September 24, 2021

Getting High on Workers' Rights

The case of *Palmiter vs. Scranton Quincy Clinic Co.,* 2021 Pa. Super. LEXIS 504 (Pa. Super. Aug. 5, 2021), concerned a workers' claim under the Medical Marijuana Act, 35 P.S. § 10231.101 et seq. ("MMA"). In this case, there was a claim of a firing based upon medical marijuana use. The question presented to the court was whether a private cause of action exists in connection with the Medical Marijuana Act on behalf of an aggrieved employee. The court ruled, in fairly perfunctory fashion, that the Act provides a private cause of action. Therefore, there may be a claim brought for wrongful discharge of an employee under the Act.

The court took pains to point out that §2103(b) authorized employers, not the Department of Health, "to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position." 35 P. S. §10231.2103(b)(2).

Subsection (b)(1) specifically prohibits any employer from discharging, threatening, or refusing to hire or discriminating or retaliating against an employee "solely on the basis of such employee's status as an individual who is certified to use medical marijuana." *Id.* at §2103(b)(1). The court found the quoted language to be the type of rights-creating language that focuses on the individuals protected. The court had no problem finding other indications that the legislature intended to create a private remedy for violations of §2103, which focuses on protecting employee-patients certified to use medical marijuana, such as Ms. Palmiter, from employers who would penalize them for availing themselves of the benefits conferred by the statute. That same section of the statute also explicitly sets forth the rights of employers, *i.e*., that an employer is not required to provide an accommodation for certified users and may discipline employees who are under the influence of medical marijuana in the workplace. *See* §2103(b)(2).

The *Palmiter* court held that in the employment context, §2103(b) of the MMA not only delineates the rights afforded employees who are certified users of medical marijuana, but also sets forth the rights of employers to discipline employees who are in violation of the terms of certified use. As the trial court correctly noted: "neither the MMA nor the regulations promulgated by the Department provide an independent enforcement mechanism against employers who violate §2103(b)(2)."

The trial court relied upon *Roman vs. McGuire Memorial*, 127 A.3d 26 (Pa. Super. 2015), and the appellate court also found that decision instructive. Roman, a health care worker, was allegedly discharged in retaliation for refusing to accept overtime work. She commenced an action against her former employer for wrongful discharge, alleging that her termination "offend[ed] the public policy of the Commonwealth of Pennsylvania as embodied in The Prohibition of Excessive Overtime in Health Care Act ("Act 102"), 43 P.S. §§932.1-932.6." *Id.* at 27. The implicated section of Act 102 provided that a health care facility could not require an employee "to work in excess of an agreed to, predetermined and regularly scheduled daily work shift" and that an employee's refusal to accept work in excess of the limitations shall not be

grounds for discrimination, dismissal, discharge or any other employment decision adverse to the employee." 43 P.S. §932.3(a)(1) and (b).

The *Palmiter* court examined its ruling in *Roman* and said that in *Roman* it had held that the statutory language established a public policy precluding a health care facility from requiring an employee to work in excess of a daily work shift. Although §6 of the statute authorized the Department of Labor and Industry to impose "an administrative fine on a health care facility or employer that violates this act" and to "order a health care facility to take an action which the Department deems necessary to correct a violation," *Roman* rejected the employer's claim that employee's sole remedy was administrative as that remedy was limited to fines and corrective action orders against the employer and did not provide for backpay or reinstatement.

The employer argued that *Macken v. Lord Corp.*, 402 Pa. Super. 1, 585 A.2d 1106, 1108 (Pa.Super. 1991), it is only in the absence of a statutory remedy and when a well-recognized public policy is at stake, that such a cause of action will be permitted. The *Palmiter* Court had, earlier in the opinion, found that the MMA does not provide statutory remedies for aggrieved employees through its administrative enforcement provisions. Further, §2103(b)(1) of the MMA evidences a clear public policy against termination of employment and other types of discrimination based on certified marijuana use off the employment premises. Thus, *Macken* did not preclude a private cause of action herein.

The enactment of the MMA in 2016 reflects a public policy designed to protect certified users of medical marijuana from employment discrimination and termination. As the Supreme Court of Pennsylvania recognized in *Gass v. 52nd Judicial Dist.*, 232 A.3d 706, 711 (Pa. 2020) (quoting *State vs. Nelson*, 195 P. 3d 826, 833 (Mont. 2008)), "[w]hen a qualifying patient uses medical marijuana in accordance with the MMA, he is receiving lawful medical treatment. In this context, medical marijuana is most properly viewed as a prescription drug."

The Court ultimately determined that there was no impediment to Ms. Palmiter maintaining a private action under the MMA or a wrongful discharge action on the facts pled and the applicable law. The law supported Ms. Palmiter and afforded her the relief she sought.

The bullet point takeaway from this Opinion are as follows:

- There is no impediment to maintaining a private action under the Medical Marijuana Act for a wrongful discharge under that Act.
- Plaintiff, Ms. Palmiter, was employed as a medical assistant by Medical Associates of NEPA.
- She became a patient able to use medical marijuana due to chronic pain.
- She applied for the position of certificate medical assistant with the hospital.
- She was turned down because she had her medical marijuana card.
- The MMA does provide a private cause of action.

The courts generally do not easily find a private cause of action, historically speaking, unless the statute is very specific in terms of providing that cause of action.

When I worked lobbying the legislature, I would frequently try to have language inserted specifically saying that a private cause of action was granted, so that there would be no ambiguity in the future. What made the difference in this decision is that §(b)(1) of the MMA was specific in prohibiting an employer from discharging, threatening or refusing to hire someone including retaliation based solely on one's status as a medical marijuana cardholder. That is about as close as it gets to stating specifically that a private cause of action is created. Also significant was the fact that the Supreme Court in *Gass*, *supra,* characterized the MMA as remedial in nature, therefore it should be accorded a liberal construction.

It is hoped that in the future the legislature will be more specific about creating private rights of action, which would lessen the need for the bureaucracy to intervene in ways that are often complicated and do not lead to salutary results for the victim.

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