue hardship on the employer's business.50 Therefore, courts have established that in order to justify an employer's refusal to reasonably accommodate the medical needs of the qualified handicap employee, an employer must prove that the employee's use of the accommodation, such as the use of medication, would cause an undue hardship to the employer's business.51 The case-in-chief is the first case in Massachusetts to recognize that an employee has a claim for handicap discrimination based upon an employer's unwillingness to accommodate an employee for the use of medical marijuana.52

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49*See id. (citing Cox. V. New England Tel. Co., 607 N.E.2d 1035, 1040 (Mass. 1993)) ([Determination [of essential function] should be based upon more than statements in a job description and should reflect the actual functioning and circumstances of the particular enterprise involved.]); Reed v. LePage Bakeries, Inc., 244 F.3d 254, 259 (1st Cir. 2001) (explaining plaintiff must show accommodation is "feasible for the employer under the circumstances"). Massachusetts law does not require that an employer provide a reasonable accommodation in the form of reassignment to a new or different position. *MASS. GEN. LAWS ch. 151B § 4 (LexisNexis 2017).* Instead, Mass. Gen. Laws. ch. 151B § 4 requires only that the employer provide reasonable accommodation in the form of modifications to an employee's existing position. *Id.*

50 *See Godfrey v. Globe Newspaper Co., Inc., 928 N.E.2d 327, 328 (Mass. 2010) (explaining potential for undue hardship with accommodation increases if position involves safety concerns); see also Webster v. Motorola, Inc., 637 N.E.2d 203, 208 (Mass. 1994) (noting undue hardship nexus between job responsibilities and risk of harm is "attenuated").

51 *See Gannon v. City of Bos., 73 N.E.3d 748, 749 (Mass. 2017) (asking whether officer was able to perform as qualified handicap without posing risk to others); Godfrey v. Globe Newspaper Co., Inc., 928 N.E.2d 327, 328 (Mass. 2010) (establishing employer has obligation to work with employee to determine whether another accommodation is possible); see also Cox v. New England Tel. & Tel. Co., 607 N.E.2d 1035, 1042 (Mass. 1993) (determining burden of proof shifts to employer to show accommodation would impose undue hardship).

In *Barbuto v. Advantage Sales & Mktg.*, the SJC reversed the holding of the trial court and opened the door to the possibility that employers within Massachusetts may now be obligated to work with employees to create a reasonable accommodation for medical marijuana. In coming to its conclusion, the SJC considered the conflicting implications of enacting the 2012 Medical Marijuana Act, which provided that "any person prescribed medical marijuana under the law shall not be penalized in any manner or denied any right or privilege for such actions." This provision of the Act is in direct conflict with Mass. Gen. Laws ch. 151B, which have historically provided that employers do not have an obligation to accommodate an employee for using marijuana.

Ultimately, the court concluded that despite marijuana's federally prohibited status, employers within Massachusetts are still under the obligation of Mass. Gen. Laws ch. 151B to engage in the interactive process and to provide reasonable accommodations for qualified handicapped employees, which may include accommodating an employee's medical use of marijuana—provided no "equally effective alternative" exists. Thus, the

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53 See *Barbuto*, 78 N.E.3d at 41 (explaining requirement reserved for very limited employment situations).

54 See An Act for the Humanitarian Medical Use of Marijuana, 2012 MASS. ACTS ch. 369 §4 ("[Qualifying patients] shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, [for their medical marijuana use]."). However, the Act explicitly states that any "on-site" medical marijuana use by an employee is strictly prohibited as a reasonable accommodation. *Id.*

55 See *Barbuto v. Advantage Sales & Mktg.*, LLC, 2016 WL 8653056, at *2 (Mass. Super. Ct. 2016) aff'd in part, reversed in part 78 N.E.3d 37 (Mass. 2017) (arguing that accommodation under 151B does not include medical marijuana because marijuana is federally illegal). The primary argument by courts in the past was that employment discrimination statues did not cover medical marijuana prescription use because "state disability discrimination statutes do not extend to marijuana use for medical purposes because such use remains illegal under federal law." *Id.* at *3 (citing *Ross*, 174 P.3d at 204; *Coats*, 350 P.3d at 852).

56 See *Barbuto*, 78 N.E.3d at 44 (elaborating Court did not need additional details about Barbuto's condition to declare handicap). Still, the Court determined she could perform the functions of her job with a reasonable accommodation as a "qualified handicap employee." *Id.*

Where, in the opinion of the employee's physician, medical marijuana is the most effective medication for the employee's debilitating medical condition and where any
court held that because Barbuto was a qualified handicap employee, a facially reasonable accommodation for Barbuto may include taking the appropriate medication. In this case, the Court held the off-site use of medical marijuana to allow Barbuto to perform the essential functions of her job was facially reasonable as an accommodation, and reasoned if ASM were to prohibit the use of medical marijuana as treatment for a debilitating condition, they would be denying Barbuto, a qualified handicap employee, the opportunity of a reasonable accommodation, which is effectively handicap discrimination. Furthermore, the court held that firing Barbuto for the proposed use of the accommodation of medical marijuana before engaging in the interactive process to explore an alternative equally effective medication not prohibited by the employer’s drug policy was sufficient enough on its own to support a claim for handicap discrimination under Mass. Gen Laws ch. 151B.

While this case only introduces the prospect for an employee to have a claim against their employer, this decision by the SJC is revolutionary nonetheless as it provides a new opportunity for a claim to be brought by an employee facing adverse action as a result of their qualified handicap.

alternative medication whose use would be permitted by the employer’s drug policy would be less effective, an exception to an employer’s drug policy to permit its use is a facially reasonable accommodation.

Id. at 45.

57 See id. at 46 (holding that use of medical marijuana is not per se unreasonable as accommodation). “To declare an accommodation for medical marijuana to be per se unreasonable out of respect for Federal law would not be respectful of the recognition of Massachusetts voters . . . .” Id.

58 See id. at 44 (analogizing handicap employee denied insulin as similar to employee denied medical marijuana). Where a handicapped employee needs medication to alleviate or manage the medical condition that renders her handicapped, and the employer fires her because company policy prohibits the use of this medication, the law does not ignore the fact that the policy resulted in a person being denied employment because of her handicap. Id. at 47.

59 See id. at 45 (explaining justification for proving undue hardship):

Where no equally effective alternative exists, the employer bears the burden of proving that the employee’s use of the medication would cause an undue hardship to the employer’s business in order to justify the employer’s refusal to make an exception to the drug policy reasonably to accommodate the medical needs of the handicapped employee.

Id.; see also Godfrey v. Globe Newspaper Co., Inc., 928 N.E.2d 327, 334 (Mass. 2010) (quoting Cox v. New England Tel. & Tel. Co., 607 N.E.2d 1035, 1040 (Mass. 1993)) (“Once an employee ‘make[s] at least a facial showing that reasonable accommodation is possible,’ the burden of proof of both production and persuasion shifts to the employer to establish that a suggested accommodation would impose an undue hardship.”).

60 See Barbuto, 78 N.E.3d. at 47 (explaining decision to reverse handicap discrimination does not necessarily mean Barbuto will succeed on claim). “The defendants at summary judgment or trial may offer evidence to meet their burden to show that the plaintiff’s use of medical marijuana
However, it does not guarantee that an employee will win on the handicap discrimination claim.\textsuperscript{61}

The SJC in\textit{Barbuto} correctly recognized that the use and possession of medically prescribed marijuana, by a qualifying patient, may be just as lawful as the use and possession of any other prescribed medication.\textsuperscript{62} Granted, the SJC provided that this accommodation may be reasonable if, and only if, the employee proves that medical marijuana is the most effective medication to treat the employee’s qualified handicap, and demonstrates that the proposed “authorized” alternative would be less effective.\textsuperscript{63}

In deciding this case, the SJC was at a crossroads between respecting the rigid federal regulations and respecting the intent of the legislatures and citizens who had collectively voted upon the Act with an intention of providing medical marijuana users, just like Barbuto, protection from being penalized for using effective medication.\textsuperscript{64} The court sided with the latter, and decided to allow Barbuto’s handicap discrimination claim to move forward, implicitly recognizing that under very specific circumstances, medical marijuana may now be permitted as a facially reasonable

\textsuperscript{61} See id. at 47 (explaining \textit{Barbuto} does not give employees right to medical marijuana if use violates company policy). For instance, transportation employers who are subject to regulations promulgated by the United States Department of Transportation that prohibit any safety-sensitive employee subject to drug testing under the Department’s drug testing regulations from using marijuana. \textit{Id.} at 48.

\textsuperscript{62} See id. at 45 (accommodating handicapped employee’s off-site use of marijuana pursuant to valid prescription is facially reasonable).

\textsuperscript{63} See id. (concluding where no equally effective “federally authorized” alternative, employer must prove medication causes undue hardship). In the case at hand, ASM was not justified in refusing to make an exception to their drug policy to accommodate the medical needs of their handicap employee. \textit{Id.} The SJC explained that an accommodation to ASM’s drug policy would not be facially unreasonable because the only person at risk of federal criminal prosecution for the possession of medical marijuana is the employee. \textit{Id.} at 46. Employers commit no crime by merely tolerating use of the drug because an employer would not be in joint possession of medical marijuana or aid and abet its possession simply by permitting an employee to continue his or her off-site use. \textit{Id.} at 47.

\textsuperscript{64} See \textit{Barbuto}, 78 N.E.3d at 47 (shying away from interpretations of federal law which completely prohibit possession especially where lawfully prescribed). Further, the intent to include a cause of action for handicap discrimination is made inherently clear by the enumeration of a provision within the Act which prohibits ‘on-site’ medical marijuana use as an ‘accommodation,’” but is silent as to the ‘off site’ use of medical marijuana. \textit{Id.}; see also An Act for the Humanitarian Medical Use of Marijuana, 2012 MASS. ACTS ch. 369, § 7 (D) (providing language that bars denial of “right or privilege” for medial marijuana use). This language suggests a preexisting “right or privilege” for the medical use of marijuana as implicated in the language from the Act which bars an already existing “right or privilege”. \textit{Id.} § 4.
accommodation, despite an employer’s policy against marijuana and federal law.\(^{65}\)

Furthermore, in outlining its reasoning, the SJC provided a rough blueprint for future employers to apply when an employee has established that they are a qualified handicap person and that their use of medical marijuana would provide a reasonable accommodation.\(^{66}\) However, the blueprint effectively stops there as the SJC acknowledged that they were not willing to decide whether Barbuto’s requested accommodation to use medical marijuana would impose undue hardship on the employers business, noting that that decision is best left to the trial court.\(^{67}\)

Thus, this decision by the SJC was a step towards a more tolerant direction, as it not only allowed for employees to establish a handicap discrimination claim against employers who deny them their statutory “right or privilege” to a reasonable accommodation, but it also created case precedent which implicitly developed an affirmative “right or privilege” for qualified patients in Massachusetts to use marijuana for medical purposes under limited circumstances and without fear of unreasonable employment termination.\(^{68}\) With not much case law or statutory intent to rely upon, the

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\(^{65}\) See Barbuto, 78 N.E.3d at 47 (“[T]he law does not ignore the fact that the policy resulted in a person being denied employment because of her handicap.”).

\(^{66}\) See id. at 48 (holding employer must engage in interactive process before firing employee who tests positive for marijuana). The court compared state court decisions which rejected employees’ claims for wrongful termination due to medical marijuana use. Id. at 45 n.7.

\(^{67}\) See id. at 48 (“Whether the employer met its burden of proving that the requested accommodation would impose an undue hardship on the employer’s business is an issue that may be resolved through a motion for summary judgment or at trial; it is not appropriately addressed through a motion to dismiss.”); see also Erica E. Flores, Accommodating Employee Use of Medical Marijuana, 99 MASS. L. REV. 72, 73 (2018) (providing examples of questions employers may now have under Barbuto decision).

\(^{68}\) See Barbuto, 78 N.E.3d at 47 (recognizing that off-site medical use of marijuana might be permissible accommodation); see also Ross v. RagingWire Telecomm., Inc., 174 P.3d 200, 207 (Cal. 2008) (comparing California statute containing no language to provide users with right or privilege). The SJC cites to Ross to recognize the main difference as to why the plaintiff was successful in her handicap claims in Barbuto compared to the California case, is due to the language of the statute. Barbuto, 78 N.E.3d at 45 n.7. Nothing in the text or history of the California statute suggests the voters intended the measure to address the respective “rights and obligations” of employers and employees. Id. at 44. In comparison, the Act specifically includes language to address the “rights and privileges” of medical marijuana users. Id.
SJC analyzed the spectrum of authority governing medical marijuana.\(^{69}\) On the one side was the federal law which provides that medical marijuana has “no accepted medical use in treatment in the United States,” and on the other side was the decision of nearly ninety percent of the states which have enacted laws recognizing the medical use of marijuana.\(^{70}\)

In coming to its conclusion, the court firmly established that Barbuto had the right and privilege to treat her condition using the appropriate medication, without termination, similar to any other handicap employee with a debilitating condition that could be treated using medication.\(^{71}\) Moreover, the courts decision created greater protections for marijuana patients, and also served as a means to judicially recognize the medical use of marijuana as an effective treatment for the prescribed conditions enumerated within the Act.\(^{72}\) Specifically, the SJC’s analogy comparing Barbuto’s circumstances to an employer who denied an employee with diabetes from using effective yet federally prohibited insulin provided some much needed clarity about the court’s understanding of the severity of the issue.\(^{73}\)

In *Barbuto v. Advantage Sales & Mktg.*, the decision to hold that medical marijuana patients have a qualified right to use medical marijuana in certain circumstances, notwithstanding federal law, is a complete departure from existing law. In its reasoning, the SJC established that when marijuana is used to treat a “qualified handicap” and is reasonable under the

\(^{69}\) See *Barbuto*, 78 N.E.3d at 45 n.7 (distinguishing Act with similar statutes from other states).

\(^{70}\) See *Barbuto*, 78 N.E.3d at 46 (recognizing other states decisions to protect medical marijuana users); but see *Gonzales v. Raich*, 545 U.S. 1, 27 (2005) (“The [Controlled Substances Act] designates marijuana as contraband for any purpose; in fact, by characterizing marijuana as a Schedule 1 drug, Congress expressly found that the drug has no acceptable medical uses”). See *Barbuto*, 78 N.E.3d at 49 (“In considering whether there is any such indication from the voters, we look to the closest equivalent to legislative history . . . which is the voters guide.”). The court also looked to federal law and opinions from state courts discussing the legalization of medical marijuana. *Id.* Another aspect the court took into consideration in determining the intent of the Act was the legalization of recreational marijuana in Massachusetts. See MASS. GEN. LAWS ch. 94G (2017) (legalizing recreational possession and use of marijuana by persons over twenty-one). However, the legalization of recreational marijuana within Massachusetts is irrelevant as to the substantive facts of the *Barbuto* decision because “Barbuto’s possession and use of marijuana for medical marijuana use was already lawful at the time her employment was terminated.” *Barbuto*, 78 N.E.3d at 49.

\(^{71}\) See *Barbuto*, 78 N.E.3d at 45 (asserting Barbuto could have competently performed her marketing associate job while treating with medical marijuana); see also *Cargill v. Harvard Univ.*, 804 N.E.2d 377, 386 (Mass. App. Ct. 2004) (requiring appropriate findings of fact before making determination about reasonable accommodation).

\(^{72}\) See *Barbuto*, 78 N.E.3d at 48 (suggesting provisions that would be acceptable for denying employee’s use of medical marijuana). Even when medical marijuana would be used to rightfully treat a debilitating condition. *Id.*

\(^{73}\) See *id.* at 44 (analogizing handicap employee denied insulin as equivalent to employee denied medical marijuana).
circumstances, an employee’s use of medical marijuana may be protected by a “right or privilege” encompassed within the Act and General Laws. Subsequently, a qualified handicap employee in Massachusetts may bring a legitimate handicap discrimination claim against their employer for terminating their employment for the off-site and disclosed use of medical marijuana when it is legally prescribed and is a reasonable accommodation to treat the employee’s condition. Furthermore, this decision confirmed that even when an employer believes an accommodation for the use of medical marijuana is unreasonable, the employer, at the very least, has an obligation to participate in the interactive process for the purpose of determining if there is an alternative treatment.

In conclusion, the effect of the Barbuto decision is two-fold. It undoubtedly answers elementary questions regarding the treatment of medical marijuana in Massachusetts, especially in an employment context. However, it also leaves open a lot of questions to be answered—specifically, in regard to how employers, both within Massachusetts and in other medical marijuana states, should now handle employees who disclose their use of medical marijuana for treatment, and how employers should operate their employment practices to remain compliant under the conflicting state and federal laws. Despite the clarification issues, Barbuto is a groundbreaking decision as it provides qualified handicap employees with the right to effectively medicate without fear of retribution. Finally and perhaps most importantly, this decision will motivate employers with strict medical marijuana employment policies to consider revising their policies to become compliant with the Barbuto decision, as it is likely that this decision will have a lasting impact on future employment practices for many years to come.

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