Medicinal Cannabis Use in Massachusetts

Howard Goldberg

February 25, 2025

Overview of State Legislation

- According to the Center for Disease Control, as of February 2024, 47 states, the District of Columbia, and 3 territories (Guam, Puerto Rico, U.S. Virgin Islands) allow for the use of cannabis for medicinal purposes.
- Following Nebraska's approval of medical marijuana, Idaho and Kansas remain as the only states without any medical ***or*** recreational cannabis program.
- 9 states have medical programs that allow for the use of CBD/low-THC products for qualifying medical condition(s) as defined by the state.

Comprehensive Medical Programs

- Comprehensive medical programs allow for the use of cannabis products beyond CBD/low THC for medical purposes as defined by the state or territory.
- 38 states, the District of Columbia, and 3 territories allow cannabis use for medical purposes through comprehensive programs.
- 14 states and 2 territories have comprehensive medical-only program.

Federal Interference with State Medical Programs

- Though illegal at the federal level, the Rohrabacher-Farr Amendment, added to the Commerce, Justice, and Science Appropriations Bill for Fiscal Year 2015 and reapproved each year since, prohibits the Justice Department from spending funds to interfere with State-level medical legalization.

Massachusetts Law

- The right to privacy protects employees from being randomly tested unless the employer's interests outweigh the employee's privacy rights.
- It is against Massachusetts law to fire an employee for testing positive for marijuana if that employee has a valid a prescription, unless medical marijuana use imposes an undue burden on the employer, such as in situations involving federal contracts or grants, or a danger to the public.

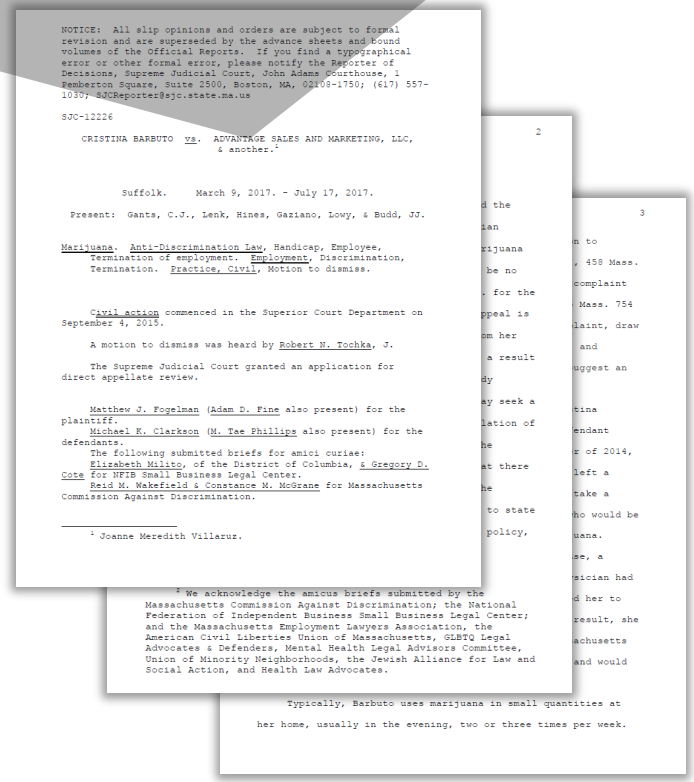
Massachusetts Medical Marijuana Act

- M.G.L. Ch. 94(I) Section 5
  - Any qualifying patient receiving a written or electronic certification for medical use marijuana shall register with the commission pursuant to regulations promulgated by the commission.

Barbuto v. Advantage Sales and Marketing

CRISTINA BARBUTO vs. ADVANTAGE SALES AND MARKETING

- In *Barbuto v. Advantage Sales and Marketing*, the Massachusetts Supreme Judicial Court considered the legal sufficiency of a complaint alleging that plaintiff was wrongfully terminated at hiring after testing positive for cannabis, despite having a medical marijuana card.
- Plaintiff suffered from Crohn's Disease and irritable bowel syndrome, and was able to obtain relief of her symptoms after her physician prescribed medical marijuana.



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SJC-12226

CRISTINA BARBUTO vs. ADVANTAGE SALES AND MARKETING, LLC, & another.[1]

Suffolk. March 9, 2017. - July 17, 2017.

Present: Gants, C.J., Lenk, Hines, Gaziano, Lowy, & Budd, JJ.

Marijuana, Anti-Discrimination Law, Handicap, Employee, Termination of employment. Employment, Discrimination, Termination. Practice, Civil, Motion to dismiss.

Civil action commenced in the Superior Court Department on September 4, 2015.

A motion to dismiss was heard by Robert N. Tochka, J.

The Supreme Judicial Court granted an application for direct appellate review.

Matthew J. Fogelman (Adam D. Fine also present) for the plaintiff.

Michael K. Clarkson (M. Tae Phillips also present) for the defendants.

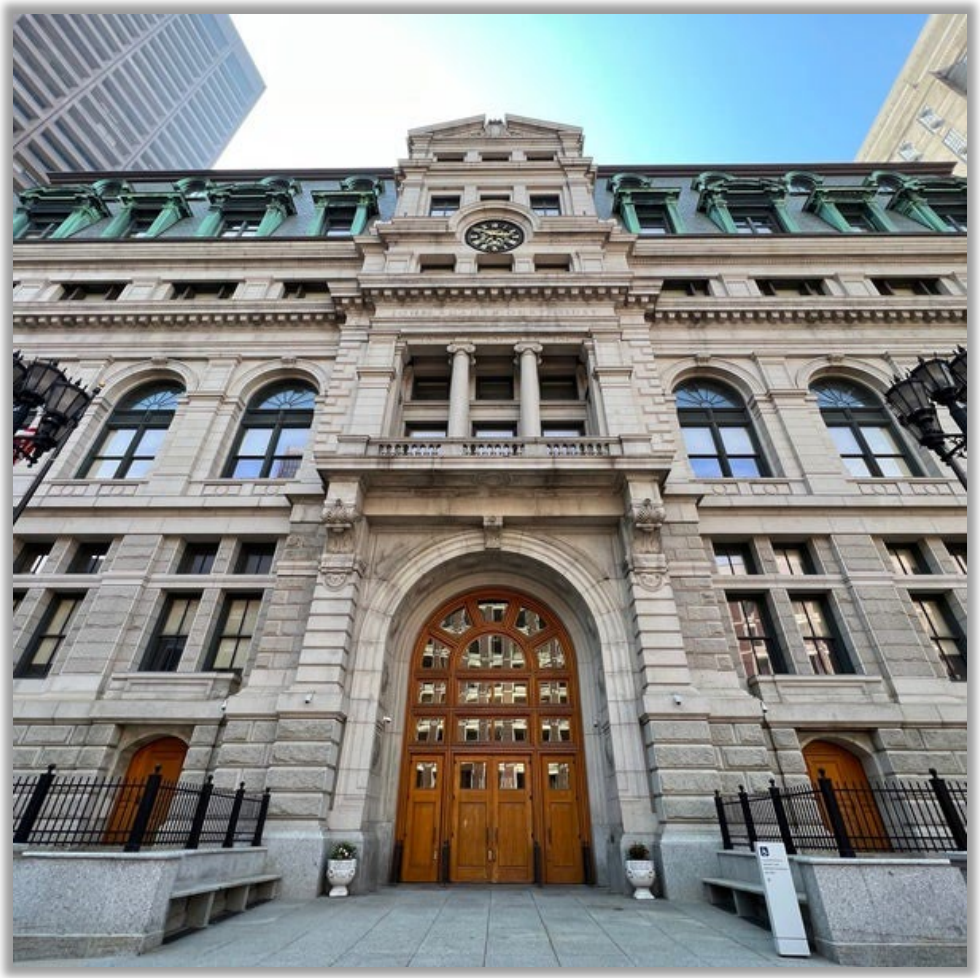
The following submitted briefs for amici curiae:
Elizabeth Milito, of the District of Columbia, & Gregory D. Cote for NFIB Small Business Legal Center.
Reid M. Wakefield & Constance M. McGrane for Massachusetts Commission Against Discrimination.

[1] Joanne Meredith Villaruz.

[2] We acknowledge the amicus briefs submitted by the Massachusetts Commission Against Discrimination; the National Federation of Independent Business Small Business Legal Center; and the Massachusetts Employment Lawyers Association, the American Civil Liberties Union of Massachusetts, GLBTQ Legal Advocates & Defenders, Mental Health Legal Advisors Committee, Union of Minority Neighborhoods, the Jewish Alliance for Law and Social Action, and Health Law Advocates.

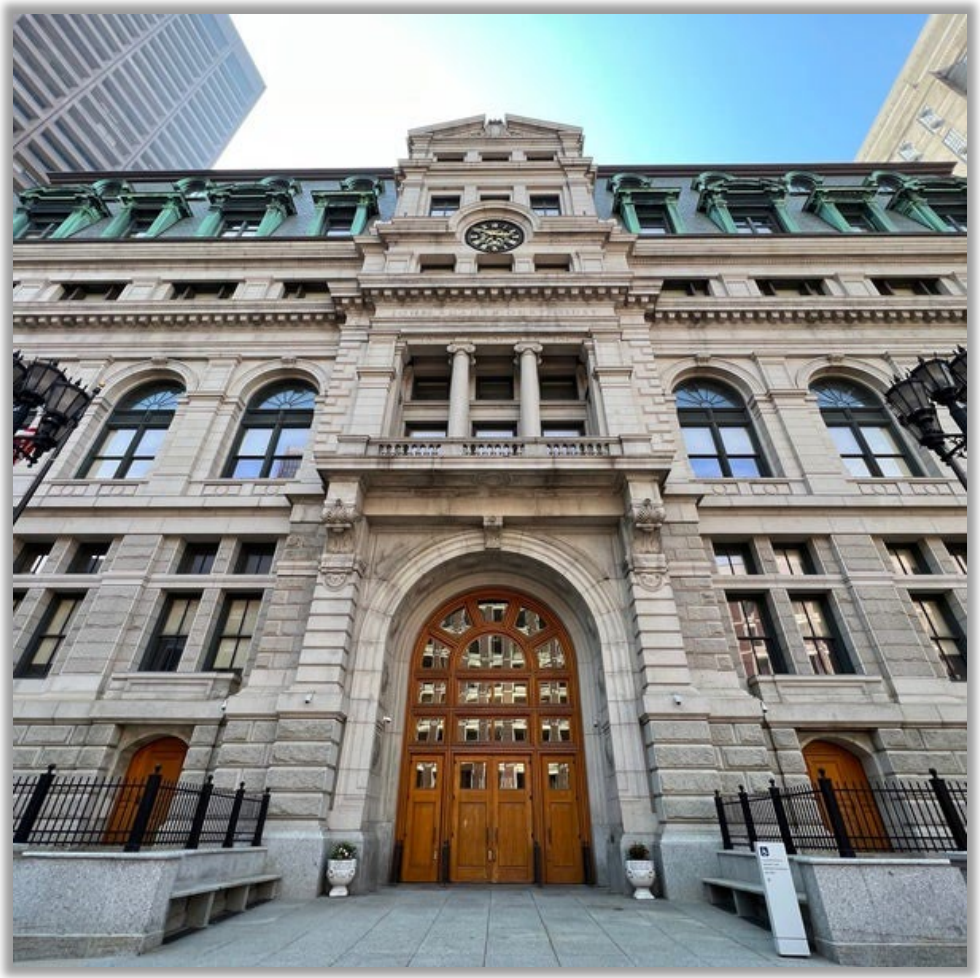
Typically, Barbuto uses marijuana in small quantities at her home, usually in the evening, two or three times per week.

Barbuto v. Advantage Sales and Marketing



- As a condition of her hiring, plaintiff had to undergo a drug test.
- Plaintiff advised her prospective employer of her medical marijuana prescription and use.
- When plaintiff inevitably tested positive for marijuana, Advantage Sales and Marketing withdrew its offer of employment.

Barbuto v. Advantage Sales and Marketing



- In reversing lower court's dismissal of the case, the SJC noted that plaintiff's conditions were qualifying conditions under the Massachusetts Medical Marijuana Act, and as such, plaintiff properly alleged she was a handicapped person within the meaning of anti-discrimination statutes.
- Because she was using medical marijuana as prescribed by a physician to treat a recognized condition, "the company's policy prohibiting any use of marijuana is applied against a handicapped employee who is being treated with marijuana by a licensed physician," and any adverse action would be discrimination, akin to "a company that barred the use of insulin" by diabetic employees.

Webster v. Motorola

- In *Webster v. Motorola*, the SJC weighed an individual's right to privacy in random drug testing policy of employees against the employer's legitimate business interests.
- G.L. c. 214 Section 1B states that a person has "a right against unreasonable, substantial or serious interference with his privacy."
- Individuals have a private cause of action against anyone who violates this right.
- Massachusetts courts repeatedly hold that, "requiring an employee to submit to urinalysis involves a significant invasion of privacy," and "the act of urination is inherently private."
- "[I]ndividuals have a privacy interest in what may be *detected* through urine analysis."

Webster v. Motorola

- Court analyzed claims of two individuals who were terminated.
- One failed a drug test, and the other refused to participate in the test.
- The failing employee was an account executive who drove a company vehicle 20,000 – 25,000 miles per year.
- The refusing employee was a technical editor who designed and developed documentation for several products, including documents sold to the Department of Defense and the Federal Aviation Administration.
- In considering whether the company's testing protocols and subsequent termination violated the employees' right to privacy, the Court balanced "the employees' interest in privacy against the employer's competing interest in determine whether its employees are using drugs."
- In considering the employer's interests, "the nature of the employer's business and the nature of the employee's duties are relevant factors in determining the gravity of the employer's interest."
- The Court reasoned that the employer's interest in maintaining a drug-free environment in which to work, by itself, is insufficient to support the random testing protocol.

Webster v. Motorola

- As to the failing employee, the Court relied heavily on the fact that the employer had “the added interest in ensuring that [employee] not operate their motor vehicle while intoxicated,” an interest that extends to protecting employee safety, the safety of others, and preventing corporate liability.
- As such, the employer interests outweighed the employee’s right to privacy, and the policy was valid as applied.
- For the refusing employee, who was merely a technical editor, the Court noted that while the documents he worked on were proprietary, and errors could result in harms to safety or national security, he was primarily the editor of texts, not the principal writer, and his work was checked by others before release.
- Therefore, the Court held that the employee’s interests outweighed the employer’s, and the policy was invalid as applied to the refusing employee.
- The Court did note, however, that if the editor’s job responsibilities changed such that his duties now “entail an immediate risk to health and safety,” the balance would shift in favor of the employer.

Interplay Between Massachusetts and Federal Law

- Because both medical and recreational use are federally prohibited, there is no carveout for medical exemptions under Federal law.
- In Massachusetts, any employer with six or more employees must allow off-site, off-duty medical marijuana use unless there is an equally effective alternative, or its use would cause undue hardship.

Department of Transportation

- The DOT has also published guidance noting that there is no carveout or exception for medical marijuana, and that an otherwise-positive drug test cannot be deemed negative based on the existence of a medical marijuana prescription.

Zero Tolerance Policies

- There is limited material governing whether an employer can still assert “zero tolerance” while also complying with requirements under disability laws to allow off-duty medical marijuana use.

Federally Regulated Employers

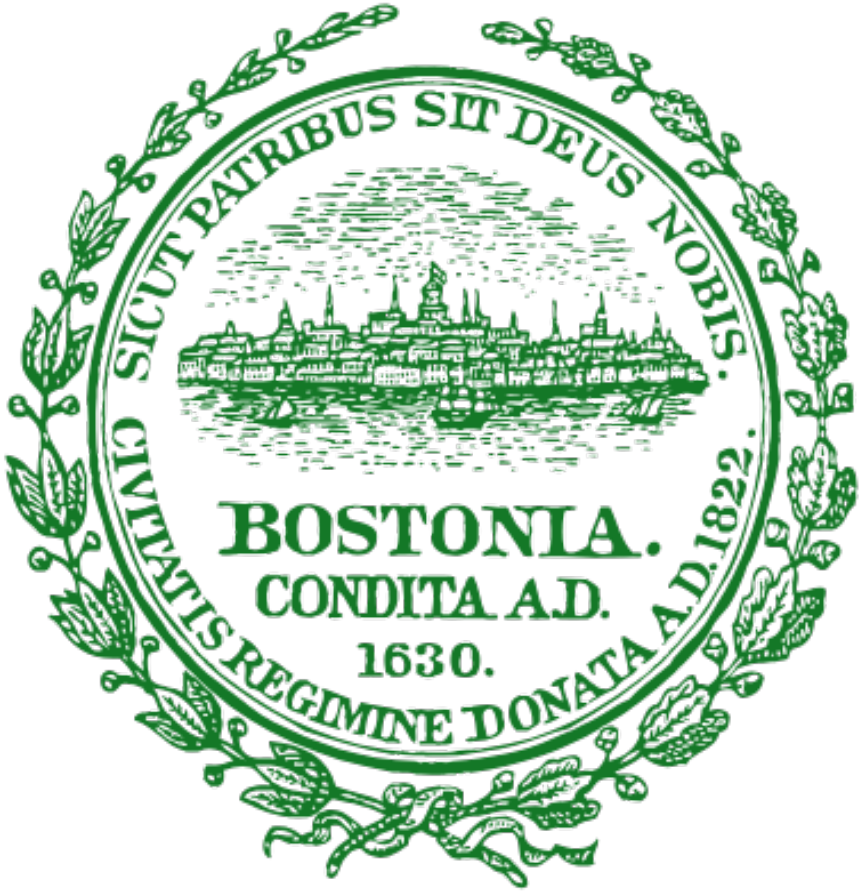
- Generally, federally regulated employers, such as those under the purview of the DOT or the FRA, are only required to conduct drug and alcohol testing for “regulated service” employees:
  - Train and engineer service employees (conductors, brakemen, switchmen, engineers, locomotive hostlers/helpers)
  - Dispatching employees
  - Signal employees who inspect, repair, or maintain signal systems
  - Maintenance-of-way employees
  - Any employee who, on behalf of a railroad, performs mechanical tests or inspections on rolling equipment or its components.
- Given that Federal requirements apply only to a subset of employees, an individual with a medical marijuana prescription could be limited to desk duty, although desk duty cannot involve dispatch work.

Federally Regulated Industries

- ALL federal contractors and those receiving federal grants are required to comply with the Federal Drug Free Workplace Act, 41 U.S.C. §§ 8101, et seq.
- Under the Drug Free Workplace Act, contractors and Federal grant recipients must make a good faith effort to discourage drug use in the workplace, including publishing literature advising that unlawful use of a controlled substance is prohibited, establishing a drug-free awareness program, etc.

Massachusetts State Policies

- The City of Boston prohibits use of drugs while on-duty, and prohibits use of illegal drugs off-duty, but does not specify or identify marijuana.
- The December 4, 2019, Commonwealth of Massachusetts New Employee Orientation Guide notes that, “In a good faith effort to comply with the federal Drug-Free Workplace Act of 1998, we seek to ensure a safe, healthy, and productive work environment for all employees. If you work for a state agency that receives federal grant funding, you must accept all conditions required by the federal government regarding controlled substances.”



Massachusetts Precedent Highlights Interplay with Federal Law

- The Court in *Barbuto* noted that a substantial hardship exists where an employer "can prove that use of marijuana by an employee would violate an employer's contractual or statutory obligation," jeopardizing its business.
- The Court noted two instances where such a hardship may exist: (1) transportation employers whose employees are subject to Dept. of Transportation regulations, and (2) Federal contractors or those receiving federal grant money who are required to "make a good faith effort to maintain a drug-free workplace" under the Drug Free Workplace Act.

Industry Specific Analysis Required

- As the SJC noted in *Barbuto and Webster*, employer drug testing, especially in light of medical marijuana developments, require that the employer have a heightened interest, beyond just ensuring that employees are not using cannabis, to justify drug testing.
- Such employers may only terminate an employee for using medical marijuana if such use causes an undue hardship.
- These concerns change based on industry, as those that do not involve federally regulated work are unlikely to face the undue hardship required to justify termination of a prescribed medical marijuana user.

Potential Future Developments

- Veterans Cannabis Use for Safe Healing Act, H.R. 966
  - Referred to committee on February 4, 2025
  - Prevents the Department of Veterans Affairs from denying benefits to veterans based on their participation in State-approved marijuana programs
- H.R. 1384
  - Referred to committee on February 14, 2025
  - Allow physicians in Veterans Affairs system to discuss state marijuana programs, give their opinions on marijuana, and provide recommendations to veterans about participation in State marijuana programs

- Continuation of President Biden's attempt to re-schedule by President Trump:
  - Prior to election, Trump indicated that he largely agreed with Biden's efforts to legalize marijuana.
  - In a September 8, 2024, TruthSocial post, Trump indicated that, "I believe it is time to end needless arrests and incarcerations of adults for small amounts of marijuana for personal use… As a Floridian, I will be voting YES on Amendment 3 [legalizing recreational marijuana] this November. As President, we will continue to focus on research to unlock the medical uses of marijuana to a Schedule 3 drug, and work with Congress to pass common sense laws."
  - The first Trump Administration was largely prohibitionist due to the stance of then-Attorney General Jeff Sessions.

Questions?

Thank You

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