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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

FILED

JUN 09 2016

CIVIL DIVISION
SUPERIOR COURT-CAPE MAY COUNTY

TO: Louis M. Barbone, Esquire
JACOBS BARBONE
1125 Pacific Avenue
Atlantic City, NJ 08401

CASE: Donald Brad Wiltshire v Christopher Breunig et als
DOCKET NO. CPM L 52-16

NATURE OF APPLICATION: PLAINTIFF'S ORDER TO SHOW CAUSE AND VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND TEMPORARY AND PERMANENT INJUNCTION AND ALL DAMAGES AND RELIEF UNDER THE NEW JERSEY CONSCIENTIOUS EMPLOYEE PROTECTION ACT AND NEW JERSEY LAW AGAINST DISCRIMINATION

MEMORANDUM OF DECISION ON MOTION

BACKGROUND AND NATURE OF MOTION

Plaintiff filed an Order to Show Cause and Verified Complaint for declaratory judgment, temporary and permanent injunction and for all damages and relief compelled by the New Jersey Conscientious Employee Protection Act and the New Jersey Law Against Discrimination. Defendants oppose Plaintiff's motion and request that this Court dismiss Plaintiff's Verified Complaint without prejudice as it is not ripe for adjudication and Plaintiff has failed to exhaust administrative remedies.

This Court has carefully and thoroughly reviewed the moving papers and attached exhibits submitted by the parties with this motion.

LEGAL ANALYSIS

An Order to Show Cause is an emergent application to the Court and to determine whether an applicant is entitled to emergent relief the Court is required to consider the following factors: (1) whether the petitioner will suffer irreparable harm if the requested relief is not granted; (2) whether the legal right underlying petitioner's claim is settled; (3) whether the petitioner has a likelihood of prevailing on the merits of the underlying claim; and (4) the relative hardship to the parties in granting or denying the relief requested. See Crowe v. DeGioia, 90 N.J. 126 (1982). It is also well settled that "irreparable harm" is that which cannot be redressed by money damages. Id.

DISCUSSION

Plaintiff seeks a declaration pursuant to N.J.S.A. §2A:16-52 of the legal rights afforded by the New Jersey Compassionate Use of Medical Marijuana Act, codified as N.J.S.A. §24:61-1. Specifically, Plaintiff seeks judgment against the defendant imposing a permanent injunction pursuant to the declaration that the medical use of marijuana pursuant to the Compassionate Care Act cannot be deemed an "illegal use" for the purpose of the City's drug policy merely because the Plaintiff's urinalysis confirms

marijuana metabolites in his system. Such interpretation is in direct violation of the New Jersey Compassionate Use of Medical Marijuana Act.

Here, Plaintiff was a firefighter employed by the City of Ocean City. He was a firefighter for over twenty years. On October 9, 2015, Plaintiff requested a meeting for the purpose of disclosing his current medical regimen of ingesting medicinal marijuana. In response to the meeting, Plaintiff was immediately removed from active duty and ordered to undergo physical and medical testing.

Specifically, on October 16, 2015, the City Physician examined the Plaintiff to determine whether he was fit for duty and as a result of that exam, the City Physician recommended that the Plaintiff be examined by a Cardiologist and Pulmonologist. Thereafter, on October 31, 2015, the GC/MS results confirmed the presence of carboxy-THC at a level of 1754 ng/mL in Plaintiff's sample. See Exhibit E attached to Defendant's Brief. Then, on November 11, 2015, Plaintiff was served with an Amended PNDA, which recommends termination. See Exhibit F attached to Defendant's Brief. Plaintiff was charged with violations of the Administrative Code and specific violations of the Department's Rules and Regulations.

The City's initial drug policy contained a provision that exempted medical marijuana from the proscribed class of drugs deemed "illegal," but that provision was deleted upon final adoption in July of 2015. The City's

policy provides that "Controlled substances [includes] the terms 'drugs' and 'controlled substances' shall include all derivatives of the following class of drugs: marijuana metabolites/THC, cocaine metabolites, opiates (heroin, codeine, morphine, etc.), thencyclidine (PCP), and amphetamines." See Exhibit D attached to Plaintiff's Verified Complaint. Specifically, the Department's Policy sets forth that "it is the policy of the Ocean City Fire Department that all uniformed fire personnel perform their duties free of any controlled dangerous substance and/or alcohol." Additionally, the Policy includes a table that sets forth the substance level that it considers to indicate the presence of drugs. For marijuana metabolites/THC, the level is 50 ng/mL in the initial test, and 15 ng/mL in the second test.

Plaintiff's drug test revealed a THC level in Plaintiff's urine of 1,754 ng/mL and for that reason alone, his off-duty use of medical marijuana prevented him from being free of any controlled dangerous substance while on duty and concerned the City as his firefighter duties include driving fire trucks, climbing ladders, operating fire hoses, and running into burning buildings.

Defendant contends that the policies required the Plaintiff to disclose his use of marijuana and his use of Klonopin, wherein failure to disclose the same is a legitimate basis for issuing the PNDAs and holding a disciplinary

hearing. Defendant further asserts that Plaintiff's declaration is not ripe and premature as the disciplinary hearing has not been held.

On January 18, 2010, the New Jersey Compassionate Use of Medical Marijuana Act was approved and passed by the Legislature. Thus, Plaintiff seeks declaration of the legal rights afforded by the New Jersey Compassionate Use of Medical Marijuana Act. Specifically, Plaintiff seeks judgment against the defendant imposing a permanent injunction pursuant to the declaration that the medical use of marijuana pursuant to the Compassionate Care Act cannot be deemed an "illegal use" for the purpose of the City's drug policy merely because the Plaintiff's urinalysis confirms marijuana metabolites in his system. Such interpretation is in direct violation of the New Jersey Compassionate Use of Medical Marijuana Act.

As this is a matter of first impression, the Court looks to the language of the Statute and the legislative intent of the Statute. N.J.S.A. §24:61-2(e) states in pertinent part, "the purpose of this act is to protect from arrest, prosecution, property forfeiture, and criminal and other penalties, those patients who use marijuana to alleviate suffering from debilitating medical conditions, as well as their physicians, primary caregivers, and those who are authorized to produce marijuana for medical purposes."

The Appellate Division interpreted the Statute in a matter where the proponents sought injunctive and/or declaratory relief to compel the New

Jersey Department of Health to comply with the New Jersey Legislature's directives set forth in the New Jersey Compassionate Use Medical Marijuana Act. See Caporusso v. New Jersey Dep't of Health & Senior Servs., 434 N.J. Super. 88 (App. Div. 2014). The Appellate Court held that the DOH must complete its reporting requirements pursuant to N.J.S.A. §24:61-12 within forty-five (45) days of the date of the opinion. The Court stated in pertinent part,

The Act was adopted on January 18, 2010 and originally scheduled to go into effect on July 1, 2010. At DOH's request, the Legislature amended the Act to delay the effective date to October 1, 2010. Stated legislative findings note that although marijuana is included as a controlled dangerous substance, as defined in N.J.S.A. §24:21-2, "[c]ompassion dictates that a distinction be made between medical and non-medical uses of marijuana." N.J.S.A. §24:61-2(e). The Act broadly seeks "to protect from arrest, prosecution, property forfeiture, . . . criminal and other penalties, those patients who use marijuana to alleviate suffering from debilitating medical conditions, as well as their physicians, primary caregivers, and those who are authorized to produce marijuana for medical purposes." Listing the specific debilitating medical conditions to which the use of medicinal marijuana is permitted, N.J.S.A. §24:61-3, the Act directs DOH to establish a registry of qualifying patients and their caregivers and issue registry identification cards. N.J.S.A. §24:61-4(a). Further, the Act proposes to license alternative treatment centers (ATC) to cultivate and distribute medicinal marijuana. N.J.S.A. §24:61-7.

434 N.J. Super. at 93-94.

Thus, this Court finds that the purpose of the medicinal marijuana act is to protect those patients who use marijuana to alleviate suffering from debilitating medical conditions. Absent language in the Statute in regard to

adverse employment action against an employee based on medicinal marijuana use, this Court considers pending legislation that was introduced on February 4, 2016 as Assembly Bill 2482. The Bill 2482 states as follows:

Specifically, an employer would be prohibited from taking any adverse employment action against an employee based on the employee's status as a registry identification cardholder or based on a positive test for marijuana, unless the employer establishes by a preponderance of the evidence that the lawful use of medical marijuana has impaired the employee's ability to perform the employee's job responsibilities. The bill provides that an employer may consider an employee's ability to perform the employee's job responsibilities to be impaired when the employee manifests specific articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position.

If an employer has a drug testing policy and an employee or job applicant tests positive for marijuana, the employee or job applicant is to be offered an opportunity to present a legitimate medical explanation for the positive test result, and is to be provided written notice of the right to explain. Within three working days after receiving notice, the employee or job applicant would be permitted to submit information to the employer to explain the positive test result, or request a confirmatory retest of the original sample at the employee's or job applicant's own expense. An employee or job applicant would be permitted to present a doctor's recommendation for medical marijuana, a registry identification card, or both, as part of the employee's or job applicant's explanation for the positive test.

Nothing in the bill would restrict an employer's ability to prohibit or take adverse employment action for the possession or use of intoxicating substances during work hours, or require an employer to commit any act that would cause the employer to be in violation of federal law, or that would result in the loss of a federal contract or federal funding.

The bill defines "adverse employment action" to mean refusing to hire or employ a qualified registered patient, barring or

discharging a qualified registered patient from employment, requiring a qualified registered patient to retire from employment, or discriminating against a qualified registered patient in compensation or in terms, conditions, or privileges of employment.

Thus, this Court considers the pending legislation as policy on the New Jersey Compassionate Use Medical Marijuana Act.

Herein, the Plaintiff was given medical testing and the results confirmed the presence of carboxy-THC at a level of 1754 ng/mL in Plaintiff's sample. See Exhibit E attached to Defendant's Brief. Plaintiff confronted his employer to disclose his use of medicinal marijuana before the medical testing was ordered. Defendant acknowledges that as a result of the medical testing, Plaintiff was terminated and charged with violations of the Administrative Code and specific violations of the Department's Rules and Regulations. Defendant contends that the use of medicinal marijuana, taking into consideration the level of THC at 1,754 ng/mL, would impair the Plaintiff's ability to perform the Plaintiff's job responsibilities. However, this Court finds that Defendant's determination of impairment is based on mere suspicion not supported by any expert or medical testimony in the record, nor does the policy articulate the basis for the threshold amount. This Court does note that the matter is still in the discovery process and a disciplinary hearing has yet to take place.

Thus, this Court finds that the purpose of the New Jersey Compassionate Use Medical Marijuana Act is to protect patients, such as Plaintiff, from being subjected to penalties for the use of medicinal marijuana. Although the Act does not explicitly address adverse employment action, the legislative intent and the pending legislation of Assembly Bill 2482 show that Plaintiff would be protected by the statute and Defendant must establish that the lawful use of medical marijuana has impaired the Plaintiff's ability to perform his job responsibilities as a firefighter.

As to the issuance of an injunction, this Court finds that Plaintiff fails to satisfy the factors set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). An Order to Show Cause is an emergent application to the Court and to determine whether an applicant is entitled to emergent relief the Court is required to consider the following factors: (1) whether the petitioner will suffer irreparable harm if the requested relief is not granted; (2) whether the legal right underlying petitioner's claim is settled; (3) whether the petitioner has a likelihood of prevailing on the merits of the underlying claim; and (4) the relative hardship to the parties in granting or denying the relief requested. See Crowe v. DeGioia, 90 N.J. 126 (1982). It is also well settled that "irreparable harm" is that which cannot be redressed by money damages. Id.

Herein, the Court finds that Plaintiff is not entitled to a permanent injunction as Plaintiff must exhaust the administrative process by appearing for the hearing before Defendant and raise objections at said time and pursue the appropriate judicial review therefrom. See Mutual Home Dealers Corp. v. Comm. Of Banking & Ins., 104 N.J. Super. 25 (Ch. Div. 1968). As to the first factor under Crowe, Plaintiff will not suffer an irreparable harm by exhausting the administrative process. Secondly, Plaintiff's claim is not well settled, as Plaintiff's Verified Complaint raises a matter of first impression. Third, for the same reason, Plaintiff cannot show that he is likely to prevail on the merits. Lastly, under Crowe, Plaintiff will not suffer a hardship by this Court denying the Order to Show Cause to require Plaintiff to exhaust the administrative process and participate in mediation either of which may provide Plaintiff with an adequate remedy at law.

This Court does not declare that that the medical use of marijuana pursuant to the Compassionate Care Act cannot be deemed an "illegal use" for the purpose of the City's drug policy. Rather, the purpose of the Act as well as policy shows that Plaintiff is protected by the statute, but Defendant has the opportunity to establish that the lawful use of medical marijuana has impairs the Plaintiff's ability to perform his job responsibilities as a firefighter.

Thus, Plaintiff is not entitled to a permanent injunction as testimony has not been taken in this matter and affidavits alone will not suffice. See Crowe v. DeGioia, 90 N.J. 126 (1982). More so, Plaintiff must exhaust the administrative process by appearing for the hearing before Defendant and raise objections at said time and pursue the appropriate judicial review therefrom. See Mutual Home Dealers Corp. v. Comm. Of Banking & Ins., 104 N.J. Super. 25 (Ch. Div. 1968).

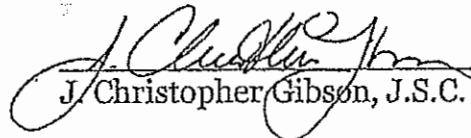
CONCLUSION

The motion is opposed. Plaintiff's Order to Show Cause and Verified Complaint for declaratory judgment, temporary and permanent injunction and for all damages and relief compelled by the New Jersey Conscientious Employee Protection Act and the New Jersey Law Against Discrimination is denied.

Plaintiff must exhaust the administrative process by appearing for the hearing before Defendant and raise objections at said time and pursue the appropriate judicial review therefrom.

An appropriate form of order has been executed. Conformed copies of that order will accompany this memorandum of decision.

June 9, 2016


J. Christopher Gibson, J.S.C.