MEDICAL MARIJUANA PATIENTS: DISCRIMINATION & THE SEARCH FOR EMPLOYMENT PROTECTIONS

Joshua Weisenfeld[†]

TABLE OF CONTENTS

All too often medical marijuana patients are fired when their employer discovers that they medicinally consume marijuana. Picture this, you have just been diagnosed with an extremely rare form of cancer, you are devastated, but return to work knowing that your life depends on you keeping your healthcare through your employer. Soon after, you begin chemotherapy ("chemo") and find yourself in some of the worst pain, nausea, and discomfort you have ever experienced in your life. Your oncologist prescribes a handful of pharmaceuticals that are supposed to alleviate the side-effects from chemo, but you find that, at best, they make you forget about the pain, but they are hardly worth taking because now you cannot eat or sleep.

You begin missing more work, but keep dragging yourself in because again, you need the healthcare. You plead with your oncologist for something to help with the chemo side effects, something that will keep you well enough to lead a normal life. Finally, your oncologist mentions your state's medical marijuana program, you are hesitant because you have never consumed illegal drugs in your whole life, but your doctor informs you that medical marijuana is a viable alternative to pharmaceuticals, and may provide more relief than the medications you are currently on. After some careful thought, you give in, anything to lessen the pain.

The next morning you arrive at the state-run medical marijuana dispensary with your new medical marijuana prescription. The employee at the counter informs you about the different options and recommends a high-CBD, low THC tincture[1] *to help with the chemo side-effects. You return home, and mix a couple drops of tincture with a cup of tea and drink it. Within twenty minutes you begin to feel the constant ache in your stomach subside, and ten minutes later, the damp, cold sweat that you have had since the beginning of chemo lessens. For the first time since you started chemo, you pick yourself up, clean your room and read your emails. You begin to re-live your life, and better yet, you wake up the next day and find that you do not have the immediate urge to vomit. You finally stop missing so much work, and feel a sense of relief knowing that your job is no longer on the line due to absence or unproductivity.*

† Staff Editor, Cardozo Journal of Equal Rights & Social Justice, Vol 26.; J.D. Candidate, Benjamin N. Cardozo School of Law, 2021; B.A. Physics and English, Gustavus Adolphus College Class of 2018.

[1] CBS produces a variety of health benefits without a psychoactive effect, whereas THC produces a psychoactive effect, commonly known as being "high." *See CBD vs. THC: What's the Difference?*, HEALTHLINE, https://www.healthline.com/health/cbd-vs-thc (last visited Dec. 15, 2020).

Even though you do not feel under the influence when you take your medical marijuana supplement, you never use the tincture before going to work, and continue to only take a couple drops with your tea once you are home at night. This is the first semblance of your life going back to normal. You are no longer defined by your diagnosis and begin to feel like yourself again. However, everything changes when one day at work, you twist your ankle and your boss informs you that you will be subject to a drug test before being taken to urgent care. This is standard company policy, so you think nothing of it. You have never done drugs in your life, and your doctor prescribed the medical marijuana to help with your cancer treatment. You are sure there cannot be anything wrong with that, since it's even legal under state law.

That is, until you are called into HR and informed that because your drug test came back positive, you are being terminated. You start to worry, you explain to your employer that you have a medical marijuana prescription and that your doctor told you to use it! You emphasize that you have never used marijuana during or before work, and had never used it before you had the prescription. It does not matter, your employer fires you anyway, and, with your terminated employment, goes your health insurance. You are terrified now because, without health insurance, you cannot afford to pay for cancer treatment out-of-pocket, and there is no way you can afford a private, independent health insurance plan.

As a last effort to support yourself, you reach out to the best employment attorney in the state, and ask them if there is anything they can do. Surely, there is no way you were fired in a just manner. After speaking with the attorney, you are devastated to find out that there is nothing they, or anyone, can do. You violated the company's drug and alcohol policy, and, as a private employer, they are free to terminate you at will. You return home, distraught, unemployed, uninsured, and out of options. This is not a hypothetical scenario, it is the story of Joseph Casias, who was using medically prescribed marijuana to cope with the side-effects of chemo, after being diagnosed with sinus cancer and a brain tumor.[2] Casias was terminated on November 24, 2009, from Wal-Mart stores, after testing positive for marijuana during a drug test, and has lived on unemployment and state-sponsored healthcare since his termination.[3]

Regrettably, this story is all too common. Medical marijuana patients regularly face employment discrimination for medical marijuana use, and it often costs these patients their livelihoods. Medical marijuana patients, going through some of the most difficult times in their lives, should not be further burdened by

[2] Casias v. Wal-Mart Stores, Inc., 764 F. Supp. 2d 914 (W.D. Mich. 2011), *aff'd*, 695 F.3d 428, 431–32 (6th Cir. 2012); Tahman Bradley, *Walmart Fires Cancer Patient with Prescription for Medical Marijuana*, ABCNEWS (Mar. 17, 2010), https://abcnews.go.com/Business/michgan-man-fired-walmart-medical-marijuana/story?id=10122193.

[3] *See* Bradley, *supra* note 2.

blatant employment discrimination for their treatment. However, due to the federal prohibition on marijuana and inconsistent state medical marijuana laws, medical marijuana patients encounter employment discrimination for their medical marijuana use, typically in the form of discipline, discharge, and refusal to hire. This type of discrimination stems from a variety of sources, but originates with the federal government's classification of marijuana as a controlled substance. The federal legalization of marijuana would arguably solve the majority of problems faced by medical marijuana patients in the employment context. However, federal legalization would require major changes to American drug laws, which have been resisted by every Congress since 1937.[4]

Therefore, to protect people like Joseph Casias, smaller-scale changes on both the state and local level should be made to account for the discrimination medical marijuana patients face. Smaller-scale changes on the state level should include amendments to state employment laws, disability laws, or medical marijuana laws that reduce the harm done by federal prohibition. On the local level, smaller-scale changes could include adjustments to company drug and alcohol policies, and restructuring of drug testing procedures.

This Note presents three claims. First, that medical marijuana patients are not provided adequate employment protections under federal or state law. Second, that medical marijuana patients should be provided employment protections. And, third, that current employment-related drug testing procedures should be amended to account for medical marijuana patients.

Part I of this Note provides background and context on medical marijuana, federal and state employment and disability law, and drug testing procedures. Part II outlines the various issues medical marijuana patients face in the employment context, and concludes that federal and state laws are inadequate for providing medical marijuana patients with employment protections. Part III delineates why employment protections are necessary for medical marijuana patients, and suggests what legislation could provide these protections. Part IV explores amendments to current employment-related drug testing procedure as an alternative to government legislation.

[4] Richard J. Bonnie & Charles H. Whitebread, *Passage of the Uniform Drug Act*, SCHAFFER LIBR. OF DRUG POL'Y, http://www.druglibrary.org/schaffer/Library/studies/vlr/vlr3.htm (last visited Dec. 15, 2020).

I. BACKGROUND

A. Medical Marijuana

Every election, more states vote to legalize and regulate the use of marijuana for medicinal purposes.[5] The medical marijuana revolution started in 1996, when California voters passed Proposition 215, commonly referred to as the Compassionate Use Act, making California the first state to legalize and regulate medical marijuana.[6] The Compassionate Use Act made sure that "seriously ill Californians [had] the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician…"[7] This regulation has been interpreted to require individuals who decide to use medical marijuana as their method of treatment, to be diagnosed with one (or multiple) qualifying conditions, and to receive a prescription from a physician for marijuana use.[8]

Numerous states proceeded to follow in California's footsteps through legislation or election that effectively legalized and regulated marijuana for medical use within their respective states.[9] In these states, medical marijuana, in general, is available for individuals who suffer from AIDS, anorexia, arthritis, cachexia, cancer, chronic pain, fibromyalgia, glaucoma, migraine, persistent muscle spasms, seizures, and severe nausea.[10] For these conditions, medical marijuana is prescribed by a physician and

[5] In 2020, Mississippi and South Dakota approved measures to regulate cannabis for medical use, bringing the total to 42 states with some form of medical marijuana laws. *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 10, 2020), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

[6] *Id*.

[7] California Health & Saf. Code §§ 11362.5, et seq. For more information on Proposition 215, *see generally* Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707, 707–17 (Spring 1998).

[8] *See generally* People v. Urziceanu, 33 Cal. Rptr. 3d 859, 864 (Cal. Ct. App. 2005) (interpreting the Compassionate Use Act to require a qualifying medical condition and doctor's prescription for protections under the Act); *see also* Vitiello, *supra* note 7.

[9] *Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php? resourceID=000881 (last updated July 31, 2014); *See also*, Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 203 (Cal. 4th 2008).

[10] While the conditions that qualify an individual vary from state to state, the above-mentioned conditions are the most common found across states with medical marijuana legislation. California Health & Saf. Code §§ 11362.5, et seq.; *CA Marijuana Qualification*, MARIJUANA DOCTORS, https://www.marijuanadoctors.com/medical-marijuana/ca/qualification (last updated Apr. 23, 2020); *State medical marijuana laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, ncsl.org/research/health/state-medical-marijuana-laws.aspx (last visited Nov. 12, 2019); *25 legal medical marijuana states and DC: laws, fees, and possession limits*, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881#DC (last visited Nov. 12, 2019).

recommended to patients as a method of pain management or, in certain circumstances, as a last resort when traditional medication has not provided relief.[11] Since medical marijuana is predominantly prescribed as a method of pain management, it is generally understood that the prescription of medical marijuana is to help alleviate symptoms associated with the patient's condition, rather than as a method of treatment for the condition itself.[12]

B. Federal Law

i. Controlled Substances Act ("CSA")

The Controlled Substances Act is a comprehensive law that outlines which substances, drugs, and chemicals are controlled or regulated in the United States.[13] The CSA differentiates the level of prohibition for different substances by placing them into a five-tier framework, with each tier called a schedule.[14] The schedules range from Schedule I, which are substances that have been deemed to have a high potential of abuse and are not safe, even under medical supervision, for any purpose; to Schedule V, which are substances that are deemed to have a low potential for abuse, and minimal to no restrictions on use.[15]

Under the CSA, marijuana is considered a Schedule I narcotic[16] making it federally prohibited within the United States.[17] This presents a significant issue for medical marijuana patients because any use of marijuana (including medical) within the United States is prohibited by federal law.[18] Therefore, medical marijuana patients are not entitled to employment protections under federal law because the CSA prohibits marijuana use generally.

ii. Americans with Disabilities Act ("ADA")

The Americans with Disabilities Act "is a civil rights law that prohibits discrimination against individuals with disabilities in all areas of

---

[11] *See generally* §§ 11362.5, et seq.

[12] Mary Barna Bridgeman & Daniel T. Abazia, *Medical Cannabis: History, Pharmacology, and Implications for the Acute Care Setting*, NAT'L INST. OF HEALTH, (Mar. 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5312634/.

[13] 21 U.S.C. § 812 (2018).

[14] *Id*.

[15] *Id*.

[16] A Schedule I narcotic is drug that is illegal because they are deemed to have a high potential for abuse, no known medical use, and severe safety concerns. 21 U.S.C. § 812 (2018).

[17] 21 U.S.C. § 841 (2018).

[18] *See e.g.*, Green Cross Medical, Inc. v. Gally, 395 P.3d 302, 307 (Ariz. Ct. App., 2017).

public life, including jobs schools, transportation, and all public and private places that are open to the general public."[19] The ADA's purpose is to make sure that people with disabilities have the same rights and opportunities as everyone else.[20] The ADA provides "civil rights protections to individuals with disabilities similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion."[21] Furthermore, the ADA "guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, state and local government, and telecommunications."[22] "The ADA is divided into five titles (or sections) that relate to different areas of public life."[23] The five sections of the ADA include: Title I (Employment); Title II (State & Local Government); Title III (Public Accommodations); Title IV (Telecommunications); and Title V (Miscellaneous Provisions).[24] This Note will address two of the five sections of the ADA, Titles I and V, Employment and Miscellaneous Provisions, respectively.

Title I of the ADA "is designed to help people with disabilities access the same employment opportunities and benefits available to people without disabilities. Employers must provide reasonable accommodations to qualified applicants or employees. A reasonable accommodation is any modification or adjustment to a job or the work environment that will enable an applicant or employee with a disability to participate in the application or to perform essential job functions."[25]

Title V of the ADA "contains a variety of provisions relating to the ADA as a whole, including its relationship to other laws, state immunity, its impact on insurance provisions and benefits, prohibition against retaliation and coercion, illegal use of drugs, and attorney's fees. This title also provides a list of certain conditions that are not to be considered as disabilities."[26]

---

[19] *What is the Americans with Disabilities Act (ADA)?*, ADA NAT'L NETWORK, https://adata.org/learn-about-ada (last updated Dec. 2020).

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] *Id*.; Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq., 12114 (2008).

[25] *What is the Americans with Disabilities Act, supra* note 19.

[26] *Id*.; Title V specifically denotes that the following do not constitute a "disability" under the ADA: "(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; (2) compulsive gambling, kleptomania, or pyromania; or (3) psychoactive substance use disorders resulting from current illegal use of drugs." 42 U.S.C. § 12211.

However, for conditions not included in Title V's list of excluded conditions, the ADA outlines a three-part framework that defines a disability to be "(1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment."[27] This statutory framework has created a whole field of jurisprudence that discusses and determines which medical conditions constitute disabilities pursuant to the ADA.[28] Moreover, since the ADA does not specifically outline which conditions constitute disabilities, the ADA protections are not necessarily uniform across the United States because different state and circuit courts have held similar conditions to different standards.[29] For example, the Massachusetts District Court in *McNiff* held that cancer constituted an impairment, but never a disability,[30] while the Court for the Eastern District of Texas held cancer can be a disability under the ADA.[31] This can cloud any concrete or solidified notions of who is protected by the ADA across the United States.

C. State Law

Unlike federal law, numerous states have legalized marijuana for medical use.[32] For purposes of this Note, these states' medical marijuana laws fall into two general categories: Category 1 states have medical marijuana laws that do not address employment; and Category 2 states have medical marijuana laws that account for medical marijuana patients in the employment context.[33] As of December 2020, there are twenty-nine states that likely fall into Category 1, and thirteen states that definitively fall into Category 2.[34]

Furthermore, states have disability discrimination laws outside of the federal law, like the ADA, and, unlike the ADA, state laws are free to be more inclusive and comprehensive of disability protections within their

[27] 42 U.S.C. § 12102 (2008).

[28] See, *infra* note 161.

[29] *See e.g.*, McNiff v. Town of Dracut, 433 F. Supp. 2d 145 (D. Mass. 2006); Norton v. Assisted Living Concepts, Inc., 786 F. Supp. 2d 1173 (E.D. Tex. 2011).

[30] *McNiff*, 433 F. Supp. 2d at 156–57.

[31] *Norton*, 786 F. Supp. 2d at 1185–86.

[32] See, *supra* Part I.A.

[33] The terms Category 1 and Category 2 have been coined for purposes of clarifying distinctions in state law in this Note.

[34] *Cannabis & Employment: Medical and Recreational Policies in the States*, NAT'L CONF. OF STATE LEGISLATURE (Nov. 2, 2020), https://www.ncsl.org/research/labor-and-employment/cannabis-employment-laws.aspx.

statutes.[35] For example, under state law, to bring a disability discrimination claim against an employer, plaintiffs typically have to establish the same or similar *prima facie* case of disability discrimination as under federal law, but states' disability discrimination laws have the option to avoid exceptions for illegal drug use.[36] If a state's disability discrimination law were to forego the "illicit drug" exception embodied in federal law, medical marijuana users may have a stronger case when seeking legal recourse if they are also able to establish a qualifying disability. Alternatively, states that have included an illicit drug exception to their disability discrimination laws could remove medical marijuana from the definition of illegal drug use. However, as described below, these options are not without fault, as state courts continue to grapple with federal prohibition, inconclusive medical marijuana statutes, and unclear causes of action, effectively eliminating any recourse potentially sought under state disability discrimination statutes that exclude an illicit drug exception.[37] Moreover, this approach may only be available to medical marijuana patients who are also considered disabled.

D. Drug Testing

i. Drug Testing Procedure

There are two general timeframes when an employee may be drug tested by an employer: before the employee has been hired; and after the employee has been hired.[38] These two types of drug testing will collectively be considered *employment-related drug testing*. The purpose of

[35] *See* Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469, 489–90, 500 (1993) ("State law sometimes covers a broader range of discrimination than federal law.").

[36] This option is available to states because they are free to draft their own disability discrimination laws, so long as they do not conflict or attempt to preempt federal law. Here, if a state were to simply not include an illicit drug exception, on its face, it would arguably not conflict or preempt federal law. *See e.g.*, ALASKA STAT. § 18.80.220 (2012); CONN. GEN. STAT. § 46a–60 (2013); DEL. CODE ANN. TIT. 19 § 724 (West 2003 & Supp. 2012); D.C. CODE § 2–1402.11 (2013); HAW. REV. STAT. § 378–2 (LexisNexis 2013); MASS. GEN. LAWS ch. 151 B § 4 (2006 & Supp. 2014); MONT. CODE. ANN. §§ 49–2–303, 49–4–101 (2013); NEV. REV. STAT. § 613.330 (2013); N.J. STAT. ANN. § 10:5–12 (West 2007 & Supp. 2014); N.M. STAT. ANN. § 28–1–7 (2007 & Supp. 2013); VT. STAT. ANN. TIT. 21 § 495 (2012 & Supp. 2014); WASH. REV. CODE §§ 49.60.030, 49.60.180 (West 2007 & Supp. 2014).

[37] *See infra* Part II.

[38] For purposes of this note, the term "pre-employment" will include all individuals who have applied for job at a company and have been offered employment, but are not yet an employee of the company. Under these circumstances, actual employment may be dependent on passing a drug test. Further, the term "current-mandated-employment drug testing" will include all employees who have a contractual relationship with an employer whose continuation is dependent on regularized or randomized drug testing during their employment.

employment-related drug testing in the workplace varies, but, in general, it is to prevent "accidents, health issues and costs, absenteeism, and litigation," and to help promote productivity.[39] The consequences for failing these drug tests range from discipline to discharge.[40]

The primary form of employment-related drug testing is through urinalysis.[41] The process to undergo this type of testing can take several forms. Primarily, employers utilize third-party-drug testing administrators to manage this testing operation.[42] Drug testing can be conducted either at the workplace (on-site) or at a third-party drug-testing facility (off-site).[43] During the initial stage of the drug testing procedure, a testing administrator will inquire into which legal substances the current or potential employee is taking, including all over-the-counter and prescription medication, drugs, and supplements.[44] When asked, the employee will need to provide corroborating evidence that they are entitled to take these substances.[45] Next, the employee will urinate into a test container, under the guidance and administration of the test administrator or laboratory technician.[46] The employee's urine will then be run through a series of screening methods to determine which substances appear in their body's system.[47] A report is created by the lab technicians and given to the test administrator, who cross-checks the substances the employee tested positive for with the substances the employee originally disclosed to the administrator.[48] The administrator then redacts, or reports negative, any substances the employee

[39] Lisa Nagele-Piazza, *Workplace Drug Testing: Weighing the Pros and Cons*, SHRM (Jan. 21, 2020), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/the-pros-and-cons-of-workplace-drug-testing.aspx#:~:text=Drug%20testing%20is%20effective%20in,from%20injury%20and%20improve%20productivity. For a further discussion of the value of drug testing in the workplace, *see generally* Michael R. O'Donnell, *Employee Drug Testing – Balancing the Interests in the Workplace: A Reasonable Suspicion Standard*, 74 VA. L. REV. 969 (1988).

[40] *See generally* UNDER THE INFLUENCE?: DRUGS AND THE AMERICAN WORKPLACE (Jacques Normand et. al. eds., 1994).

[41] *Id*.

[42] *Id*.

[43] *In Drug Testing…What is a TPA (Third Party Administrator)?*, ORIGIN, https://origin.net/2017/07/05/tpa/ (last visited Jan. 31 2021); *Workplace Drug Testing*, DATIA.ORG, https://www.datia.org/datia-resources/27-credentialing/cpc-and-cpct/931-workplace-drug-testing.html, (last visited Jan. 31, 2021).

[44] This process can take place before or after the drug test is administered, and can be conducted by either the testing administrator or a doctor. *In Drug Testing*, *supra* note 43; *Workplace Drug Testing, supra* note 43.

[45] *Id*.

[46] *Id*.

[47] *Id*.

[48] *Id*.

was entitled to take from the report and leaves any substances that were not disclosed.[49] The redacted report is then sent to the employer for review.

Most, if not all, drug testing procedures will discover marijuana in the testee's system.[50] And, as discussed below, drug testing is the primary method in which employers discover that an employee is a medical marijuana user.[51] Meaning that medical marijuana patients will almost certainly have their medical marijuana use discovered by employers when they are subjected to employment-related drug testing. Furthermore, medical marijuana does not fall under the category of "legal" substances, meaning that under no system of drug testing administration will disclosure of medical marijuana use lead to the redaction of marijuana from positive substances found in an employee's test.[52] Thus, under the current legal and procedural drug testing practice, employers will always discover an employee's use of medical marijuana when they are subjected to employment-related drug testing.

ii. Public vs. Private Employer Drug-Testing

The United States Supreme Court has held that employment-related drug testing performed by public employers, or in circumstances involving state action, are considered searches within the meaning of the Fourth Amendment, and therefore, must satisfy the Fourth Amendment's reasonableness requirement.[53] However, private employers are not bound by the same standard, especially where state action is not involved. Thus, the potential for a current employee's Fourth Amendment right, to be free from unreasonable searches and seizures, is not implicated when working for private employers.[54]

---

[49] *Id*. More comprehensive urinalysis procedures will discover everything from over-the-counter pain medication to Schedule I narcotics, so administrator reports can contain positive substance indicators that may not be of concern to employers, such as Advil or Tylenol.

[50] *See generally Workplace Drug Testing*, *supra* note 43.

[51] All employers in the relevant jurisprudence discovered their employees' use of medical marijuana through employment-related drug testing. See *infra* Part II.B.

[52] Under the CSA, all marijuana, including medical marijuana, is considered federally illegal, prohibiting the marijuana from being a permitted "legal substance" disclosure in drug testing. *See generally* 21 U.S.C. § 812.

[53] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, (1989); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989).

[54] *See* Wilkinson v. Times Mirror Corp., 264 Cal. Rptr. 194 (Cal. Ct. App. 1989), discussed in §§ 3, 8, and 9. The court expressed the view that potential employees might be required to participate in pre-employment drug testing as a condition for employment, notwithstanding that current employees in the same position could not be subjected to suspicionless drug testing.

Typically, private employers have extensive discretion in how they conduct drug testing.[55] However, private employers who receive federal funding may be required to mandate drug-testing procedure within the Fourth Amendment jurisprudence.[56] But, employers who do not receive federal funding are free to conduct drug tests and establish restrictive drug policies in a virtually unregulated manner.[57]

This lack of regulation presents a challenge for medical marijuana patients who are private employees, since they are unable to resort to protective laws, such as the ADA, when confronted with employment issues on the basis of their medical marijuana use. The federal illegality of marijuana presents an issue as well for medical marijuana patients who are public employees. Even though they are protected under the Fourth Amendment, they are in violation of federal law by using medical marijuana.

II. MEDICAL MARIJUANA PATIENTS ARE NOT PROVIDED ADEQUATE PROTECTIONS UNDER THE ADA OR EQUIVALENT STATE LAW

A. Under the ADA

Medical marijuana patients are not provided adequate protections under the ADA because of the ADA's illicit drug exception. As described above, the ADA outlines protections for disabled persons in the employment context. However, the ADA precludes disabled persons from its protections when they are using illicit drugs, i.e., the illicit drug exception.[58] More specifically, the ADA reads, "[f]or purposes of this subchapter, a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use."[59] Thus, the illicit drug exception bars disabled employees who are also medical marijuana patients from seeking enforcement or protection under the ADA.[60]

Therefore, medical marijuana patients, who may otherwise qualify for ADA protections, are prohibited from enforcing those protections under the

[55] *Workplace Drug Testing*, DATIA (2018), http://www.datia.org/datia-resources/27-cr%20edentialing/cpc-and-cpct/931-workplace-dru%20g-testing.html.

[56] *Id.*

[57] *Id*.

[58] 42 U.S.C. § 12114 (2008).

[59] *Id*.

[60] *Id*.; 21 U.S.C. § 812 (2018).

language of the ADA itself.[61] In other words, the combination of federal law prohibiting marijuana use and the ADA precluding those who violate federal drug laws, excludes medical marijuana patients from legal protections, enforcement, and recourse against employers for employment decisions on the basis of their medical marijuana use.[62] As discussed below, this is problematic because it focuses the federal inquiry into ADA protections on an individual's choice of treatment options, rather than the disability itself. [63]

B. Under State Law

State law, in general, does not provide adequate employment protection for medical marijuana patients because courts have interpreted Category 1 medical marijuana statutes to not provide remedies or duties for medical marijuana patients in the employment context. Furthermore, there are too few Category 2 medical marijuana statutes to constitute widespread employment protection.

Typically, state courts provide a viable method to seek relief from when someone has experienced employment discrimination,[64] such as discipline, discharge, or refusal to hire on the basis of a given characteristic (here, medical marijuana use). However, due to the complexities and irregularities in state medical marijuana regulation, common law jurisprudence has varied in the employment discrimination context. State courts have taken two approaches to medical marijuana patients who have faced employment discrimination on the basis of their medical marijuana use. These approaches mirror the two categories of medical marijuana statutes state legislatures have put forward. In general, courts that reside in states that have category 1 medical marijuana statutes have found that no cause of action exists for medical marijuana patients who have faced employment discrimination. And, conversely, courts that reside in states that have category 2 medical marijuana statutes have found a private cause

[61] § 12114; U.S. Equal Emp't Opportunity Comm'n, Technical Assistance Manual § 8.3 (1992), http://askjan.org/links/ADAtaml.html#VHI, [http://perma.cc/F5QA-GDB6]. *See* James v. City of Costa Mesa, 700 F.3d 394, 404 (9th Cir. 2012).

[62] *See James*, 700 F.3d at 404.

[63] I.e., an individual choosing to pursue pain management with medical marijuana (which excludes ADA protections) rather than opiates (which permit ADA protection). See *infra* Part III.B.

[64] *See generally Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/filing-lawsuit (last visited Dec. 15, 2020); *Remedies for Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/remedies-employment-discrimination (last visited Jan. 31, 2021); Concurrent Jurisdiction of Title VII Actions, 42 WASH. & LEE L. REV. 1403, 1403–13 (1985). *See also* Chappell v. Southern Maryland Hosp., Inc., 578 A.2d 766, 774 (Ct. App. Md. 1990).

of action for medical marijuana patients who have faced employment discrimination. While the second approach does provide at least a cause of action for medical marijuana patients, this approach has only been adhered to by thirteen of the forty-two states with medical marijuana laws.[65] Thus, this approach does not provide adequate or widespread protections for the majority of medical marijuana patients facing employment discrimination.

Six cases are often cited when addressing employment rights in relation to medical marijuana.[66] Four of these cases strongly favor the employers' ability to make adverse employment decisions on the basis of medical marijuana use.[67] The other two cases, at a minimum, provide a cause of action for medical marijuana patients to bring employment discrimination claims.[68] These cases are widely cited by courts when addressing issues of medical marijuana use outside of the workplace and employment, and provide minimal (if any) rights, remedies, or recourse for medical marijuana patients facing adverse employment decisions on the basis of their marijuana use.

i. Category 1 State Jurisprudence

States with medical marijuana statutes that do not extend to the employment context fall into the first approach that courts can take and offer virtually no protections to medical marijuana patients. For example, in *Roe v. Teletech Customer Care*, the Supreme Court of Washington determined the scope of Washington's Medical Use of Marijuana Act ("MUMA") to not include affirmative duties on behalf of employers.[69] The plaintiff, Jane Roe, suffered from "debilitating migraine headaches that caused chronic pain, nausea, blurred vision, and sensitivity to light," such that she was unable to properly care for her children or go to work.[70] Roe had tried both over-the-counter and prescription medications for migraines, but was unable to find relief.[71] On June 26, 2006, Roe received a prescription for medical marijuana after a physician opined that "the

[65] Cannabis & Employment Law, *supra* note 34.

[66] Roe v. TeleTech Customer Care Management (Colo.), LLC, 257 P.3d 586, 588 (Wash. 2011); Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225, 1227 (D.N.M. 2016); Barbuto v. Advantage Sales & Mktg., LLC, 78 N.E.3d 37, 40 (Mass. 2017); Coats v. Dish Network, LLC, 350 P.3d 849, 850 (Colo. 2015); Noffsinger v. SSC Niantic Operating Co., 273 F. Supp. 3d 326 (D. Conn. 2017); Whitmire v. Wal-Mart Stores Inc., 359 F. Supp. 3d 761 (D. Ariz. 2019).

[67] *TeleTech*, 257 P.3d at 586; *Garcia*, 154 F. Supp. 3d at 1225; *Barbuto*, 78 N.E.3d at 40–41; *Coats*, 350 P.3d at 850.

[68] *Noffsinger*, 273 F. Supp. 3d at 330–32; *Whitmire*, 359 F. Supp. 3d at 769–70.

[69] *TeleTech*, 257 P.3d at 588.

[70] *Id*.

[71] *Id.*

potential benefits of the medical use of marijuana would likely outweigh the health risks for this patient."[72]

Subsequently, Roe began using medical marijuana, which alleviated her migraine pain to the point that she could care for her children and return to work.[73] After Roe began using medical marijuana in compliance with MUMA,[74] she was offered a job by Defendant, Teletech Customer Care, on the condition that she pass both a background check and drug screening.[75] Roe notified Teletech of her medical marijuana prescription, took the mandated drug test, worked for nearly two weeks, and was then terminated on the basis of marijuana found in her drug test.[76] Roe then brought suit for wrongful termination against her former employer.[77]

The court in *Roe* conducted a two-part test to address Roe's wrongful termination claim: first, whether the language of MUMA prohibited employers from discharging an employee for authorized use of medical marijuana; and second, whether there was a sufficient public policy interest to support a cause of action for Roe's termination.[78] The court held that MUMA merely created an affirmative defense to criminal convictions for marijuana possession, alongside a process for medical doctors to prescribe medical marijuana to patients.[79] The court went on to hold that, based on a reading of the statute alone, MUMA did not create an implicit duty for employers to accommodate medical marijuana use in the workplace or at home, nor did it create a cause of action for employees who faced discrimination for their marijuana use.[80]

In 2011, at the time of this case, public support for medical marijuana use was varied.[81] Thus, the *Roe* court felt that changing workplace rights in favor of medical marijuana patients, beyond the language of the statute, was better left to the legislature.[82] By doing this, the *Roe* court created well-reasoned precedent for future courts to favor employers by reading the

[72] *Id*.

[73] *Id*.

[74] MUMA provided an affirmative defense to criminal liability for medical marijuana sale, prescription, and use. Wash. State Medical Use of Marijuana Act, ch. 69.15A. Further, for compliance with MUMA, a patient simply had to receive a prescription for medical marijuana from a physician, and restrain from the use of medical marijuana in public places. ch. 69.15A.

[75] *TeleTech*, 257 P.3d at 595.

[76] *Id*.

[77] *Id*.

[78] *Id*. at 594–96.

[79] *Id*.

[80] *Id*.

[81] *Id*.

[82] *Id*.

explicit text of medical marijuana statutes, which often only create affirmative defenses to criminal convictions, but are silent to employment protections.[83] Due to the factors, analysis, and holding of the *Roe* decision, courts often cite *Roe* when they seek to favor an employer's ability to conduct drug screening in states with medical marijuana laws, withstand claims from medical marijuana patients, and dismiss wrongful termination claims brought medical marijuana patients against their employers.[84]

Similarly, in *Garcia v. Tractor Supply Co.*, the District Court of New Mexico determined that neither New Mexico's Compassionate Use Act ("CUA") nor New Mexico's Human Rights Act created a cause of action for plaintiff Rojerio Garcia's wrongful termination claim.[85] Garcia was diagnosed with HIV/AIDS, a qualifying condition providing human rights protections under New Mexico's Human Rights Act.[86] Due to Garcia's diagnosis, he was granted a medical marijuana prescription pursuant to CUA.[87] Soon after, Garcia secured a job with Defendant, Tractor Supply Company, following an interview where he notified Defendant of both his HIV/AIDS status and his use of medical marijuana under CUA.[88] On August 8, 2014, Garcia underwent an employment-mandated drug test at a third-party drug-testing facility, and twelve days later, was discharged for testing positive for marijuana.[89] Following his termination, Garcia brought suit alleging wrongful termination on the basis of his HIV/AIDS status and his use of medical marijuana.[90]

In District Court, Garcia argued that the CUA did not provide affirmative language protecting medical marijuana patients from adverse employment decisions, but, rather, medical marijuana use at home should be considered an accommodation that must be provided by the employer under New Mexico's Human Rights Act.[91] However, the District Court adopted the ruling set forth in *Curry v. Miller Coors* by the Colorado District Court, which states that "anti-discrimination law does not extend so

[83] For more information on specific state Medical Marijuana Statutes please *see State Medical Marijuana Laws,* NCSL (last visited Dec. 15, 2020), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

[84] *See e.g.*, *Casias*, 764 F. Supp. 2d at 924, *aff'd*, 695 F.3d 428, 431–32 (6th Cir. 2012); Jama v. Golden Gate Am. LLC, No. C16-0611RSL, 2017 WL 44538, at *2 (W.D. Wash. Jan. 4, 2017); State Farm Mut. Auto. Ins. Co. v. Jacobs, No. C14-5512 RBL, 2014 WL 5470623, at *2 (W.D. Wash. Oct. 28, 2014) (collecting cases).

[85] *Garcia*, 154 F. Supp. 3d at 1227.

[86] *Id*. at 1226; N.M. STAT. ANN. § 28–1–1, et seq (2011).

[87] *Garcia*, 154 F. Supp. 3d at 1226.

[88] *Id*. at 1227.

[89] *Id*.

[90] *Id*.

[91] *Id*. at 1228.

far as to shield a disabled employee from the implementation of his employer's standard policies against employee misconduct."[92] The court reasoned that there was no factual basis for Garcia's claim that he had been terminated on the basis of his HIV/AIDS status, but rather that he was terminated solely on the basis of non-compliance with Defendant's drug policy.[93] Therefore, the District Court ultimately held that neither New Mexico's Human Rights Act nor the CUA, or a combination thereof, provided a cause of action for Garcia, or any plaintiff that was terminated on the basis of medical marijuana use.[94]

This case presents a significant hurdle for plaintiffs in states whose medical marijuana statutes do not provide for employment-protections (i.e., Category 1). In combination with other statutory provisions, this case limits further judicial interpretation of medical marijuana statutes that might otherwise provide relief and encourages courts to focus on the employers' drug policies when addressing employee termination on the basis of medical marijuana use.[95]

Likewise, in *Barbuto v. Advantage Sales & Marketing*, the Supreme Court of Massachusetts addressed the issue of "whether a qualifying patient who has been terminated from her employment because she tested positive for marijuana as a result of lawful medical use of marijuana has a civil remedy against her employer."[96] Plaintiff, Cristina Barbuto, had Crohn's disease, a debilitating gastrointestinal condition that qualified her for a medical marijuana prescription, pursuant to Massachusetts's Medical Marijuana Statute.[97] Barbuto used small quantities of marijuana in her home several times a week to alleviate symptoms of her Crohn's disease.[98] After Barbuto began using medical marijuana, she was hired by Defendant, Advantage Sales & Marketing ("ASM").[99] Barbuto reached out to her future supervisor to determine whether her medical marijuana use would be an issue with ASM, and was told by her supervisor that her use of medical marijuana "should not be a problem."[100] She was reassured at a later time

[92] *Id.* (quoting Curry v. MillerCoors, Inc., No. 12-CV-024771-JLK, 2013 WL 4494307, at *1 (D. Colo. Aug. 21, 2013)).

[93] *Id*. at 1228.

[94] *Id*. at 1229.

[95] *Id*.

[96] *Barbuto*, 78 N.E.3d at 40–41.

[97] *Id*. at 41; *see also* (2012) Mass. Acts. ch. 369.

[98] *Barbuto*, 78 N.E.3d at 41.

[99] *Id*.

[100] *Id*.

that her "lawful medical use of marijuana would not be an issue with the company."[101]

However, in September 2014, Barbuto took a pre-employment drug test, began training at ASM, and then was terminated for testing positive for marijuana on her drug test.[102] At no point while Barbuto was employed by ASM did she use marijuana in the workplace, nor did she ever show up under the influence of marijuana.[103] Yet, Barbuto was still terminated on the basis of her medical marijuana use, despite ASM's reassurances and her legal use of medical marijuana.[104]

Subsequently, Barbuto brought suit alleging (1) handicap discrimination;[105] (2) interference with her right to be protected from handicap discrimination; (3) aiding and abetting ADM in committing handicap discrimination; (4) invasion of privacy; (5) denial of the "right or privilege" to use marijuana lawfully as a registered patient to treat a debilitating medical condition; and (6) violation of public policy by terminating a plaintiff for lawfully using marijuana for medicinal purposes.[106] The Supreme Court of Massachusetts engaged in a four-part analysis of Barbuto's claims.[107] First, that even though Barbuto (a legally qualified patient) had been lawfully prescribed marijuana under state law, she could still potentially be subject to federal criminal prosecution for the marijuana prescribed.[108] Second, even though Barbuto alleged handicap discrimination, it is unclear whether her condition permitted disability protections.[109] Third, it is unclear whether a private cause of action can be read into Massachusetts's Medical Marijuana Statute.[110] And fourth, contemplated whether there is a public policy concern that is not already addressed by relevant law.[111]

The Supreme Court of Massachusetts held that Barbuto should be considered a "handicap person" "for purposes of handicap discrimination protections; that Massachusetts's Medical Marijuana Statute did not create

---

[101] *Id*.

[102] *Id*.

[103] *Id*.

[104] *Id*. at 41.

[105] While the term "handicap" is no longer politically correct, the complaint filed, and the court used, the term throughout the case in reflection of statutory language. *Barbuto*, 78 N.E.3d at 41–42. For the purpose of accuracy, this terminology will be kept in this section.

[106] *Barbuto*, 78 N.E.3d at 459.

[107] *Id*.

[108] *Id*. at 459–71.

[109] *Id*. at 467.

[110] *Id*. at 459.

[111] *Id*. at 471.

an implied private right of action for employment termination claims; and that Barbuto's wrongful termination claim was not in clear violation of public policy.[112] Thus, Barbuto was unable to seek judicial relief for her termination, even though she was considered disabled.[113] The *Barbuto* decision introduced a relevant inquiry into the plaintiffs' condition, in light of a state's medical marijuana statute, which had not previously been observed by other courts. Furthermore, the *Barbuto* decision is engrained with notion of the federal prohibition on marijuana use, emphasizing the difficulty future medical marijuana plaintiffs will face while bringing wrongful termination claims on the basis of their medical marijuana use.[114]

Coats v. Dish Network presents another challenge for medical marijuana patients.[115] In *Coats*, the Supreme Court of Colorado was tasked with determining whether the use of medical marijuana in compliance with Colorado's Medical Marijuana Statute, but in violation of federal law, is considered "lawful activity."[116] If it is, it would be an unfair and discriminatory labor practice to discharge an employee on the basis of the employee's "lawful" outside-of-work activities.[117] Plaintiff, Brandon Coats, was a quadriplegic who had been wheelchair-bound since he was a teenager.[118] Coats received a medical marijuana prescription in 2009 to treat painful muscle spasms caused by his quadriplegia.[119] Coats consumed medical marijuana in his home and after work, but never consumed marijuana before the workday nor at his workplace.[120] After three years of employment as a telephone customer service representative for Defendant, Dish Network, Coats was subjected to a random drug-screening where he tested positive for marijuana.[121] Coats was then terminated for violating Defendant's drug policy.[122]

Following his termination, Coats filed suit against Defendant, claiming wrongful termination under Colorado law, which "prohibits employers from discharging an employee based on his engagement in 'lawful activities' off the premises of the employer during nonworking

[112] *Id*. at 459-71.

[113] *Id*.

[114] *See generally Barbuto*, 78 N.E.3d at 471.

[115] *See generally Coats*, 350 P.3d at 850.

[116] *Id*.

[117] *Id*. at 850.

[118] *Id*.

[119] *Id*.

[120] *Id*.

[121] *Id*. at 850–51.

[122] *Id*. at 851.

hours."[123] Coats argued that his medical marijuana use, which was in compliance with Colorado's Medical Marijuana statute, was "lawful activity" under Colorado state law, making his termination for medical marijuana use at home a violation of Colorado law.[124]

The Supreme Court of Colorado reviewed the meaning of the term "lawful" in light of Colorado state law and determined that "lawful" meant in accordance with the law; therefore, an activity that is prohibited by any law, state or federal, is unlawful.[125] Thus, the court found that Coats had been terminated on just grounds, since medical marijuana use could not be considered "lawful activity" as long as federal law prohibited it.[126]

Coats has been, and will likely continue to be, the most challenging hurdle to face when addressing employment decisions on the basis of medical marijuana use outside of the workplace. The federal prohibition on marijuana has also been the final analytical step many courts rely on when ruling on medical marijuana cases, since the basis for employment protections is generally understood to require federal legality.[127] While each of the aforementioned courts used a different analysis, the commonality between the cases is in the verdict: an employee was denied accommodations, protections, or legal remedy that they otherwise would have been entitled to as an employee on the basis of their medical marijuana use. Therefore, due to the nature of Category 1 medical marijuana statutes and state courts' interpretation of these statutes, Category 1 states do not provide adequate protections for medical marijuana patients.

ii. Category 2 State Jurisprudence

As noted earlier in this section, states with medical marijuana statutes that contain explicit anti-discrimination language fall into the second approach that courts can take, and offer some protections for medical marijuana patients. For example, in *Noffsinger v. SSC Niantic Operating Co.*, the Connecticut District Court determined that Connecticut's Palliative Use of Marijuana Act ("PUMA") supported a private cause of action to a potential employee who was denied employment on the basis of a positive marijuana drug test and found that the anti-discrimination provision was not preempted by federal law.[128]

---

123 *Id*. at 851; C.R.S. § 24–34–402.5.

124 *Id*.

125 *Id*. at 852.

126 *Id*.

127 *See generally Id.* at 852.

128 *Noffsinger*, 273 F. Supp. 3d 326 at 338–39; CONN. GEN. STAT. §§ 21a–408 et seq. (2017).

In *Noffsinger*, plaintiff, Katelin Noffsinger, suffered from post-traumatic stress disorder ("PTSD"), and was recommended medical marijuana by her doctors to treat her PTSD.[129] After receiving her prescription, Noffsinger registered with Connecticut's Department of Consumer Protections as a qualifying patient under PUMA, and after she subsequently received her registration certificate, she began taking one capsule of Marinol (a synthetic form of marijuana produced by Insys Therapeutics) each night as prescribed.[130] After Noffsinger began taking Marinol, she began interviewing for an employment position with Defendant, and was offered Noffsinger a position during an interview, and then informed her that she must complete a pre-employment drug test.[131] Noffsinger completed the drug test, and then the day before Noffsinger was to begin work, she was informed that she had tested positive for marijuana, then, later that day, that day that her employment offer had been rescinded on this basis.[132]

Noffsinger brought suit against her potential employer for (1) violating the anti-discrimination provision under PUMA; (2) common law wrongful recession of a job offer in violation of public policy; and (3) negligent infliction of emotional distress.[133] Noffsinger's prospective employer removed to federal court and argued that the CSA, ADA, and Food, Drug, and Cosmetic Act ("FDCA") preempted PUMA's anti-discrimination provision.[134] The Connecticut District Court responded to this argument, and held in the alternative that neither the CSA, ADA, nor FDCA preempted PUMA's anti-discrimination language.[135] The court explicitly stated that while "most cases dealing with [federal] preemption of state medical marijuana statutes have come out in favor of employers, these cases have not concerned statutes with specific anti-discrimination provisions; courts and commentators alike have suggested that a statute that clearly and explicitly provided employment protections for medical marijuana patients could lead to a different result."[136] Therefore, here, the court found it appropriate to read the language of PUMA, which provided for employment protections against discrimination for medical marijuana use, to allow a plaintiff to bring a discrimination claim under PUMA.[137]

---

129 *Noffsinger*, 273 F. Supp. 3d at 331.

130 *Id*.

131 *Id*. at 332.

132 *Id*.

133 *Id*.

134 *Id*. at 333.

135 *Id*. at 335, 338, 340–41.

136 *Id*. at 335.

137 *Id*. at 336.

Thus, the *Noffsinger* court provides an exception to the generally established jurisprudence that favors employers. As with the few other Category 2 states,[138] it is important to note that the *Noffsinger* holding turned on explicit statutory language that permitted legal remediation for employment discrimination on the basis of medical marijuana use.[139] Thus, while medical marijuana patients in the limited states whose medical marijuana statutes provide for employment protections are covered, patients residing in the remainder of the country are still not.

Similarly, in *Whitmire v. Wal-Mart Stores*, the Arizona District Court found that, as a matter of first impression, the Arizona Medical Marijuana Act ("AMMA") did create an implied cause of action for wrongful termination on the basis of a positive marijuana drug test.[140] In *Whitmire*, plaintiff, Carol Whitmire, was hired by defendant, Wal-Mart Stores.[141] During the hiring process Whitmire signed several documents assenting to defendant's drug and alcohol policy, which stipulated that if "testing indicat[ed] the presence of illegal drugs… in [her] body in any detectable amount, [she] w[ould] be terminated."[142] In December 2013, approximately four years after Whitmire began working in defendant's stores, she was promoted to Customer Service Supervisor, which required her to ensure a safe work environment, handle money, and supervise associates.[143]

Several months after Whitmire's promotion, she obtained an Arizona medical marijuana card, which she maintained during the remainder of her employment at defendant's store.[144] Several months after Whitmire received her medical marijuana card, she was injured at defendant's premises and brought to urgent care.[145] In accordance with defendant's injury policy, Whitmire was administered a drug test at the urgent care facility.[146] Whitmire's drug test came back positive for marijuana, and she was subsequently terminated.[147] Whitmire then brought suit for wrongful termination under the AMMA, the Arizona Civil Rights Act ("ACRA"), and the Arizona Employment Protection Act ("AEPA")—her claim

138 *See* discussion of Category 2 above.

139 Note: this is easily distinguished by state courts residing in Category 1 states.

140 *Whitmire*, 359 F. Supp. 3d at 774–75.

141 *Id*. at 769.

142 *Id*.

143 *Id*. at 769–70.

144 *Id*. at 770.

145 *Id*. at 770–71.

146 *Id*. at 771–72.

147 *Id*.

stipulated discrimination under the AMMA, and retaliation under the AEPA.[148]

The Arizona District Court found that the language of AMMA provided for an implied private right of action, as it contained explicit language prohibiting employment discrimination against medical marijuana patients on the basis of medical marijuana use.[149] This differentiated the AMMA from other states' medical marijuana statutes, such as California's Compassionate Care Act, which only provided an affirmative defense to criminal convictions.[150] Thus, the court found that Whitmire had a private right of action for wrongful termination on the basis of medical marijuana use because it "effectuat[ed] the evident legislative purpose" of preventing discrimination in employment against qualifying medical marijuana patients, as explicit in the AMMA.[151] The court went on to dismiss the retaliation claim due to Whitmire's inability to produce sufficient evidence to meet pleading standards.[152]

Unfortunately, the critical analysis in *Noffsinger* and *Whitmire* is based on the explicit statutory language in their respective medical marijuana statutes that extends to employment discrimination on the basis of medical marijuana use, rather than medical marijuana itself being a judicially recognized form of medical treatment. This means that unless a state's legislature had the foresight to include employment protections in their medical marijuana statutes, employment protections are still unavailable to medical marijuana patients for adverse employment decisions on the basis of their medical marijuana use. Further, this means that medical marijuana patients are receiving unequal protections across the several states, which would allow employers to unfairly forum shop when attempting to uphold an adverse employment decision against a medical marijuana patient. Moreover, the fact that these states' statutes are in conflict with several federal laws (i.e., ADA, CSA) means they are constantly at risk of being overturned in an appellate court. And, in addition, while Category 2 medical marijuana statutes provide an avenue for relief, not enough of these statutes exist in the United States to constitute widespread employment protections for medical marijuana patients.

Therefore, because medical marijuana patients are unable to seek judicial remedies in the majority of states, and because the ADA does not

148 *Id*. at 772.

149 *Id*. at 775–76.

150 *Id*. at 778.

151 *Id*. at 781.

152 *Id*. at 784–87.

provide an avenue for disability protections for these individuals, medical marijuana patients, in general, lack adequate legal remedies, when faced with adverse employment decisions on the basis of their medical marijuana use.

III. MEDICAL MARIJUANA PATIENTS OUGHT TO BE PROVIDED EMPLOYMENT PROTECTIONS

Medical marijuana patients should be afforded employment discrimination protections because (A) the medical conditions that qualify an individual for ADA protections and qualify an individual for medical marijuana are essentially the same, and, should therefore, be provided equal treatment; (B) treating employees differently based on what method of treatment they receive is unfair and discriminatory; and (C) medical marijuana use can easily be used as a form of proxy discrimination.[153]

A. Qualifying Conditions for Medical Marijuana Patients are Essentially the Same as the Qualifying Conditions for ADA Protections

As discussed, the conditions that qualify a person for medical marijuana programs vary by state.[154] On the one hand, the majority of conditions that qualify a person to use medical marijuana, would otherwise qualify a person as disabled, entitling them to protections under the ADA. On the other hand, the ADA's "illicit drug" exception strips ADA protections from medical marijuana patients.[155] As a disabled employee, who is also a medical marijuana patient, would be unable to seek a legal remedy for an adverse employment decision made against them on the basis of their medical marijuana use, which is seems unfair, and is surely discriminatory.

As aforementioned, the ADA enables a person with a qualifying disability to seek enforcement of reasonable protections and accommodations within the employment context.[156] The ADA does not specifically list the qualifying disabilities, but rather outlines three-factors

[153] Employees are entitled to a discrimination free workplace pursuant to 42 U.S.C. § 2000e02(a)(1). *See* Krasner v. HSH Nordbank AG, 680 F. Supp. 2d 502, 513 (S.D.N.Y. 2010).

[154] *See generally List of Qualifying Health Conditions For Medical Marijuana in Each State*, COMPASSIONATE CERTIFICATION CTRS. (2017), https://www.compassionatecertificationcenters.com/news/list-of-qualifying-health-conditions-for-medical-marijuana-in-each-state/.

[155] 42 U.S.C. § 12114 (2008).

[156] 42 U.S.C. §§ 12101 *et seq*. (2008).

that determine whether a condition constitutes a disability.[157] Often, courts will determine whether these factors are satisfied when a case is brought under the ADA.[158] Therefore, when a medical marijuana patient brings a case under the ADA, the relevant inquiry should be two-fold: whether the medical marijuana patient has a condition that qualifies them as disabled under the ADA, and whether they faced employment discrimination on the basis of that condition or treatment for that condition. If they did, they should be entitled to legal remedies or enforcement.

Unfortunately, when a medical marijuana patient brings suit under the ADA, the courts have focused their inquiry on the employee's use of medical marijuana, rather than the discrimination against the employee. This focus is caused by the illicit drug exception to the ADA, alongside the federal prohibition of marijuana and inconclusive state law. This, inappropriately, takes the attention away from the injured plaintiff as a disabled employee and places it on the injured plaintiff as a marijuana user. This forces courts into a position where they cannot preempt federal law, nor provide a remedy for these plaintiffs. As seen throughout this Note, this is illogical from a legal perspective because the majority of conditions that qualify a person for medical marijuana also qualify a person for disability protections under the ADA.

The National Library of Medicine and the National Institute of Health keep extensive, but not exhaustive, records on the conditions for which states have permitted the use of medical marijuana.[159] Of these conditions, the most common are: Alzheimer's disease, HIV/AIDS, amyotrophic lateral sclerosis, cancer, inflammatory bowel disease/Crohn's disease, glaucoma, multiple sclerosis, Parkinson's disease, post-traumatic stress disorder, cachexia, anorexia, wasting syndrome, severe or chronic pain, seizure disorders, and skeletal muscle spasticity.[160] While, arguably, all of these conditions should qualify a person for disability protections, nine of the fifteen conditions have been explicitly recognized as ADA-protected disabilities through jurisprudence.[161] Therefore, individuals with any one of

[157] The "disability" means, with respect to an individual (A) a physics or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; (C) being regarded as having such an impairment. 42 U.S.C. § 12102 (2008).

[158] *See* e.g., Bragdon v. Abbott, 524 U.S. 624, 625–26 (1998); Mercado Rivera v. Loctite P.R., Inc., 222 F. Supp. 2d 136, 139 (D.P.R. 2002).

[159] *See* Bridgeman & Abazia, *supra* note 12.

[160] *See* Bridgeman & Abazia, *supra* note 12.

[161] Creasy v. Rusk, 730 N.E.2d 659, 669 (Ind. 2000) (considering Alzheimer's disease to be a disability); *Bragdon*, 524 U.S. at 625–26 (holding the HIV/AIDS is a disability under the ADA); Bowers v. Shinseki, 26 Vet. App. 201 (2013) *aff'd*, 748 F.3d 1351 (Fed. Cir. 2014) (considering Amyotrophic Lateral Sclerosis a disability); Treiber v. Lindbergh Sch. Dist., 199 F. Supp. 2d 949, 959–63 (E.D. Mo.

these nine conditions should be granted employment protections under the ADA, regardless of whether they use medical marijuana as a treatment therapy.

However, under the current law, medical marijuana patients are not permitted ADA protections for their medical marijuana use. So why are medical marijuana patients treated differently? Medical marijuana patients are treated differently primarily because the law has not been amended to account for recent developments in medicine. At the present time, the ADA largely represents the belief that any and all marijuana use is harmful and perceived to be potential problem both inside and outside the workplace.[162]

Recent developments in medicine have shown that medical marijuana can be beneficial to individuals suffering from a variety of conditions and be one of the only alleviating factors for disabilities that may otherwise prohibit a disabled person from working. For example, medical marijuana has shown to be effective when used to treat neuropathic pain, fibromyalgia, arthritis, and mixed chronic pain.[163] Further, medical marijuana use has been found to be just as successful as standard antiemetics in its treatment of chemotherapy-related symptoms.[164] Moreover, medical marijuana has shown to be a viable alternative to traditional medications in relation to neurological conditions (such as epilepsy and multiple-sclerosis).[165] Finally, in 2016, the American Academy of Neurology went as far as issuing a formal statement saying that oral cannabis[166] extracts are an effective way of reducing spasticity, central pain,

2002) (even though the plaintiff's breast cancer surgery was not entitled to ADA protections, Cancer generally is subject to disability discrimination protections under the ADA); *Mercado Rivera*, 222 F. Supp. 2d at 139 (holding that employee's diagnosis of multiple sclerosis constituted a "disability" under the ADA); Wilson v. Phoenix Specialty Mfg. Co, 513 F.3d 378, 385 (4th Cir. 2008) (holding that a person with Parkinson's disease was considered disabled under the ADA) (abrogated on other grounds by Young v. United Parcel Service); U.S. Equal Emp. Opportunity Comm'n v. Rite Aid Corp., 750 F. Supp. 2d 564, 570–71 (D. Md. 2010) (holding that epilepsy was a disability under the ADA); Garcia-Hicks v. Vocational Rehab. Admin., 148 F. Supp. 3d 157, 163–68 (D.P.R. 2015) (considering chronic pain to be a disability under the ADA if it is sufficiently limiting); Sjostrand v. Ohio State University, 750 F.3d 596, 598–99 (6th Cir. 2014) (holding Crohn's Disease to be a disability under the ADA). *Contra*, Blanchard v. Tuland Medical Center Hospital and Clinic, No. CIV. A. 95-0683, 1996 WL 709420 (E.D. La. 1996) (holding that glaucoma alone did not qualify an employee as disabled under ADA); Johnston v. Henderson, 144 F. Supp. 2d 1341, 1349 (S.D. Fla. 2001) (holding that post-traumatic stress disorder alone is not a disability under the ADA); Frank v. United Airlines, Inc., 216 F.3d 845, 857 (9th Cir. 2000) (holding that eating disorders alone do not amount to a disability).

[162] *See* Lempert, supra at 40.

[163] See Bridgeman & Abazia, *supra* note 12.

[164] *Id*.

[165] *Id*.

[166] Cannabis and marijuana are synonymous terms.

and painful spasms in multiple-sclerosis patients.[167] Thus, under a current medical understanding, it is wrong to say that marijuana has no medical use.

The ADA was written to afford people with disabilities the "right to fully participate in all aspects of society."[168] Thus, when a disabled employee is able to re-enter the workforce because they were able to use medical marijuana at home, they are enacting the very purpose of the ADA. The condition that the employee faces does not change whether they are attempting to qualify for medical marijuana or the ADA—disability is disability. Thus, the practice of refusing ADA protections to disabled employees because they are medical marijuana patients creates a separate class of disabled persons, one that is treated differently on the sole basis of being a member of this class. While being a medical marijuana patient does not trigger equal rights protections under the Fourteenth Amendment, i.e., medical marijuana use does not create a constitutionally protected class, it does present the important and challenging issue of equality and fairness under the color of law.[169] As stated throughout this Note, similarly situated individuals are treated differently based on their medical marijuana use alone.

Therefore, as suggested, the science and practice regarding medical marijuana use does not justify the ADA's "illicit drug" exception. Among other things, such an exception further discriminates within the employment context. The result of current ADA practice: failure to a large number of disabled persons "[to] provid[e] 'a clear and comprehensive national mandate for the elimination of discrimination.'"[170] Since, certain conditions that qualify an employee for medical marijuana are clearly within ADA protections, employees who qualify for both ADA protections and medical marijuana, should, at a minimum, be permitted ADA protections.

B. Treating Employees Differently Based On What Method Of Treatment They Receive Is Unfair And Discriminatory

As discussed above, when a medical marijuana patient brings suit under the ADA, the courts have focused their inquiry on the employee's use of medical marijuana, rather than discrimination against the employee, which places the focus on the injured plaintiff as a marijuana user, rather

---

[167] Koppel et al., *Efficacy and safety of the therapeutic use of medical marijuana in selected neurologic disorders*, 82 Neurology 1556 (2014) https://n.neurology.org/content/neurology/82/17/1556.full.pdf.

[168] 42 U.S.C. §§ 12101 et seq.

[169] U.S. CONST. amend. XIV, § 1.

[170] 42 U.S.C. §§ 12101 et seq.

than as a victim of employment discrimination. An employee's choice of medical treatment should not determine whether they are protected from discrimination.

Individuals who qualify as disabled under ADA jurisprudence are excluded from protections because they use medical marijuana as a treatment therapy. In practice, this means a disabled employee who uses pharmaceutical-based treatments are entitled to employment protections, while a disabled employee who uses medical marijuana-based treatment, is not. Such a distinction would not be unlike, for example, disciplining, discharging, or refusing to hire an employee because they received chemotherapy instead of radiation for cancer treatment. And is, similarly, unfair. If an employee is discriminated against based on their choice of treatment, they are essentially being discriminated against based on their condition requiring the treatment, since the treatment would be unnecessary without the condition. Thus, the choice of one treatment method over another should not entitle a person with disabilities to greater or fewer privileges in the eyes of the law.

C. Continuing to Permit Employers to Make Employment Decisions on the Basis of Medical Marijuana Use Risks Proxy Discrimination

Medical marijuana use can be used as a proxy for other discrimination. In employment law, proxy discrimination is a form of discrimination where an employer enacts a law, rule, or policy that treats individuals differently on the basis of a seemingly neutral criteria that implicates a disadvantaged, marginalized, or unprivileged group, such that discrimination on the basis of such criteria is, constructively, discrimination against the group.[171] In other words, a proxy is a type of condition that is used to legally justify disciplining, discharging, or refusing to hire an employee on the basis of a reasonably permitted condition.[172] For example, if an employer created a workplace rule that no individual could have gray hair, it would permit the employer to discipline, discharge, or refuse to hire an employee superficially because of an employee's gray hair, when, in reality, they are using gray hair as a proxy for age discrimination.[173]

---

[171] *See* Schmitt v. Kaiser Found. Health Plan, 965 F.3d 945, 958 (9th Cir. 2020).

[172] Horizon House Developmental Servs, Inc. v. Twp. of Upper Southampton, 804 F. Supp. 683, 694 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993) (describing what a proxy is in relation to employment discrimination).

[173] Cmty. Servs., Inc. v. Wind Gap Mun. Auth., 421 F.3d 170 (3d Cir. 2005) (holding a policy that prohibited gray hair in the workplace to be a proxy for age-based discrimination).

In the medical marijuana context, the lack of available protections[174] could be utilized by employers as a proxy for discriminating on the basis of disability, as well as superficial justification for disciplining, discharging, or refusing to hire medical marijuana patients as employees. For example, an employer may decide to terminate an employee who has cancer, and is a medical marijuana patient, on the basis of their medical marijuana use, when in actuality the employer terminated the employee to reduce health insurance costs for the company. Under state and federal law, the employee would be entitled to disability protections for being terminated for having cancer,[175] but would subsequently not be entitled to protection for being terminated for their medical marijuana use. Since a number of conditions that qualify a patient for medical marijuana use also qualify a person for disability protections, the continued ability for employers to discipline, discharge, or refuse to hire employees on the basis of medical marijuana use further permits employers to discriminate on the basis of disability, through the proxy condition of medical marijuana use.

D. Proposed Amendments to Protect Medical Marijuana Patients

One way to afford protections to medical marijuana patients would be by amending the ADA to either remove medical marijuana from its definition of illicit drugs, or remove the illicit drug exception altogether. However, enforcement of this concept[176] may be challenging since the conditions that qualify an employee for medical marijuana are more expansive than conditions that qualify an employee for ADA protections, meaning an employer would be forced to police employees' conditional status and method of treatment to determine whether they are entitled to ADA protections and whether they decide to medicate with marijuana. Practically, this would place too much responsibility on the employers' ability to understand disability protections and medical marijuana law, and would encourage employer intrusion into employee lives.

So, in the alternative, Category 1 states should amend their medical marijuana laws to incorporate anti-discrimination provisions, as Category 2 states do. By doing this, it would reduce the responsibility of employers to determining whether an employee is considered disabled under the ADA and remove the inquiry into their method of treatment. This would also

---

[174] See Note, *supra* section II.

[175] *See Trieber*, 199 F. Supp. 2d at 959–63 (even though the plaintiff's breast cancer surgery was not entitled to ADA protections, Cancer generally is subject to disability discrimination protections under the ADA).

[176] Allowing ADA protections for employees who are medical marijuana patients, only when they qualify for both the ADA and medical marijuana.

render marijuana use as a proxy, moot, because an employer would no longer be able to discipline, discharge, or refuse to hire an employee on the basis of medical marijuana use alone, or they would risk ADA enforcement. Moreover, this would re-focus the issue onto disability and discrimination, and reduce the focus on the method of treatment an employee receives.

IV. DRUG TESTING PROCEDURES SHOULD BE AMENDED TO ACCOUNT FOR MEDICAL MARIJUANA PATIENTS

A. Drug Testing Procedures Should Account for Medical Marijuana Patients

Since federal and state law do not provide reactive solutions to employment discrimination for medical marijuana patients in general, drug testing procedures should be amended to provide a proactive solution for medical marijuana patients. Drug testing procedures should be amended to avoid employers discovering employee medical marijuana use by redacting marijuana from the reports' employers receive from drug testing facilities. This would provide some level of protection to medical marijuana patients because employment-related drug testing is the predominant way employers discover employee medical marijuana use, as discussed above. Thus, a change to drug testing procedures would reduce the chance of an employer having the knowledge of employee medical marijuana use and subsequently disciplining, discharging, or refusing to hire an employee on this basis.

B. Proposed Amendments to Drug Testing Procedures

Drug testing procedures should be amended to incorporate the varying levels of marijuana legality on a state-by-state basis. Therefore, I propose that third-party drug testing facilities should adopt the following three-tier system to determine whether they disclose marijuana present in an employee's system to a private employer.

Tier I: States where medical marijuana and recreational marijuana are illegal.[177]

Tier II: States where medical marijuana is legal, but recreational marijuana is illegal.[178]

[177] As of November 4, 2020: Alabama, Idaho, Kansas, Nebraska, North Carolina, South Carolina, Tennessee, Wyoming. *Map of Marijuana Legality by State*, DISA (Nov. 4, 2020), https://disa.com/map-of-marijuana-legality-by-state.

[178] As of November 4, 2020: Arkansas, Connecticut, Delaware, Florida, Georgia, Hawaii, Indiana, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, Virginia, West Virginia, Wisconsin. *Id*.

Tier III: States where medical marijuana and recreational marijuana are legal.[179]

Under this system, Tier I states would be unaffected by changes in marijuana drug testing procedure. A current or potential employee who tests positive for marijuana in their drug screen would have this positive test result passed on to their employer. It is then entirely under the employer's discretion to discharge, discipline, or refuse to hire an employee based on a positive marijuana drug test result. While this outcome juxtaposes the direction of this Note, it is necessary to recognize that states that do not have medical marijuana laws of any kind present an exceptional challenge to discrimination claims for medical marijuana use since the basis for a discrimination claim must come from a legally viable option for remediation.[180] Under these facts, state law, in addition to federal law, would prohibit the use of medical marijuana for disabled persons.

Changes to Tier II states would carry the greatest impact on medical marijuana patients because amendments to drug testing procedure would make the difference between an employer being made aware of an employee's medical marijuana use and an employer assuming non-use.[181] In Tier II states, when a current or potential employee who is a medical marijuana patient engages in third-party drug testing, they will disclose medical marijuana use alongside all other legal drugs they are taking. Thus, when the test administrator cross-checks the lab technician's report of positive substance findings with the employee's disclosure, if marijuana is found in the employee's system, the report will have marijuana redacted from it since the employee is, under state law, legally permitted to consumer it. By doing this, the employer will not be made aware of the employee's medical marijuana use and, so long as no other illegal substances were discovered on the drug test, the employer will be notified that the employee passed the drug test. This differs from the current system, which does not recognize medical marijuana as a legal substance, and, thus would not redact it from an employee's report.

Tier III states would operate similarly to Tier II states. However, with recreational legalization of marijuana in Tier III states, employers would have a wider level of discretion when considering marijuana use by

[179] As of November 4, 2020: Alaska, Arizona, California, Colorado, District of Columbia, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, Oregon, South Dakota, Vermont, Washington. *Id.*

[180] This is because an employee must have standing to sue to be able to seek relief for a disability claim. One of the requirements for standing is that the injury could be redressed by a favorable judicial decision. Sierra Club v. U.S. Dep't of the Interior, 899 F.3d 260 (4th Cir. 2018).

[181] An employer must assume that a new employee does not use illicit substances without evidence.

employees outside of the workplace. Procedurally, in Tier III states, when a current or potential employee who is a medical marijuana patient engages in third-party drug testing, they will disclose medical marijuana use alongside all other legal drugs they are taking. Thus, when the test administrator cross-checks the lab technician's report of positive substance findings with the employee's disclosure, if marijuana is found in the employee's system, the report will have marijuana redacted from it since the employee is, under state law, legally permitted to consumer it. Thus, in the same manner as Tier II states, the employer would not be made aware of an employee's medical marijuana use.

The difference in Tier III states arises with recreational marijuana users who are not medical marijuana patients. Thus, when a current or potential employee who is a recreational marijuana user engages in third-party drug testing, they may disclose their use of marijuana to the test administrator, but this disclosure does not necessarily preclude the test administrator from disclosing the marijuana use to the employer. It is then the duty of the third-party facility to determine a policy that either discloses or redacts knowledge of employee marijuana use, and then communicates this policy to its clients (employers) who wish to use the service. Under these facts, both the testing administrator and the employer are granted significantly more discretion in regard to their actions pertaining to employees who are recreational marijuana users.[182]

While this three-tier solution does not address all of the issues presented to medical marijuana patients in the employment context, and certainly does not remedy the issue of federal illegality, it does proactively alleviate some of the harms associated with employment discrimination medical marijuana patients face. Further, this solution begins proactively normalizing both the use of medical marijuana and medical marijuana patients under the same standard of care afforded to patients who use pharmaceuticals. Moreover, this proposed system would provide clarity to both employers and employees with regards to medical marijuana use and would encourage employers to reevaluate and preemptively determine their position towards marijuana users – a further step towards proactively addressing issues faced by medical marijuana patients.

[182] Recreational marijuana use does not present the same arguments as medical marijuana use for protections from discrimination. Because recreational marijuana use does not make an employee a member of a protected class, whereas medical marijuana use arguably covers classes protected by disability doctrine. Thus, there is no *prima facie* case for discrimination that an employee could bring against an employer for discipline, discharge, or refusal to hire based on a positive recreational marijuana drug test.

VI. CONCLUSION

In conclusion, federal and state laws do not provide for adequate and widespread protections for medical marijuana patients against employment discrimination. This lack of protection has created significant problems for medical marijuana patients as employees, and further complicates the employer/employee relationship in states with medical marijuana laws. There are several avenues that would provide medical marijuana patients with employment protections. First, removing marijuana from the list of controlled substances would provide medical marijuana patients an avenue for federal employment protections under the ADA. Second, states' amending either their employment laws or medical marijuana laws to account for medical marijuana patients would provide for state protections. And third, third-party drug testing facilities amending their reporting procedures to prohibit facilities from informing employers of employee medical marijuana use would provide for local protection. Any one of these options would have saved Joseph Casias from unemployment, and many of these avenues will be required in the coming years as medical marijuana use becomes more prevalent. It is now up to us, the people of the United States, to demand federal, state, and local governments end the search for employment protections for medical marijuana patients.