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### A CRUEL CHOICE: PATIENTS FORCED TO DECIDE BETWEEN MEDICAL MARIJUANA AND EMPLOYMENT

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**BIO:** \* J.D. Candidate 2009, Hofstra University School of Law. Thank you all who supported me throughout the process of researching, writing and editing this Note. In particular, I would like to thank my parents, the editors and staff of the Hofstra Labor & Employment Law Journal, and my co-author Aaron Solomon. Many thanks to Professor Leon Friedman for his leadership and advisement, and Professor Grant Hayden and Professor Herbie DiFonzo for taking time to discuss the topic of this Note and offer their guidance.

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**HIGHLIGHT:** Jonathon has cancer. He was diagnosed a year ago and has undergone chemotherapy for the last two months, and faces six weeks of further treatment. Jonathon's treatment causes him to become violently ill at night, so much so that he cannot sleep. Jonathon works at a large stereo equipment outlet store. His boss is understanding of his illness and accommodates Jonathon when necessary by permitting him to leave work early and even missing full days of work.

Jonathon's doctor prescribed various medications for his nausea and insomnia. When the original medication did not quell his symptoms, his doctor prescribed new medication. Jonathon complained this new medication made him too groggy the following day, and affected his performance at work. Eventually, the doctor informed Jonathon of the possibility of using marijuana to alleviate his symptoms. Jonathon asked if that was legal. The doctor indicated that in their state a doctor could legally recommend marijuana and the patient would be able to use the drug at home, without fear of arrest by the police. The doctor told him that it was still considered illegal by the federal government, but the risk of federal prosecution was extremely low.

Jonathon considered this option. The doctor informed him it could definitely ease his nausea and help him sleep at night. He was about to ask his doctor what the next step would be, when he remembered that his employer required random drug testing.

He just had one question. "Can I lose my job?"

**TEXT:**  
[\*620]

**Introduction**

The answer to Jonathon's question is largely left unanswered and has been deemed a "legal gray area." n1 The California Supreme Court concluded in *Ross v. RagingWire Telecommunications, Inc.* n2 that under state law, an employer could legally fire an employee who used medical marijuana pursuant to the Compassionate Use Act n3 ("CUA") even when the marijuana use was at home and was not alleged to affect workplace performance. n4 On the other hand, Rhode Island's medical marijuana law explicitly states that an employer cannot discriminate against individuals who use medical marijuana. n5 In total, thirteen states allow doctors to recommend marijuana to their patients, n6 and roughly 300,000 Americans use medical marijuana for various illnesses and ailments including cancer, AIDS or HIV, chronic and acute pain, anorexia, migraines, glaucoma, multiple sclerosis, insomnia, epilepsy, and Hepatitis C. n7

Almost half of those that use marijuana for medical purposes live in California. n8 California was the first state to recognize a medical marijuana law with the enactment of the CUA in 1996. n9 The CUA, [\*621] originally entitled Proposition 215, passed by referendum, a direct reflection of the will of California's voters. n10 Since then, twelve states have followed California's initiative: Alaska, n11 Colorado, n12 Hawaii, n13 Maine, n14 Montana, n15 Nevada, n16 New Mexico, n17 Washington, n18 Oregon, n19 Rhode Island, n20 Vermont, n21 and Michigan. n22

Despite states' efforts to legalize the use of medical marijuana upon a doctor's recommendation, the drug remains illegal under federal law. n23 Marijuana is categorized as a Schedule I drug in the Controlled Substances Act n24 ("CSA"). Under the CSA, drugs in this category have a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and a "lack of accepted safety for use of the drug ... under medical supervision." n25 The Food and Drug Administration ("FDA") has stated that marijuana has no known medical benefits, and therefore, does not condone its use for medical purposes. n26 Furthermore, the United States Supreme Court decision in *Gonzales v. Raich*, n27 held that the federal government's classification of marijuana in the CSA declares the drug illegal even in a state that allows the medical [\*622] use of marijuana. n28 However, following the Supreme Court's ruling, it still remains unclear whether medical marijuana must be accommodated by an employer. n29

This clearly places medical marijuana in a state of limbo. While various states continue to pass statutes and ordinances that allow the infirm to choose marijuana as a legal option, n30 the use of medical marijuana is a federal crime. n31 Though arrest or prosecution by the federal government is very unlikely, n32 a user may have another concern if he chooses marijuana. That concern is the very realistic fear of losing his job. In California (and possibly more states to come), a medical patient who is allowed to use marijuana pursuant to state law will not be protected from workplace discrimination for taking, what may be, his best possible medication. n33 In essence, these states will be allowing a third party, the employer, to determine the medical decisions of an employee when those decisions are traditionally left for the patient and doctor to determine. n34

[\*623] As Justice Kennard of the California Supreme Court pointed out, many seriously ill patients are left with only two options. n35 On the one hand, they may continue to use marijuana and ease many of their symptoms but face unemployment. n36 Or, on the other hand, they may keep their job, but suffer needlessly from their debilitating illness. n37 "Surely this cruel choice is not what California voters intended when they enacted the state Compassionate Use Act." n38

This Note will discuss the implications of medical marijuana in disability discrimination law. Section I will discuss various states' medical marijuana laws and cases brought under state disability law. Section II will analyze requirements and problems that may arise if an employee attempts to bring a claim under the Americans with Disabilities Act ("ADA") n39 upon termination for medical marijuana use. Finally, Section

III will examine whether a patient's use of medicinal marijuana is an "illegal use of drugs" n40 for the purposes of the ADA.

### **I. An Employee's Use of Medical Marijuana: Under State Law**

Thirteen states have enacted legislation which allows licensed healthcare professionals to recommend the use of marijuana to their patients for various medical conditions. n41 The specifics of these laws vary from state to state, n42 and only Rhode Island contains a provision explicitly protecting employee rights. n43 However, several other states contain provisions in their medical marijuana laws that could be [\*624] interpreted as providing protections for employees. n44 For example, the Montana Medical Marijuana Act states that a "qualifying patient ... may not be arrested, prosecuted or penalized in any manner or be denied any right or privilege, including but not limited to civil penalty ... ." n45 Only a few states that allow the medical use of marijuana have considered the question of how the laws will affect employment, specifically a private employer's ability to terminate or refuse to hire employees for their use of medical marijuana.

#### **A. Rhode Island**

Rhode Island is currently the only state that specifically protects the jobs of employees who use medical marijuana. n46 Rhode Island's statute states "no school, employer or landlord may refuse to enroll, employ or lease to or otherwise penalize a person solely for his or her status as a registered qualifying patient ... ." n47 The ultimate goal of this provision was to ensure that marijuana was treated similarly to other medications. n48 As a result of its inclusion, medical marijuana consumers in Rhode Island are the most protected in the nation. They receive protections that they can rely on up-front, instead of being forced to litigate those protections after damage has incurred. n49

#### **B. Oregon**

California and Oregon are the only two states whose courts have substantively tested the issue of medical marijuana use and employment under their state's disability discrimination law. In the Oregon case, *Washburn v. Columbia Forest Products*, n50 the plaintiff, Robert Washburn, was hired as a millwright for Columbia Forest Products, with responsibilities that included maintaining dangerous heavy equipment. n51 [\*625] Washburn had trouble sleeping due to muscle spasms that occurred at night. n52 Washburn's doctor recommended that he use marijuana as part of the Oregon medical marijuana program. n53 Washburn heeded his doctor's recommendation. Washburn found that the marijuana alleviated his sleeping disorder. n54 He requested that his employer accommodate his disability through a drug test that would only determine if he was currently under the influence of marijuana in lieu of the drug test required for other employees. n55 The traditional test detects trace amounts of marijuana in one's system and can provide a positive result two to three weeks after the marijuana use. n56 Washburn's employer refused to make the accommodation and subsequently terminated him for failing the drug test. n57 Washburn brought an action alleging that the employer failed to reasonably accommodate his disability as required by Oregon's disability law. n58

The trial court granted summary judgment to the employer on two grounds: Washburn was not disabled as a matter of law, and the employer was not required to accommodate the use of marijuana. n59 The court believed that the definition of "disabled person" under Oregon law had to be analyzed in "lockstep" with the similar provision defining "person with a disability" under the ADA. n60 At that time, this meant that mitigating factors, such as medications, would have to be taken into account when assessing whether a person's impairment substantially limited a major life activity. n61 The trial court noted that since the marijuana alleviated Washburn's insomnia, he was no longer disabled, and unable to state a claim under the act. n62 Further, the court found that [\*626] the Oregon medical marijuana law provided that an employer was not required to accommodate medical marijuana at the workplace. n63

The Court of Appeals reversed the trial court's findings on both issues. n64 First, the court noted that Oregon disability law did not mandate that the definition of "disabled person" be analyzed in "lockstep" with

federal law, and the plain language of the law did not require mitigating measures to be taken into account. n65 The court found that Washburn could be found disabled and, as a result, summary judgment was improvidently granted. n66

The next issue the Court of Appeals considered was whether the use of medical marijuana had to be accommodated. n67 The Oregon Medical Marijuana Act n68 specifically stated that nothing in the act shall be construed to require "an employer to accommodate the medical use of marijuana in any workplace." n69 The main question for the court was whether, by having trace elements of marijuana in his system at work, did Washburn use marijuana in the workplace? n70 Oregon law defined "medical use of marijuana" as "the production, possession, delivery, or administration of marijuana, or paraphernalia used to administer marijuana, as necessary for the exclusive benefit of a person to mitigate the symptoms or effects of his or her debilitating medical condition." n71 Since it was undisputed that Washburn did not produce, deliver or administer marijuana in the workplace, the issue became whether he possessed marijuana in the workplace by having trace elements of the drug in his urine. n72 The court followed a holding in the criminal law context where it was decided that a person no longer possessed a controlled substance after the drug was consumed and entered the bodily fluids. n73 Since Washburn did not possess the drug in the workplace, then he did not use the drug in the workplace, and the provision stating that an employer need not accommodate the "medical use of marijuana in [\*627] [the] workplace" n74 had no significance to the case. n75 The Court of Appeals left for the trial court the issue of what, if any, would be a necessary reasonable accommodation. n76

The Oregon Supreme Court took a different position on the issues involved in Washburn. n77 The Oregon Supreme Court agreed with the Court of Appeals' holding that the provision defining "disabled person" did not have to be analyzed in "lockstep" with the Americans with Disabilities Act. n78 However, the court held that by looking at the plain language of the definition, which used the present indicative tense, the assessment of whether an individual had a disability should be analyzed by taking into account mitigating factors for a determination whether the individual was presently disabled, rather than potentially or hypothetically disabled. n79 After the Oregon Supreme Court took the plaintiff's medication into consideration, it determined that the plaintiff did not meet the definition of "disabled." n80 Accordingly, he did not receive protection under Oregon's disability law. n81 The court, however, did not overrule the Court of Appeals' ruling that an employee who used marijuana during off-duty hours and not on the employer's premises did not use marijuana in the workplace. n82 Thus, in Oregon there is the potential that if an employee is actually disabled and terminated for his use of medical marijuana, he may succeed under Oregon disability discrimination law.

Shortly after this case was decided, the Oregon legislature considered amending the Oregon Medical Marijuana Act to include a provision giving employers a right to terminate employees for their use of marijuana "regardless of where the use occurs." n83 The bill was designed to strengthen an employer's ability to terminate an employee [\*628] for their use of medical marijuana. n84 Opponents of the bill argued that urinalysis, the drug test commonly used by employers, cannot accurately test for impairment. n85 However, proponents of the bill argued that marijuana use, whether at the job or at home, presented a safety risk to anyone at the job site. n86 The bill passed the Senate by a vote of 23 to 5, n87 but then moved to the House where it died in committee. n88 Currently, a revised version of the bill is being debated in the Oregon legislature. n89

### **C. California**

In California the issue of medical marijuana and employment was analyzed in *Ross v. RagingWire Telecommunications, Inc.* n90 Pursuant to the CUA, Gary Ross' physician recommended he use marijuana to treat chronic pain that he suffered from since being injured serving in the Air Force. n91 Ross' employer required that he take a drug test, which tested positive for THC, the active chemical found in marijuana. n92 Ross gave the employer a copy of his physician's recommendation for the drug; nevertheless he was fired. n93 Subsequently, Ross brought charges against the employer alleging disability discrimination under the

California Fair Employment and Housing Act n94 ("FEHA") and wrongful termination in violation of public policy. n95

The California Supreme Court held that an employee whose doctor recommended medical marijuana was not immune from termination by a disapproving employer upon the failure of a drug test, despite the fact [\*629] that the marijuana use was legal under state law. n96 The court began by stating that marijuana is not afforded the same status as other prescription drugs. n97 The court construed the CUA to apply narrowly, by only protecting those who possess medical marijuana from criminal prosecution. n98 The court noted that the CUA was devoid of any language that would suggest it was addressing the issue of employee rights and privileges. n99 Further, the court stated that FEHA did not protect people who used drugs that were illegal under federal law. n100

The California Supreme Court relied heavily on case law that gave employers the ability to test employees and applicants for illicit drug use. *Loder v. Glendale* n101 provided that employers had the right to test for drug use "in light of the well-documented problems that are associated with the abuse of drugs and alcohol by employees - increased absenteeism, diminished productivity, greater health costs, increased safety problems and potential liability to third parties, and more frequent turnover ... ." n102 However, as the dissent in *Ross* noted, the majority's reliance on *Loder* may have been misplaced. n103 The workplace drug policy in *Loder* stated that if the drug test revealed "the presence of drugs for which the applicant [had] no legitimate medical explanation, the applicant was disqualified from hiring or promotion." n104 *Ross*, on the other hand, did have a legitimate medical explanation for his marijuana use; it was recommended by his doctor to treat chronic pain and it was used pursuant to state law. n105 Since the marijuana use in *Ross* was pursuant to a legitimate medical purpose, and not associated with drug abuse, the concerns in *Loder* of increased absenteeism and diminished work productivity were inapplicable. n106 [\*630] What is most stirring about the majority opinion in *Ross* is the lack of analysis under the FEHA, the law under which the suit was brought. n107 The majority analyzes the issue as if the case was brought under a violation of the CUA, and finds that the CUA did not create any employment rights. n108 However, under the FEHA, employers have the duty to provide a "reasonable accommodation" to employees that suffer from a disability. n109 The majority concludes that it would not be a "reasonable accommodation" for an employer to accommodate an employee's medical use of marijuana. n110

The plaintiff contended that by enacting an amendment to the CUA that explicitly stated that employers need not accommodate the use of medical marijuana at the jobsite, n111 the FEHA and the CUA acting together required the accommodation of the use of marijuana when it occurred at home during off-duty hours. n112 Five state legislators who authored the amendment provided amici curiae concurring with the plaintiff's interpretation. n113 Nevertheless, the California Supreme Court rejected it. n114 The court did not analyze the fact that there is a general rule that disabled employees must be reasonably accommodated under the FEHA, but only noted that the CUA did not provide any employee protections. n115

Two justices vehemently dissented from the *Ross* majority with regards to the FEHA claim. n116 The dissent characterized the majority's [\*631] opinion as "conspicuously lacking in compassion." n117 Unlike the majority, the dissent analyzed the plaintiff's claim utilizing the FEHA, stating:

Nothing in the text of the FEHA ... supports the proposition that a requested accommodation can never be deemed reasonable if it involves off-duty conduct by the employee away from the jobsite that is criminal under federal law, even though that same conduct is expressly protected from criminal sanction under state law. n118

The FEHA includes, "adjustment or modification of examinations, training materials or policies" as examples of reasonable accommodations. n119 Therefore, according to the CUA amendment, though an employer need not accommodate an employee's medical marijuana use at the jobsite, n120 the FEHA mandates a general rule that an employer must accommodate an employee's disability. n121 Thus, medical

marijuana would have to be accommodated when used in order to mitigate a disability, unless the use took place at the jobsite. The dissent directly stated:

Unless an employer can demonstrate that an employee's doctor-approved use of marijuana under the [CUA] while off duty and away from the jobsite is likely to impair the employer's business operations in some way, or that the employer has offered another reasonable and effective form of accommodation, the employer's discharge of the employee is disability discrimination prohibited by the [FEHA]. n122

Additionally, the dissent noted that though marijuana has intoxicating effects, so do many other prescription drugs. n123 In fact, several over the counter medications have effects that could impair the productiveness of employees on their particular jobsite. n124 According to [\*632] the dissent, the majority's argument that marijuana is different solely due to its intoxicating affect is baseless inasmuch as the majority does not deny that employers must make accommodations for other potentially intoxicating drugs. n125 Ultimately, the dissent opines that it is improper for an employer to summarily fire an employee for at-home use of medical marijuana without requiring the employer to demonstrate how the employee's drug use will damage their business interests. n126

On February 20, 2008, less than a month after the California Supreme Court decided *Ross*, a bill was introduced in the California legislature that sought to overturn this ruling. n127 The bill would still permit employers to prohibit medical marijuana consumption at the workplace. n128 However, it would prohibit employers from firing an employee for use of medical marijuana when used at home and where it would not affect job performance. n129 Assemblymember Mark Leno said, "[the bill] is merely an affirmation of the intent of the voters and the legislature that medical marijuana patients need not be unemployed to benefit from their medicine." n130 The bill was approved by the legislature. n131 However, Governor Schwarzenegger vetoed the bill. n132 Thus, the decision in *Ross* remains as the law in California.

While the questions concerning medical marijuana and employment have been determined in a few courts with regards to state law, no court has substantively questioned whether federal law, namely the ADA, protects employees from discrimination based on their medical marijuana use. n133 Assuming that the use takes place at home and does [\*633] not affect job performance, a disabled individual using medical marijuana for treatment may find solace in the last place they would look: the federal government.

## **II. Medical Marijuana and the Americans with Disabilities Act**

An employee who is terminated due to his medical marijuana use may be able to state a claim under the ADA. n134 To succeed with a claim under the ADA, the plaintiff must establish a prima facie case of discrimination. The plaintiff must demonstrate that: 1) he or she is "disabled" according to the ADA; 2) that he or she is qualified to perform the essential functions of the job, with or without reasonable accommodation; and 3) the employer discriminated against the plaintiff because of the plaintiff's disability. n135 A disability is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." n136 If the person has a record [\*634] of such an impairment or is regarded as having such an impairment, then he may also be able to claim a disability under the Act. n137

### **A. Impairment That Substantially Limits a Major Life Activity**

Marijuana may be used to relieve the symptoms of many impairments n138 that adversely affect major life activities. n139 The following conditions, for which marijuana may provide relief, n140 have been considered to be "impairments" by the courts: HIV infection, n141 cancer, n142 chronic or acute pain, n143 insomnia, n144 glaucoma, n145 multiple sclerosis, n146 anorexia, n147 and epilepsy. n148 Some of the affected major life activities are more obvious than others, depending on the impairment that the individual is claiming. For example, a plaintiff who has glaucoma will claim that their major life activity of seeing is limited. n149 One who has severe nausea from cancer treatment, has the wasting effect [\*635] caused by

AIDS, or is otherwise anorexic, may claim that this impairment caused their major life activity of eating to be limited. n150 If the plaintiff has been authorized to use marijuana because of insomnia or some other sleep impairment, then he may claim that his major life activity of sleeping is adversely affected. n151

Another potential argument is that the medical marijuana use itself is the disability. n152 The plaintiff may attempt to claim that the major life activities of learning or concentrating have been affected. n153 Another possible theory, suggested in a footnote in *Washburn v. Columbia Forest Products, Inc.* n154 is that the employee may claim that the marijuana use substantially limited the major life activity of "employment." n155 In order for the employee to succeed with such a theory, they must be limited from working a "broad class of jobs." n156 Since many jobs require that an employee abstain from marijuana use, this claim may prove to be successful.

**[\*636]**

### **B. The United States Supreme Court "Substantially Limits" the Protection of the ADA**

Although the original intent of the ADA's drafters was to establish a broad scope of protection, n157 many employees were denied relief under the ADA because their impairment did not qualify as a disability under the definition set forth in the original ADA. Through a string of Supreme Court decisions, the ADA protections were extremely narrowed. One study in 2003 found that the employer prevailed in approximately 97% of the decisions. n158

One of these Supreme Court decisions was *Sutton v. United Air Lines*. n159 The Supreme Court decided that Congress intended mitigating measures, such as medications and prosthetics, to be taken into account when determining whether an individual was disabled. n160 The Court noted that the phrase "substantially limits a major life activity," was in the present tense, and thus, the issue of whether an individual had a disability needed to be assessed presently with consideration given to any ameliorating factors. n161 The requirement to take mitigating factors into account would have a significant impact on the issue of medical marijuana. Specifically, since marijuana is used as a medication, an individual who uses marijuana to treat an impairment may no longer be disabled, and the person will no longer have protection under the ADA. n162 Thus, if the employee is no longer disabled due to the marijuana, even if the adverse employment action was in response to the marijuana use, the employee will not receive any protection from the ADA. n163

**[\*637]** Congress responded to the Supreme Court's tapering of the ADA's protection with the 2008 amendments, which became effective January 1, 2009. n164 Congress expressly overruled *Sutton*, enacting rules of construction that now read, "the determination of whether [a person is disabled] shall be made without regard to the ameliorative effects of mitigating measures such as medication ... ." n165 Now, employees seeking protection under the ADA will be "deemed disabled based on the underlying medical condition, and not based on what therapies they have pursued." n166

### **C. The Duty to Reasonably Accommodate**

The ADA prohibits employment discrimination on the basis of an individual's disability. n167 "Not making reasonable accommodations" is included within the statute's definition of the term "discriminate." n168 Employers may be concerned that they may have to accommodate an employee's use of marijuana at the workplace. However, many states' medical marijuana laws provide that an employer is not required to accommodate the medical use of marijuana in the workplace. n169 Taking this language on its own merits, it does not appear to require an employer to accommodate an employee's use of marijuana. However, if this language is understood as an express exception to the general rule of law provided in the ADA - that an employer must accommodate a disabled employee n170 then the employer may have to accommodate such use as long as it does not occur at the jobsite. n171

**[\*638]** Many employers have workplace drug policies that require employees to abstain from marijuana use. To enforce these policies, employers may require employees pass a pre-employment drug test through urinalysis. n172 The employer may also require that an employee be drug tested throughout the course of

employment. n173 The ADA does not limit an employer's ability to perform drug tests in order to determine whether or not the employee is engaging in the illegal use of drugs. n174 An employee, who used marijuana even for medical purposes, may be in violation of their workplace drug policy.

One of the examples of a reasonable accommodation in the ADA is to change or modify workplace policies. n175 When a policy is changed to make a reasonable accommodation, it is only altered for the disabled individual and not for the employees as a whole. n176 Thus, waiving or altering the employer's drug policy concerning the medical use of marijuana may be a reasonable accommodation.

Most employers drug test through urinalysis. n177 Urinalysis cannot determine current impairment, but in some cases can determine if they have used marijuana in the previous two to six weeks. n178 Medical marijuana advocates suggest a model workplace policy whereby the employer would test the blood or saliva, instead of the urine, of an employee. n179 This test would have the ability to determine if the employee used marijuana within the past few hours, opposed to the past [\*639] few weeks. n180 This impairment test may be a reasonable accommodation for an employee who uses medical marijuana.

#### **D. Termination for Misconduct or Discrimination Against Disability**

Some courts have recognized the distinction "between termination of employment because of misconduct and termination of employment because of a disability." n181 An employer who terminates or disciplines an employee for using medical marijuana may attempt to defend such action by claiming it was not based on the employee's disability, but instead on the employee's workplace misconduct.

Of course, employers are permitted to terminate employees due to their misconduct, regardless of whether or not the employee has a disability. n182 On the other hand, "conduct resulting from a disability is considered part of the disability, rather than a separate basis for termination." n183 Because of this, medical marijuana is in an interesting situation. While the use of the drug will violate a workplace conduct rule, its use may be conduct resulting from the disability, and, therefore, should be accommodated.

This dichotomy has previously surfaced in the context of drug use. In *Collings v. Longview Fibre Co.*, n184 eight employees, who did not claim that they used marijuana for medical purposes, were terminated for recreational on-the-job use of marijuana. n185 The employees claimed that the termination was in violation of the ADA because they were addicted to the drug, and thus disabled. n186 The court rejected their claim, [\*640] and held that the employer could terminate them because they were engaging in "the illegal use of drugs," and the ADA does not limit an employer's ability to discipline employees for engaging in such use. n187 In fact, according to the ADA, if a person engages in "illegal use of drugs," and the employer acts on the basis of such use, then the person is not a "qualified individual with a disability." n188 Therefore, it becomes imperative to determine whether an employee who utilizes medical marijuana as a result of the employee's disability is engaging in the "illegal use of drugs." n189 If the medical use of marijuana is not an "illegal use of drugs" and it is conduct that results from a disability, then the employer may be liable if he discriminates on the basis of its use.

### **III. Is the Medical Use of Marijuana an "Illegal Use of Drugs" for the Purposes of the Americans with Disabilities Act?**

The ADA permits employers to terminate employees who use illegal drugs, even when that employee is disabled, as long as the drug use is the basis of the employment decision. n190 If the medical use of marijuana is considered an "illegal use of a drug," then the employer will not be liable for terminating a disabled employee, as long as the decision was based on the medical marijuana use.

At first glance, this appears to ban an employee who is terminated or otherwise discriminated against for using marijuana from bringing a claim under the ADA. After all, the Supreme Court held in *Gonzales v. Raich* n191 that medical marijuana is considered an illegal drug under federal law even in states that allow its medical consumption. n192 However, the ADA's definition of the phrase "illegal use of drugs" supports an argument that the phrase does not include the medical use of [\*641] marijuana. n193

The ADA's definition of "illegal use of drugs" provides:

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act ... . Such term 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. n194

The definition of "illegal use of drugs" can be separated into three elements. Each element will be labeled with a letter, as the following:

The term "illegal use of drugs" means:

A	B	C
Use of drugs, possession or distribution of which is unlawful under the CSA	Use of a drug taken under supervision by a licensed healthcare professional	Other uses [of drugs] authorized by the CSA or other provisions of Federal Law n195

If the designated letters are substituted for the elements then the definition will appear as:

The term "illegal use of drugs" means A. Such term does not include B, or C. n196

To determine whether medical marijuana is illegal for purposes of the ADA, each element will be separately analyzed.

**[\*642]**

**A. Use of Drugs, Possession or Distribution of Which Is Unlawful Under the CSA**

Medical marijuana is a drug, the possession or distribution of which is unlawful under the CSA. Since marijuana is a Schedule I drug, n197 the distribution of it is unlawful under the CSA without regard to its purpose. n198 Additionally, the Supreme Court has interpreted the CSA as outlawing the possession of marijuana in *Gonzales v. Raich* n199 and *United States v. Oakland Cannabis Buyers' Coop.*, n200 even when possessed and distributed solely for medical purposes. Therefore, medical marijuana is a drug of which possession or distribution is unlawful under the CSA, and medical marijuana therefore meets the definition of Element A. Under Element A alone, the medical use of marijuana appears to be an "illegal use of drugs." n201

**B. Use of a Drug Taken Under Supervision of a Licensed Healthcare Professional**

Next, Element B is determined by whether medical marijuana is a "drug taken under supervision by a licensed healthcare professional." n202 The term "under supervision" is somewhat ambiguous. It is unclear whether the phrase refers to a drug taken under direct supervision of a licensed healthcare professional, meaning actually in the doctor's presence, or to a drug authorized or prescribed by a doctor during the course of treatment. n203

**[\*643]** All three federal district courts that have considered the definition of "illegal use of drugs" have implied that the meaning of "under supervision" was the latter. In *McDaniel v. Mississippi Baptist Medical Ctr.*, n204 the court's ruling implied that it understood "under supervision by a licensed health care professional," to mean the drug's use was authorized by a licensed health care professional. n205 *Toscano v. National Broadcasting Company* n206 implied a stricter reading; an individual abusing a prescribed drug outside the presence of a licensed health care professional was no longer taking the drug "under supervision." n207 These courts seem to agree that the drug does not have to be administered in the physical presence of the physician to be considered "under supervision of a licensed healthcare professional" as long as it was

taken during the course of treatment. n208 Additionally, the court in Barber v. Gonzales n209 assumed that medical marijuana was a drug taken "under supervision of a licensed healthcare professional." n210 None of these courts indicated that the drug must have been taken in the physical presence of their doctor.

Physicians who advise their patients on the use of medical marijuana have the same moral, ethical, and legal responsibilities to use their best judgment in "accordance with their training, experience and clinical insight" as they do when recommending other controlled [\*644] substances or another form of therapy. n211 According to a brief submitted in Ross v. RagingWire on behalf of associations of physicians, nurses and other public health practitioners, n212 "should a physician choose [to recommend the medical use of marijuana], a formal recommendation should be made in the context of a proper doctor-patient relationship and in compliance with the professional standards of the community." n213 Thus, when a doctor recommends the use of medical marijuana, the use is considered to be "under supervision" as it is substantially similar to any other treatment a doctor may recommend or prescribe.

### **1. Ambiguity?**

Before considering Element C, the definition of "illegal use of drugs" already appears to be contradictory when it comes to medical marijuana. Inasmuch as medical marijuana is both illegal to possess and distribute under the CSA and also a drug that is taken under supervision of a licensed healthcare professional, medical marijuana meets both Element A and Element B. As stated above, the definition reads:

The term "illegal use of drugs" means A. Such term does not include B, or C.

Therefore, the medical use of marijuana is an "illegal use of drugs" by the terms of Element A. Simultaneously, by the terms of Element B, the term "illegal use of drugs" does not include medical marijuana. Perhaps Element C will clarify this ambiguity.

### **C. Uses [of Drugs] Authorized by the CSA or Other Provisions of Federal Law**

There is a handful of individuals who use medical marijuana that is expressly authorized by federal law. n214 Though the current understanding is that medical marijuana is illegal under federal law except for these selected few, the authors of this Note have recognized two arguments that the CSA or other provisions of federal law can be [\*645] interpreted as authorizing the use of medical marijuana. These arguments may still be viable even after the Supreme Court's holding in Gonzales v. Raich. n215

#### **1. The Selected Few in the Compassionate Use Program**

The National Institute on Drug Abuse ("NIDA") is the sole source of legal medical marijuana in the United States. n216 In 1978, as part of a legal settlement, NIDA began to supply marijuana to patients whose physicians applied for and received permission from the Food and Drug Administration. n217 In 1992, the program ended and the Federal government stopped supplying medical marijuana to new patients. n218 However, NIDA continues to supply marijuana to those patients who were receiving the drug at the time of the termination. n219 Today, there are only seven individuals that receive marijuana legally as authorized by the federal government. n220

#### **2. The Controlled Substances Act**

Generally, the CSA is understood to outlaw the use of marijuana, even for medical purposes. However, there is an argument, not presented in Gonzales v. Raich, n221 that the text of the CSA authorizes state-sanctioned medical marijuana. n222 Section 844(a) of the CSA outlines the penalties for simple possession. n223 It reads, "it shall be unlawful for any person ... to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice." n224 If this text were read on its own, as long as marijuana is obtained "pursuant to a valid prescription," then the [\*646] possession would not be unlawful. n225

Section 829 of the CSA sets out the legal methods through which controlled substances may be prescribed. n226 The provision sets out the methods for substances in Schedules II through V, but is silent for Schedule I substances, such as marijuana. n227 This silence is generally understood as a ban on the prescription of Schedule I substances, but a possible reading of the silence is a reservation of the states' right to enact legislation that allows the prescription of these substances.

Section 903 provides that the CSA does not preempt state laws that are "within the authority of the State" unless there is a "positive conflict between [the CSA] and that state law so that the two cannot consistently stand together." n228 Courts have consistently recognized that the practice of medicine is in the province of the states. n229 In 2006, the Supreme Court ruled, in a different context, that the CSA did not change this proposition. n230 Since the CSA is silent on the methods by which Schedule I drugs may be prescribed, n231 then there is no "positive conflict" as required by section 903 when states authorize their medical professionals to "prescribe" medical marijuana. n232

The question then becomes whether a medical professional's recommendation to use marijuana is, in fact, a "prescription." The CSA does not contain a definition for the term "prescription." n233 A federal district court came up with the definition of the term in a different context by turning to a dictionary and found that "prescription" was, "a [\*647] bona fide order - i.e., directions for the preparation and administration of a medicine, remedy, or drug for a real patient who actually needs it after some sort of examination or consultation by a licensed doctor." n234 As noted by one commentator, if this definition were applied to the CSA in the medical marijuana context, then the recommendation of a doctor to use medical marijuana may be a "prescription." n235 Therefore, since states would be authorized through section 903 to enact laws allowing the "prescription" of Schedule I substances, and the possession of medical marijuana is pursuant to a valid "prescription," n236 the possession of medical marijuana is lawful.

### **3. The Fourteenth Amendment - Substantive Due Process**

Element C, states the term "illegal use of drugs" does not include use of a drug that is authorized by the CSA or other provisions of federal law. n237 Some claim the substantive due process doctrine supports the federal authorization of medical marijuana. n238 If it were deemed that the right to medical marijuana is a fundamental right, then laws restricting its use would have to be analyzed utilizing strict scrutiny. n239 A Harvard Law Review note contemplated the substantive due process rights of patients who use medical marijuana as a last resort. n240 The note reviewed fundamental rights such as the right to live, to die with dignity, to avoid severe physical suffering, and to exercise medical autonomy within the context of a patient who uses medical marijuana. n241 A separate law review article focused on medical marijuana and the right of palliative care. n242 The Supreme Court in *Washington v. Glucksberg* n243 [\*648] held that a terminally ill patient did not have the fundamental right to physician-assisted suicide. n244 However, the concurring opinions of five justices left open the possibility of challenging a law that restricts a patient from obtaining palliative care. n245 Thus, it is conceivable that a person with a severe disease, whose only ability to obtain palliative care is to use medical marijuana, may have a substantive due process claim.

The Ninth Circuit in *Raich v. Gonzales* n246 determined that an individual who uses medical marijuana does not have a substantive due process claim. n247 The court phrased the purported fundamental interest as a "right to make life-shaping decision on a physician's advice to use medical marijuana to preserve bodily integrity, avoid intolerable pain, and preserve life, when all other prescribed medications and remedies have failed." n248 The court attempted to determine whether this right is "deeply rooted in this nation's history and tradition" and "implicit in the concept of ordered liberty." n249 The court noted that the nation has a long history of marijuana use, both medical and otherwise. n250 Even though all fifty states criminalized possession of marijuana by 1965, almost all states created exceptions for using the drug when a medical professional authorized its use. n251 In fact, it was not until the passage of the CSA in 1970 that all marijuana use, medical and otherwise, became illegal. n252 In agreeing with *Raich*, the court held that marijuana's use as a treatment had gained traction in recent years. n253 However, the court further held that use of medical marijuana, even as a last resort, is not a fundamental right. n254 The court stated, "although

that day has not yet dawned, considering that during the last ten years eleven states [now thirteen] have legalized the use of medical marijuana, that day may be upon us sooner than expected." n255

[\*649] Besides the select group of individuals federally authorized to use marijuana, medical marijuana does not currently appear to be a drug authorized by the CSA or federal law. If either of the above arguments is successful in court then medical marijuana may become a drug authorized by federal law; however, for the present medical marijuana does not meet Element C.

#### **D. Back to the Text**

The definition of "illegal use of drugs" in the ADA is clearly ambiguous in its application to the medical use of marijuana. n256 Yet, Element A states that if the drug's distribution or possession is unlawful under the CSA, then the use of the drug is illegal. n257 When solely focusing on Element A, the use of medical marijuana appears to be illegal. Yet Element B and Element C make exceptions to Element A. Medical marijuana is a drug taken "under supervision of a licensed healthcare professional." n258 However, currently it is not a drug authorized by the CSA or other provisions of federal law. Therefore, medical marijuana meets Element B, but it does not meet Element C.

Again, substituting the elements for the phrases and the definition is read:

The term "illegal use of drugs" means A. Such term does not include B, or C.

It will be left to the courts to determine how this definition should be applied to medical marijuana. However, it appears that the second sentence creates two separate exceptions to the first sentence. The phrase "such term does not include" creates at least one exception to the first sentence, and the "comma," followed by an "or," separating Element B and Element C, creates two distinct exceptions from Element A. Meaning, as a general rule, if a drug's distribution or possession is unlawful under the CSA, then the drug is illegal. However, if the drug is used either under supervision of a licensed healthcare professional, or authorized by CSA or other provisions of federal law, then the drug is not illegal. Therefore, since medical marijuana is taken "under supervision of a licensed healthcare professional" it is not an "illegal use [\*650] of drugs." However, since the plain language is not entirely clear, it is important turn to the legislative history for guidance. n259

#### **E. Legislative History**

Two descriptions of the term "illegal use of drugs" that appear in House Reports offer some direction on how to interpret the statute. One such description of the definitions of "illegal use of drugs" was:

The use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act and does not mean the use of controlled substances taken under supervision by a licensed health care professional or other uses authorized by the Controlled Substances Act or other provisions of Federal law. n260

In this description, the phrase "such term does not include ..." was substituted for the phrase "and does not mean ... ." n261 The phrases, "such term does not include" and "and does not mean," both seem to create at least one exception to Element A. n262 They state, unequivocally what "illegal use of drugs" are not, and they are not "drugs taken under supervision by a licensed healthcare professional, or otherwise authorized by the CSA or other provisions of federal law." n263

In House Report No. 101-485, another description of the definition clarifies that not only is the second sentence an exception to Element A, but Element B and Element C are two separate exceptions. n264 "The term 'Illegal use of drugs' does not include the use of controlled substances, including the use of experimental drugs, taken under supervision of a licensed health care professional. It also does not include uses authorized by the Controlled Substances Act or other provisions of federal law." n265 By using the

phrase "it also does not include ..." to separate Element B from Element C, the description of the "illegal use of drugs" used in this report clarifies that Element B and Element C are, [\*651] in fact, two separate exceptions. n266 The explanation also includes the use of experimental drugs in Element B. n267 This demonstrates the intent of Congress that the use of a drug, experimental or otherwise, taken under supervision of a licensed health care professional will not be an "illegal use of drugs." n268 Thus, using the two descriptions of the definition of "illegal use of drugs," it appears that the second sentence creates two separate exceptions to Element A.

The same house report indicates that when a drug is taken "under supervision of a licensed healthcare professional" it is not an "illegal use of drugs." The report discusses the right of employees to not disclose their medical conditions to prospective employers, and states "The committee wishes to emphasize ... the right of individuals who are legally taking drugs (e.g., taking drugs under medical supervision for their disability) not to disclose their medical condition ... ." n269 Thus, according to the report, drugs taken under medical supervision during the course of treatment are taken legally.

The House Report not only clarifies that Element B, standing on its own, is an exception from Element A, but it also states the intended purpose of Element B. The report states:

The term "illegal drugs" ... 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 use of such drugs would not be allowed. n270

It is clear from this report that Element B was intended to prohibit discrimination based on an employees' medication use, even if the medication was experimental, as long as the drug was taken under the supervision of a health care professional. This report clearly states that Element B is an exempted category, n271 showing that if a drug is taken under supervision of a licensed health care professional it is not an [\*652] "illegal use of a drug." n272

The question of an employee's use of medical marijuana was actually discussed during the legislative history of the ADA. In the Senate hearing, the Deputy Attorney General John P. Mackey noted that the administration

[does] not wish to penalize those persons who, in limited cases, are using "controlled substances" such as marijuana or morphine under the supervision of medical professionals as part of a course of treatment ... . These persons would fall under the same category as those who are users of legal drugs. n273

Even though this statement was made seven years before states began enacting medical marijuana laws, n274 there appears to be a clear intent not to include the medical use of marijuana in the ADA's definition of "illegal use of drugs." n275 The statute was written in such a manner, and the legislative history clarifies that drugs, including marijuana, used under the supervision of a licensed healthcare professional are not illegal uses of a drug for purposes of the ADA. n276 It is apparent that Congress intended the definition to be understood such that Element B and Element C are two separate and independent exceptions to Element A.

Could this actually be what Congress intended? Would the ADA be expanding the scope of the CSA if this were how the definition is read? One of the purposes of the CSA was to control the traffic of drugs in the United States. n277 While one of the purposes of the ADA was to end disability discrimination, and, if need be, require employers to [\*653] provide reasonable accommodations in the workplace. n278 Specifically the House Committee stated that they, "[do] not intend to affect the Controlled Substances Act." n279 Would the CSA be affected if the ADA required employers to accommodate an employee who used marijuana

solely for medical purposes? If the medical use of marijuana were not an "illegal use of a drug" for purposes of the Americans with Disabilities Act, the drug's status would only enable an employee to be "a qualified individual with a disability" and thus receive protection under the ADA. The fact that it is not "illegal" for purposes of the ADA would not remove it from its Schedule I classification in the CSA, nor would it prevent the federal government from enforcing the CSA against marijuana users and distributors.

#### **F. The Interpretation of the Courts**

Only three United States District Courts have tackled the ADA's definition of "illegal use of drugs." All three of these courts interpreted the provision differently, and two of them held that it had to be consistent with the CSA in at least some capacity. In *McDaniel v. Mississippi Baptist Medical Ctr.*, n280 the plaintiff was using various opiate-derivative painkilling medications and was terminated by his employer when the abuse was discovered. n281 There was evidence that the plaintiff exaggerated his physical impairments to his physicians in order to obtain prescription medication. n282 The court attempted to determine whether or not the drug use was illegal under the ADA. n283 The court stated, "thus, a question arises as to whether, in the context of the present case, the second sentence of [the definition of "illegal use of drugs"] takes precedence over the first sentence ... acting in conjunction with [section] 843(a) [of the CSA]." n284 Stated differently, the court is asking whether Element B and Element C create exceptions to Element A, or whether it must be read in conjunction with Element A, and in particular, a single provision of the CSA. The specific provision of the CSA that the court is referring to states, "it shall be unlawful for [\*654] any person knowingly or intentionally to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge." n285 The CSA rendered illegal the plaintiff's actions of obtaining drugs by exaggerating his condition to his physician. n286 The opinion continues:

The Court rules that when Congress enacted [the definition of "illegal use of drugs"] it in no way intended to abrogate the effect of [section] 843(a)(3). Thus, even though a person may be taking drugs pursuant to a physician's or other health care professional's supervision, if misrepresentation or deceit is involved in obtaining such drugs, that person has violated [section] 843(a)(3). n287

The court assumes that the term "under supervision of a licensed health care professional" meant "prescribed or authorized by a licensed health professional," without an inquiry of whether the plaintiff abused the drugs. n288 However, according to *Toscano v. National Broadcasting Co.* n289 if the drug was being abused, even though it was prescribed, it was no longer being taken "under supervision" of the physician. n290 If the *McDaniel* court had considered the *Toscano* ruling, it would not have been necessary to decide whether the second sentence abrogates the first sentence, since the drug use would not have met either of the exceptions in the definition, as it was not taken "under supervision of a licensed healthcare professional." Therefore, neither Element B (the "under supervision" exception) nor Element C (the "other uses authorized by federal law" exception) would apply, and the drug would be illegal because Element A (the use of a drug, the possession or distribution of which is unlawful under the CSA), standing on its own, would result in the drug use being an "illegal use of drugs."

The decision in *McDaniel* is unclear as to whether or not the court's construction would apply in other contexts. When the court phrases the question, it asks whether the second sentence takes precedence over the first "in the context of the present case." n291 Further, the court ruled that Congress did not intend to abrogate the effect of a particular section of [\*655] the CSA, specifically section 843(a)(3). n292 There is no mention of other provisions of the CSA which the second sentence of the definition may or may not abrogate. Therefore, under *McDaniel*, in the context of a plaintiff who is prescribed drugs through subterfuge or fraud, Element B and Element C do not create exceptions to Element A, but must be read in conjunction with Element A. Under this narrow reading of *McDaniel*, only a medical marijuana user who obtains authorization through deceit will be barred from bringing a claim. n293 However, if this construction is

extended to other contexts, and the second sentence never abrogates provisions of the CSA, then the medical use of marijuana, in general, may be illegal under the ADA. n294

The construction of the definition of "illegal use of drugs" in Barber v. Gonzales n295 is more damaging to a medical marijuana user who attempts to raise a claim under the ADA. This case, decided on the heels of Gonzales v. Raich, n296 was an attempt by the plaintiff to prove that, while medical marijuana use may be unlawful under provisions of the CSA, it was not an "illegal use of drugs" under the ADA. n297 The Plaintiff, appearing pro se, n298 claimed that Congress intended "to limit the application of the CSA to non-disabled individuals who engage in unlawful drug activity," and the definition of "illegal use of drugs" in the ADA did not include the use of medical marijuana. n299 The plaintiff brought an action under Title II of the ADA, n300 asserting that Washington State University discriminated against him by prohibiting his use of medical marijuana in his dorm room. n301 The court believed that at first glance of the definition of "illegal use of drugs," the [\*656] plaintiff's assertion might be correct. However, absent any cited authority or even an explanation, the court arrived at a different conclusion n302:

The structure of the second sentence of [the definition of "illegal use of drugs"] requires the use of the drug taken under the supervision of a licensed health care professional be consistent with the Controlled Substances Act. The sentence reads "[the term illegal use of drugs] does not include the use of a drug taken under supervision of a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law." Accordingly, the physician-supervised drug must be an authorized drug use under the Controlled Substances Act or other provisions of Federal law. n303

The court interpreted the second sentence, which contains Element B and Element C, to be an exception to Element A. However, the court interpreted the second sentence to contain only one exception, and in order for the drug use not to be illegal it must be used under the supervision of a licensed health care professional and authorized by the CSA or other federal law. n304 However, the language of the statute states that the term does not include the use of drugs taken "under the supervision of a health care professional, or other uses authorized by the [CSA]." n305 The opinion clearly mistakes an "and" for the "or" which Congress used.

To reiterate, the McDaniel interpretation says that Element B and Element C must still be consistent with Element A, and therefore the drug's possession or distribution cannot be unlawful under the CSA. n306 If this was accurate, why would Congress use the phrase, "Such term [the illegal use of drugs] does not include?" Congress seems to have made at least one exception to the first sentence of the definition. However, the McDaniel interpretation may be limited to the context of a person receiving prescription medication through deceit. The Barber interpretation creates one exception to Element A; if the drug's [\*657] possession or distribution is unlawful under the CSA then to be legal under the ADA the drug must be used under the supervision of a licensed health care professional and authorized by the CSA or other Federal law. n307 However, not only does the actual text of the statute suggest that there are two exceptions to the first proposition, but the legislative history makes clear that when a worker's marijuana use is part of a course of treatment, then it will be considered legal drug use. n308

### **Conclusion**

Currently, the use of medical marijuana is legal pursuant to the law of thirteen states. However, the federal government still deems all use of marijuana illegal. This puts those individuals, like Jonathon, who use marijuana for medical purposes, in an interesting predicament. While their home state allows them to use the drug, they will be committing a crime against the federal government.

A person who uses medical marijuana will have another conundrum, and that is in the field of employment. It may tend to be very difficult for Jonathon and others who use medical marijuana to obtain and secure employment, especially with an employer who tests its employees for their use of drugs.

This Note has discussed an argument that could lead a court to conclude that marijuana, when used under supervision of a licensed health care professional, is not an "illegal use of a drug" for purposes of the Americans with Disabilities Act. Since it is, arguably, not illegal uses of drugs, nothing in the ADA preempts the employee from receiving protection under the Act. Following the ADA Amendments of 2008, a medical marijuana user may have a higher likelihood of success compared to a claim brought prior to the amendments. The amendments state that mitigating measures need not be taken into consideration when assessing whether an individual has a disability. Therefore, a person's underlying illness will be the determinative factor whether the individual has a disability, and not the medication that individual takes. Thus, if Jonathon's employer discriminates or terminates him, he may be able to [\*658] succeed with a claim under the Americans Disabilities Act.

#### FOOTNOTES:

n1. Stephanie Armour, *Employers Grapple With Medical Marijuana Use*, USA Today, Apr. 18, 2007, at 1B, available at [http://www.usatoday.com/money/workplace/2007-04-16-medical-marijuana-usat\\_N.htm](http://www.usatoday.com/money/workplace/2007-04-16-medical-marijuana-usat_N.htm). Companies remain uncertain if it is legal to terminate a medical marijuana user. Questions Grow About Medical Marijuana, Workplace, Join Together, Apr. 20, 2007, <http://www.jointogether.org/news/headlines/inthenews/2007/questions-grow-about-medical.html>. Labor and employment lawyer Richard Meneghello said: "It's almost an untenable situation. Employers are screaming for answers ... and there's not one out there right now. There's a lot of uncertainty. Employers are living in a dangerous situation." Id.

n2. *174 P.3d 200 (Cal. 2008)*.

n3. *Cal. Health & Safety Code § 11362.5(a)* (West 2007).

n4. *Ross, 174 P.3d at 206-07*.

n5. *R.I. Gen. Laws § 21-28.6-4(b)* (West 2008).

n6. Alaska Stat. § 17.35.010 (West 2008); *Cal. Health & Safety Code § 11362.5(b)(1)(A)* (West 2007); Colo. Rev. Stat. Ann. § 18-14-1(b) (West 2001); *Haw. Rev. Stat. § 329-122* (West 2007); *Me. Rev. Stat. Ann. tit. 22, § 2383-B* (West 2004); *Mich. Comp. Laws § 333.26424* (West 2008); *Mont. Code Ann. § 50-46-103* (West 2007); *Nev. Rev. Stat. § 453A.170* (West 2008); *N.M. Stat. § 26-2B-1* (West 2008); *Or. Rev. Stat. § 475.300* (West 2003); *R.I. Gen. Laws § 21-28.6-4* (West 2007); *Vt. Stat. Ann. tit. 18 § 4473* (West 2007); *Wash. Rev. Code § 69.51A.005* (West 2009) [hereinafter *State Medical Marijuana Statutes*].

n7. Armour, *supra* note 1; see also *Brief of the American Pain Foundation et al. as Amici Curiae Supporting Petitioners, at 20-24, Ross v. RagingWire Telecomms., Inc., 174 P.3d 200 (Cal. 2008)*, No. C043392 (Aug. 7, 2006) [hereinafter *Amici Curiae Brief of American Pain Foundation*].

n8. StoptheDrugWar.org, *Medical Marijuana and the Right to Work: Under Attack in California and Oregon, At Risk In Most Other States As Well*, Drug War Chronicle, Feb. 1, 2008, available at [http://stopthedrugwar.org/chronicle/521/marijuana\\_medical\\_employee\\_patient\\_rights](http://stopthedrugwar.org/chronicle/521/marijuana_medical_employee_patient_rights).

n9. See *Cal. Health & Safety Code § 11362.5(a)* (West 2007).

n10. See Bill Zimmerman & Dave Fratello, Medical Pot Laws Don't Blow Smoke, Cannabis News, Jan. 7, 2007, available at <http://cannabisnews.com/news/22/thread22501.shtml>.

n11. *Alaska Stat. § 17.37.010* (West 2008).

n12. *Colo. Rev. Stat. Ann. § 18-14-1* (West 2001).

n13. *Haw. Rev. Stat. § 329-122* (West 2007).

n14. *Me. Rev. Stat. Ann. tit. 22, § 2383-B* (West 2004).

n15. *Mont. Code Ann. § 50-46-101* (West 2007).

n16. *Nev. Rev. Stat. § 453A.120* (West 2008).

n17. *N.M. Stat. § 26-2B-1* (West 2008).

n18. *Wash. Rev. Code § 69.51A.005* (West 2009).

n19. *Or. Rev. Stat. § 475.300* (West 2003).

n20. *R.I. Gen. Laws § 21-28.6-4(a)* (West 2008).

n21. *Vt. Stat. Ann. tit. 18 § 4471* (West 2007).

n22. *Mich. Comp. Laws § 333.26421* (West 2008); see Dennis Hayes, Michigan Medical Marijuana Act Passes, Michigan Medical Marijuana Patients, available at [http://www.medicalmarijuanapatient.org/NEWS\\_110408.cfm](http://www.medicalmarijuanapatient.org/NEWS_110408.cfm).

n23. See *21 U.S.C. § 812* (2006); see also *Gonzales v. Raich*, *545 U.S. 1, 29 (2005)*. Under the CSA, marijuana is a Schedule I drug, meaning it has no accepted safe use in the United States. § 812. Further, the Supreme Court in *Raich* held that the Federal Government's classification of the drug renders it illegal even in a state that allows its medical use. See generally *Raich*, *545 U.S. at 29*.

n24. § 812(c)(10).

n25. § 812(b)(1)(A-C).

n26. Press Release, FDA, Inter-Agency Advisory Regarding Claims That Smoked Marijuana Is a Medicine (Apr. 20, 2006), available at <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01362.html>.

n27. *545 U.S. 1 (2005)*.

n28. *Raich*, 545 U.S. at 29. The Supreme Court held that the United States Commerce Clause allowed the Federal government to prohibit the use of medical marijuana even in states that permitted such use. Id. "It is beyond peradventure that federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' however legitimate or dire those necessities may be." Id. (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968)).

n29. Compare Press Release, Littler: Employment & Labor Solutions Worldwide, Supreme Court Ruling on Medical Marijuana to Benefit Employers and Employees, According to Littler Mendelson Attorneys (June 2005), available at <http://www.littler.com/PressPublications/Lists/Press%20Releases/DispRelease.aspx?id=104>. (Attorney Nancy N. Delogu noted the Supreme Court's decision in *Raich* "permits employers to rely upon the fact that marijuana use is illegal under federal law ... and to deny employment to individuals who test positive for marijuana use."), with Josephine Elizabeth Kenney, How State Medical Marijuana Laws Affect Workplace Drug Testing, Occupational Health & Safety, Apr. 2006, available at <http://www.civilliberties.org/mmarworkplace.html>. (After considering the Supreme Court's decision in *Gonzales v. Raich*, the author noted, "under state and federal [disability discrimination] laws, employers still may have to consider accommodating an employee whose medical condition has led to a recommendation of medical marijuana use.").

n30. See State Medical Marijuana Statutes, *supra* note 6.

n31. See generally 21 U.S.C. § 812 (2006); 21 U.S.C. § 844 (2006); *Raich*, 545 U.S. at 57 (O'Connor, J., dissenting).

n32. *Armour*, *supra* note 1.

n33. *Amici Curiae Brief of American Pain Foundation*, *supra* note 7, at 20-24.

n34. See *id.* "That medical treatment is a matter for individuals and their physicians is not simply a widely held belief that tends to further the general public: it is a bedrock protection ... ." Id. at 8; see also *Pettus v. Cole*, 57 Cal. Rptr. 2d 46, 84-85 (Cal. Ct. App. 1996) ("[N]o law or policy ... suggests that a person forfeits his or her right of medical self-determination by entering into an employment relationship ... . Indeed, it would be unprecedented ... to hold that an employer may dictate to an employee the course of medical treatment he or she must follow, under pain of termination ... .").

n35. *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 211 (Cal. 2008) (Kennard, J., concurring & dissenting).

n36. Id.

n37. Id.

n38. Id.

n39. 42 U.S.C. § 12101 (2008). In 2008, Congress amended the ADA in response to United States Supreme Court cases that narrowed the intended broad protection of the Act to only a small group of plaintiffs who would be able to prove that their impairment rendered them "substantially limited in a major life activity," which meant that mitigating measures had to be taken into account. See ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-335, § 2(b)(2), 122 Stat. 3553, 3553 (2008); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 476-77 (1999). The 2008 amendments instruct courts to no longer take consideration of ameliorating or mitigating measures. ADAAA § 2(b)(2), 122 Stat. at 3554.

n40. 42 U.S.C. § 12114(a) (2006).

n41. See State Medical Marijuana Statutes, *supra* note 6.

n42. See generally State Medical Marijuana Statutes, *supra* note 6; ProCon.org, State Medical Marijuana Laws, <http://medicalmarijuana.procon.org/viewresource.asp?resourceID=881> (discussing the laws of the states that have legalized the use of medical marijuana).

n43. StoptheDrugWar.org, *supra* note 8; see also *R.I. Gen. Laws § 21-28.6-4(b)* (West 2008).

n44. StoptheDrugWar.org, *supra* note 8.

n45. *Mont. Code Ann. § 50-46-201(1)* (West 2007).

n46. StoptheDrugWar.org, *supra* note 8; § 21-28.6-4(b).

n47. § 21-28.6-4(b).

n48. StoptheDrugWar.org, *supra* note 8. Jesse Stout, the executive director of the Rhode Island Patient Advocacy Coalition said that employee protection was included because "we went to our patients and asked them what they thought, and they said they wanted marijuana treated like any other medicine." *Id.*

n49. *Id.*

n50. *104 P.3d 609 (Or. Ct. App. 2005)*.

n51. *Id. at 610*.

n52. *Id.*

n53. *Id.*

n54. *Id. at 610-11*.

n55. *Id.*

n56. *Id. at 611.* The test the employer provided could only detect whether the employee had used marijuana in the previous two to three weeks and could not detect whether the employee was currently impaired. *Id.*

n57. *Id.*

n58. *Id.*

n59. *Id.*

n60. See *id. at 612.*

n61. *Id.*; see generally *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999) (holding mitigating measures had to be considered when assessing whether an individual had a disability). But see ADA Amendments Act of 2008, S. 3406, 110th Cong. § 2(b)(1) (2008). The ADA was amended in 2008, took effect on January 1, 2009, and stated that mitigating measures no longer needed to be taken into account when determining whether a person was disabled. The amendments expressly overruled the decision from *Sutton*. S. 3406, 110th Cong. § 2(b)(1) (2008).

n62. *Washburn*, 104 P.3d at 611.

n63. *Id.*

n64. *Id. at 616.*

n65. *Id. at 612.* This issue was a matter of first impression for the Oregon Court of Appeals. *Id. at 611.*

n66. *Id. at 613.*

n67. *Id.*

n68. *Or. Rev. Stat. § 475.300* (West 2003).

n69. *Washburn*, 104 P.3d at 613; § 475.340(2).

n70. *Washburn*, 104 P.3d at 613.

n71. *Id.*; § 475.302(7).

n72. *Washburn*, 104 P.3d at 614.

n73. *Id.* (citing *State v. Daline*, 30 P.3d 426, 430 (2001)).

n74. § 475.340(2).

n75. *Washburn*, 104 P.3d at 614.

n76. *Id.* at 616.

n77. *Washburn v. Columbia Forest Prod. Inc.*, 134 P.3d 161, 162 (Or. 2006).

n78. See *id.* at 164-65.

n79. *Id.* at 164.

n80. *Id.* The Oregon Supreme Court only considered the prescription medication that Washburn took prior to taking the medical marijuana. See *id.* However, one should note that if the court was concerned with whether Washburn was presently disabled, it should have considered the medical marijuana which he presently utilized, rather than prescription medication that he used prior to 1999.

n81. *Washburn*, 134 P.3d at 166.

n82. *Id.* at 164. The court limited its inquiry to whether the plaintiff was disabled. *Id.*

n83. S.B. 465, 2007 Sen., Reg. Sess. (Or. 2007).

n84. Libby Tucker, Medical Marijuana Bill Ignites a Debate in Oregon Legislature, Daily J. Of Com., Feb. 21, 2007, available at <http://www.allbusiness.com/services/religious-grantmaking-civic-professional/4066124-1.html>. The bill also stated that nothing in the Oregon marijuana law shall be construed to "require an employer to allow any person who is impaired by the use of marijuana to remain in the workplace" or "preclude or restrict an employer from establishing or enforcing a policy to achieve or maintain a drug-free workforce." S.B. 465, 2007 Sen., Reg. Sess. (Or. 2007).

n85. Libby Tucker, Oregon Senate Passes Medical Marijuana Bill, Daily J. of Com., Mar. 16, 2007, available at [http://findarticles.com/p/articles/mi\\_qn4184/is\\_20070316/ai\\_n18738226](http://findarticles.com/p/articles/mi_qn4184/is_20070316/ai_n18738226).

n86. See *id.*

n87. *Id.*

n88. StoptheDrugWar.org, *supra* note 8.

n89. *Id.*

n90. *174 P.3d 200 (Cal. 2008)*.

n91. *Id. at 203*.

n92. *Id.*

n93. *Id.*

n94. Cal. Gov't Code § 121900 (West 2005).

n95. *Ross, 174 P.3d at 203*.

n96. *See id. at 203*.

n97. *See generally id. at 204-06*.

n98. *See id. at 205-06*.

n99. *Id. at 205*. The court noted that the CUA merely exempted medical marijuana users from criminal liability under state statutes, and "nothing in the text or history of the CUA suggested that the voters intended to address the rights and obligations of employees and employers." *Id. at 204*.

n100. *Id. at 205*.

n101. *927 P.2d 1200 (Cal. 1997)*.

n102. *Id. at 1222-23* (emphasis added); *Ross, 174 P.3d at 204*.

n103. *Ross, 174 P.3d at 214* (Kennard, J., dissenting).

n104. *Loder, 927 P.2d at 1205* (emphasis added); *Ross, 174 P.3d at 214*.

n105. *Ross, 174 P.3d at 214* (Kennard, J., dissenting).

n106. *See id.*

n107. *See* Vikram David Amar, The California Supreme Court's Decision on Whether an Employee Can be Fired For Testing Positive for Off-The-Job, Doctor-Suggested Medical Use of Marijuana, FindLaw, Feb. 1, 2008, <http://writ.news.findlaw.com/amar/20080201.html>. The author called the opinion "less than satisfying" and noted,

the court's narrow reading of the CUA isn't persuasive in disposing of this case simply because Ross' claim is brought under the FEHA, not under the CUA directly. Thus, the question shouldn't be whether the CUA "speaks to" employment law (as the court asked), but rather whether the CUA's existence has an effect on employment law, particularly on what "reasonable accommodation" under the FEHA means.

Id.

n108. *Ross*, 174 P.3d at 204-05; see also Amar, *supra* note 107.

n109. *Cal. Gov't Code § 12940(m)* (West 2005).

n110. See *Ross*, 174 P.3d at 212 (Kennard, J., dissenting).

n111. *Cal. Health & Safety Code § 11362.785(a)* (West 2005) ("Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment ... .").

n112. *Ross*, 174 P.3d at 207.

n113. *Id.* at 207-08.

n114. *Id.* at 208.

n115. *Id.*

n116. *Id.* at 209-16. The two justices dissented to the FEHA claim, but concurred with the public policy issue. *Id.* at 210.

n117. *Id.* at 209.

n118. *Id.* at 212.

n119. *Cal. Gov't Code § 12926(n)(2)* (West 2005) (emphasis added).

n120. *Cal. Health & Safety Code § 11362.785(a)* (West 2005).

n121. See *Cal. Gov't Code § 12926*.

n122. *Ross*, 174 P.3d at 209-10.

n123. *Id.* at 214.

n124. *Id.* at 215; see also *Amici Curiae Brief of American Pain Foundation*, *supra* note 7, at 14-15, 26 (reporting that opioids can have very debilitating side effects including nausea, drowsiness and confusion, and can lead to physical dependence; additionally, continual use of over-the-counter medication, such as aspirin or ibuprofen can lead to side effects such as ulcers and stomach bleeding).

n125. *Ross*, 174 P.3d at 215; see also *Amici Curiae Brief of American Pain Foundation*, *supra* note 7, at 26 ("It is indisputable that many traditional medications, [even when] properly used, can affect work performance and safety in ways far more serious than off-premises medical marijuana use possibly could.").

n126. *Ross*, 174 P.3d at 209-10.

n127. Press Release, Americans for Safe Access, State Bill Protects Employment Rights of Medical Marijuana Patients (Feb. 21, 2008) available at <http://www.americansforsafeaccess.org/article.php?id=5466>.

n128. *Id.*

n129. *Id.* The bill carved out an exception for safety-sensitive positions. *Id.*

n130. *Id.*

n131. Press Release, Americans for Safe Access, Medical Marijuana Employment Rights Bill Passes Both California Houses (Aug. 20, 2008), available at <http://www.safeaccessnow.org/article.php?id=5559>.

n132. Julian Ayrs, Governor Schwarzenegger Vetoes AB 2279. Patient Rights Jeopardized by Misstep!, *Zimbio.com*, Oct. 1, 2008, <http://www.zimbio.com/Governor+Arnold+Schwarzenegger+/articles/122/Governor+Schwarzenegger+vetoed+AB+2279+Patient>.

n133. But see *Barber v. Gonzales*, No. CV-05-0173-EFS, 2005 WL 1607189, at 2 (E.D. Wash. July 1, 2005) (holding that defendants did not violate the ADA when they terminated Barber based on his marijuana use), and *Dvorak v. Clean Water Servs.*, 432 F. Supp. 2d 1090, 1095, 1099 (D. Or. 2006) (holding that defendant's termination of Dvorak, who used "medical marijuana," did not violate the ADA). At first glance, Barber and Dvorak seem to foreclose consideration of the option of protecting medical marijuana users under the ADA, but upon closer examination, neither case speaks dispositively on the issue. Barber only concerned Title II of the ADA, governing public entities, and is not binding on private employers. *Barber*, 2005 WL 1607189, at 1; see also *infra* text accompanying notes 277-86 (discussing Barber in more detail). Dvorak is not dispositive either because first, the court found that the plaintiff was not disabled and he was not regarded as having a disability, *Dvorak*, 432 F. Supp. 2d at 1099; and second, even though the plaintiff used medical marijuana, the court made no substantive findings on the issue of whether the employer needed to accommodate the use of medical marijuana in any way. *Id.* at 1095, 1099. See also *Washburn v. Columbia Forest Prods., Inc.*, 134 P.3d 161, 164 (holding that defendant's termination of Washburn, who used medical marijuana,

did not violate the ADA, but also noting that "because we conclude that the question of plaintiff's status as a disabled person is dispositive in this case, we limit the scope of our inquiry to that issue").

n134. See U.S. Equal Employment Opportunity Commission, Enforcement Guidance on Reasonable Accommodation & Undue Hardship Under the Americans With Disabilities Act, EEOC Bull. No. 915.002 (2002), at P 39, available at [www.eeoc.gov/policy/docs/accommodation/html](http://www.eeoc.gov/policy/docs/accommodation/html). The EEOC Guidelines state that medications along with their side effects should be considered part of the disability, and accommodated for as well. *Id.*

n135. Accord *Jenkins v. Cleco Power, LLC*, 487 F.3d 309, 315 (5th Cir. 2007); *McPherson v. O'Reilly Auto. Inc.*, 491 F.3d 726, 730 (8th Cir. 2007); *Thompson v. Henderson*, 226 Fed. App'x. 466, 471 (6th Cir. 2007); *Boone v. Rumsfeld*, 172 Fed. App'x. 268, 271 (11th Cir. 2006); *Tobin v. Liberty Mut. Ins. Co.*, 433 F.3d 100, 104 (1st Cir. 2005); *Burke v. Niagara Mohawk Power Corp.*, 142 Fed. App'x. 527, 528 (2d Cir. 2005); *MacKenzie v. Denver*, 414 F.3d 1266, 1274 (10th Cir. 2005); *Gaul v. Lucent Tech., Inc.*, 134 F.3d 576, 580 (3d Cir. 1998).

n136. 42 U.S.C. § 12102(2)(A).

n137. *Id.* § 12102(2)(B)-(C).

n138. See 29 C.F.R. § 1630.2(h) (1998). An "impairment" is defined as the following:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

*Id.* § 1630.2(h)(1)-(2). The ADA, as amended contains a list of possible "major life activities" which include, but are not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working." ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-335, § 3(2)(A) (2008).

n139. See *Amici Curiae Brief of American Pain Foundation*, *supra* note 7, at 12.

n140. See *id.* at 20-24.

n141. See *Bragdon v. Abbot*, 524 U.S. 624, 625 (1997).

n142. See *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177, 182 (D.N.H. 2002).

n143. See generally *Green v. R.R. Donnelly & Sons Co.*, No. 3:06CV01867, 2007 WL 2815573, at 3-4 (N.D. Ohio Sept. 26, 2007) (stating that acute back pain can be considered an impairment under the ADA; however, plaintiff in this particular case did not present sufficient evidence to demonstrate he suffered a physical impairment).

n144. See *Nadler v. Harvey*, No. 06-12692, 2007 WL 2404705, at 5 (11th Cir. Aug. 24, 2007).

n145. See generally *Mondaine v. Am. Drug Stores, Inc.*, 408 F. Supp. 2d 1169, 1200 (D. Kan. 2006) (stating that glaucoma can be considered an impairment under the ADA; however, plaintiff in this particular case did not present sufficient evidence to satisfy the burden of proof).

n146. See *Berry v. T-Mobile USA, Inc.*, 490 F.3d 1211, 1215 (10th Cir. 2007).

n147. See *Shalbert v. Marcincin*, No. Civ.A.04-5116, 2005 WL 1941317, at 4 (E.D. Pa. Aug. 9, 2005).

n148. See *Taylor v. USF-Red Star Exp., Inc.*, 212 Fed. App'x. 101, 106 (3d Cir. 2006).

n149. *Mondaine*, 408 F. Supp. 2d at 1200.

n150. *Shalbert*, 2005 WL 1941317, at 4.

n151. E.g., *Nadler v. Harvey*, No. 06-12692, 2007 WL 2404705, at 6 (11th Cir. Aug. 24, 2007).

n152. See U.S. Equal Employment Opportunity Commission, supra note 134, at P 39.

n153. A noted side effect of marijuana is having trouble with their memory or learning. Marijuanaaddiction.info, Marijuana Side Effects, <http://www.marijuana-addiction.info/side-effects.htm> (last visited May 18, 2009).

n154. 104 P.3d 609 (Or. Ct. App. 2005).

n155. *Id.* at 612 n.3.

n156. *Id.* at 612; see also *Dvorak*, 432 F. Supp. 2d 1090. The employee was fired from a safety sensitive manual job after a doctor told the employer that the medication the employee was using for pain, including opiate-based pills and medical marijuana, may affect the employee during working hours. *Id.* at 1097. Dvorak attempted to bring a case pursuant to the ADA under the theory that the employer mistakenly perceived that he had a disability, and claimed that the employer believed that the major life activity of working was substantially limited. *Id.* at 1099. However, the plaintiff must prove that the defendant believed the plaintiff was limited from a broad class of jobs and not just a single job. *Id.* at 1107. Even though the supervisor said, "I would not even put you behind a computer," the court did not find this strong enough to pass summary judgment on the issue of perceived disability. *Id.* The plaintiff claimed that by saying this, the employer thought that Dvorak

was not fit for any job, sedentary or active. *Id.* However, the court determined this literally meant that the employer would not give the employee a job involving computer work. *Id.*

n157. See ADA Amendments Act of 2008, S. 3406, 110th Cong. § 2(a)(4) (2008) (enacted).

n158. Amy L. Allbright, 2003 Employment Decisions Under the ADA Title I - Survey Update, 28 *Mental & Physical Disability L. Rep.* 309, 319 (2004).

n159. 527 *U.S.* 471 (1999).

n160. *Id.* at 482.

n161. *Id.*

n162. *Washburn*, 104 *P.3d* at 612. The Court of Appeals discussed the trial court's ruling that since the marijuana alleviated the plaintiff's muscle spasms, he was no longer disabled and, thus, no longer received protections under the Oregon disability law. *Id.*

n163. Compare *Washburn*, 104 *P.3d* at 609 (rejecting ADA coverage because the marijuana use alleviated employee's muscle spasms and was thus no longer disabled), with *American with Disabilities Act Now Applies to More People*, Chicago Tribune, Jan. 5, 2009 available at <http://newsblogs.chicagotribune.com/triage/2009/01/american-disabi.html#more> (Robert Burgdorf Jr., a professor of law at David Clarke School of Law at the University of the District of Columbia makes the point that an individual with well-managed epilepsy would not prevail on a disability discrimination charge under the ADA against an employer who put up signs stating that "epileptics not welcome here").

n164. See *Americans with Disabilities Act Now Applies to More People*, supra note 163; S. 3406 supra note 157.

n165. S. 3406 supra note 157, § 3(E)(I).

n166. *American with Disabilities Act Now Applies to More People*, supra note 163.

n167. 42 *U.S.C.* § 12112(a) (2000). ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual ...").

n168. 42 *U.S.C.* § 12112(b)(5)(A). Employers are only required to make reasonable accommodations as long as they do not impose undue hardships. 42 *U.S.C.* § 12112(b)(5)(A); 29 *C.F.R.* § 1630.15(d). The ADA defines an "undue hardship" as an "action requiring significant difficulty or expense ..." and many of the factors to be considered deal with the expense of the accommodation relative to the overall size and financial resources of the employer. 42 *U.S.C.* § 12111(10) (2000).

n169. See, e.g., *Cal. Health & Safety Code § 11362.785(a)*; *Or. Rev. Stat. § 475.340(2)* (West 2003).

n170. See *42 U.S.C. § 12112(b)(5)(A)*.

n171. Compare *Washburn, 104 P.3d at 612* (holding that the provision stating that an employer need not accommodate the use medical use of marijuana at the workplace only including the possession, administration or distribution of the drug at the workplace, and did not include using the drug at home during off-duty hours and having trace elements of the drug in the employee's urine at work. The Court left open for the trial court what a "reasonable accommodation" would be under Oregon law.), with *Ross, 174 P.3d at 206-08* (holding that the provision stating that nothing in the California Compassionate Use Act required the accommodation of marijuana in the workplace was not an exception to a general rule of accommodation in the FEHA).

n172. See Peter B. Bensinger, *Drug Testing in the Workplace*, 498 *Annals Am. Acad. Pol. & Soc. Sci.* 43, 44 (1998).

n173. *Id.* at 45.

n174. *42 U.S.C. § 12114(c)* (2000).

n175. *42 U.S.C. § 12111(9)(B)*.

n176. Enforcement Guidance: Reasonable Accommodation & Undue Hardship under the Americans with Disabilities Act, EEOC Compl. Man. (BNA), P 24 (Oct. 17, 2002) [hereinafter *Compliance Manual*].

n177. Dale H. Gieringer, *Urinalysis or Uromancy: The Untold Costs of Drug Testing Abuse*, available at [http://norml.org/index.cfm?Group\\_ID=4936](http://norml.org/index.cfm?Group_ID=4936).

n178. *Id.*

n179. The Nat'l Org. for the Reform of Marijuana Laws, *NORML's Model Workplace Policy for Cannabis* [http://norml.org/index.cfm/content/facts/pdf\\_files/breif\\_blank/index.cfm?Group\\_ID=7161](http://norml.org/index.cfm/content/facts/pdf_files/breif_blank/index.cfm?Group_ID=7161).

n180. *Id.* Urinalysis, the standard form of drug testing in the workplace is not suitable for detecting cannabis impairment or recent cannabis use. The procedure can only detect the presence of metabolites, not the psychoactive parent compound THC. *Id.* The metabolites can be detected several days to several weeks after the use of marijuana, and cannot test whether the employee is currently impaired or affected by the drug on the job. *Id.* Companies may have vital interests in ensuring a safe workplace environment, and may still enforce a drug policy. *Id.* However, NORML recommends that an employer test the employee's blood or saliva which can determine recent cannabis use by detecting the presence of THC, not the metabolites. *Id.* Both blood and saliva can detect the presence of THC a few hours past the use, and sometimes one to two days after the use. *Id.*

n181. *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 (9th Cir. 1995).

n182. *Id.*

n183. *Humphrey v. Mem'l Hosps. Ass'n.*, 239 F.3d 1128, 1139-40 (9th Cir. 2001); *Dark v. Curry County*, 451 F.3d 1078, 1084 (9th Cir. 2006).

n184. 63 F.3d 828 (9th Cir. 1995).

n185. *Id. at 831.*

n186. *Id. at 832.*

n187. *Id. at 833.*

n188. 42 U.S.C. § 12114(a).

n189. 42 U.S.C. § 12114(a).

n190. 42 U.S.C. § 12114(a) "The term 'qualified individual with a disability' shall not include an employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use. *Id.* An employee must be a "qualified individual with a disability" in order to bring a claim under the ADA. See 42 U.S.C. § 12112(a). When employer fires an employee for using illegal drugs that employee will no longer be a "qualified individual." See *id.*

n191. 545 U.S. 1 (2005).

n192. See generally *Gonzales*, 545 U.S. 1. The Supreme Court held Congress has the authority under the Commerce Clause to regulate interstate manufacture and possession of marijuana, even if for medical purposes.

n193. See Ed Reeves, Clarence Belnavis & Stoel Rives, *The Impact of Medical Marijuana Laws on Employment in the Wild, Wild West*, A.B.A. at 6 (2000) ("However, the ADA also states that the illegal use of drugs "does not include the use of a drug taken under supervision by a licensed health care professional ... ." Thus, depending on how courts interpret this exception, medical marijuana use under a doctor's supervision might be permitted under the ADA."); 42 U.S.C. § 12111(6)(A).

n194. 42 U.S.C. § 12111(6)(A).

n195. *Id.* The definition of "illegal use of drugs" in the ADA exudes three distinct uses of a drug. The first sentence, labeled Element A, is the use of a drug, the possession or distribution of which is unlawful under the CSA. *Id.* The first clause of the second sentence, labeled Element B, is the use of a drug taken under supervision of a licensed healthcare professional. *Id.* Finally, the second clause of

the second sentence, following the comma, labeled Element C, is the use of a drug authorized by the CSA or other provisions of federal law. See *id.*

n196. *Id.*

n197. *21 U.S.C. § 812(c)* (2000). Drugs in this category have a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and a "lack of accepted safety for use of the drug or other substance under medical supervision." *Id.*

n198. *21 U.S.C. § 828(a)* (2000); *21 U.S.C. § 841(a)* (2000). It is unlawful unless pursuant to an order issued by the Attorney General. Therefore, if there are people who distribute marijuana pursuant to such an order, such distribution would not be unlawful; see generally Nat'l Inst. on Drug Abuse, Nat'l Advisory Council on Drug Abuse, Jan. 1998 available at <http://www.nida.nih.gov/about/organization/nacda/marijuanastatement.html>. A group of seven individuals receive medical marijuana pursuant to the authorization of the Attorney General as part of a federal compassionate use program. *Id.*

n199. *545 U.S. 1* (2005). There will be a discussion in the Element C section, *infra*, of arguments that may have been left open by the Supreme Court decision.

n200. *532 U.S. 483, 494 and n. 7* (2001). The CSA prohibits the manufacture and distribution of marijuana, even when it is for medical purposes. *Id.*

n201. See *42 U.S.C. § 12111(6)* (2000).

n202. *Id.*

n203. See generally *McDaniel v. Miss. Baptist Med. Ctr.* 869 F. Supp. 445 (S.D. Miss. 1994); *Toscano v. Nat'l Broad. Co.*, No. 99 Civ. 10006, 2000 WL 1742097 (S.D.N.Y. Nov. 28, 2000); *Barber v. Gonzales*, No. C-05-01-0173, 2005 WL 1607189 (E.D. Wash. 2005).

n204. *869 F. Supp. 445* (1994).

n205. See *id.* at 449. This can be inferred because the court, in figuring out how to structure *42 U.S.C. § 126111(6)(A)*, held that the second sentence of the definition of "illegal use of drugs" did not abrogate the first sentence. The employee obtained drugs through deceit and deception by exaggerating his ailments to his physicians. Since this act is outlawed by the CSA, the court held that the drugs were illegal. In order for the court to reason this, the court must have determined that the individual was taking drugs "under supervision of a licensed healthcare professional," or else it would not have had to hold that the second sentence did not abrogate the first sentence. Therefore, the Court ruled that the drug was taken "under supervision" when it was prescribed, even though that prescription was based on deceit, and the drugs were being abused. *Id.*

n206. *No. 99 Civ. 10006, 2000 WL 1742097* (S.D.N.Y. Nov. 28, 2000).

n207. See *id.* at 3. The court remanded the case to the trial court for a determination if the prescription medication were being abused. If the drugs were abused, then they were no longer taken "under supervision of a licensed healthcare professional," and it would be an "illegal use of drugs." *Id.*

n208. See *id.*; see also *McDaniel*, 869 F. Supp. at 449.

n209. *Barber v. Gonzales*, No. C-05-0173, 2005 WL 1607189 (E.D. Wash. 2005).

n210. *Id.* at 2. The court concluded that medical marijuana was an "illegal use of drugs." *Id.*

The court implied that medical marijuana was taken "under supervision of a licensed healthcare professional," however the court construed the definition to mean the drug use must also be pursuant to federal law. *Id.* at 1.

n211. Amici Curiae Brief of American Pain Foundation, *Ross v. RagingWire*, No. C043392, (Cal. 2006), *supra* note 7, at 9-10.

n212. *Id.* at 1.

n213. *Id.* at 10.

n214. *Nat'l Inst. on Drug Abuse*, *supra* note 198.

n215. See generally *545 U.S. 1 (2005)* (holding that the federal government through the commerce clause has the power to regulate controlled substances such as marijuana, however, the court did not look to the forthcoming arguments).

n216. *Nat'l Inst. on Drug Abuse*, *supra* note 198.

n217. *Id.*

n218. *Id.*

n219. *Id.*

n220. *Id.*

n221. *545 U.S. 1 (2005)*.

n222. See *id.* at 63 (Thomas, J., dissenting).

n223. *21 U.S.C. § 844(a) (2000)* (emphasis added).

n224. Id.

n225. This argument was never raised in the Supreme Court. It was raised on remand to the Ninth Circuit, however, the court did not rule due to the tenet not to "consider arguments that are raised for the first time on appeal." *Raich v. Gonzales*, 500 F.3d 850, 868 (9th Cir. 2007). But see K.K. DuVivier, State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study, 40 *Wake Forest L. Rev.* 221, 289 (2005) (citing *United States v. Nazir*, 211 F. Supp. 2d 1372, 1375 (S.D. Fla. 2002)). Duvivier argued that a district court's definition of the term "prescription," as applied to medical marijuana may render the drug lawful under section 844(a) of the CSA. Id.

n226. 21 U.S.C. § 829.

n227. Id.

n228. 21 U.S.C. § 903.

n229. *Linder v. United States*, 268 U.S. 5, 18 (1925) ("Direct control of medical practice in the states is beyond the power of the federal government."); *Whalen v. Roe*, 429 U.S. 589, 597, 603 n. 30 (1997); *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002).

n230. See *Gonzales v. Oregon*, 546 U.S. 243 (2006). The Supreme Court held that despite the Attorney General's declaration that physician-assisted suicide is unlawful under the CSA, section 903 allowed states to adopt laws authorizing the practice. Id.

n231. 21 U.S.C. § 829.

n232. 21 U.S.C. § 903.

n233. See generally 21 U.S.C. § 802 (2000).

n234. *United States v. Nazir*, 211 F. Supp. 1372, 1375 (D.N.J. 2002).

n235. DuVivier, supra note 225 at 288-89.

n236. But see id. at 289 n. 379. Duvivier noted that since marijuana is a schedule I substance, one may argue that there could be no "valid prescription" because schedule I substances are not safe even under medical supervision. Id. However, a court may determine that "valid" only refers to validity under state law. Id.

n237. 42 U.S.C. § 12111(6)(A).

n238. See Note, Last Resorts and Fundamental Rights: The Substantive Due Process Implications of Prohibitions on Medical Marijuana, 118 *Harv. L. Rev.* 1985 (2005); Adam Hyatt, Medicinal

Marijuana and Palliative Care: Carving a Liberty Interest Out of the Glucksberg Framework, 33 *Fordham Urb. L.J.* 1345 (2006).

n239. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 503-04 (1965); *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

n240. Note, *supra* note 238 at 1990-91.

n241. *Id.* at 1990.

n242. Hyatt, *supra* note 238 at 1348.

n243. 521 U.S. 702 (1997).

n244. *Id.* at 728.

n245. *Id.* at 736-92; Hyatt, *supra* note 238, at 1354.

n246. 500 F.3d 850 (9th Cir 2007). This case was decided on remand from the Supreme Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005). *Id.*

n247. *Id.* at 866.

n248. *Id.* at 864.

n249. *Id.*

n250. *Id.* at 864-65.

n251. *Id.* at 865 (citing *Leary v. United States* 395 U.S. 6, 16-17 (1969)).

n252. *Id.*; 21 U.S.C. § 812 (2000).

n253. *Raich*, 500 F.3d at 866.

n254. *Id.*

n255. *Id.*

n256. 42 U.S.C. § 12111(6)(A) (2000).

n257. *Id.*

n258. Id.

n259. See, e.g., *U.S. v. Pub. Util. Comm'n of Cal.*, 345 U.S. 295, 315-16 (1953); *U.S. v. Awadallah*, 349 F.3d 42, 53-55 (2d Cir. 2003) (If a statute's language is ambiguous, the court may turn to legislative history in order to determine the legislative intent.).

n260. H.R. Rep. No. 101-558, at 56 (1990) (Conf. Rep.) (emphasis added).

n261. Compare id., with 42 U.S.C. § 12111(6)(A).

n262. See H.R. Rep. No. 101-558; see also 42 U.S.C. § 12111(6)(A).

n263. H.R. Rep. No. 101-55, at 56; see also 42 U.S.C. § 12111(6)(A).

n264. H.R. Rep. No. 101-485 at 32 (1990).

n265. Id. (emphasis added).

n266. See id.

n267. Id.

n268. See id.

n269. *Id.* at 47 (emphasis added).

n270. H.R. Rep. No. 101-485, pt.2, at 79 (emphasis added).

n271. Id.

n272. See id.

n273. Americans with Disabilities Act of 1989: Hearings on S.933 Before the Comm. on Labor and Human Resources and the Subcomm. on the Handicapped, 101st Cong. 828, 837-38 (1989) (emphasis added). But see Michael Vitiello, Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy, 31 *U. Mich. J.L. Reform.* 707, 735 (1998) (arguing that the language of the second sentence, containing Element B and Element C, required that a drug taken "under supervision of a licensed healthcare professional" had to be a drug whose was otherwise legal under the CSA. Vitiello believed that Deputy Attorney General Mackey's statement only referred to those select few in the federal Compassionate Use Program.). Vitiello, *supra* note 273, at 735.

n274. See *Cal. Health & Safety Code § 11362.5* (West 1996). The hearing took place in 1989, while California did not pass the CUA until 1996.

n275. H.R. Rep. No. 101-485 pt. 3, at 32 (1990).

n276. See *id.*

n277. See *21 U.S.C. § 801* (2000).

n278. See *42 U.S.C. § 12101* (2000).

n279. H.R. Rep. No. 101-485 pt. 3, at 32 (1990).

n280. *869 F. Supp. 445 (S.D. Miss. 1994)*.

n281. *Id. at 448*.

n282. *Id. at 449*.

n283. *Id. at 449-50*.

n284. *Id.*; *21 U.S.C. § 843(a)* (2006).

n285. *21 U.S.C. § 843(a)(3)*.

n286. See *id.*

n287. *McDaniel, 869 F. Supp. at 449*.

n288. See *id.*

n289. *No. 99 Civ. 1006, 2000 WL 1742097 (S.D.N.Y. Nov. 28, 2000)*.

n290. See *id.* at 3.

n291. *McDaniel, 869 F. Supp. at 449*.

n292. *Id.*

n293. See *id.*

n294. See 42 U.S.C. § 12114(a); 42 U.S.C. § 12111(6). See generally *Gonzales v. Raich*, 545 U.S. 1, 22, 29 (2005). Since marijuana is a Schedule I drug, its use is illegal under federal law, regardless if it is for medical purposes. *Id.* at 22, 29.

n295. *Barber v. Gonzales*, CV-05-0173, 2005 WL 1607189 (E.D. Wash. 2005).

n296. *Gonzales v. Raich* was decided in June 2005. Less than a month later in July 2005, *Barber v. Gonzales* was decided. *Gonzales*, 545 U.S. at 1; *Barber*, 2005 WL 1607189.

n297. *Barber*, 2005 WL 1607189, at 1.

n298. The Motion for Reconsideration and Motion for Distinction from *Gonzales v. Raich* was handwritten, and the Plaintiff placed his own signature to close the motion. From these facts it can be assumed that the Plaintiff was acting without an attorney. See *Motion for Reconsideration and Motion for Distinction From Gonzales v. Raich, Barber v. Gonzales*, No. CV-05-0173, 2005 WL 1607189 (E.D. Wash. June 7, 2005) (on file with author).

n299. *Id.*

n300. *Id.*

n301. Letter from Eleanor Finger, Dir. of Residence Life, Washington State Univ., to James E. Barber (Oct. 25, 2004) (on file with author).

n302. See *Barber*, No. C-05-0173, 2005 WL 1607189 at 1.

n303. *Id.* (emphasis included).

n304. *Id.*

n305. 42 U.S.C. § 12114(6)(A) (2000) (emphasis added).

n306. See *McDaniel*, 869 F. Supp. at 449 ("a question arises as to whether, in context of the present case, the second sentence of 42 U.S.C. § 12111(6) takes precedence over the first sentence of § 12111(6) acting in conjunction with 21 U.S.C. § 843(a)(3). The Court ruled that when Congress enacted 42 U.S.C. § 12111(6) it in no way intended to abrogate the effect of 21 U.S.C. § 843(a)(3).").

n307. See *Barber*, No. C-05-0173, 2005 WL 1607189 at 1 ("Accordingly, the physician-supervised drug use must be an authorized drug use under the Controlled Substances Act or other provisions of Federal Law.").

n308. See Americans with Disabilities Act of 1989: Hearings on S.933 Before the Comm. on Labor and Human Resources and the Subcomm. on the Handicapped, 101st Cong. 828, 837-38 (1989).

