

Saint Louis University Journal of Health Law & Policy

Volume 12

Issue 2 *Would the ADA Pass Today?: Historical and Political Perspectives on the Americans with Disabilities Act*

Article 9

2019

Medical Marijuana and the ADA: Following the Path Blazed by State Courts to Extend Protection

Stephen M. Scannell
steve.scannell@slu.edu

Follow this and additional works at: <https://scholarship.law.slu.edu/jhlp>

 Part of the [Health Law and Policy Commons](#)

Recommended Citation

Stephen M. Scannell, *Medical Marijuana and the ADA: Following the Path Blazed by State Courts to Extend Protection*, 12 St. Louis U. J. Health L. & Pol'y (2019).

Available at: <https://scholarship.law.slu.edu/jhlp/vol12/iss2/9>

This Student Comment is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Journal of Health Law & Policy by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

**MEDICAL MARIJUANA AND THE ADA: FOLLOWING THE PATH
BLAZED BY STATE COURTS TO EXTEND PROTECTION**

ABSTRACT

Thirty-three states across the country have legalized the use of medical marijuana for disabled individuals. Nevertheless, medical marijuana's status in the workplace still faces significant uncertainty, because the current understanding of the Americans with Disabilities Act (ADA) categorizes medical marijuana use as an "illegal use of drugs." Thus, the ADA provides no protection for disabled employees seeking to treat their condition with medical marijuana. In recent years, courts deciding cases involving state medical marijuana and anti-discrimination statutes have brought a more patient-centered and pragmatic approach to the issue. These courts have offered an interpretation of the "illegal use of drugs" provision of the ADA that is both practical and in line with the purpose of the ADA: to protect discrimination against disabled individuals. This approach centers on the idea that the ADA was never intended to regulate drug use outside the workplace, nor was it intended to exclude from protection those individuals using drugs under supervision of licensed professionals. This Comment argues this approach should be adopted by the Equal Employment Opportunity Commission (EEOC), and that employee use of medical marijuana should be protected and treated in the same way as other medications with significant side effects.

I. INTRODUCTION

In 1996, California became the first state to legalize medical marijuana with fifty-five percent of the electorate in favor.¹ In 2018, Missouri became the thirty-third state to legalize medical marijuana, and it did so with sixty-six percent of voters behind it.² Clearly, public opinion about the use of medical marijuana is changing. Despite this, marijuana remains a Schedule I substance under the Controlled Substances Act (CSA), making its use illegal under federal law.³ This has created a disjunction between federal policy and societal reality. This disjunction surfaces when employers rely on federal drug policy to summarily discharge workers who legally use medical marijuana under state law. Current polls show as many as 94 percent of Americans support the legalization of medical marijuana,⁴ and there are 2.5 million registered patients. However, courts have been slow to grant protection to the 2.5 million registered patients that have taken their claims to court.⁵ One of those patients was Cristina Barbuto.

In the summer of 2014, Ms. Barbuto was contacted by a recruiter from Advantaged Sales and Marketing (ASM) regarding a job opportunity with the company.⁶ After interviewing and accepting the job offer, Ms. Barbuto was notified of her need to take a mandatory drug test.⁷ Ms. Barbuto immediately informed the company that she would test positive for marijuana.⁸ She explained that she had Crohn's disease and irritable bowel syndrome, and that under the care of her physician, she treated her disability by using medical marijuana two to three times a week.⁹ Ms. Barbuto never used marijuana at work and did not consume marijuana before work.¹⁰ Her supervisor informed her that the medicinal use of marijuana "should not be a problem," and later that day he even

1. *State Medical Marijuana Laws*, NAT'L CONF. STATE LEG. (Mar. 5, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

2. Andy Marso, *Missouri Voters Approve Medical Marijuana with a Constitutional Amendment*, KAN. CITY STAR (Nov. 7, 2018), <https://www.kansascity.com/news/politics-government/election/article221150305.html>; Sarah Rense, *Here Are All the States That Have Legalized Weed in the U.S.*, ESQUIRE (Nov. 7, 2018), <https://www.esquire.com/lifestyle/a21719186/all-states-that-legalized-weed-in-us/>.

3. 21 U.S.C. § 812(c)(1)(c)(10) (2012).

4. Press Release, Quinnipiac Univ. Poll, U.S. Voter Support for Marijuana Hits New High; Quinnipiac University National Poll Finds; 76 Percent Say Their Finances are Excellent or Good (Apr. 20, 2017), <https://poll.qu.edu/nationna/release-detail?ReleaseID=2453>.

5. *Medical Marijuana Patient Numbers*, MARIJUANA POL'Y PROJECT (2018), <https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/medical-marijuana-patient-numbers/>.

6. *Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37, 41 (Mass. 2017).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

called Ms. Barbuto to confirm her use would not be problematic.¹¹ Following the drug test, Ms. Barbuto attended training and was assigned a work location.¹² After completing her first day of work, she went home excited about this new opportunity.¹³ That evening, she received a call from ASM's Human Resources representative informing her that the company was terminating her for testing positive for marijuana, with the purported rationale being "we follow federal law, not state law."¹⁴

Nearly three years after these events took place, the Massachusetts Supreme Judicial Court found in Ms. Barbuto's favor, rejecting the employer's argument that medical marijuana is not a reasonable accommodation under state anti-discrimination law because marijuana is illegal under federal law.¹⁵ The court reasoned that finding the requested accommodation of allowing continued employment despite failing the drug test to be unreasonable per se based on federal law "would not be respectful of Massachusetts voters, shared by the legislatures or voters in the vast majority of States, that marijuana has an accepted medical use for some patients' suffering from a variety of disabilities."¹⁶ The court also reasoned that because the employee bears the risk of prosecution, the employer cannot claim federal law prevents making an exception to his drug use policy for a person using medical marijuana.

This Comment will argue that the recent success Christina Barbuto had in claiming disability discrimination based on state anti-discrimination law can and should be applied to federal employment discrimination law—the Americans with Disabilities Act (ADA). As a primer, Part II will explain the current landscape of medical marijuana in the U.S. by laying out the federal policy rationale that has endured despite overwhelming public support. It will then explore how these conflicting policies create unique problems in the workplace, largely because of the inability of current drug testing methods to accurately determine marijuana impairment rather than use.

Part III will begin by outlining the ADA's protection of qualified individuals with a disability. It will then explain how medical marijuana has not been afforded protection under the ADA, because it is treated as an "illegal use of drugs" before providing policy-based and practical rationales for interpreting it differently. Part III will review and classify state medical marijuana and anti-discrimination statutes in to three categories based on statutory language regarding an employer's obligation to accommodate a disabled individual that has been prescribed medical marijuana. Finally, it will analyze the developing

11. *Barbuto*, 78 N.E.3d at 41.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 50–51.

16. *Barbuto*, 78 N.E.3d at 46.

case law in jurisdictions with the anti-discrimination provisions and compare the outcomes to earlier court decisions in states without these protections to demonstrate the importance of explicit and unambiguous statutory language granting or denying protection to patients in the employment context.

Part IV will argue that the rationale put forth recently by the courts that have favored plaintiff-employees should be applied to the ADA. These courts drew several conclusions about various sub-provisions of the ADA that contest crucial arguments for pre-emption of these state laws. Specifically, the courts concluded the ADA was never intended to exclude individuals using drugs under supervision of licensed professionals, nor is it intended to regulate employee drug use that is entirely outside the workplace. This interpretation is supported by a policy-based rationale that the ADA is not serving its purpose—to protect discrimination against individuals with disabilities in the workplace—by allowing federal drug policy law to dictate workplace dilemmas, and that it is erroneous to attempt to delineate discrimination based on an individual's disability from the treatment of their disability. Finally, it will provide a framework that argues medical marijuana should be treated the same as other prescription drugs with significant side effects.

II. PUBLIC SUPPORT, ARCHAIC POLICY, AND PRACTICAL REALITIES OF THE WORKPLACE

What was once considered the counter-culture has become the mainstream. In the vast majority of states, marijuana is legalized for medical use, recreational use, or both.¹⁷ Recent polls report that nearly sixty percent of the country supports legalization of *recreational* marijuana, and overwhelmingly, ninety-four percent of Americans favor legalization of medical marijuana.¹⁸ While state legislators and their citizens continue to push the issue forward, a few practical realities continue to stifle its progress. Employees are left to navigate a complicated system plagued by a combination of outdated federal regulation, ineffective drug testing methods, and a complete disregard of the reasons why these individuals are granted a prescription for medical marijuana in the first place.

A. *The Controlled Substances Act*

Despite the overwhelming support for medical marijuana, the CSA continues to criminalize the use of medical marijuana in the U.S. Congress enacted the CSA as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970¹⁹ and continues to enforce it today. The purpose of the CSA

17. *State Medical Marijuana Laws*, *supra* note 1.

18. Quinnipiac Univ. Poll., *supra* note 4.

19. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970); Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970).

is to regulate and facilitate the manufacture, distribution, and use of controlled substances for legitimate medical, scientific, research, and industrial purposes.²⁰ It is also designed to prevent these substances from being diverted for illegal purposes.²¹ CSA regulations classify various plants, drugs, and chemicals (such as narcotics, stimulants, depressants, hallucinogens, and anabolic steroids) into one of five different schedules. A substance's classification depends on its potential for abuse, accepted medical use, and safety in treatment.²²

Schedule I substances are deemed to have no medical utility and are only authorized in limited circumstances, while Schedules II, III, IV, and V have recognized medical uses and may be manufactured, distributed, and used in accordance with the CSA. The CSA classifies marijuana as a Schedule I drug, along with LSD and heroin, saying it has "a high potential for abuse, no currently accepted medical use, and a lack of accepted safety for use of the drug."²³ This classification is seemingly at odds with findings of many in the medical community, which has supported marijuana as a 'safe and effective' means of treating chronic pain.²⁴ Even at the time of the CSA's enactment, the Schedule I classification of marijuana was controversial because of the lack of research conducted to that point.²⁵ Marijuana was immediately scheduled, and unlike newly discovered drugs, it went without evaluation by the Food and Drug Administration (FDA) and Drug Enforcement Agency (DEA).²⁶ Even today, the government almost entirely refrains from funding research regarding the therapeutic benefits of marijuana. In fact, there is only one marijuana research facility granted by federal authority, and the research is used to study the negative effects of marijuana.²⁷

Marijuana scheduling has been contemplated a number of times since then, with the latest being in 2016.²⁸ These efforts began in 1972 when the National Organization for the Reform of Marijuana Laws petitioned to reclassify

20. See *Mission*, U.S. DRUG ENF'T ADMIN., <https://www.dea.gov/mission> (last visited Apr. 13, 2019) (setting forth the Drug Enforcement Administration's mission "to enforce the controlled substances laws and regulations of the United States").

21. See generally 21 U.S.C. § 801 (2012).

22. *Id.* § 812.

23. Tyler Duff, *Nip it in the Bud: Compassionate Use of Medical Cannabis Pilot Program Act Does Not Provide Employees a Legal Remedy for Adverse Action Based Upon Use in Compliance with the Statute*, 49 J. MARSHALL L. REV. 193, 196 (2015).

24. *Id.*

25. *Id.*

26. See Annaliese Smith, *Marijuana as a Schedule I Substance: Political Ploy or Accepted Science?*, 40 SANTA CLARA L. REV. 1137, 1137–38, 1148 (2000).

27. See *Marijuana Research*, UNIV. MISS., <https://pharmacy.olemiss.edu/marijuana/> (last visited Mar. 24, 2019).

28. See generally Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,688 (proposed Aug. 12, 2016).

marijuana to a Schedule II drug, so it could be legally prescribed by physicians.²⁹ Sixteen years later, Chief Administrative Judge Francis L. Young ruled in favor of reclassifying cannabis, stating:

[M]arijuana, in its natural form, is one of the safest therapeutically active substances known to man. By any measure of rational analysis marijuana can be safely used within a supervised routine of medical care. . . . It would be unreasonable, arbitrary and capricious for DEA to continue to stand between those sufferers and the benefits of this substance in light of the evidence in this record.³⁰

Judge Young's determination was overruled by the DEA administrator in 1989,³¹ and the numerous petitions since that time have been equally unavailing in persuading the agency to rethink its classification.³² Because of this classification, the CSA prohibits the manufacture, distribution, dispensation, and possession of marijuana even when a state authorizes its use to treat medical conditions.³³

How can the states legalize a Schedule I substance under the CSA? This question was answered by the Supreme Court in 2005 in the now well-known case of *Gonzales v. Raich*.³⁴ The case was brought by Angel Raich, an Oakland native who suffered from scoliosis, a brain tumor, chronic nausea, and other ailments.³⁵ Her physician recommended using marijuana to stimulate her appetite and obtain relief from severe pain.³⁶ Raich followed her doctor's advice, acting in a manner that was legal under California state law but illegal under federal law.³⁷ In 2002, she sought a declaratory judgment and injunctive relief to prevent the federal government from interfering with her medical treatment and prosecuting her under the CSA.³⁸ The Supreme Court held in favor of the Department of Justice, finding that federal law did not exceed congressional power under the Commerce Clause to criminalize the cultivation and possession of marijuana for medical use anywhere in the country.³⁹ The Supreme Court

29. Paul Armentano, *Time to Remove Marijuana from the Controlled Substances Act*, THE HILL (June 16, 2016), <https://thehill.com/blogs/pundits-blog/uncategorized/283710-time-to-remove-marijuana-from-the-controlled-substances-act>.

30. Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of Administrative Law Judge, In the Matter of Marijuana Rescheduling Petition, Dept. of Justice, Drug Enforcement Admin. No. 86-22 (Sept. 1988).

31. 54 Fed. Reg. 53767 (Dec. 29, 1989); *see also* Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1133 (D.C. Cir. 1994).

32. *See* *Gonzales v. Raich*, 545 U.S. 1, 15 (2005).

33. 21 U.S.C. § 841(a)(1) (2012).

34. *See generally* *Gonzales*, 545 U.S. at 1.

35. *Id.* at 6.

36. *Id.* at 7.

37. *Id.*

38. *Id.*

39. *Gonzales*, 545 U.S. at 7.

found the fact that California and eight other states had legalized marijuana did not affect federal law enforcement in any way.⁴⁰ While this opinion drastically widened congressional power under the Commerce Clause, more importantly for our purposes, the Court did not find that the CSA invalidated the contrary state law.

The purpose of this Comment is not to advocate for or against the legalization of medical marijuana. Instead, it will operate under the assumption that because medical marijuana use will likely continue to be legalized by states across the country, and because the *Gonzales* decision did not invalidate these statutes, the disjunction between federal and state law will continue generating questions about protections for disabled employees who use medical marijuana.

B. *Managing the Practical Realities of Drug Testing*

Another issue plaguing medical marijuana's status in the workplace is the prevalence of drug testing combined with its ineffectiveness at determining impairment. The ADA provides employers wide discretion in drug testing their employees. Because "tests for illegal drugs are not subject to the same restrictions as medical examinations," employers are permitted to test for the presence of marijuana.⁴¹

Fifty-six percent of U.S. employers require applicants to take a drug test prior to becoming an employee.⁴² Additionally, "[t]he annual cost to American companies for drug testing is about \$3,750,500,000."⁴³ Impairment is also extremely difficult to evaluate, largely because the most common method of drug testing, urinalysis, does not analyze the amount of tetrahydrocannabinol (THC) in a person's system.⁴⁴ THC is the active ingredient in marijuana that gives it the psychotherapeutic effects.⁴⁵ Instead, a drug test searches for the metabolites of THC. These metabolites are present in the body long after the effects of marijuana have worn off and can leave a person testing positive weeks after use.⁴⁶ Therefore, even those using medical marijuana occasionally to treat chronic pain will likely test positive for weeks after their last use.⁴⁷ To illustrate, imagine an epileptic who has a seizure on May 1st. In treating her, the physician

40. *Id.*

41. 42 U.S.C. § 12114(d)(1) (2012); Russell Rendall, Note, *Medical Marijuana and the ADA: Removing Barriers to Employment for Disabled Individuals*, 22 HEALTH MATRIX 315, 330–31 (2012).

42. Melissa Wylie, *Surprising Stats on Drugs in the Workplace*, PSYCHEMEDICS (Jan. 29, 2018), <https://www.psychemedics.com/blog/2018/01/surprising-stats-drugs-workplace/>.

43. *Id.*

44. Bradley M. Bakker, *Employers Need to Manage Medical Marijuana Issues*, 72 J. MO. B. 186, 188 (2016).

45. *Id.*

46. *Id.*

47. *Id.*

prescribes a cannabis-based oil, a legal substance under the state's law. Fortunately, after this treatment her symptoms subside, and she goes without a seizure for the next four weeks. On June 1st, her employer requires her to undergo a random drug test, the results of which test positive for cannabis despite having taken it only once and nearly a month prior. While this illustration may seem unrealistic, in reality it is a common occurrence. Christina Barbuto faced a similar situation, discussed in the introduction to this Comment. Ms. Barbuto used medical marijuana before bed and only two-to-three times a week. She was never impaired at work and never brought any of her medicine to work. Yet, her employer terminated her for a positive drug test showing use of marijuana. Ms. Barbuto is one of countless patients who fall victim to the inability of current drug testing methods to accurately gauge impairment rather than use.

III. FEDERAL AND STATE REGULATION OF MEDICAL MARIJUANA

A. *The Americans with Disabilities Act*

The ADA is a civil rights law that prohibits discrimination against individuals with disabilities.⁴⁸ The purpose of the ADA is to ensure “that people with disabilities have the same rights and opportunities as everyone else.”⁴⁹ Title I of the ADA prohibits private employers with fifteen or more employees from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.⁵⁰

1. Qualified Individual with a Disability

An individual may bring a claim under the ADA if he or she is a qualified individual with a disability. A qualified individual is one who—with or without reasonable accommodation—can perform the essential functions of the job in question.⁵¹ Under the ADA, disability is defined as “a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such impairment, or a person who is perceived by others as having such an impairment.”⁵² In 2008, the ADA was amended with the intent of redefining the term “major life activities” and making it clear that the definition of disability should be interpreted broadly.⁵³ Despite the

48. Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2012).

49. *What is the Americans with Disabilities Act (ADA)?*, ADA NAT'L NETWORK, <https://adata.org/learn-about-ada> (last visited Apr. 13, 2019).

50. *See* 42 U.S.C. § 12112 (2012).

51. *Id.* § 12111(8).

52. *Id.* § 12102(1).

53. ADA Amendments Act of 2008, 42 U.S.C. §§ 12101–12211 (2012). Accordingly, under the amendment “major life activities include, but are not limited to, caring for oneself, performing

amendments, disabled individuals who would otherwise clearly fall within the broadened definition of disability have been left without protection from the ADA due to treating their underlying disability with medical marijuana.

In the present context, medical marijuana users are not seeking to have their prescription drug use treated as a disability. These patients have underlying disabilities, which serve as the basis for their ADA claims. In order to be qualified for the use of medical marijuana, these individuals must have been found to have an underlying disability as defined by state law. For instance, in Florida, an individual may qualify if they have cancer, epilepsy, glaucoma, HIV/AIDS, post-traumatic stress disorder, or Parkinson's disease.⁵⁴ Thus, in reality, in any state with legal medical marijuana, it is impossible to gain patient status without an underlying disability. So, while some courts have implied otherwise, the ADA addresses drug use as disability and says nothing about drug use as treatment.

2. Exclusion of Individuals Engaging in the “Illegal Use of Drugs”

Despite the expansive definition of who is a “qualified individual with a disability,” an employee currently engaged in illegal use of drugs is not covered by the ADA when an employer takes adverse action on the basis of such *use*. The ADA defines “illegal use of drugs” as follows:

[T]he use of drugs, the possession or distribution of which is unlawful under the controlled substance act... such term does not include the use of a drug under supervision by a licensed health care professional, or other uses authorized by the Controlled Substance Act or other provisions of federal law.⁵⁵

For purposes of this Comment, the question becomes, does everything unlawful under the CSA constitute an illegal use of drugs under the ADA? Or can the ADA be interpreted to hold a narrower view of what constitutes an illegal use of drugs? Currently, the ADA “is silent as to whether current use of marijuana can be reasonable accommodation for a disability (other than drug addiction).”⁵⁶ To date, this issue has come up only a few times in federal court, as discussed below. While the cases that follow are unreported, they do provide some clarity as to medical marijuana's place in the ADA.

manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, readings, concentrating, thinking, communicating, and working.” *Id.* § 12102(2)(A). Further, “a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” *Id.* § 12102(2)(B).

54. FLA. STAT. § 381.986(2) (2017).

55. 42 U.S.C. § 12111(6)(A) (2012).

56. LINDSEY A. WHITE ET AL., STRATEGIC PERSPECTIVES – SMOKY LINES: WHETHER TO ACCOMMODATE EMPLOYEES' USE OF MEDICAL MARIJUANA MAY NOW DEPEND ON STATE LAW (Wolters Kluwer 2018).

Following the court's decision in *Gonzales v. Raich*, discussed in Part II, in *Barber v. Gonzales* James Barber filed a motion for reconsideration and motion for distinction from *Gonzales*.⁵⁷ Barber was evicted from university housing because of his marijuana use and argued his eviction was unlawful because his marijuana use was for medical reasons.⁵⁸ Barber argued that while the university's actions were arguably consistent with the CSA, the conduct was unlawful under the ADA.⁵⁹ His contention was that Congress intended to limit the application of the CSA to non-disabled individuals engaged in unlawful use of drugs, and thus the ADA was intended to protect individuals utilizing drugs for medical purposes.⁶⁰ The court acknowledged that at first glance, Barber's construction of the "illegal use of drugs" provision seemed to support a right under the ADA to possess medical marijuana prescribed by a licensed physician of Washington.⁶¹ Yet, the court construed the second sentence of the provision—"the term 'illegal use of drugs' does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law"—to require the use of the drug taken under the supervision of a licensed health care professional be consistent with the CSA.⁶² In denying the motions, the court found no claim can be made under the ADA when action is taken on the basis of his marijuana use because the term "individual with disability" does not include individuals engaged in illegal use of drugs.⁶³

While not an employment case, *James v. City of Costa Mesa* is also pertinent, because the district court denied an injunction based on its interpretation of the term "illegal use of drugs," a definition that also applies to the employment subchapter.⁶⁴ In *James*, several disabled individuals challenged ordinances of Costa Mesa and Lake Forest prohibiting the operation of medical marijuana dispensaries within their cities on grounds that it violated Title III of the ADA, which prohibits discrimination against disabled individuals in places of public accommodation.⁶⁵ The plaintiffs argued that their use of medical marijuana pursuant to the supervision of licensed healthcare professional was exempt from the ADA's exclusion of coverage for individuals engaging in the

57. *Barber v. Gonzales*, No. CV-05-0173-EFS, 2005 WL 1607189, at *1 (E.D. Wash. July 1, 2005).

58. However, Barber had previously been arrested for marijuana cultivation, and it is not completely clear whether he was actually a medical marijuana patient under supervision of a physician. *Id.* at *1-2.

59. *Id.* at *2.

60. *Id.*

61. *Id.*

62. *Barber*, 2005 WL 1607189, at *1 (emphasis omitted).

63. *Id.* at *2.

64. *James v. City of Costa Mesa*, 700 F.3d 394, 397 (9th Cir. 2012); see Kathleen Harvey, *Protecting Medical Marijuana Users in the Workplace*, 66 CASE W. RES. L. REV. 209, 210 (2015).

65. *James*, 700 F.3d at 397.

illegal use of drugs, because the provision created two exceptions, one for supervised drug use by a licensed health care professional and a second for drug use authorized by the CSA or other federal laws.⁶⁶ The court rejected this interpretation, instead adopting the cities' argument that the provision offered a single exception for "uses authorized by the CSA or other provisions of Federal law," and that the use of drugs under supervision of a licensed health care professional was intended to encompass the "CSA-authorized uses that involve professional supervision."⁶⁷ The court held that the language of "[the illegal use of drugs provision] lacks a plain meaning" and relying on an implicit relationship between the ADA and CSA found "the ADA does not protect against discrimination on the basis of marijuana use, even medical marijuana use supervised by a doctor in accordance with state law."⁶⁸ In other words, the ADA's definition of "illegal use of drugs" mirrors the CSA, and therefore, does not afford protection to disabled individuals using medical marijuana under a licensed health care professional's supervision.⁶⁹

3. Discrimination Based on Disability

A disabled person bringing an ADA claim must demonstrate that he was subjected to discrimination "on the basis of disability."⁷⁰ Employers who choose to take action against medical marijuana users deny that such action is the result of the employee's disability, but rather it is directed at that person's conduct.⁷¹ This creates the appearance that action is taken based on the employee's behavior, use of marijuana, and not the underlying disability.⁷² However, there is strong reason to believe that such adverse action is prohibited by the ADA and employees should be protected.

In the context of medical marijuana, discrimination usually involves an employer who knowingly does not provide a disabled employee a reasonable accommodation or denies employment to an individual who requires an accommodation.⁷³ Examples of reasonable accommodations can include: modifying work schedules, changing materials or policies, making facilities more accessible, and changing job responsibilities, among others.⁷⁴ Moreover, an employer's obligation to provide reasonable accommodation can be overcome when such an accommodation would create undue hardship on the business or if the employee poses a direct threat to the health and safety of the

66. *Id.* at 398.

67. *Id.*

68. *Id.* at 397–98.

69. *Id.* at 398.

70. 42 U.S.C. § 12112(a) (2012).

71. Rendall, *supra* note 41, at 329.

72. *Id.*

73. *Id.*

74. 42 U.S.C. § 12111(9) (2012).

work environment.⁷⁵ Undue hardship is defined as “an action requiring significant difficulty or expense.”⁷⁶ The ADA articulates a number of factors to be weighed in determining if it creates an undue hardship, including: (1) the nature and cost of the accommodation, (2) the financial commitment required to accommodate, (3) size of the business, (4) type and operations of the employer, and (5) the overall financial resources available to the employer.⁷⁷

In most cases, employers argue they would suffer undue hardship in providing the accommodation, and that making an exception to their policies for disabled employees using medical marijuana is inherently unreasonable due to its illegal status under the CSA. However, in analyzing the other factors, the proposed accommodation may be reasonable for many employers because (1) the cost is low and (2) the overall financial resources of the employer would not be affected.⁷⁸ These two factors will depend upon the type of job, “because the side effects of marijuana will have a different impact depending upon the workplace or job requirements.”⁷⁹ Further, “[a]bsent undue hardship, the ADA prohibits an employer from either refusing to accommodate or taking adverse action because of the need to accommodate an employee.”⁸⁰

Additionally, while an employer testing for marijuana is lawful under the ADA, if the results are used in a way that tends to “screen out” disabled persons, the employer is engaging in unlawful discrimination, absent a showing of business necessity.⁸¹ Business necessity is based on individualized circumstances, but it generally requires an employer to show that an employee cannot perform essential job functions or a showing that they pose a direct threat to the safety of the workplace.⁸² It should be recognized that in some cases, it may be appropriate to prohibit medical marijuana use, such as for bus drivers, pilots, or forklift operators.⁸³ However, in many cases, it is hard to imagine an employee not being able to perform the essential functions of a position, especially when the drug is not used at or before work, such as customer services roles where the work does not involve overseeing the safety of others and takes place in an office setting.⁸⁴ Further, accommodating qualified medical marijuana patients, even under the ADA, would not require an employer to entirely discard the discriminatory policy. Such a policy can still be enforced against all other

75. *Id.* § 12112(b)(5)(A).

76. *Id.* § 12111(10)(A).

77. *Id.* § 12111(10)(B).

78. Rendall, *supra* note 41, at 330.

79. *Id.*

80. *Id.*

81. *Id.* at 331.

82. 42 U.S.C. § 12112(b) (2012).

83. *Bates v. Dura Auto. Sys., Inc.*, 650 F. Supp. 2d 754, 758 (M.D. Tenn. 2009), *rev'd in part*, 625 F.3d 283 (6th Cir. 2010).

84. *Id.* at 770.

employees; an exception only needs to be made for the disabled employee. Thus, even if it is established that medical marijuana is not an illegal use of drugs, recreational use remains illegal and employers are entitled to test for it.

B. *Legal Protections Under State Law*

While disabled medical marijuana patients have found little success thus far in gaining protection through the ADA, states have been making their own means of determining how qualifying patients should be treated in the workplace through medical marijuana and anti-discrimination statutes. This section will classify the thirty-four jurisdictions that have legalized medical marijuana based on statutory language addressing the employer's obligation to accommodate an employee who uses medical marijuana. It will then analyze the developing case law in these jurisdictions, which demonstrates the importance of definitive, explicit statutory language granting or denying protection to patients in the employment context.

Thirty-four jurisdictions have taken different approaches in medical marijuana use in their anti-discrimination statutes. The main difference this section highlights is how the laws address the obligation to accommodate employee use of medical marijuana. These jurisdictions fall in to one of three primary categories:⁸⁵ (1) explicitly requiring an employer to make a reasonable accommodation of medical marijuana users, (2) silent as to accommodations, but do allow employers to prohibit employee use in the workplace or impairment on work premises, and (3) explicitly do not require employers to provide accommodations on work premises or during work hours.

1. *Explicit Requirement to Make Reasonable Accommodation*

Of the thirty-four jurisdictions with legal medical marijuana, Nevada is the sole jurisdiction that explicitly requires an employer to attempt to make a reasonable accommodation of medical marijuana use for employees holding a "valid registry identification card."⁸⁶ However, this requirement can be overcome if the accommodation would (1) "pose a threat of harm or danger to persons or property," (2) impose an undue hardship on the employer," or (3) "prohibit the employee from fulfilling any and all of his or her job responsibilities."⁸⁷

85. Utah was left out of this. Although the Utah Medical Cannabis Act states that it "provides certain state employment discrimination protection for an individual who lawfully uses medical cannabis" the implications for employers are not clearly stated in the law as it currently exists. *See* H.B. 3001, 62d Leg., 3d Spec. Sess. (Utah 2018).

86. NEV. REV. STAT. § 453A.800 (2017).

87. *Id.*

2. Silence is Golden

The next group of jurisdictions are silent as to accommodations but do allow employers to prohibit the use of marijuana in the workplace and/or allow employers to prohibit employees being under the influence at work. These include Arizona,⁸⁸ Arkansas,⁸⁹ Connecticut,⁹⁰ Delaware,⁹¹ the District of Columbia,⁹² Hawaii,⁹³ Illinois,⁹⁴ Maryland,⁹⁵ Minnesota,⁹⁶ New York,⁹⁷ North Dakota,⁹⁸ and Oklahoma.⁹⁹ Thus, the duty to accommodate in these states is fairly uncertain. For instance, Illinois prohibits discrimination against an employee based “solely for his or her status as a registered qualifying patient.”¹⁰⁰ Notably, the Illinois statute does not prevent discrimination for actual medical marijuana use, but rather it only protects employees from discrimination due to their status as a qualifying patient¹⁰¹—suggesting that positive drug tests under existing substance abuse policies could still permit termination. Connecticut and Rhode Island’s protections are worded similarly. An employee’s request for accommodation can still be derailed on grounds of undue hardship, direct threat, or reasonability¹⁰²—much in the same way the ADA is designed. Further, distinct from the language of the Nevada statute, this category of jurisdictions includes language about impairment. Under statutes that use the term “impairment,” an employer may be permitted to fire an employee that simply shows the physical signs of impairment (like smell or red eyes) without having to show that the employee’s marijuana use poses some threat to the workplace. For example, Illinois’ definition of impairment includes “specific, articulable symptoms while working that decrease or lessen [the employee’s] performance . . . including symptoms of the employee’s speech, physical dexterity, agility,

88. ARIZ. REV. STAT. ANN. § 36-2813(B) (2010).

89. ARK. CONST. amend. 98, § 3(f)(3)(A)-(C) (LexisNexis 2018).

90. CONN. GEN. STAT. § 21a-408p(b)(3) (2012).

91. DEL. CODE ANN. tit. 16, § 4907A(a)(3), (b) (2011).

92. D.C. CODE § 7-1671.03(d)(1) (2017).

93. HAW. REV. STAT. § 329-122(e)(1)-(2) (2015).

94. 410 ILL. COMP. STAT. 130/50 (2014).

95. MD. CODE ANN., Health-Gen. § 13-3313(a) (LexisNexis 2018) (Implications for employers are not clearly stated, although the statute says that qualifying patients may not be subject to any civil or administrative penalty, including disciplinary action by a professional licensing board, or “be denied any right or privilege” for the medical use of or possession of medical cannabis).

96. MINN. STAT. § 152.32(3)(c)(2) (2018).

97. N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2018).

98. N.D. CENT. CODE ANN. § 19-24.1-34.2 (West 2017).

99. OKLA. STAT. tit. 63, § 425(B) (2018).

100. 410 ILL. COMP. STAT. 130/40(a)(1) (2014).

101. *Id.* § 130/40(a)(2).

102. *See* CONN. GEN. STAT. § 21a-408p(b)(3) (2012); R. I. GEN. LAWS § 21-28.6-7(b)(2).

coordination, demeanor, irrational or unusual behavior.”¹⁰³ This broad language is extremely problematic, as it leaves employees at the will of their employer’s subjective judgments about their behavior. Coupled with the already ineffective methods of urinalysis drug testing determining use rather than impairment, it is easy to see how even these statutes leave patient-employees severely at risk.

3. Explicitly Not Required to Accommodate In the Workplace

The third group consists of Alaska,¹⁰⁴ California,¹⁰⁵ Colorado,¹⁰⁶ Florida,¹⁰⁷ Georgia,¹⁰⁸ Maine,¹⁰⁹ Massachusetts,¹¹⁰ Michigan,¹¹¹ Missouri,¹¹² Montana,¹¹³ New Hampshire,¹¹⁴ New Jersey,¹¹⁵ New Mexico,¹¹⁶ Ohio,¹¹⁷ Oregon,¹¹⁸ Pennsylvania,¹¹⁹ Rhode Island,¹²⁰ Vermont,¹²¹ Washington,¹²² and West Virginia.¹²³ The statutes in these states explicitly do not require an employer to accommodate during work hours or on work premises. Oregon’s Medical Marijuana Act, for instance, specifically provides that an employer has no duty to accommodate an employee who uses medical marijuana.¹²⁴ Outside of one recent case in Rhode Island, courts interpreting these ‘no accommodation’ statutes consistently held that because marijuana is a Schedule I drug under the

103. 410 ILL. COMP. STAT. 130/50(f) (2014).

104. ALASKA STAT. § 17.37.040(d)(1) (2018).

105. CAL. HEALTH & SAFETY CODE § 11362.785(a) (West 2017).

106. COLO. CONST. art. XVIII, § 14(10)(b).

107. FLA. STAT. § 381.986(15) (2018).

108. GA. CODE ANN. § 16-12-191(f) (2017).

109. ME. STAT. tit. 22, § 2426(2)(B) (2017).

110. MASS. GEN. LAWS ANN. ch. 369, § 6(D) (West 2012).

111. MICH. COMP. LAWS § 333.26427(c)(2) (2008).

112. MO. CONST. art. XVI, § 1(7)(d).

113. MONT. CODE ANN. § 50-46-320(4)(b) (2017).

114. N.H. REV. STAT. ANN. § 126-X:3(III)(c) (2016).

115. N.J. STAT. ANN. § 24:6I-14 (West 2019).

116. Although there are no specific authorizations to discharge or discipline employees for marijuana use on the job, the law specifies that criminal prosecution and civil penalty are authorized for marijuana possession or use in the workplace. N.M. STAT. ANN. § 26-2B-5.A. (2007); *see also* Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225, 1229 (D.N.M. 2016) (finding that an employer need not accommodate an employee’s use of medical marijuana).

117. OHIO REV. CODE ANN. § 3796.28(A)(1) (LexisNexis 2019).

118. OR. REV. STAT. § 475B.794 (2018).

119. 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2103 (West 2016).

120. 21 R.I. GEN. LAWS ANN. § 21-28.6-7 (West 2018).

121. Vermont’s statute is a criminal statute, but there is a carve out that individuals may be subject to arrest or prosecution for being under the influence of marijuana while in a workplace. VT. STAT. ANN. tit. 18, § 4474c(a)(1)(B) (West 2018).

122. WASH. REV. CODE ANN. § 69.51A.060(4) (West 2016).

123. W. VA. CODE ANN. § 16A-15-4(b)(2) (West 2017).

124. OR. REV. STAT. § 475B.794 (2018).

CSA and thus illegal under federal law, an employer has no duty to accommodate the marijuana-using employee under the ADA.¹²⁵

A number of jurisdictions also carve out a federal law exception including: Arizona,¹²⁶ Arkansas,¹²⁷ Delaware,¹²⁸ Illinois,¹²⁹ Maine,¹³⁰ Massachusetts,¹³¹ Minnesota,¹³² New York,¹³³ Ohio,¹³⁴ Oklahoma,¹³⁵ Pennsylvania,¹³⁶ and West Virginia.¹³⁷ This subcategory of jurisdictions allows an employer to argue that accommodating medical marijuana would be an undue hardship because doing so would cause the employer itself to violate federal law. These statutes typically provide that the state marijuana law does not require the employer to put a monetary or licensing benefit under existing federal law or regulation at risk.

In sum, statutes authorizing medical marijuana use for qualifying patients vary tremendously throughout the U.S. The importance of this language is evidenced by the court precedent developing in states with and without protections.

C. *State Court Decisions and the Importance of Anti-Discrimination Provisions*

Recent decisions in Connecticut and Massachusetts have set a new course for protecting employee use of medical marijuana by utilizing state anti-discrimination provisions. Even in the absence of such a provision, a Rhode Island trial court found in favor of the employee.¹³⁸ Precedent is starting to build toward the proposition that the CSA does not preempt the provisions when medical marijuana is used outside the workplace. These rulings provide a strikingly new approach that impacts employers, especially in states with laws that prohibit discrimination. To clarify the importance of these differences, this section will first examine recent court decisions stemming from states with laws

125. *See generally* Washburn v. Columbia Forest Prod., Inc., 134 P.3d 161 (Or. 2006); Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC, 742, 257 P.3d 586 (2011); Ross v. RagingWire Telecommunications, Inc., 174 P.3d 200 (2008).

126. ARIZ. REV. STAT. ANN. § 36-2813(B)(2) (2010).

127. ARK. CONST. amend. 98, § 3(f)(1) (2016).

128. DEL. CODE ANN. tit. 16, § 4905A(a)(2) (West 2011).

129. 410 ILL. COMP. STAT. ANN. 130/50 (West 2014).

130. ME. REV. STAT. ANN. tit. 22, § 2423-E(2) (2017); *see also* Bourgoin v. Twin Rivers Paper Co., 187 A.3d 10, 22 (Me. 2018) (finding that an employer was not required to pay for workers' compensation claimant's medical marijuana because that would conflict with federal law).

131. MASS. GEN. LAWS ANN. ch. 94C, § 1-7(F) (West 2013).

132. MINN. STAT. ANN. § 152.32(3)(c) (West 2014).

133. N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2018).

134. OHIO REV. CODE ANN. § 3796.28(A)(4) (West 2016).

135. OKLA. STAT. ANN. tit. 63, § 425(B) (West 2018).

136. 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2103(b)(3) (West 2016).

137. W. VA. CODE ANN. § 16A-15-4(b)(3) (West 2017).

138. ARK. CONST. of 1874, amend. 98, § 3(f)(1) (2016).

prohibiting discrimination, then analyze prior decisions of state court's in jurisdictions without laws explicitly prohibiting discrimination.

1. Accommodating Use Outside the Workplace

The first of these cases is *Callaghan v. Darlington Fabrics Corp.*, in which a Rhode Island trial court granted summary judgment to the plaintiff-employee who was denied hire as a paid intern after her disclosure that she had a medical marijuana card and would therefore fail the employer's drug test.¹³⁹ Notably, the employer's policy only prohibited the use of drugs on company property.¹⁴⁰ The plaintiff filed suit both under the Hawkins-Salter Act (which authorizes the use of medical marijuana) and the Rhode Island Civil Rights Act.¹⁴¹

First, the court rejected the employer's argument that the plaintiff was not refused hiring because of her status as a cardholder, but rather, because she failed the pre-employment drug test; the court found her status as a cardholder or as a user of medical marijuana was indistinguishable, because it is impossible to imagine protecting the cardholder status while believing "that a patient cardholder might never use medical marijuana."¹⁴² In addition, the statute states that a qualifying patient cardholder cannot be denied "any right or privilege . . . for the medical use of marijuana" and while employment is "not a right or privilege in the legal sense," the provision mandating that an employer may not refuse employment on the basis of her status as a cardholder is such a right.¹⁴³ Accordingly, the court concluded an employer who denies employment based on use of medical marijuana is, in effect, denying her for her status as a cardholder and therefore is in violation of the Hawkins-Slater Act.¹⁴⁴

Next, the court considered the second part of the Hawkins-Slater Act that states the use of medical marijuana need not be accommodated by an employer *in the workplace*. The court found the provision indicated "the general Assembly contemplated that the statute would, in some way, require employers to accommodate the medical use of marijuana outside the workplace."¹⁴⁵ In response to the employer's argument that they would be required to accommodate an employee who comes to work after staying up all night using medical marijuana, the court determined the Act did in fact not require such accommodation and that employers would not have to tolerate an employee coming to work under the influence.¹⁴⁶ Moreover, on the issue of a sufficient

139. *Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680, 2017 WL 2321181, at *3 (R.I. Super. May 23, 2017).

140. *Id.* at *21.

141. *Id.* at *3.

142. *Id.* at *8.

143. *Id.* at *5.

144. *Callaghan*, 2017 WL 2321181, at *14–15.

145. *Id.* at *7.

146. *Id.* at *9.

accommodation, the court found the employer's burden would be minimal, because they would not need to "make existing facilities readily accessible," "restructure jobs," "modify work schedules," or even alter their existing drug policy, because the current policy only prohibited alcohol and drug use on company property.¹⁴⁷

Finally, the court addressed the "final arrow in [the employer's] quiver," the issue of federal preemption by the CSA.¹⁴⁸ Notably, the court recognized the purpose of the CSA was never intended to regulate employment and anti-discrimination laws like the Hawkins-Slater Act. While the CSA may be implicated when drugs are used in the workplace, the Act explicitly mandated that accommodations need not be made for medical marijuana use in the workplace.¹⁴⁹ Thus, it was not impossible to comply with both the CSA and the Hawkins-Slater Act, because employers could not be in violation of the CSA by employing someone who uses medical marijuana outside the workplace.

Following in the footsteps of the *Callaghan* court, the U.S. District Court for the District of Connecticut held in *Noffsinger v. SSC Niantic Operating Co., LLC* that federal law does not preempt Connecticut's Palliative Use of Marijuana Act (PUMA), largely because PUMA contained a provision explicitly prohibiting employers from discriminating against qualifying patients.¹⁵⁰ In *Noffsinger*, the plaintiff filed a complaint under PUMA's anti-discrimination provision after having her job offer rescinded after testing positive for marijuana in a pre-employment drug test due to treating her disability with a synthetic cannabis pill.¹⁵¹ The employer moved to dismiss, arguing that PUMA's anti-discrimination provision is preempted by the CSA, the ADA, and the Food, Drug, and Cosmetic Act.¹⁵²

First, the employer argued that PUMA was "an impermissible obstacle to the basic purpose of the CSA" and was therefore preempted, because as a Schedule I substance, the CSA prohibits the manufacture, distribution, dispensation, and possession of marijuana.¹⁵³ In rejecting this contention, the court concluded the CSA does not make it illegal to employ a marijuana user.¹⁵⁴ The court found the CSA does not purport to regulate employment practices in any manner, and thus, PUMA's anti-discrimination provision did not stand in

147. *Id.* at *10.

148. *Id.* at *13.

149. *Callaghan*, 2017 WL 2321181, at *13.

150. *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 3d 326, 331, 338 (D. Conn. 2017).

151. *Id.* at 331–32.

152. *Id.* at 332–33.

153. *Id.* at 333–34.

154. *Id.* at 336.

the way of or conflict with the CSA.¹⁵⁵ While the court acknowledged that other state and federal courts have evaluated other state medical marijuana statutes—even in the employment context—and came to different conclusions, it found them to be readily distinguishable, because the statutory provisions at issue in those cases were not analogous to the anti-discrimination provision of PUMA.¹⁵⁶

The court analyzed the several provisions of the ADA pertaining to illegal drug use and reached the following conclusions. First, it found that the ADA's language explicitly allows for employers to place a prohibition on the "illegal use of drugs and the use of alcohol *at the workplace* by all employees."¹⁵⁷ The court recognized that:

[T]he fact that the ADA does not further provide that an employer may prohibit an employee from illegal use of drugs outside the workplace is a powerful indication that the ADA did not mean to regulate non-workplace activities, much less preclude State's from prohibiting employers from taking adverse action against employees engaged in the use of illegal drugs outside of the workplace, especially when such use does not affect job performance.¹⁵⁸

Moreover, it found that although the ADA refers to employer drug testing, it did so for the limited purpose of clarifying that drug testing is not itself a violation of the ADA when intended to confirm an individual who undergoes a drug rehabilitation program is "no longer engaging in the illegal use of drugs."¹⁵⁹ The court explained that this authorization was intended to serve a limited purpose and not intended as an "employer's 'Magna Carta' to engage in drug testing."¹⁶⁰ The court made note of the language in § 12114(d)(2), which clarifies that this authorization shall not "be construed to encourage, prohibit, or authorize" drug testing of employees or applications.¹⁶¹

The *Callaghan* and *Noffsinger* courts put forth well-reasoned analyses of state anti-discrimination laws and their relation to federal policy, specifically the CSA and ADA. While the *Noffsinger* court would not go as far as to say that employers are required to provide a reasonable accommodation to medical marijuana users, the Massachusetts Supreme Court was willing to do so.¹⁶² This Comment began by detailing the revocation of Christina Barbuto's offer of employment following her positive drug test for marijuana, which was

155. *Noffsinger*, 273 F. Supp. 3d at 338. The court further relied on the provision that explicitly indicates that Congress did not intend for the CSA to preempt state law "unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together." *Id.* at 336.

156. *Id.* at 338–40.

157. *Id.* at 337 (emphasis in original).

158. *Id.*

159. *Noffsinger*, 273 F. Supp. 3d at 336.

160. *Id.* at 337.

161. *Id.*

162. *Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37, 45 (Mass. 2017).

prescribed to treat her underlying disability, Crohn's disease.¹⁶³ Barbuto filed a claim against her former employer alleging handicap discrimination and unlawful termination.¹⁶⁴ The court found Barbuto's claim fit squarely in the protections of the state's medical marijuana statute, which "forbids denial of any right or privilege on the basis of medical marijuana use."¹⁶⁵ In reaching its conclusion, the court explained:

[T]o declare an accommodation for medical marijuana to be per se unreasonable out of respect for Federal law would not be respectful of the recognition of Massachusetts voters, shared by the legislatures of voters in the vast majority of States, that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions.¹⁶⁶

The court also rejected defendant-employer's argument that even if Barbuto were a "qualified handicapped person," she was terminated because she failed a drug test that all employees are required to pass, not because of her handicap.¹⁶⁷ In reaching this conclusion, the court explained: "[T]he medical condition that renders her handicapped, and the employer fires her because company policy prohibits the use of this medication, the law does not ignore the fact that the policy resulted in a person being denied employment because of her handicap."¹⁶⁸ Under the defendant's logic, a company barring the use of insulin by its employees in accordance with a company policy would not be discriminating against diabetics because of their handicap but would be implementing a company policy prohibiting the use of a medication.¹⁶⁹ In sum, the court found it was appropriate to recognize handicap discrimination in circumstances like Barbuto's, because terminating an employee for violating company policy effectively denies an employee with a handicap the opportunity of a reasonable accommodation.¹⁷⁰

2. No Anti-Discrimination Provision, No Accommodation

The cases discussed above exemplify the vitality of explicit statutory language protecting medical marijuana patients, so long as they are not using or impaired by medical marijuana in the workplace. Until these cases, in various contexts, the highest state courts in California, Oregon, Washington, and Montana have all found that states cannot actually require employers to accommodate medical marijuana use due to the federal prohibition under the

163. *Id.* at 41.

164. *Id.*

165. *Id.* at 41.

166. *Id.* at 46.

167. Barbuto, 78 N.E.3d at 47.

168. *Id.* at 47.

169. *Id.*

170. *Id.* at 47-48.

CSA.¹⁷¹ While factually consistent with the cases discussed above, these cases were not dealing with anti-discrimination provisions of state law. While not exhaustive, the remainder of this section will analyze some of these prior opinions favoring employers and argue they are readily distinguishable from the opinions coming out of states with anti-discrimination provisions.

In *Ross v. RagingWire*, the Supreme Court of California reviewed the lower court's rejection of a plaintiff's complaint alleging his employer violated the Fair Employment and Housing Act by discharging him for his disability.¹⁷² The plaintiff suffered from severe back pain from injuries he sustained while serving in the United States Air Force.¹⁷³ He used marijuana under California's Compassionate Use Act (CUA) to treat his pain symptoms.¹⁷⁴ After beginning work at defendant-employer, Ross was required to take a drug test.¹⁷⁵ When the results were returned that indicated Ross was using marijuana, the employer terminated him.¹⁷⁶ Ross subsequently filed suit, claiming his termination violated state law prohibiting employers from discriminating on the basis of a medical condition.¹⁷⁷ The court found that because the CUA was without explicit language protecting patients from discrimination based on such use, it should defer to the federal law's prohibition of marijuana.¹⁷⁸ Even though the statute in question dealt with housing, not employment, the court's analysis indicates that in either case, had California enacted a statute similar to that of Connecticut or Massachusetts, Ross may have been granted anti-discrimination protection.¹⁷⁹

Colorado's seminal case on employee marijuana use is the *Coats* case, in which an off-duty employee consumed marijuana to treat painful muscle spasms caused by his quadriplegia.¹⁸⁰ Coats was terminated after failing a random drug test in violation of the employer's drug policy, despite using marijuana in compliance with Colorado's medical marijuana law.¹⁸¹ The issue in this case was whether the use of marijuana in compliance with Colorado's medical marijuana statute—but in violation of federal law—was a “lawful” activity under Colorado's “lawful activities statute,” which prohibits terminating an

171. Dustin Carlton, *Medical Marijuana in the Workplace: Where Do Things Stand?*, HRDIVE (Feb. 20, 2018), <https://www.hrdiver.com/news/medical-marijuana-in-the-workplace-where-do-things-stand/517229/>.

172. *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200, 202 (Cal. 2008).

173. *Id.* at 203.

174. *Id.*

175. *Id.*; see also CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

176. *Ross*, 174 P.3d at 203.

177. *Id.*

178. See *id.* at 206–07.

179. See *id.* at 215–16 (Kennard, J. concurring and dissenting).

180. *Coats v. Dish Network*, 350 P.3d 849, 850 (Colo. 2015).

181. *Id.*

employee due to participation in a lawful activity while not at work.¹⁸² The court found an activity must be permitted by both federal and state law to be “lawful.”¹⁸³ Because marijuana was illegal under the CSA, the court held that an employee’s off-duty medical marijuana use was not a lawful activity protected by Colorado’s lawful activities statute.¹⁸⁴

In 2010, Oregon faced this issue in the case of *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industry*.¹⁸⁵ As in *Noffsinger*, the employee in *Emerald Steel* was fired by his employer one week after disclosing his status as a state law-authorized user of medical marijuana.¹⁸⁶ Yet, the Oregon Supreme Court determined that Oregon’s medical marijuana statute was preempted by the CSA.¹⁸⁷ Why? Because the *Emerald Steel* court was interpreting a medical marijuana statute that did not contain a provision explicitly barring employment discrimination.¹⁸⁸ In contrast to cases like *Noffsinger* where the court was faced with a question of whether the CSA preempts a provision that prohibits an employer from taking adverse action against an employee on the basis of the employee’s otherwise state-authorized medicinal use of marijuana, the question for the *Emerald Steel* court was whether the CSA more generally preempted a provision of Oregon law that authorized the use of medicinal marijuana.¹⁸⁹

The drastically different outcomes of the cases discussed in this section evidence the importance of explicit statutory language prohibiting discrimination against qualifying patients. Because of the nearly identical nature of the statutes at issue in *Barbuto* and *Noffsinger* as compared to the ADA, these rationales can and should be applied to the ADA in order to provide employee-patients protection from disability discrimination.

V. ADOPTING STATE COURT RATIONALES ON THE FEDERAL LEVEL

The quickest and most effective means of alleviating the problems facing an employee-patient is the rescheduling of marijuana under the CSA. While the rescheduling of marijuana is outside the scope of this Comment, it must be noted as the best possible solution. Due to a shift in marijuana enforcement policy between the Obama and Trump administrations, the likelihood that marijuana is rescheduled in the near future seems miniscule.¹⁹⁰

182. *Id.* at 851; see also COLO. REV. STAT. §24-34-402.5 (West 2007).

183. *Coats*, 350 P.3d at 853.

184. *Id.* at 851.

185. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010).

186. *Id.* at 521.

187. *Id.* at 529.

188. See *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 3d 326, 334–35 (D. Conn. 2017).

189. *Emerald Steel*, 230 P.3d at 529; see *Noffsinger*, 273 F.Supp.3d at 335.

190. See Memorandum from Attorney General Jefferson B. Sessions on Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

Even without rescheduling, the state court decisions of *Barbuto* and *Noffsinger* provide a well-reasoned framework for analyzing medical marijuana patient protections under state law that should be applied in the ADA context. The court in *Noffsinger* reached several conclusions about various sub-provisions of § 12114, the illegal use of drugs provision, that contest crucial arguments for pre-emption of these state laws and clarify the application of the ADA to conduct in the workplace.¹⁹¹ This Part will highlight the key points of the *Noffsinger* and *Barbuto* courts and argue that they can and should be adopted into ADA jurisprudence.

First and foremost, individuals who are prescribed medical marijuana only qualify for such a prescription when they are found to have an underlying disability, as defined under state law. The reasoning of the court in *Noffsinger* and *Barbuto* struck to the core of this problem. As the court explained in *Barbuto*:

[W]here a handicapped employee needs medication to manage the medical condition that renders her handicapped, and the employer fires her because company policy prohibits the use of this medication, the law does not ignore the fact that the policy resulted in a person being denied employment because of her handicap.¹⁹²

One case filed by the EEOC shows signs that disabled individuals using medical marijuana can be protected in certain circumstances. Just as importantly, however, it shows the inherent impossibility of separating an employee's use of medical marijuana to treat their disability from the disability itself. In *EEOC v. The Pines of Clarkston*, the EEOC alleged The Pines violated the ADA when it terminated Ms. Holden because the drug test conducted on her second day of work revealed marijuana use.¹⁹³ However, instead of bringing a failure to accommodate claim, the EEOC claimed that The Pines terminated her upon learning about her disability.¹⁹⁴ This was because following the failed drug test, the employee informed that the positive drug test was due to treating her disability, epilepsy, with medical marijuana. While the employer's rationale for denying Ms. Holden's employment was purportedly her lack of candor about her use of medical marijuana as treatment before hire, there was evidence that this justification was unfounded.¹⁹⁵ During her initial interview, the employer asked questions about her disability, and officials expressed concern that she could not "handle the stress" of the position and ultimately recommended that the company "not hire her for medical issues."¹⁹⁶ The court ultimately denied

191. *Noffsinger*, 273 F. Supp. 3d at 337–38.

192. *Barbuto*, 78 N.E.3d at 47.

193. *EEOC v. The Pines of Clarkston*, 2015 WL 1951945, at *1 (E.D. Mich., April 29, 2015).

194. *Id.*

195. *Id.*

196. *Id.* at *5.

the employer's motion for summary judgment, holding that the shifting rationales could be evidence of pretext.¹⁹⁷

There are three important ideas to be taken from *The Pines* that are central to the position advanced in this Comment. First, it indicates the EEOC is not completely unwilling to protect medical marijuana patients. Second, it illustrates that medical marijuana patients may be protected by the ADA upon a showing that the discrimination is based on the underlying disability and not the marijuana use. Third, and most importantly, it shows the inherent difficulty and confusion in trying to separate an individual's underlying disability from her medical marijuana use to treat it, exactly the problem discussed in *Barbuto*, *Callaghan*, and *Noffsinger*. While encouraging, the EEOC's position in *The Pines* does not go far enough and should instead be expanded to protect not only individuals like Ms. Holden, but all individuals facing adverse treatment based on their use of medical marijuana in treating their underlying disability.

Moreover, the ADA never intended to regulate the illegal use of drugs outside the workplace. The ADA explicitly provides that an employer "may prohibit the illegal use of drugs and use of alcohol *at the workplace* by all employees."¹⁹⁸ The *Noffsinger* court aptly pointed out that the fact that the ADA does not further provide that an employer may prohibit an employee from the illegal use of drugs *outside* the workplace. This is a powerful indicator that the ADA was not meant to regulate non-workplace activities, much less to preclude the states from doing so or to preclude the states from prohibiting employers from taking adverse actions against employees who may use illegal drugs outside the workplace, and whose drug use does not affect job performance.¹⁹⁹

Furthermore, the purpose of the exclusion of individuals engaging in the illegal use of drugs was never intended to allow discrimination against disabled individuals for their use of drugs under the supervision of licensed professionals. While the unreported decisions in *James* and *Barber* have clarified the current treatment of medical marijuana under the ADA, they also show how far the "illegal use of drugs" provision has drifted from its original purpose. The exclusion of individuals engaging in the illegal use of drugs was never intended to allow discrimination against individuals for the use of drugs as treatment for their disabilities. Moreover, the argument that treatment of the disability is somehow separate from the disability itself finds little support when legislative intent and history behind the ADA is examined.²⁰⁰

197. *Id.* at *7.

198. *Noffsinger*, 273 F. Supp. 3d at 336 (emphasis in original); 42 U.S.C § 12114(c)(1) (2009).

199. *Noffsinger*, 273 F. Supp. 3d at 337.

200. *See supra*, Part III, (A)(1).

As argued by the plaintiff in *James*, the initial draft of the ADA did not exclude coverage for those engaged in the illegal use of drugs.²⁰¹ That exclusion was later added in response to drug abuse under the Rehabilitation Act.²⁰² The rationale being, as one senator put it, that the war on drugs would fail if drug abusers could “hide behind the laws designed to help those who are seriously handicapped.”²⁰³ The main concern was that individuals would claim current drug use or addiction as a disability covered by the ADA.²⁰⁴ In the present context, however, medical marijuana users are not seeking to have their prescription drug use treated as a disability. These patients already have underlying disabilities, which service as the basis for an ADA claim. “The ADA addresses drug use as disability and says nothing about drug use as treatment,” although holdings in cases like *James* may imply otherwise.²⁰⁵

The Legislature published a report that was released prior to passage of the ADA with the intent to clarify that persons with disabilities taking medications with physician supervision were not going to be affected:

The term “illegal drugs” is defined in section 101(5) and does not include drugs taken under supervision by a licensed health care professional. The exempted category includes, for example, experimental drugs taken under supervision. Many people with disabilities, such as people with epilepsy, AIDS, and mental illness, take a variety of drugs, including experimental drugs, under supervision by a health care professional. Discrimination on the basis of such drugs would not be allowed.²⁰⁶

This passage’s focus on experimental drugs is used as an example; however, “it places special emphasis on whether or not a particular drug is used pursuant to licensed supervision.”²⁰⁷ This further “supports an understanding of ‘illegal use of drugs’ that allows for supervised medical use regardless of a drug’s status under criminal statutes like the CSA.”²⁰⁸ The refusal of the EEOC to protect medical marijuana patients is incompatible with the strong legislative history

201. Memorandum in Opposition to Defendant Costa Mesa’s Motion to Dismiss at 12, *James v. City of Costa Mesa*, Case No. SACV 10-0402 AG (MLGx), 2010 WL 1848157 (C.D. Cal. Apr. 30, 2010), 2010 WL 2934614 at 16.

202. *Id.* The Rehabilitation Act was the predecessor to the ADA. Shirley Wilcher, *The Rehabilitation Act of 1973: 45 Years of Activism and Progress*, INSIGHT INTO DIVERSITY (Sept. 17, 2018), <http://www.insightintodiversity.com/the-rehabilitation-act-of-1973-45-years-of-activism-and-progress/>.

203. Memorandum in Opposition to Defendant Costa Mesa’s Motion to Dismiss, *supra* note 201, at 16.

204. *Id.*

205. Rendall, *supra* note 41, at 327.

206. H.R. REP. NO. 101-485, pt. 2, at 79 (1989), reprinted in 1990 U.S.C.C.A.N. 303, 361.

207. Rendall, *supra* note 41, at 328.

208. *Id.*

indicating that prescription drug treatment should not disqualify disabled persons from seeking the protection of the ADA.²⁰⁹

The approach this Comment advocates for is not a complete authorization of medical marijuana in the workplace. In fact, employers can and should maintain their drug policies, while also making exceptions when dealing with qualifying medical marijuana patients. The approach should reflect how employers currently treat employees using such other major prescription drugs such as opiates or benzodiazepines. Along those lines, a decision from a federal district court in Tennessee may provide a useful means of analyzing the context of legal prescription drugs with significant side effects. In *Bates v. Dura Automotive*, employees previously held a wide range of manufacturing duties, including work with heavy machinery.²¹⁰ The employer instituted a policy that “employees could not use legal prescription drugs if such use adversely affected safety, company property, or job performance.”²¹¹ Seven employees tested positive for drugs the company deemed dangerous (Oxycodone, Lortab, Xanax, etc).²¹² These employees were subsequently terminated and brought suit under the ADA.²¹³

The employer argued that its facility was a dangerous place to work with significant safety issues that justified its policies regarding legal prescription drug use.²¹⁴ However, the district court found that the employer was not entitled to summary judgment on all claims, as material questions of fact existed whether the company’s testing protocol was “broader and more intrusive than necessary” because it categorically “excluded all employees” from using such drugs “without any regard for individualized circumstances.”²¹⁵ The court concluded that “the utter inflexibility of the employer’s policy precludes summary judgment.”²¹⁶

Although the Sixth Circuit ultimately reversed the district court on other grounds,²¹⁷ the analysis is a useful guide that should be used when dealing with an employee’s medical marijuana use as treatment for their underlying disability. Disabled employees who find marijuana to be the only treatment that alleviates their suffering should not be punished by the government. The

209. See H.R. REP. NO 101-485, pt. 2, at 79 (1989), reprinted in 1990 U.S.C.C.A.N. 303, 361 (explaining the term “illegal drugs” does not include drugs—medical marijuana—taken under supervision by a licensed health care professional).

210. *Bates v. Dura Auto. Sys., Inc.*, 650 F. Supp. 2d 754, 758 (M.D. Tenn. 2009), *rev’d in part*, 625 F.3d 283 (6th Cir. 2010).

211. *Id.* at 759.

212. *Id.* at 760–62.

213. *Id.* at 760, 763.

214. *Id.* at 770.

215. *Bates*, 650 F. Supp. 2d. at 771–72.

216. *Id.* at 772.

217. *Bates v. Dura Auto. Sys., Inc.*, 625 F.3d 283, 284 (6th Cir. 2010).

uncertain status of marijuana under the ADA has had a chilling effect on individuals otherwise eligible to bring claims related to medical marijuana. Employers need to know how they should treat employees who use medical marijuana. Employees need to know that they can pursue treatment for their disabilities without fear of losing their jobs or being subject to criminal sanctions.

VI. CONCLUSION

Individuals with disabilities should not be forced to choose between effective treatment and gainful employment. As many as 2.5 million disabled individuals rely on medical marijuana, and this number continues to rise as more states legalize medical marijuana. Medical marijuana enables these individuals to work, care for themselves, and effectively manage their disabilities. These individuals should not be excluded from ADA protection or from the workplace based on treatment that is legal under state law. The purpose of the ADA is to regulate the employment relationship and ensure that disabled individuals are provided the same opportunities as all others, yet to date, it has bowed to the will of federal drug policy rather than fulfill its purpose. The ADA framework is fully capable of protecting employers while living up to its ideal of eliminating discrimination against individuals with disabilities, and it is time for the ADA to start doing so.

STEPHEN M. SCANNELL*

* J.D., Saint Louis University School of Law, 2019; B.A., University of Illinois Urbana-Champaign, 2015. This article is published with enormous gratitude to my family for their unending support and for teaching me to always stay curious and trust my instincts. I would also like to thank Elizabeth Pendo for her expertise, engagement, and enthusiasm through the writing process, for without her this idea could not have made it this far. Finally, thank you to the members of the Saint Louis University Journal of Health Law and Policy, especially Colleen Kinsey and Lauren Pair, for their unwavering diligence and patience throughout the publication process.

