

HIGHER EDUCATION

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Pennsylvania Commonwealth Court Finds College Not Required to Accommodate Nursing Student's Use of Medical Marijuana

By Karen Baillie

The Pennsylvania Commonwealth Court recently ruled that a college, which required all nursing students to take annual mandatory urine drug screens, was not required to accommodate a student's use of medical marijuana. *Harrisburg Area Community College v. Pennsylvania Human Relations Commission*, No. 664 C.D. 2019.

BACKGROUND

A nursing student filed a complaint with the Pennsylvania Human Relations Commission (PHRC) alleging violations of both the Pennsylvania Human Relations Act (PHRA), 43 P.S. §§951-963, and the Pennsylvania Fair Educational Opportunities Act (PFEOA), 24 P.S. §5004(a)(3). Both laws prohibit discrimination against individuals with disabilities and require accommodation of disabilities.

The student alleged that she suffered from disabilities which her doctor treated with medical marijuana pursuant to Pennsylvania's Medical Marijuana Act (MMA). 35 P.S. §§10231.101 *et seq.* She was enrolled in a college program which prepares students to take the licensure exam to become registered nurses. The college required all students in the program to submit to a urine screening test for the presence of drugs. The student allegedly informed the college's director of nursing that she had a medical condition which she treated with medical marijuana, and she requested permission to continue in the nursing program without being subject to testing for marijuana. The student alleged that the college told her that she would be required to undergo a drug test in 90 days.

COURT DECISION

The Commonwealth Court considered whether the college was required to accommodate the student's use of medical marijuana under either the PHRA or the PFEOA. Both laws require that employers, public accommodations, and schools make reasonable accommodations for qualified individuals with disabilities. Employers must make reasonable accommodations that will enable employees to perform their essential job functions. Likewise, institutions of higher education must make adjustments to provide equal access to the institutions' programs and activities. However, neither law requires accommodations or adjustments of any kind for *current users of illegal drugs*. Thus, the question before the Commonwealth Court was whether medical marijuana use is or is not lawful.

The PHRC argued on behalf of the nursing student that her medical marijuana use was *lawful* because she used the drug only in compliance with the state's MMA. Thus, the PHRC reasoned that the student was not a current user of an *illegal* drug. But the Commonwealth Court reasoned that both the PHRA and the PFEOA referenced the Federal Controlled Substances Act – rather than Pennsylvania law – in determining whether drug use was lawful or unlawful. Because the Federal Controlled Substances Act still lists marijuana as a controlled substance for which there is no approved medical use under federal law and because the Pennsylvania General Assembly when it enacted the MMA did not change or delete the

reference to federal law in either the PHRA or the PFEOA, the Court found the student's medical marijuana use was unlawful for purposes of the PHRA and the PFEOA.

The Court concluded that the college was under no obligation to accommodate the student's use of medical marijuana under either the PHRA or the PFEOA. Further, the Court found that there was nothing in the MMA itself that required the college to make an accommodation.

Judge Covey filed a concurring opinion in which she called the majority's decision "an egregious result" and urged the Pennsylvania General Assembly to amend the PHRA and the PFEOA to ensure that "the benefits ... created in the MMA ... are not illusory or applicable in only limited circumstances."

ADDITIONAL DEVELOPMENTS

Employers and schools should continue to watch for developments in this area of the law. The Commonwealth Court's decision is limited to the question before it involving a higher education student who used medical marijuana (as opposed to CBD oil, for example) and who asserted claims under the PHRA and the PFEOA. Indeed, employers should not expect that the decision will carry over to employment cases. A handful of courts have considered whether adverse employment actions resulting from drug tests for medical marijuana in Pennsylvania might result in liability for employers. These decisions, all decided in the earliest stages of litigation, suggest that Pennsylvania employers may have obligations to consider accommodations. For example, perhaps employers may need to tolerate off site, off duty use by employees who do not perform any functions that would pose a risk to public health or safety if performed under the influence.

Recent decisions related to these issues include: *Hudnell v. Thomas Jefferson University Hospitals, Inc.*, No. 20-01621 (E.D. Pa. Sept. 25, 2020) (a terminated employee with an expired certification card who failed a urine screen stated a cause of action for discrimination against a certified user under the Pennsylvania MMA); *Laidacker, Jr. v. Berwick Offray, LLC*, No. 726 of 2019, 2020 WL 3410881 (Pa.Com.Pl. Jan. 02, 2020) (Columbia Cnty) (an applicant for employment whose

offer was revoked for failing a drug test could proceed with two causes of action against the prospective employer: (i) a violation of the Pennsylvania MMA and (ii) wrongful discharge from employment against public policy); and *Palmiter v. Commonwealth Health Systems*, No. 19 CV 1315, 2019 WL 6248350 (Pa.Com.Pl. Nov. 22, 2019) (Lackawanna Cnty), amended 2019 WL 7372712 (Dec. 31, 2019) (an employee terminated for off-site use of medical marijuana stated a cause of action for discrimination against a certified user under the Pennsylvania MMA). Compare this to *Parrotta v. PECO*, 363 F. Supp. 3d 577 (E.D. Pa. 2019) (an engineer who failed a random drug test due to *self-medicating* foot pain with marijuana as recommended by an out-of-state doctor had no claim of disability discrimination, retaliation, FMLA retaliation or tortious interference with business relations).

Additionally, a recent decision by a different panel of the Pennsylvania Commonwealth Court ruled that an employee who was terminated after testing positive for marijuana due to her use of CBD oil was eligible for unemployment compensation benefits under Pennsylvania's unemployment compensation system. *Washington Health System v UC Bd of Rev.*, No. 886 CD 2019, 2020 WL 2312347 (Pa. Commonw. Ct. May 11, 2020). The court concluded that "the CBD oil that Claimant ingested was not a controlled substance. See 28 Pa. Code §25.72." The court reasoned that "tetrahydrocannabinol, the active ingredient in marijuana, is a controlled substance, but CBD is not." *Id.*

Given this rapidly developing area of the law, as well as the rapid expansion of the availability of CBD and hemp products, institutions may want to consult with counsel and keep abreast of new developments prior to taking adverse action against students and/or employees who use medical marijuana. ♦

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