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EMPLOYMENT LAW

'Self-Prescribed' Medical Marijuana Leads to Employee's Termination

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Special to the Legal

The employment law implications of medical marijuana are rapidly evolving. The recent decision in *Parrotta v. PECO Energy*, No. 18-2842, 2019 U.S. Dist. LEXIS 15336 (E.D. PA Jan. 31, 2019), addresses an employee's self-diagnosed use of "medical" marijuana along with a number of other practical ADA and FMLA issues.

FOOT SURGERY

Michael Parrotta was a senior engineer for PECO when, in September 2016, he was diagnosed with a "second plantar plate tear in his left foot." He was placed on restricted duty for approximately 30 days (approved and accommodated by PECO) after which he underwent surgery. He was on FMLA leave while recuperating. Parrotta returned to work in early December on restricted duty (and was again accommodated) and, in early March, told PECO that he could resume "full duty" subject to "maintenance follow-up" with his physician.

FAILED DRUG TEST

Parrotta was selected for a random drug test in mid-May and, on May 19, tested positive for marijuana usage.

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According to PECO's protocol, he was contemporaneously "removed from duty and directed to contact the Employee Assistance Program within 24 hours to schedule a substance abuse evaluation." The purpose of the EAP evaluation was to determine what assistance, education and treatment would be necessary. Parrotta was advised that he was "to remain off-duty until such time as the EAP has determined that the employee has satisfactorily completed the recommended treatment program." PECO's drug and alcohol policy provides, however, that for exempt employees (like Parrotta) "the first positive drug test will result in termination of employment." PECO's policy also states that employees in the EAP Program are placed on short-term disability and that FMLA leave runs concurrent with the period of short-term disability. Parrotta, however, did not request FMLA in association with his EAP treatment.

On Aug. 2, after approximately 10 weeks of treatment, the EAP recommended that Parrotta "be considered for return to work." Rather than return Parrotta to work, or terminate him at that time, PECO held a fact-finding hearing to "determine whether or not he had any legitimate dispute with the results of the positive random drug test." During the fact-finding, Parrotta admitted to having used marijuana but claimed that he did so for pain associated with his foot surgery. He admitted, however, that no doctor had prescribed the marijuana and that he was obtaining it "through his own devices." Parrotta claimed that he had consulted with a physician in Delaware, but acknowledged that marijuana usage remained illegal in Pennsylvania. The fact-finding concluded and Parrotta was told that the company would be in contact with him "pending the results of the investigation." Parrotta was subsequently terminated on Aug. 30, 2017. He subsequently brought suit claiming disability discrimination under the

Americans With Disabilities Act and Pennsylvania Human Relations Act as well as retaliation under the Family and Medical Leave Act. PECO moved for summary judgment at the close of discovery.

NOT DISABLED

The court first addressed whether Parrotta was able to establish that he was "disabled" at the time of his termination. PECO contested this classification on the grounds that Parrotta suffered only from a "temporary, short-term medical condition that was resolved through surgery" before termination. Parrotta countered that he continued to be in pain after surgery and testified to an extensive routine to alleviate the pain both in the morning and throughout the day.

The court found that Parrotta was not able to establish that he was "disabled" as a matter of law because he relied "only on his own testimony … without any medical documentation of his impairment at the time of the adverse action. Such self-diagnosing testimony alone fails to clear … the low hurdle for establishing a disability."

Nor was Parrotta able to establish a record of impairment in light of the U.S. Court of Appeals for the Third Circuit's decision in *Eshelman v. Agere Systems,* 554 F.3d 426, 437 (3rd Cir. 2009), in which the Third Circuit found that a six-month absence from work for cancer treatment, without a showing of long-term impairment, was insufficient to create a "record of" impairment. In Parrotta's case, he was able to establish, at most, a five-month period during which he was substantially limited from a major life activity which is "too short to establish a record of impairment." Nor was Parrotta able to establish that he was "regarded as" disabled without evidence that PECO specifically regarding him as being impaired at the time of termination.

NO PRETEXT FOUND

The court went on to find that even if Parrotta was able to establish a prima facie case, his evidence of pretext failed. Initially, Parrotta argued that if he was terminated pursuant to PECO's "zero-tolerance" policy, mandating the termination of every exempt employee who failed a drug test, he would have been terminated immediately, rather than 107 days after the test results were revealed. Parrotta further argued that his termination was pretextual because he was told that he was being relieved of his duties "pending the results of an investigation" at the conclusion of the fact-finding hearing but there was no evidence of a subsequent investigation. His final substantive argument was that the HR managers involved in the termination decision could not locate their notes from the fact-finding hearing and did not ask any follow-up questions during the hearing. The court rejected these arguments finding that the termination was in accordance with PECO's policy and there was no evidence that Parrotta was treated worse than a similarly situated co-worker. The court also observed that an employee cannot establish pretext with evidence that an investigation was flawed or superficial. Nor does the failure to follow an internal disciplinary process suggest pretext without evidence that similarly situated individuals were subject to a different process.

The case highlights that, for employees, providing medically required accommodations and then returning the employee to work full-duty when the restrictions end will largely end ADA issues.

Finally, the court granted summary judgment to PECO on Parrotta's FMLA claim because, while PECO treated Parrotta as if he were on FMLA leave while in the EAP, he did not specifically request such leave. The court found that "federal law … does not allow a retaliation claim when Parrotta fails to establish he invoked his rights under the FMLA. It is incongruous to argue an employer retaliates against an employee for taking FMLA leave when the employer puts the employee on leave and there is no evidence the employee knows he is on FMLA leave."

The case highlights that, for employees, providing medically required accommodations (as PECO did) and then returning the employee to work full-duty when the restrictions end will largely end ADA issues. Further, providing FMLA benefits will not, in and of itself, set up a potential retaliation claim if the employee did not request FMLA coverage. As for medical marijuana, an employee, at a minimum, must have medical support for such usage. "Self-prescription" is still a bridge too far. •