Employers may need to reevaluate their response to an employee’s failed drug test following a recent decision from the Supreme Court of New Jersey.

A certified medical marijuana user was terminated after testing positive for marijuana in a return to work drug test. The employee suffers from cancer and uses medical marijuana pursuant to state law. Following his termination, the employee filed a lawsuit claiming unlawful discrimination based, in part, on New Jersey’s Law Against Discrimination (“LAD”) and the New Jersey Compassionate Use Medical Marijuana Act (“Compassionate Use Act”).

The employee claims that a disability qualified his medical marijuana use and that his off-site, non-working hours use of medical marijuana could be a reasonable accommodation under the LAD. The court acknowledged that the Compassionate Use Act impacts employment rights. It opined that the plaintiff’s reasonable accommodation argument to use medical marijuana is only possible because the Compassionate Use Act permits such use. The court held that the plaintiff’s lawsuit could proceed against the employer after being dismissed by the trial court.
Accordingly, using medical marijuana outside working hours may be found to be a reasonable accommodation in the case.

This decision follows a recent employee-friendly trend. Various courts have found that employers discriminate against certified medical marijuana users when adverse employment actions are taken against them solely because of failed drug tests. Employers should consider assessing current policies and procedures by:

- Documenting expected conduct for positions;
- Training supervisors to observe conduct that may indicate an employee is under the influence;
- Preparing to engage in the interactive process with an employee if the employee is certified under state law to use medical marijuana and requests to use it off-site and during non-working hours; and
- Reevaluating zero tolerance drug testing policies.

The New Jersey litigation is ongoing and may yield additional developments for employers.

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