

## Employer Discrimination Against Certified Medical Marijuana Users

On Jan. 28, the New York State Appellate Division, First Department, issued a decision with potentially significant implications for employers confronted with their employees' use of medical marijuana.

In *Gordon v. Consolidated Edison, Inc.*, the First Department refused to dismiss the employment discrimination claims of Kathleen Gordon, an employee of Consolidated Edison, Inc. (Con Ed), who was terminated for using marijuana when she was not medically authorized to do so. Ms. Gordon was a probationary employee who suffered from irritable bowel disease (IBD), a condition covered by the Compassionate Care Act (CCA). A few weeks into her employment, Ms. Gordon's doctor told her that she would be a "suitable medical marijuana patient." Not waiting for formal approval, Ms. Gordon nonetheless used marijuana on Dec. 17, 2016 and claimed she received immediate positive relief from her symptoms. The day after, Ms. Gordon contacted a physician registered under New York's State Department of Health's Medical Marijuana Program (MMP) and received an appointment on Dec. 27, 2016 with the goal of obtaining certification for further medical marijuana treatment.

A few days after Ms. Gordon used marijuana, Con Ed, pursuant to its policy, randomly selected her for a drug test. Ms. Gordon, unsurprisingly, tested positive for marijuana and on Dec. 27, she saw the MMP-registered physician who certified her use of medical marijuana. However, concurrent to this approval, Con Ed's human resources department notified Ms. Gordon of the positive test. Ms. Gordon explained she was a medical marijuana patient and used the drug for her IBD. Con Ed investigated and learned that Ms. Gordon was not a certified patient at the time of her drug test. Once Con Ed learned this, it terminated her on the grounds that she breached company policy as a probationary employee and was not eligible for an accommodation which would have permitted her to at least continue the certification process.

The case presented multiple issues for the court. The primary issue was whether Con Ed failed to engage in a cooperative dialogue under the New York State Human Rights Law (NYSHRL) to determine whether it could accommodate Ms. Gordon's status as an uncertified medical marijuana patient during her probationary period. The court found that a question of fact arose as to whether Con Ed, who learned that Ms. Gordon was seeking certification but not certified at the time of her positive drug test, failed to accommodate, principally by "cut[ing] the dialogue process short." The court reasoned that plaintiff began the certification process prior to her positive drug test, which should have started the accommodation dialogue. Moreover, the court went on, Ms. Gordon was never "impaired" at work and her ability to do her work was never affected.

The court next found an issue of fact as to discrimination under the NYSHRL, noting that the claim for disability discrimination under the NYSHRL survived because Con Ed's explanation, mainly that Ms. Gordon violated existing drug policy, was pretextual. Finally, the court declined to create a private right of action under CCA, explaining that certified patients have "a 'disability' under [the NYSHRL]" and can use that to enforce their rights. Notably, the CCA does "not bar the enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance."

Currently, New York law does not authorize the use of recreational marijuana or prohibit employers from crafting policies that prohibit employees from performing work while impaired. Instead, the CAA only prohibits discrimination against *certified* medical marijuana users and requires employers to provide reasonable accommodations to certified patients under the NYSHRL. Notably, only patients suffering from certain medical conditions, including ALS, epilepsy, IBD and other chronic pain, are eligible for medical marijuana under the CAA.

Going forward, employers in New York should be aware that they may have to engage in further cooperative dialogue with employees who seek to use marijuana for medicinal purposes for qualified disabilities. This issue is even more at the forefront of discussion as the New York legislature is currently considering recreational use of marijuana.

Bond's attorneys are experienced in New York's medical marijuana laws and have represented employers throughout the state on this issue. If you have any questions about the information presented here, please contact [Samuel Wiles](#), or any [attorney](#) in Bond's [Labor and Employment practice](#).



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