

Federal Court Ruling Provides Clarification for New Jersey Employers On Use of Medical Marijuana in the Workplace

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A recent opinion out of the United States District Court for the District of New Jersey provides New Jersey employers with some welcome insight into how courts are navigating the fine line between New Jersey's Compassionate Use of Medical Marijuana Act (CUMMA) and an employer's obligations under that law.

U.S. District Judge Robert Kugler's August 10, 2018 unpublished ruling in *Cotto v. Ardagh Glass Packing, Inc.* serves to educate employers that CUMMA does not require an employer to accommodate the medical use of marijuana in any workplace. The Court held that neither CUMMA nor the New Jersey Law Against Discrimination (NJLAD) requires an employer to waive a drug test as a condition of employment for use of a federally-prohibited drug.

The facts in *Cotto* are similar to many recent cases where state statutes decriminalizing the use of medical marijuana intersect with an employee's use of medical marijuana, both on and off the job. Daniel Cotto, Jr., a forklift operator and employee of defendant Ardagh Glass, hit his head on the roof of a forklift. His supervisor advised Cotto to be examined by an orthopedist. A company safety employee also told Cotto that "he was required to pass a breathalyzer and urine test in order to return to work." Cotto explained that he was taking prescription medication, which the safety employee advised would not be an issue. Cotto was prescribed drugs for pain management because of a 2007 neck and back injury in 2007. These drugs included Percocet, Gabapentin and medical marijuana. Cotto claimed he told his employer about his medicinal use of marijuana pursuant to a doctor's orders prior to the forklift incident.

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Cotto was advised that he could not return to work until he could pass a drug test. Ardagh Glass maintained that while Percocet and Gabapentin were generally not to be used while operating heavy machinery, it was Cotto's use of medical marijuana that was the main issue, notwithstanding Cotto turning over his medical marijuana card and doctor's prescription.

Cotto claimed that he was put on indefinite suspension unless he passed a drug test, and that this condition constituted discrimination since he had an underlying medical condition and was therefore disabled within the meaning of NJLAD. Cotto claimed he remained capable of performing all the essential functions of his job as a forklift operator despite his disability, and was simply seeking a "reasonable accommodation." The Court inferred this to be a request that Cotto's employer waive the requirement that Cotto pass a drug test for marijuana – a substance prohibited by federal law.

In its Motion to Dismiss, Ardagh Glass argued that CUMMA does not mandate an employer to accept an employee's use of a drug that is illegal under federal law. In determining whether Cotto met his burden to establish a prima facie case under NJLAD, the Court focused on the second element – whether Cotto was qualified to perform the essential functions of his job. The Court was not convinced that Cotto was being discriminated against for his disability related to his neck and back injury, but rather that he was seeking to avoid the consequences of criminal conduct under federal law, which conduct resulted from the disability. Cotto's employer was willing to allow use of the Percocet and Gabapentin, but not marijuana, despite the medical marijuana card and a note from his doctor stating that he could operate heavy machinery while taking the medications and marijuana. Since Cotto could not pass the drug test, he could not perform an essential function of his job.

When analyzing whether Ardagh Glass could condition Cotto's employment on a drug test, the Court agreed that the "departure point" is the current federal prohibition of marijuana under the Controlled Substances Act, which designates marijuana as a Schedule I substance. Percocet is a Schedule II substance, with the schedules connoting the substance's relative potential for abuse, lack of acceptable medical use, and absence of any accepted safety for use in medically supervised treatments. While the Court noted that at least 30 states now recognize the medical utility of marijuana in legislation similar to CUMMA, it highlighted that CUMMA specifically provides that "[n]othing in this act shall be construed to require...an employer to accommodate the medical use of marijuana in any workplace."

CUMMA protects licensed medicinal marijuana users from criminal prosecution and certain civil consequences, but it does not mandate that an employer accommodate the use.

In dismissing Cotto's complaint on the narrow issue of whether Cotto can compel Ardagh Glass to waive its requirement that he pass a drug test under CUMMA and NJLAD, Judge Kugler acknowledged that no court has directly addressed the interplay between CUMMA and NJLAD. Judge Kugler predicted that the New Jersey judiciary would hold that NJLAD does not require an employer to accommodate an employee's use of medical marijuana with a drug test waiver. Judge Kugler noted that court rulings on this issue have generally held that, unless expressly provided by the subject statute, statutes which decriminalize the use of medical marijuana do not shield employees from adverse employment action.

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As courts continue to grapple with the interplay between CUMMA, NJLAD and employment practices, employers are encouraged to consult with legal counsel on implementing policies and dispensing discipline implicating an employee's use of medical marijuana on and off the job.

To learn more about best practices in this area, please contact the author of this alert, **Jemi Goulian Lucey**, a member of the firm's **Employment Law Practice Group**.

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