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SJC: Reinstate Officer Who Employed Chokehold

In *City of Boston v. Boston Police Patrolmen's Association, 477 Mass. 434 (2017)* the SJC refused to vacate an arbitrator's award reinstating Boston police officer David Williams. In March 2009, Williams applied a chokehold to arrest an unarmed intoxicated suspect. The Department determined that Williams had used excessive force and discharged him. The arbitrator found the City lacked just cause to dismiss Williams for excessive force and for making false statements during the Police Department investigation, finding the victim was not credible and the force used was reasonable. The SJC held its nose and sided with the arbitrator. *For more details and guidance on this case, please see our Employment Blog.*

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SJC: Medical Marijuana Leads to 151B Claim

In *Barbuto v. Advantage Sales and Marketing,* 477 Mass. 456 (2017), the Supreme Judicial Court (SJC) ruled that an employee terminated for using medical marijuana may have a viable claim of handicap discrimination under G.L. c. 151B. The Court refused to recognize an implied private right of action under the medical marijuana statute.

Barbuto accepted a position with Advantage Sales and Marketing (ASM), and disclosed that she would test positive for marijuana on the pre-employment drug test, because she used marijuana pursuant to a valid prescription to treat symptoms of Crohn's disease. Barbuto submitted to the drug test and was terminated on her first day of work for testing positive for marijuana. Barbuto filed a charge of discrimination with the MCAD, which she withdrew to Superior Court. The Court dismissed the employment related claims and the employee appealed.

The SJC ruled that the employer owed the employee an obligation "to participate in the interactive process to explore with her whether there was an alternative, equally effective medication which she could use that was not prohibited by the employer's drug policy" under G.L. c. 151B § 4(16). The SJC left open that the employer may still show at summary judgment or trial that the plaintiff's use of medical marijuana is not a reasonable accommodation, because it would impose an undue hardship on the defendant's business.

In public employment settings, employers may have enhanced bases for claiming that medical marijuana use is unreasonable; for example, if Employers are required to abide by federal drug free workplace or drug free school acts, if they have employees subject to federal DOT drug testing, or where there are contractual or other statutory requirements in play. In this case, ASM's reflexive action was a big factor in the decision against it. In many cases, providing an interactive process to explore the facts surrounding medical marijuana use will help the employer avoid liability. When faced with issues concerning medical marijuana, you should proceed with caution, and with the advice of experienced labor and employment counsel. *For more details on this case, please see our Employment Blog*.

CSC: Waiver of Future Civil Service Rights Unenforceable

In *Lizette Emma v. Department of Correction*, (DI-16-194), the Civil Service Commission refused to enforce a Last Chance Agreement (LCA) against Officer Emma as the LCA waived all rights of appeal for future offenses. Emma signed the LCA to resolve charges of smoking in violation of a mandatory dismissal statute and for being absent without leave for several shifts. After the LCA was signed, Emma continued to be absent, and failed to call in, resulting in discharge. The Commission found that waiver of a civil service appeal for a future offense was contrary to public policy and would not be enforced. The Commission allowed that if a LCA left an appeal to arbitration, then public policy would not be frustrated.

The Commission sympathized with Emma's reasons for being absent, and found disparate treatment because another employee was retained despite a LCA for missing work to play golf. The Commission matched Emma's discipline to the discipline in that case: 15 day suspension and extension of the LCA. The decision is worrisome because even though most LCAs leave open an appeal on whether the offense violates the LCA, the decision leaves open the question of whether the Commission will honor a waiver of appeal on even the limited issue of the quantum of discipline. One way to avoid the risk may be to limit an appeal of discipline imposed under a LCA to arbitration, where the Arbitrator is bound to honor the parties' agreement. *For more details on this case, please see our Employment Blog.*