

# HIGH RISK EMPLOYMENT: THE MANAGEMENT HEADACHE OVER MEDICAL MARIJUANA

*By Kabrina Krebel Chang J.D.\**

## I. INTRODUCTION

Brandon Coats has used a wheelchair since he was paralyzed in a car accident sixteen years ago. When prescription drugs were no longer effective in controlling his involuntary muscle spasms and seizures, his doctor recommended medical marijuana.<sup>1</sup> Using medical marijuana each evening allowed Coats to work comfortably the next day at DISH Network in Colorado. A phone operator who consistently received good performance reviews; he was fired after a random drug test came back positive for marijuana.<sup>2</sup>

Nick Stennet's congenital disorder, Poland's syndrome, left him without a chest muscle on his right side and with shorter fingers on his right hand. To relieve severe stiffness and pain in his arms, doctors prescribed one or two inhalations of marijuana before bed. When Stennet applied for a job at The Home Depot in Hilo, Hawaii, he informed Human Resources about his prescription, but he was not hired because he tested positive for THC, the active chemical in marijuana.<sup>3</sup>

Brandon Coats and Nick Stennet are not alone. Medical marijuana is used by approximately 500,000 people. Compared with the total population of the United States, this is a small segment of U.S. workers.<sup>4</sup> However, legalization of medical marijuana is a growing trend, both through state legislatures and voter initiatives, thus leading to an important question for how will these new laws impact the employment relationship? In states where medical marijuana is legal, must employers treat employees "medicating" using marijuana the same as employees taking Zoloft or Percocet, or is it still considered lawful to discharge an employee who tests positive for marijuana, even if it is prescribed as a medical treatment?

Surprisingly, looking to the present law does not provide answers. Among those states with medical marijuana laws, requirements differ, and federal law prohibits marijuana use under almost every circumstance; moreover, U.S. Attorney General Eric Holder has stated that drug enforcement agents will "vigorously enforce" federal drug laws.<sup>5</sup> This position is a reversal from the Obama Administration's 2009 decision to end prosecutions of medical marijuana collectives and patients that followed state law.<sup>6</sup> How then is an employer to know how to

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Jennifer Mascia, *Medical Use of Marijuana Costs Some a Job*, N.Y. TIMES, Aug. 28, 2010, <http://www.nytimes.com/2010/08/29/us/29marijuana.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Approximately 154.9 million workers in 2010. <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited January 7, 2013)

<sup>5</sup> John Hoeffel, *Holder Promises to Enforce U.S. Drug Laws if Prop. 19 Passes*, L.A. TIMES, Oct. 16, 2010, <http://www.latimes.com/news/local/la-me-marijuana-holder-20101016,0,5547626.story>.

<sup>6</sup> *Id.*

handle drug test data where there is off-duty use of medical marijuana? This article will examine the current status of state and federal laws and the impact of these laws on the traditional at-will employment relationship. It will describe recent cases and legal arguments where employees have been fired or applicants not hired due to their state-sanctioned off-duty use of medical marijuana, and, furthermore, it will discuss why employers are reluctant to make exceptions to their drug-free workplace policies, even for top-performing employees. Finally, the article will examine both the legislative efforts to address the lack of guidance for employers and employees and other areas of law where employees have had some success in asserting their right to take medical marijuana.

## II. MIXED MESSAGES: STATE AND FEDERAL LAW

Currently, eighteen states and the District of Columbia allow the use of medical marijuana. The laws were all passed in the last fifteen years, with seven passed in the last five years.<sup>7</sup> According to the National Conference of State Legislatures, at least thirteen more states are considering such laws.<sup>8</sup> California was the first state to legalize medical marijuana (1996), and reports that 37,000 medical marijuana cards have been authorized since 2004. Michigan reports that approximately 10,800 cards have been issued since its medical marijuana law was passed in 2008<sup>9</sup>, and as of March 2011, Colorado lists 123,890 people on its registry. Its medical marijuana law was passed in 2000.<sup>10</sup> According to Karen O'Keefe of the Marijuana Policy Project, there could be 27 states with medical marijuana laws by 2014.<sup>11</sup> Ohio currently has two different measures moving towards a vote, and Connecticut, Massachusetts, New York, Arkansas, Idaho, North Dakota, and New Hampshire appear on the verge of introducing legislation.<sup>12</sup> States are also becoming more progressive when it comes to non-medical use of marijuana. On November 3, 2010, California voters narrowly rejected legalizing personal marijuana use, growth, and distribution.<sup>13</sup> Thirteen states have decriminalized some amount of

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<sup>7</sup> <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last visited January 7, 2013). The states are: Alaska, Arizona, California, Colorado, Delaware, Hawaii, Maine, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

<sup>8</sup> Stephanie Chen, *Medical marijuana users risk job loss*, CNNLIVING, Mar. 24, 2010, [http://articles.cnn.com/2010-03-24/living/michigan.medical.marijuana.fired\\_1\\_medical-marijuana-marijuana-laws-daily-pain?\\_s=PM:LIVING](http://articles.cnn.com/2010-03-24/living/michigan.medical.marijuana.fired_1_medical-marijuana-marijuana-laws-daily-pain?_s=PM:LIVING).

<sup>9</sup> *Id.*

<sup>10</sup> Jeffrey Wolf & Chris Vanderveen, *Unemployment Benefits Granted to Medical Marijuana Patient*, 9NEWS, May 25, 2011, <http://www.9news.com/news/article/200201/188/Unemployment-benefits-granted-to-medical-marijuana-patient>.

<sup>11</sup> Scot Kersgaard, *Majority of States Could Soon Have Medical Marijuana*, THE COLORADO INDEPENDENT, July 18,

2011 <http://coloradoindependent.com/94133.majority-of-states-should-soon-have-medical-marijuana>.

<sup>12</sup> *Id.*

<sup>13</sup> Ray Sanchez, *Proposition 19 Rejected by Voters*, ABCNEWS, Nov. 3, 2010, <http://abcnews.go.com/Politics/proposition-19-results-california-votes-reject-marijuana-measure/story?id=12037727>.

marijuana possession for non-medical uses.<sup>14</sup> In some parts of California, marijuana is the biggest cash crop with annual sales of \$14 billion.<sup>15</sup> As a result, some cities are contemplating taxing it.<sup>16</sup> The overall trend appears to be toward acceptance and legalization of limited marijuana use.

In the states where medical marijuana is legal, very few laws indicate how its use impacts employment rights. Two notable exceptions are Arizona and Rhode Island. According to the Arizona Medical Marijuana Act,<sup>17</sup> an employer cannot discriminate against registered patients unless that employer would lose funding or licensing under federal law.<sup>18</sup> Moreover, employers cannot penalize registered patients solely for testing positive for marijuana in drug tests either. However, Arizona's law does forbid use, possession or impairment by marijuana while on the job.<sup>19</sup> Rhode Island's medical marijuana law offers some protection for workers as well, because employers, landlords, and schools cannot refuse to employ, lease, or enroll a registered patient solely based on medicinal marijuana usage.<sup>20</sup> Elsewhere, laws include an affirmative defense for possession of marijuana,<sup>21</sup> removal of state-level criminal penalties for possession,<sup>22</sup> and even licensed dispensaries.<sup>23</sup> With the exception of Arizona and Rhode Island, however, these state laws do not clarify the impact of legalization of marijuana as medicine on the rights of employers and employees.

In contrast to the growing state trend, marijuana remains illegal under the Federal Controlled Substances Act (CSA).<sup>24</sup> The purpose of the CSA is to "conquer drug abuse and control the legitimate and illegitimate traffic in controlled substances."<sup>25</sup> To accomplish this goal, Congress created a system that criminalizes the "unauthorized manufacture, distribution, dispensation, and possession of controlled substances classified in five schedules."<sup>26</sup> The controlled substances

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<sup>14</sup> [http://norml.org/index.cfm?Group\\_ID=3383](http://norml.org/index.cfm?Group_ID=3383) (last visited February 8, 2013). Alaska, California, Colorado, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio and Oregon.

<sup>15</sup> Andrew Ferguson, *The United States of Amerijua*, TIME MAGAZINE, Nov. 11, 2010, <http://www.time.com/time/magazine/article/0,9171,2030925-3,00.html?artId=2030925?contType=article?chn=us>.

<sup>16</sup> *Id.*

<sup>17</sup> On May 27, 2011, Arizona Attorney General Tom Horne filed suit on behalf of Governor Brewer seeking declaratory judgment whether the Arizona law is preempted by the federal Controlled Substances Act. *Arizona v. U.S.*, Complaint for Declaratory Judgment, filed May 27, 2011.

<sup>18</sup> A.R.S. §36-2813 (2012).

<sup>19</sup> *Id.*

<sup>20</sup> R.I. Gen. Laws §21-28.6 (2011).

<sup>21</sup> Md. CRIMINAL LAW Code Ann. §5-601.

<sup>22</sup> Alaska Sta. §17.37.10-17.37.80, Cal. Health & Saf. Code §11362.5, Co. Const. atr. XVIII, §14, Haw. Rev. Stat. §329.121-329.128, Me. Rev. Stat. tit. 22, §2383-B(5), (6), Vem Rev. Stat. §453A.010-453A.240, N.M. Stat. Ann. §30-31C-1, Or. Rev. Stat. § 475.300, Wash. Rev. Code §69.51A-69.51A.901.

<sup>23</sup> Az. Rev. Stat. c. 28,1, §36.

<sup>24</sup> 21 U.S.C. §801 et. seq.

<sup>25</sup> *Gonzales v. Raich*, 545 U.S. 1, 12-13 (2005).

<sup>26</sup> *Id.* at 13.

listed in Schedules II through V currently have acceptable medical uses; while the controlled substances listed in Schedule I have no acceptable medical uses.<sup>27</sup> Congress has classified marijuana as a Schedule I controlled substance.<sup>28</sup> Despite continued efforts by some members of Congress to change the status,<sup>29</sup> Congress does not recognize any acceptable medical uses for marijuana, and its manufacture, distribution, and possession are prohibited by federal law.<sup>30</sup> The current status of the law puts employers in a difficult position because “the reality is that there are no federal guidelines like there are when dealing with other types of prescription medications.”<sup>31</sup>

### III. DRUG-FREE WORKPLACE POLICIES

Many employers strive to maintain a drug-free workplace, and implementing policies to enforce the drug-free workplace is becoming common.<sup>32</sup> But, where does this leave employers that manage workers who use medical marijuana off-duty and pursuant to state law?

In *Ross v. RagingWire Telecommunications*,<sup>33</sup> the California Supreme Court addressed the conflict between employees using medical marijuana and employers enforcing their drug-free work policies. Gary Ross suffered from back pain from injuries suffered while serving in the U.S. Air Force. In 1999, Ross’s doctor recommended marijuana in accordance with the California Compassionate Use Act.<sup>34</sup> On September 10, 2001, RagingWire offered Ross a job as a lead systems administrator contingent upon his passing a drug test.<sup>35</sup> When he tested positive for marijuana, Ross provided a copy of his doctor’s recommendation to the company and began his new job.<sup>36</sup> Later that week, the Board of RagingWire met to discuss the matter, and on September 25<sup>th</sup>, the CEO informed Ross that he was fired because of his marijuana use.<sup>37</sup> Despite the fact that Ross had worked in the systems administration field since he began using marijuana and had performed satisfactorily.<sup>38</sup> Ross sued RagingWire claiming it violated the California Fair

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<sup>27</sup> *Emerald Steel Fabricators v. Bureau of Labor and Indus.*, 348 Or. 159, 175 (2010).

<sup>28</sup> *Id.*

<sup>29</sup> Reps. Ron Paul (R,TX) and Barney Frank (D,MA) recently introduced legislation to legalize marijuana and remove it from Schedule I classification. <http://latimesblogs.latimes.com/washington/2011/06/ron-paul-barney-frank-to-jointly-introduce-a-bill-to-end-federal-war-on-marijuana.html> (last visited January 7, 2013).

<sup>30</sup> 21 U.S.C. §812(c) and 21 U.S.C. §841(a)(1).

<sup>31</sup> Mascia, *supra* note 1.

<sup>32</sup> <http://www.sba.gov/content/drug-free-workplace>.

<sup>33</sup> 42 Cal. 4<sup>th</sup> 920, 174 P. 3d 200 (2008).

<sup>34</sup> *Id.* at 924.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 925.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

Housing and Employment Act (FEHA).<sup>39</sup> FEHA prohibits employment discrimination based on physical disability or medical conditions if a person can perform the essential functions of a job with a reasonable accommodation.<sup>40</sup> Ross claimed that his physical disability was covered under the act.<sup>41</sup> However, Ross's use of marijuana to treat the pain associated with the disability conflicted with RagingWire's drug-free employment policy.<sup>42</sup> Ross asked RagingWire to accommodate his marijuana use, because, according to Ross, medical marijuana should be treated like Zoloft or insulin; firing someone for the use of such drugs is illegal under FEHA.<sup>43</sup> In Ross's view, by treating marijuana in a similar manner, the Compassionate Use Act (CUA) and the FEHA can be read as working together to require a reasonable accommodation for medical marijuana users.<sup>44</sup>

However, according to the Court, the CUA does not give marijuana use a status equal to the use of legal prescription drugs.<sup>45</sup> The CUA merely exempts medical marijuana users from state criminal prosecution, and thus the Court did not recognize FEHA as requiring employers to accommodate an employee's use of medical marijuana.<sup>46</sup> In the Court's view, an employer's interest in determining whether its employees are engaging in illegal drug use is important in light of well-documented problems that are associated with the abuse of drugs, such as increased absenteeism, diminished productivity, increased health care costs, and increased safety problems that may result in liability to third parties.<sup>47</sup> The Court reasoned that the CUA does not eliminate marijuana's potential for abuse or the employer's legitimate interest in whether an employee uses the drug.<sup>48</sup> Further, the Court made it clear that had California voters meant to require employers to accommodate the use of marijuana under the CUA, they could have included such language in the law.<sup>49</sup> Instead, the only right given by the law is for a patient to possess or cultivate marijuana for personal medical uses upon written or oral recommendation by their doctor.<sup>50</sup> An employer's refusal to accommodate an employee's use of medical marijuana does not affect that right.<sup>51</sup> Therefore, the Court upheld Ross's firing.<sup>52</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 926.

<sup>41</sup> 42 Cal. 4<sup>th</sup> 920, 174 P. 3d 200 (2008).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*, (citing *City of Glendale v. Loder*, 14 Cal.4<sup>th</sup> 846.)

<sup>47</sup> *Id.* at 927.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 928

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 930.

<sup>52</sup> *Id.*

The dissent in this case accused the majority of forcing a seriously ill person to choose between receiving the benefits of marijuana and their job.<sup>53</sup> In the dissent's view, this could not have been the will of California voters when they enacted the Compassionate Use Act.<sup>54</sup> Nor is this choice what FEHA requires.<sup>55</sup> Although the majority opinion stated that accepting Ross's off-duty doctor-approved marijuana use was not a reasonable accommodation, the FEHA does set out a list of measures that may constitute a reasonable accommodation, such as "adjustment or modification of examinations, training materials or policies."<sup>56</sup> According to the dissent, it would be well within the parameters of FEHA for RagingWire to make an adjustment to its drug policy as a reasonable accommodation for Ross's disability, especially because RagingWire presented no evidence that Ross's use would interfere with its rights or interests as an employer.<sup>57</sup> In addressing management concerns related to marijuana use (increased absenteeism, lower employee productivity and increased safety issues), the dissent stressed that the physical effects of marijuana do not differ significantly from the effects of many prescription drugs such as Vicodin, Dilaudid, OxyContin, and Valium.<sup>58</sup> All may affect cognitive functioning and have the potential for abuse; in fact, many non-prescription common cold medications cause drowsiness or dizziness and may impair productivity.<sup>59</sup> The majority decision, according to the dissent, should not have concluded that FEHA may require an employer to accommodate an employee's use of such drugs despite their potential to impair job performance.<sup>60</sup>

#### IV. PUBLIC POLICY

California courts refused to require changes to drug-free workplace policies to accommodate medical marijuana use, despite what the dissent claimed was the will of the voters in protecting marijuana patients. This then leads to the question of whether voter intent is enough to create a public policy protecting patients who use marijuana?

The Medical Use of Marijuana Act (MUMA) was passed by the state of Washington in 1998. In June 2011, *Jane Roe v. TeleTech Customer Care Management*,<sup>61</sup> addressed the issue of whether the use of medical marijuana by an employee is grounds for termination.<sup>62</sup> Jane Roe<sup>63</sup> suffered from debilitating

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<sup>53</sup> *Id.* at 936.

<sup>54</sup> *Id.* at 937.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 939.

<sup>58</sup> *Id.* at 941.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 941-42.

<sup>61</sup> *Jane Roe v. TeleTech Customer Care Management*, 171 Wash. 2d 736 (2011).

<sup>62</sup> Jonathan Martin, *Can Legal Use of Marijuana Get You Fired? State Supreme Court to Decide*, THE SEATTLE TIMES, Feb. 27, 2011, [http://seattletimes.nwsourc.com/html/localnews/2014352603\\_marijuana28m.html](http://seattletimes.nwsourc.com/html/localnews/2014352603_marijuana28m.html).

migraine headaches and sought relief from medical marijuana pursuant to the MUMA.<sup>64</sup> Roe accepted a position at TeleTech’s call center as a customer service representative, a position that was contingent upon Roe passing a drug test.<sup>65</sup> Roe informed TeleTech of her use of medical marijuana, took the drug test, and began work, but she was fired a week later.<sup>66</sup> Roe sued TeleTech for wrongful termination, claiming her firing violated the MUMA, and was in violation of public policy created by the MUMA supporting medical use of marijuana.<sup>67</sup> According to Roe’s lawyer, “It would flabbergast the average voter to think, ‘I’ve been given this right but can get fired for it anyway.’”<sup>68</sup> In contrast, many businesses have paid close attention to the Court’s decision because they view a ruling in favor of Roe as reducing the state’s competitiveness compared with other states.<sup>69</sup>

The language of the MUMA provides an affirmative defense to employers sued for wrongful termination.<sup>70</sup> With respect to the employment relationship, the law reads that “Nothing in this chapter requires any accommodation of any medical marijuana use in any place of employment, in any school bus or on any school grounds, or in any youth center.”<sup>71</sup> This section was amended in 2007, adding the words “on-site” before “medical marijuana use” to read: “Nothing in this chapter requires any accommodation of any *on-site* medical use of marijuana in any place. . . .”<sup>72</sup> Roe claimed the MUMA required an employer to accommodate off-site use of medical marijuana.<sup>73</sup> Roe points to the 2007 amendment adding the “on-site” language as further evidence that the limits on workplace accommodation were only intended to apply to on-the-job-use of medical marijuana.<sup>74</sup>

The Washington court did not agree with Roe’s interpretation of the MUMA.<sup>75</sup> According to the court, the language of the MUMA cannot be interpreted to regulate the conduct of private employers or protect users of medical marijuana from termination.<sup>76</sup> The explicit prohibition of marijuana use at work, explained the court, does not implicitly create an obligation to accommodate it outside of work.<sup>77</sup>

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<sup>63</sup> Roe filed under a pseudonym because marijuana is illegal under federal law. *Jane Roe*, 171 Wash. 2d 736, 764 n.1

<sup>64</sup> *Id.* at 742.

<sup>65</sup> *Id.* at 743.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 744.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 745 (citing RCW 69.51A.040(1)).

<sup>71</sup> *Id.* (citing former RCW 69.51A.060(4)).

<sup>72</sup> Also added by the amendment, after “youth center” “in any correctional facility, or smoking medical marijuana in any public place as that term is defined in RCW 70.160.020.” *Id.* at 746 (citing RCW 69.51A.060).

<sup>73</sup> *Id.* at 748.

<sup>74</sup> *Id.* at 751.

<sup>75</sup> *See Id.* at 748.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 751.

The original language of the Act and relied upon by Roe follows language that creates an affirmative defense for users and caregivers in a criminal proceeding only. Thus, the court said that the section, when read in context, does not create a duty of accommodation for private employers.<sup>78</sup> The 2007 amendment, according to the court, does not materially change the original meaning of the law; “neither the original nor the current language of MUMA requires employers to accommodate an employee’s off-site use of medical marijuana.”<sup>79</sup>

Nor was the court persuaded that the MUMA created a public policy to support Roe’s wrongful discharge claim.<sup>80</sup> Historically, Washington courts have found the public policy exception to employment at-will in only a limited number of circumstances, none of which include medical marijuana use.<sup>81</sup> The court’s interpretation of the MUMA was equally limited. According to the court, the MUMA is not so broad as to authorize all medical marijuana use nor so narrow as to prohibit a private employer from firing a medical marijuana user.<sup>82</sup> To the contrary, MUMA is limited to an affirmative defense to criminal prosecution alone.<sup>83</sup> This conclusion is supported by the fact that marijuana is still illegal under federal law, because under Roe’s interpretation employers would be forced to accommodate an employee’s off-duty illegal conduct.<sup>84</sup> Roe’s firing was upheld.<sup>85</sup>

Like the dissent in *Ross*, the dissent in *Roe* claimed that the majority’s decision runs counter to the spirit of the law and the intent of the voters.<sup>86</sup> According to the dissent, Roe was the kind of person voters had in mind when passing the MUMA: she suffered from debilitating migraines, traditional treatment no longer provided relief, and with the help of medical marijuana she could work.<sup>87</sup> In the dissent’s view, wrongful discharge in violation of public policy protects workers like Roe.<sup>88</sup> The dissent agreed with Roe’s argument that the 2007 amendment indicates a legislative intent to require accommodation of off-site use of medical marijuana.<sup>89</sup> The dissent stressed that while nothing in the MUMA requires businesses to tolerate workers impaired by drugs, the law is intended to treat marijuana like other prescription medications.<sup>90</sup> However, TeleTech’s drug policy excludes workers who

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 751-52.

<sup>80</sup> *Id.* at 757-58.

<sup>81</sup> *See Id.* at 755. These circumstances are: employees are fired for refusing to commit an illegal act; for performing a public duty or obligation; for exercising a legal right or privilege; in retaliation for reporting employer misconduct. *Gardner v. Loomis Armored, Inc.* 128 Wash. 2d 931, 936 (1996).

<sup>82</sup> *Id.* at 757.

<sup>83</sup> *Id.* at 758-59.

<sup>84</sup> *Id.* at 759.

<sup>85</sup> *Id.* at 760.

<sup>86</sup> *Id.* at 760-761.

<sup>87</sup> *Id.* at 761.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 762.

<sup>90</sup> *Id.* at 763.

test positive for medical marijuana regardless of whether the marijuana was consumed at work; whether it impairs the employee's productivity; or whether the employee's use can be reasonably accommodated. This case, according to the dissent, illustrates the need for the Washington legislature to revise and clarify the parameters of its law.<sup>91</sup>

A Michigan court has also confronted the issue of whether its state medical marijuana law creates public policy protection for employees and therefore changes the employment at-will relationship. Joseph Casias had sinus cancer and an inoperable brain tumor.<sup>92</sup> Despite his challenges, Casias married, had two children, and worked at Wal-Mart for five years. He was named Wal-Mart Associate of the Year in 2008.<sup>93</sup> Casias' doctor recommended medical marijuana, and Casias registered with the state of Michigan to use the drug pursuant to the Michigan Medical Marijuana Act (MMMA).<sup>94</sup> According to Casias, he never came to work under the influence of marijuana.<sup>95</sup> In November 2009, Casias twisted his knee at work and sought medical treatment.<sup>96</sup> Wal-Mart requires drug testing for all employees injured at work,<sup>97</sup> and when Casias tested positive for marijuana, he showed his manager his Michigan registry card.<sup>98</sup> The next week, Casias was fired because he failed the drug test.<sup>99</sup> He then sued claiming that although he is an employee at-will, his firing violated the public policy created by the MMMA.<sup>100</sup>

The MMMA prohibits the denial of "any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau" for marijuana used in accordance with the law.<sup>101</sup> Casias claimed that this language, specifically the word "business," created a new public policy that prohibited private employers from taking action against employees for conduct that is protected from criminal prosecution under the MMMA.<sup>102</sup>

The court did not agree.<sup>103</sup> According to the court's interpretation, the MMMA does not regulate private employment; it merely provides a potential

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<sup>91</sup> *Id.* at 764.

<sup>92</sup> Eve Tahmincioglu, *Wal-Mart Worker Fired Over Medical Marijuana*, MSNBC.COM, Mar. 17, 2010, <http://www.msnbc.msn.com/id/35913492/ns/business-careers/39438809>.

<sup>93</sup> Complaint ¶ 2, *Casias v. Wal-Mart Stores, Inc.*, No. 2010-2067 (37th Mich. Cir. Ct. June 29, 2010).

<sup>94</sup> *Id.*

<sup>95</sup> Barry Leibowitz, *Walmart faces medical marijuana suit from fired worker; cancer patient tested positive for pot*. CBSNEWS, June 30, 2010, [http://www.cbsnews.com/8301-504083\\_162-20009206-504083.html](http://www.cbsnews.com/8301-504083_162-20009206-504083.html).

<sup>96</sup> Complaint ¶ 36, *Casias*, No. 2010-2067.

<sup>97</sup> *Id.* ¶ 37.

<sup>98</sup> *Id.* ¶ 40.

<sup>99</sup> *Id.* ¶ 41.

<sup>100</sup> *Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp.2d 914, 921 (W.D. Mich. 2011).

<sup>101</sup> *Id.* at 918.

<sup>102</sup> *Id.* at 918, 923.

<sup>103</sup> *Id.* at 922.

defense to criminal prosecution or other adverse action by the state.<sup>104</sup> The court says the MMMA never mentions private employers or the protection of private employees from disciplinary action for using medical marijuana.<sup>105</sup> The term “business,” when read in context, said the court, is not a stand-alone term, but rather modifies “licensing board or bureau.”<sup>106</sup> Therefore “business,” used as part of the phrase “civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau,”<sup>107</sup> applies to state boards and bureaus, not private businesses.<sup>108</sup> According to the court, the MMMA does not then create a special class of employees who would be protected from discharge or other adverse treatment by private employers for their use of medical marijuana.<sup>109</sup>

The *Roe* and *Casias* courts were clear: state medical marijuana laws do not create a private right of action for medical marijuana users.<sup>110</sup> In *Roe*, the court stressed that no matter how strong the voter intent, if the law does not specifically address employment rights for marijuana patients, the court will not read them into the statute.<sup>111</sup> Voter intent is not enough to create a broad sweeping public policy.<sup>112</sup> The *Casias* court, in contrast, simply found no relationship between the law and private employment relationships.

## V. ACCOMMODATING A DISABILITY

While public policy challenges and drug-free workplace modifications have failed to protect certain patients, some plaintiffs have attempted to make in-roads by directly challenging their termination under state disability laws. These challenges have presented courts with novel issues such as whether allowing off-duty medical marijuana use by employees is a reasonable accommodation? Oregon courts faced this question shortly after its passage of the Oregon Medical Marijuana Act (OMMA) in 1998. The OMMA removes state-level criminal penalties for possession and use of marijuana by patients with a recommendation from their doctor.<sup>113</sup> Anthony Scevers suffered from anxiety, panic attacks, nausea, vomiting, and severe stomach cramps, all of which substantially limited his ability to eat.<sup>114</sup> Scevers

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<sup>104</sup> *Id.* at 921-22.

<sup>105</sup> *Id.* at 922.

<sup>106</sup> *Id.* at 923.

<sup>107</sup> *Id.* (citing M.C.L. § 333.26424(a)).

<sup>108</sup> *Id.* at 923.

<sup>109</sup> *Id.* at 925. The ACLU appealed the decision on behalf of Mr. Casias. See *Casias v. Wal-Mart Stores Inc.*, 695 F.3d 428 (6th Cir. 2012).

<sup>110</sup> *Roe*, 171 Wash.2d 736, 753 and *Casias*, 764 F.Supp.2d 914,922

<sup>111</sup> *Roe*, 171 Wash.2d 736, 754.

<sup>112</sup> *Id.*

<sup>113</sup> Oregon Medical

Marijuana, www.http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881&print=true. (last visited January 7, 2013).

<sup>114</sup> *Emerald Steel Fabricators*, 348 Or. at 161.

consulted with his doctor in order to obtain an OMMA registry identification card.<sup>115</sup> No prescription was required for obtaining a registry identification card, but possession of the card exempted Scevers from criminal prosecution for the possession, distribution, and manufacture of marijuana under certain conditions.<sup>116</sup>

In January 2003, Emerald Steel Fabricators (Emerald) hired Scevers as a temporary drill press operator.<sup>117</sup> While working for Emerald, Scevers used medical marijuana one to three times a day, although not at work.<sup>118</sup> Emerald was interested in hiring Scevers full-time, but Scevers knew he would then have to pass a drug test.<sup>119</sup> Scevers told his supervisor that he had a registry identification card and that he used marijuana to treat a medical problem.<sup>120</sup> One week later, he was fired.<sup>121</sup> Scevers filed a complaint with the Bureau of Labor and Industries (BOLI) alleging that Emerald had discriminated against him and did not make a reasonable accommodation for his disability.<sup>122</sup> An administrative law judge held that Emerald had violated state law by failing to engage in a meaningful interactive process with Scevers in order to determine whether a reasonable accommodation was possible.<sup>123</sup> According to BOLI, although marijuana is illegal under federal law, Scevers' use of medical marijuana was legal under state law and therefore not an "illegal use of drugs."<sup>124</sup> Note that Oregon law defines "illegal use of drugs," as all drugs whose possession is unlawful under state or federal law, except uses authorized under other sections of state law and "the use of drugs taken under supervision of a licensed health care professional."<sup>125</sup> Since medical marijuana use is authorized under state law (OMMA), BOLI determined that Emerald was required to engage in an interactive process to find an accommodation for Scevers.<sup>126</sup>

Emerald appealed BOLI's decision to the Oregon Supreme Court, and the court agreed with the administrative finding that Scevers' use of medical marijuana was "authorized under other provisions of state law."<sup>127</sup> Nevertheless, Emerald argued that the federal Controlled Substances Act (CSA) preempts any state law in conflict with federal law.<sup>128</sup> According to the court, states are free to pass laws on the same subject matter as the CSA, unless that law conflicts with the CSA, or stands as "an obstacle to the accomplishment and execution of the full purposes and

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<sup>115</sup> *Id.* at 162.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 163

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 170.

<sup>125</sup> *Id.* at 170-71.

<sup>126</sup> *See Id.* at 163. NOTE: The author's statement cannot be corroborated with the case.

<sup>127</sup> *Id.* at 171.

<sup>128</sup> *Id.* at 172.

objectives of Congress.”<sup>129</sup> Because Oregon law affirmatively authorizes the use of medical marijuana and the CSA prohibits the use of marijuana regardless of whether it is used for medical purposes, Emerald argued that the section of OMMA that authorizes the use of medical marijuana “stands as an obstacle to the implementation and the purposes of the [CSA]” and should be preempted by federal law.<sup>130</sup> Though the court acknowledged that Scevers’ use was authorized by Oregon law, they were persuaded by Emerald that the protections were otherwise preempted by the CSA.<sup>131</sup>

Oregon’s disability law also exempts drugs taken under the “supervision of a licensed health care professional or other uses authorized under the Controlled Substances Act” from its definition of “illegal drug use.”<sup>132</sup> Scevers argued that because his doctor signed a statement that Scevers had been diagnosed with a debilitating medical condition and that the use of marijuana might help control the symptoms, he should be protected from discharge from employment.<sup>133</sup> The court rejected Scevers’ argument and held that statement was not a prescription to use marijuana, but that it was merely a statement sufficient under OMMA for Scevers to obtain a registry identification card.<sup>134</sup> Without a prescription, Scevers’ doctor had no ability to control either the amount or frequency of use.<sup>135</sup> Moreover, said the court, the use of medical marijuana that is supervised by a licensed health care professional must also be a use authorized by the CSA.<sup>136</sup> The court concluded that Scevers’ use of marijuana was not authorized by the CSA and his physician could not prescribe a Schedule I controlled substance for medical purposes.<sup>137</sup> Based on this evidence, the court reasoned that Scevers had been engaged in the use of illegal drugs at the time Emerald fired him.<sup>138</sup> Thus Emerald had no duty to engage in a “meaningful, interactive process” to determine whether a reasonable accommodation existed before it fired him.<sup>139</sup>

According to the dissent, OMMA does not violate the CSA because it does not permit state residents to violate the federal CSA nor does it bar the federal government from enforcing the CSA against Oregon residents.<sup>140</sup> According to the dissent, the majority erroneously determined that because OMMA uses the word “authorizes,” the Act creates a new right: the right to use marijuana for medical

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<sup>129</sup> *Id.* at 177 (citing *Michigan Cannery & Freezers Ass’n v. Agric. Mktg. and Bargaining Bd.*, 467 U.S. 461, 478 (1984)).

<sup>130</sup> *Id.* at 178.

<sup>131</sup> *Id.* at 190.

<sup>132</sup> *Id.* at 186.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 186-87.

<sup>135</sup> *Id.* at 187.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 189.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 190.

<sup>140</sup> *Id.*

purposes, even though the CSA expressly prohibits marijuana.<sup>141</sup> However, in the dissent's view, the word "authorizes" does not create any new rights; it merely explains conduct that is not prohibited by state law, i.e. using marijuana for medical purposes.<sup>142</sup> The Oregon court and the United State Supreme Court have held that state laws that impose a different standard of conduct than federal law do not interfere with the enforcement of federal law.<sup>143</sup> However, where a federal law creates rights and a state law impairs the exercise of those rights, the state law cannot stand.<sup>144</sup> Therefore, says the dissent, because the CSA does not create a federal right, and the OMMA does not impair the exercise of a federal right, the Oregon law is not preempted by the CSA.<sup>145</sup>

Based on these preliminary decisions by state courts, it seems that a claim based on disability protection would seem to be a more effective legal argument for many marijuana patients as opposed to public wrongful discharge. An affected employee's best argument may be that he or she can perform the essential functions of the job, despite the physical impairment, if they use medical marijuana as a therapeutic intervention. Eventually there needs to be a definitive finding of whether allowing some employees to use medical marijuana outside of work for the treatment of a physical condition is a reasonable accommodation for the employer. As the court noted in *Ross*, drug use creates management concerns.<sup>146</sup> Labeling marijuana use as "medical" does not erase those concerns. In deciding that disability protection does not apply to those actively engaged in illegal drug (medical marijuana) use, the court in *Scevers* relied on federal law; because federal law prohibits marijuana use, those employees using marijuana for medical reasons in accordance with state law are engaged in the "illegal use of drugs" and therefore are not protected by state disability laws according to this interpretation of the law, thus relieving employers from the duty to accommodate an employee's off-duty use of medical marijuana.<sup>147</sup>

## VI. CONCLUSION

It is clear that state court decisions that have addressed this issue early on have, thus far, protected an employer's right to enforce drug-free workplace policies and have blocked attempts by employees to use medical marijuana and to keep their jobs. However, this interpretation is far from settled as most decisions have so far been made by lower courts. Both *Ross* and *Roe* dissents present arguably persuasive evidence that the majority opinions' interpretation of state medical marijuana laws, laws that are subject to differing interpretations, does not reflect the intent of the

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<sup>141</sup> *Id.* at 195. The Act "authorizes persons holding a registry identification card to use marijuana for medical purposes".

<sup>142</sup> *Id.* at 197.

<sup>143</sup> *Id.* at 198.

<sup>144</sup> *Id.* at 199.

<sup>145</sup> *Id.*

<sup>146</sup> *Ross*, 42 Cal. 4th at 926.

<sup>147</sup> *Emerald Steel Fabricators*, 348 Or. at 162.(which page is it)

voters at the time the law was passed.<sup>148</sup> This disconnect causes confusion for employees and employers and frustrates medical marijuana users. John Vasconcellos, a state senator from California, believes lawmakers had not anticipated the collision between state and federal law on medical marijuana use and potential adverse employment consequences, saying “I think they’re hiding from common sense, and they’re hiding from the science that shows it might help their employee be more healthy and feel less pain.”<sup>149</sup>

In response to the *Ross* decision, California State Senator Mark Leno has introduced legislation that would prevent California employers from discriminating against medical marijuana patients.<sup>150</sup> “The people who voted for Proposition 215 never intended for law-abiding patients to be out of a job.”<sup>151</sup> On April 5, 2011 the California Senate Judiciary Committee passed Senate Bill 129,<sup>152</sup> but the bill did not come before the full Senate before the session ended.<sup>153</sup>

Medical marijuana users have been gaining momentum in securing employee protections. For example, Colorado courts have been testing the impact of their medical marijuana laws on unemployment benefits. In the past year, of three decisions by the Colorado Department of Labor and Employment regarding unemployment benefits paid to employees fired because they tested positive for medical marijuana, two were awarded benefits.<sup>154</sup>

Approximately 80% of Americans support the use of medical marijuana in certain circumstances.<sup>155</sup> “Even when polls showed strong resistance to making pot legal, large majorities of Americans supported making it available to patients for pain relief.”<sup>156</sup> Twenty-three states allow for use of marijuana under limited circumstances or have eased prosecution, and it is predicted that more states will follow suit.<sup>157</sup> Yet, the federal government still considers all use of marijuana

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<sup>148</sup> *Ross*, 42 Cal. 4<sup>th</sup> 920, 924 and *Roe* 171 Wash 2d 736, 761.

<sup>149</sup> Mascia, *supra* note 1.

<sup>150</sup> *Medical Marijuana Employment Rights Bill Introduced in California Legislature*, Jan. 31, 2011, <http://www.safeaccessnow.org/article.php?id=6263&printsafe=1>.

<sup>151</sup> *Id.*

<sup>152</sup> *CA Bill to Protect Medical Marijuana Patients From Firing Passes Committee*, Apr. 5, 2011, <http://www.the420times.com/2011/04/ca-bill-to-protect-medical-marijuana-patients-from-firing-passes-committee>.

<sup>153</sup> <http://www.safeaccesssd.org/2011/06/delay-on-sb-129-means-more-time-to.html>.

<sup>154</sup> See *In the Matter of [Omitted] v. [Omitted]*, Industrial Claim Appeals Office, Docket Number 9428-2010, April 14, 2010; Scot Kersgaard, *Paul Curry Win Unemployment Case Against Coors*, THE COLORADO INDEPENDENT, May 27, 2011, <http://coloradoindependent.com/89288/paul-curry-wins-unemployment-case-against-coors>; and *Sosa v. Indus. Claim Appeals Office*, 259 P.3d 558 (Colo. App. 2011).

<sup>155</sup> Gary Langer, *High Support for Medical Marijuana*, ABC NEWS, Jan 18, 2010, <http://abcnews.go.com/Politics/medical-marijuana-abc-news-poll-analysis/story?id=9586503>.

<sup>156</sup> Ferguson, *supra* note 17.

<sup>157</sup> State Rep Files Medical Marijuana Bill, <http://www.myfoxaustin.com/story/20663606/state-representative-files-medical-marijuana-bill>.

illegal. Karen O'Keefe of the Marijuana Policy Project believes that with each new state that legalizes medical marijuana, it becomes more likely that Congress will change the federal law.<sup>158</sup> To date, courts have not been overly sympathetic to employees' arguments that disciplining them for their use of marijuana is contrary to the spirit of the law and the voters' intent. As many dissenting judges have argued, voter intent was to prevent medical marijuana use from interfering with a patient's job. Thus, many state laws may need to be rewritten to make this intent clear. Right now, no court has held that employers are required to accommodate medical marijuana use by employees.<sup>159</sup>

Some employers may want to accommodate medical marijuana use by employees and create workplace policies that reflect a new view of off-duty use of medical marijuana. Jian Software, based in Chico, California, recently consulted with NORML (National Organization for the Reform of Marijuana Laws) to create and implement a new policy that accounts for medical marijuana use.<sup>160</sup> It is possible that courts have actually given management a blueprint for an effective policy. For example, in his dissent in *Roe*, Justice Chambers criticized TeleTech's drug policy as too restrictive because it did not take into account whether medical marijuana was consumed on-site; whether it affected an employee's job performance; or whether TeleTech could reasonably accommodate the employee's use.<sup>161</sup> His opinion suggested that these guidelines could be incorporated into an effective workplace drug policy that allows for some medically necessary off-site marijuana use. Whether, for now, efforts like these adequately and appropriately address the very real concerns for employers about employees' off site use of medical marijuana remains a decision that managers are making on a piecemeal basis.

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<sup>158</sup> Kersgaard, *supra* note 13.

<sup>159</sup> The political standstill on the status of medical marijuana may become moot. According to Mark A.R. Kleiman, a specialist in drug policy at UCLA, advances in medicine will make marijuana measurable and doseable and delivered via spray or inhaler. For example, Sativex, a cannabis-based spray which does not cause a high, developed by GW Pharmaceuticals, has been approved for use in Canada and the U.K. and is in late-stage testing in the U.S. Kleiman speculates that if Sativex enters the U.S. market, the argument for medical marijuana disappears. Of course, the potential entrance of Sativex in the U.S. market does not mean that all currently registered users would qualify and/or benefit from the drug. Ferguson, *supra* note 17.

<sup>160</sup> Mascia, *supra* note 1.

<sup>161</sup> *Jane Roe*, 171 Wash. at 763.