

## JUST SAY NO: FORECLOSING A CAUSE OF ACTION FOR EMPLOYEES SEEKING REASONABLE ACCOMMODATION UNDER THE NEW JERSEY COMPASSIONATE USE MEDICAL MARIJUANA ACT

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### I. INTRODUCTION

On January 11, 2010, New Jersey passed the New Jersey Compassionate Use Medical Marijuana Act (NJCUMMA or “Act”).<sup>1</sup> The Act passed with mostly positive support in both the House and the Senate,<sup>2</sup> and Governor Jon Corzine signed it into law on January 18, 2010,<sup>3</sup> Governor Corzine’s last full day in office.<sup>4</sup> The bill was one of fifty-five that Corzine signed on that day.<sup>5</sup> This seemingly rushed procedure stands as a precursor to what a reading of the statute’s text reveals: a poorly written law that avoids answering many of the important issues in this complicated area of law. The NJCUMMA leaves unanswered many key questions regarding medical marijuana in the employment law context, and, specifically, the accommodation of an employee’s off-site use of medical marijuana. The problems and extensive litigation that arise when a medical marijuana statute is silent on this issue have begun to emerge in other states.<sup>6</sup>

One of the major driving forces behind enacting medical marijuana statutes is the results of recent medical research suggesting

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<sup>1</sup> *Medical Marijuana: 18 Legal Medical Marijuana States and DC*, PROCON.ORG (Feb. 8, 2012, 9:04 AM), <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881#NewJersey>.

<sup>2</sup> *Id.* The House voted to pass the Act 48–14, and the Senate passed the Act by a vote of 25–13. *Id.*

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

<sup>4</sup> *Corzine signs medical marijuana bill on last day in office*, N.Y. POST, Jan. 19, 2010, [http://www.nypost.com/p/news/local/corzine\\_signs\\_medical\\_marijuana\\_14Gz0yctGPxX71ySAf83JL](http://www.nypost.com/p/news/local/corzine_signs_medical_marijuana_14Gz0yctGPxX71ySAf83JL).

<sup>5</sup> *Corzine signs medical marijuana law*, ABCLOCAL.GO.COM (Jan. 18, 2010), <http://abclocal.go.com/wabc/story?section=news/local&id=7224843>.

<sup>6</sup> *See infra* Part IV.

the drug's beneficial effects.<sup>7</sup> As a reason for its enactment, the NJCUMMA specifically notes the potential use of marijuana to treat or alleviate pain and other symptoms associated with certain medical conditions.<sup>8</sup> Yet, despite research showing the drug's potential for medical use, marijuana remains a Schedule I controlled substance under the Controlled Substance Act.<sup>9</sup> As a Schedule I drug, the federal government considers marijuana to be a drug with a high potential for abuse,<sup>10</sup> no currently accepted medical use,<sup>11</sup> and a lack of safety for using the drug under medical supervision.<sup>12</sup> This means that under federal law, all possession or distribution of marijuana—medical or not—is prohibited.<sup>13</sup>

To date, eighteen states and the District of Columbia have enacted medical marijuana statutes.<sup>14</sup> Medical marijuana statutes are also pending in other states.<sup>15</sup> A common thread amongst all of these statutes is an emphasis on protection from state criminal prosecution.<sup>16</sup> Some of these statutes explicitly protect employees against discrimination or retaliation based on medical marijuana use.<sup>17</sup> The NJCUMMA has no such provision. The Act neither

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<sup>7</sup> Stacy A. Hickox, *Clearing the Smoke on Medical Marijuana Users in the Workplace*, 29 QUINNIPIAC L. REV. 1001, 1002–03 (2011) (stating that “cannabinoids found in marijuana are known to relieve pain in patients who cannot otherwise find relief because of the adverse side effects from other analgesics”).

<sup>8</sup> N.J. STAT. ANN. § 24:6I-2 (West 2011) (“Modern medical research has discovered a beneficial use for marijuana in treating or alleviating the pain or other symptoms associated with certain debilitating medical conditions, as found by the National Academy of Sciences’ Institute of Medicine in March 1999.”).

<sup>9</sup> 21 U.S.C. § 812 (2006).

<sup>10</sup> § 812(b)(1)(A).

<sup>11</sup> § 812(b)(1)(B).

<sup>12</sup> § 812(b)(1)(C).

<sup>13</sup> § 844(a).

<sup>14</sup> *Medical Marijuana: 18 Legal Medical Marijuana States and DC*, *supra* note 1.

<sup>15</sup> Hickox, *supra* note 7, at 1003 (directing to summaries and links to bills).

<sup>16</sup> *See, e.g.*, ALASKA STAT. ANN. § 17.37.030 (West 2011); ARIZ. REV. STAT. ANN. § 36-2811 (West 2011); CAL. HEALTH & SAFETY CODE § 11362.5 (West 2011); COLO. CONST. art. XVIII, § 14 (West, Westlaw through Nov. 2010 amendments); HAW. REV. STAT. § 329-125 (West 2011); ME. REV. STAT. ANN. tit. 22, § 2423-E (2011); MICH. COMP. LAWS ANN. § 333.26424 (West 2011); MONT. CODE ANN. § 50-46-301 (2011); NEV. REV. STAT. ANN. § 453A.200 (West 2010); N.J. STAT. ANN. § 24:6I-2 (West 2011); N.M. STAT. ANN. § 26-2B-4 (West 2011); OR. REV. STAT. ANN. § 475.316 (West 2011); R.I. GEN. LAWS § 21-28.6-4 (West 2011); VT. STAT. ANN. tit. 18, § 4474b (West 2011); WASH. REV. CODE ANN. § 69.51A.040 (West 2011).

<sup>17</sup> *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2813(B) (West 2011).

Unless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination

explicitly denies nor explicitly creates a private cause of action for employees to combat such discrimination.

Like many other state medical marijuana statutes,<sup>18</sup> the NJCUMMA explicitly states that an employer is not required to accommodate an employee's use of marijuana "in any workplace."<sup>19</sup> This type of limited language in a medical marijuana statute, which explicitly prohibits only on-site use or being under the influence of marijuana at work, may imply that accommodation is required for use outside of the workplace.<sup>20</sup> A noted pitfall of medicinal marijuana statutes is their failure to address the accommodation of medical marijuana users who do not use marijuana at work or come to work under the influence of the drug.<sup>21</sup> Many of these statutes fail to explicitly resolve this issue, and because "THC metabolites can be detected long after a user is impaired or influenced by the use of marijuana . . . medical marijuana users may still face discharge," even if the user does not use marijuana in the workplace or come to work under the influence.<sup>22</sup> Some argue that "[b]y negative inference, the failure to mention accommodation for employees who test positive on an employer-administered drug test, but who are not 'under the influence' at work, suggests that [such employees] could seek accommodations."<sup>23</sup> Following this line of reasoning, a medical marijuana user may request an accommodation "in the form of an exception to a zero-tolerance for positive drug tests."<sup>24</sup>

A closer examination of the NJCUMMA reveals that, while an

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or imposing any term or condition of employment or otherwise penalize a person based upon either: (1) The person's status as a cardholder[; or] (2) A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment.

*Id.*

<sup>18</sup> See, e.g., ALASKA STAT. ANN. § 17.37.040(d)(1) (West 2011); COLO. CONST. art. XVIII, § 14(10)(b) (West, Westlaw through Nov. 2010 amendments); ME. REV. STAT. ANN. tit. 22, § 2426(2)(B) (West 2011); MICH. COMP. LAWS ANN. § 333.26427(c)(2) (West 2011); MONT. CODE ANN. § 50-46-205(2)(b) (2011); NEV. REV. STAT. ANN. § 453A.800(2) (West 2011); OR. REV. STAT. ANN. § 475.340(2) (West 2011); R.I. GEN. LAWS ANN. § 21-28.6-7(b)(2) (West 2011); WASH. REV. CODE ANN. § 69.51A.060(4) (West 2011).

<sup>19</sup> N.J. STAT. ANN. § 24:6I-14 (West 2011).

<sup>20</sup> Hickox, *supra* note 7, at 1009.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

employer would obviously be free to make such an accommodation, employers are under no obligation to acquiesce to such a request. Nevertheless, creative plaintiffs will likely bring failure-to-accommodate suits due to the lack of absolute clarity in the NJCUMMA's language. As a result, the Legislature should amend the NJCUMMA to clarify this issue and foreclose the possibility that New Jersey employers will be subject to expensive and ultimately fruitless litigation. The amendment to the Act should include explicit language clarifying that nothing in the Act should be construed to prevent an employer from maintaining a drug-free workplace.

Part II of this Comment examines the plain language and legislative history of the NJCUMMA, as well as the current state of the Act's implementation. Part III provides an overview of New Jersey's employment law regime and analyzes how the NJCUMMA fits into this framework. Part IV discusses court decisions from other states involving employees' off-site use of medical marijuana and predicts how these cases would be decided under New Jersey law. In Part V, this Comment suggests how to amend and improve the NJCUMMA to avoid unnecessary litigation by adding language that preserves an employer's right to maintain a drug-free workplace.

## II. THE NEW JERSEY COMPASSIONATE USE MEDICAL MARIJUANA ACT

### A. *Plain Language of the New Jersey Compassionate Use Medical Marijuana Act*

Similar to other state medical marijuana statutes, the NJCUMMA fails to fully flesh out how employers should treat employees that use medical marijuana while not on the job.<sup>25</sup> Once medical marijuana is distributed in New Jersey, litigation on this issue will be inevitable. To fully understand where the Act is lacking, we must first examine the plain language of the Act. Courts interpreting medical marijuana statutes in other states have limited potential causes of action based on what is said and what is not said in the statute.<sup>26</sup>

Initially, the NJCUMMA limits the class of people who could potentially have access to medical marijuana to only the seriously ill.<sup>27</sup> Specifically, marijuana is medically available via prescription to patients who will be able to use the marijuana to "alleviate suffering

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<sup>25</sup> See *infra* Part II.A.

<sup>26</sup> See *infra* Part IV.

<sup>27</sup> N.J. STAT. ANN. § 24:6L-3 (West 2011).

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from debilitating medical conditions.”<sup>28</sup> NJCUMMA defines “debilitating medical condition” to include seizure disorders (including epilepsy), intractable skeletal muscular spasticity, or glaucoma.<sup>29</sup> This definition also includes positive status for human immunodeficiency virus (HIV), acquired immune deficiency syndrome (AIDS), or cancer.<sup>30</sup> Other “debilitating medical conditions” include amyotrophic lateral sclerosis, multiple sclerosis, terminal cancer, muscular dystrophy, inflammatory bowel disease (including Crohn’s disease), terminal illness (if the physician has determined a prognosis of less than twelve months of life), and “any other medical condition or its treatment that is approved by the department by regulation.”<sup>31</sup> The extreme nature of these “debilitating medical conditions” creates a more limited class of potential medical marijuana patients than in some other states.<sup>32</sup> These conditions are not, however, so extreme that any person with them would be confined to a hospital bed. This means that, in New Jersey, medical marijuana users are likely to be employed individuals who will continue to work for their employer during their time as a medical marijuana patient. Furthermore, the Act reserves the right to add additional medical conditions to this list through department regulations,<sup>33</sup> meaning that the potential class of patients is open to expansion.

The main stated purpose of the NJCUMMA is to “protect from arrest, prosecution, property forfeiture, and criminal and other penalties, those patients who use marijuana to alleviate suffering from debilitating medical conditions.”<sup>34</sup> The NJCUMMA also provides protection from prosecution under state law for others

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<sup>28</sup> § 24:6I-2(e).

<sup>29</sup> § 24:6I-3. In addition, these conditions must be resistant to conventional medical therapy. *Id.*

<sup>30</sup> *Id.* In addition, there is the added requirement for these conditions that severe or chronic pain, severe nausea or vomiting, cachexia, or wasting syndrome results from the condition or treatment thereof. *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Cf.* CAL. HEALTH & SAFETY CODE § 11362.5 (West 2011).

[S]eriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person’s health would benefit from the use of marijuana in the treatment of . . . any other illness for which marijuana provides relief.

*Id.*

<sup>33</sup> § 24:6I-3.

<sup>34</sup> § 24:6I-2.

involved in the medical marijuana distribution system.<sup>35</sup> This stated purpose seems to imply that the Act is intended solely to protect qualified patients from state criminal prosecution.<sup>36</sup>

The Act also explicitly limits the availability of certain activities and protections to medical marijuana patients.<sup>37</sup> Conduct explicitly not permitted under the NJCUMMA includes operating any vehicle, aircraft, train, boat, or heavy machinery while under the influence of marijuana.<sup>38</sup> The Act also exempts from protection smoking marijuana on a school bus, on public transportation, in a currently operating private vehicle, on any school ground, in any “correctional facility, at any public park or beach, at any recreation center, or in any place where smoking is prohibited pursuant to [New Jersey’s public smoking statute].”<sup>39</sup>

Limiting the Act’s application in the employment context, the Act states “[n]othing in this act shall be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace.”<sup>40</sup> This provision seemingly makes a request for accommodation an open and shut case: the NJCUMMA does not require an employer to accommodate the medical use of marijuana in any workplace. There are, however, three potential interpretations of the phrase “use of marijuana in any workplace.” First, it could mean that the only action an employer need not accommodate is the actual smoking or ingestion of medical marijuana while in the workplace. Second, this phrase could mean that an employer need not accommodate an employee who comes to work under the influence of medical marijuana. A third interpretation is that an employer need not accommodate the presence of THC metabolites in the system of a medical marijuana patient-employee. This third possible interpretation of the phrase “use in any workplace” would mean that an employer is not required to accommodate a request from an employee that he or she be given a “pass” on a drug test that would

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<sup>35</sup> § 24:6I-6 (“No person shall be subject to arrest or prosecution for constructive possession, conspiracy or any other offense for simply being in the presence or vicinity of the medical use of marijuana as authorized under this act.”).

<sup>36</sup> *But see* Melissa Brown, Comment, *The Garden State Just Got Greener: New Jersey is the Fourteenth State in the Nation to Legalize Medical Marijuana*, 41 SETON HALL L. REV. 1519, 1551 (2011) (arguing that the NJCUMMA only provides an affirmative defense to medical marijuana patients, not protection from arrest and prosecution).

<sup>37</sup> § 24:6I-8.

<sup>38</sup> § 24:6I-8(a).

<sup>39</sup> § 24:6I-8(b).

<sup>40</sup> § 24:6I-14 (emphasis added).

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reveal (still federally illegal) marijuana use.

The language of the Act is ambiguous enough that it will not deter an ambitious plaintiff from bringing (and possibly succeeding) on a failure-to-accommodate claim. A problem arises from the fact that “use in any workplace” is quite different than home-use of medical marijuana during non-working hours. This language is bound to cause confusion. The Act mentions nothing about employer accommodation of an employee’s off-site use of medical marijuana, despite the obvious fact that most medical marijuana users administer the drug in the privacy of their homes.

How long marijuana stays in a person’s system depends on how often marijuana is used.<sup>41</sup> This means that an employee could test positive for marijuana in an employer-administered drug test even though he or she did not “use” medical marijuana in the workplace. Arguably, a requested accommodation (e.g., allowing a positive drug test result or requesting an alternate form of a drug test that would test for something other than “leftover” remnants of medical marijuana) must be granted under the current language of the NJCUMMA.<sup>42</sup> The Legislature should amend this portion of the statute to clarify this issue and to prevent costly litigation, which is likely to arise as a result of this ambiguity. The best solution is to amend the Act to include the following language: “Nothing in this act should be construed to require . . . an employer to accommodate the medical use of marijuana or change existing drug policies.” Employers should not be forced to accommodate employee use of a drug that remains illegal under federal law. Compassionate employers may still voluntarily make an accommodation for a medical marijuana patient, but forcing employers to allow employees to use drugs that are illegal under federal law is bad policy. While at some point it may be necessary to reevaluate this policy if marijuana is decriminalized at the federal level, we have not yet reached that point and, as a result, any legally required accommodation for medical marijuana use is unwarranted.

Even if the “use in any workplace” language is interpreted to mean that an employer need not make any accommodation

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<sup>41</sup> *Mental Health—Marijuana and Its Effects*, WEBMD, <http://www.webmd.com/mental-health/marijuana-use-and-its-effects> (last visited Feb. 12, 2012) (“Light users—those who smoke pot once in a while—will have a negative drug screen after a marijuana-free week. Heavy users . . . may continue testing positive for a month after last smoking pot.”).

<sup>42</sup> See discussion *infra* Part III.B.2.

whatsoever for a medical marijuana patient-employee,<sup>43</sup> this interpretation is complicated by other language in the Act. The NJCUMMA states:

*A qualifying patient . . . or any other person acting in accordance with the provisions of this act shall not be subject to any civil or administrative penalty, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a professional licensing board, related to the medical use of marijuana as authorized under this act.*<sup>44</sup>

Nearly identical language also appears in the Assembly Committee Statement<sup>45</sup> and Senate Committee Statement<sup>46</sup> regarding the NJCUMMA. This language seems to suggest the Act offers a certain protection of rights for medical marijuana patient-employees. Specifically, a plaintiff may argue that any adverse employment action taken against him or her on the basis of medical marijuana use qualifies as a denial of a right or privilege under the New Jersey Law Against Discrimination (NJLAD).<sup>47</sup> This argument is likely to fail,<sup>48</sup> but to avoid confusion and unnecessary litigation, the Legislature must amend the Act's language. It would be wise to include language stating: "Nothing in this act shall be construed to prevent an employer from taking adverse employment action against an employee as a result of a positive result in a drug test for THC metabolites."

#### B. Legislative Findings and Declarations

The text of the NJCUMMA outlines the legislative findings and declarations behind the Act.<sup>49</sup> The Act notes that modern medical research has discovered beneficial uses for marijuana "in treating or alleviating the pain or other symptoms associated with certain debilitating medical conditions."<sup>50</sup> It also notes that fourteen other states have enacted laws permitting the use of medical marijuana,<sup>51</sup> and that New Jersey wishes to join this effort "for the health and

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<sup>43</sup> See *infra* Part IV for a discussion of the application of this interpretation in other states.

<sup>44</sup> § 24:6I-6 (emphasis added).

<sup>45</sup> GEN. ASSEMB. 213-804, at 4 (N.J. 2009).

<sup>46</sup> S. 213-119, at 4 (N.J. 2009).

<sup>47</sup> See *infra* Part III for further analysis of this argument.

<sup>48</sup> See *infra* Part III.

<sup>49</sup> § 24:6I-2.

<sup>50</sup> § 24:6I-2(a).

<sup>51</sup> § 24:6I-2(c).

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welfare of its citizens.”<sup>52</sup> The Act notes that states are not required to enforce federal law, and, as such, “compliance with this act does not put the State of New Jersey in violation of federal law.”<sup>53</sup>

The Act emphasizes that because “[c]ompassion dictates that a distinction be made between medical and non-medical uses of marijuana,” one of the main purposes of the Act is to “protect from arrest, prosecution, property forfeiture, and criminal and other penalties, those patients who use marijuana to alleviate suffering from debilitating medical conditions.”<sup>54</sup> Language found elsewhere in the Act, stating that nothing in the Act “is to be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace,”<sup>55</sup> echoes the Senate Assembly Health and Senior Services Committee Statement.

The main focus of these declarations seems to be emphasizing the Act’s main goal of removing criminal liability under state law for patients involved in New Jersey’s medical marijuana program. But, due to similar legislation in other states at the time of NJCUMMA’s adoption, the New Jersey Legislature must have known that confusion would arise over the issue of employer accommodation of employee medical marijuana use.<sup>56</sup> Yet it chose to avoid answering these hard questions and remained silent. Because the NJCUMMA’s scope is limited as compared to the more liberal medical marijuana statutes in other states,<sup>57</sup> a liberal interpretation of the Act would be out of line. The Act’s main focus is to provide protection from state criminal conviction, not to create a new right for employees. The Act should have stated this distinction clearly in the “Findings and Declarations” section. In sum, the discovery of medical benefits of marijuana and the Act’s claim of compassionate goals are not enough to create a new set of accommodation obligations for employers in New Jersey.

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

<sup>53</sup> § 24:6I-2(d).

<sup>54</sup> § 24:6I-2(e).

<sup>55</sup> § 24:6I-1.

<sup>56</sup> *See, e.g., DiProspero v. Penn*, 874 A.2d 1039, 1049 (N.J. 2005) (citing another source) (“[T]he Legislature is presumed to be aware of judicial construction of its enactments.”).

<sup>57</sup> *See, e.g., CAL. HEALTH & SAFETY CODE* § 11362.5 (West 2011) (discussed *infra* Part IV).

C. *The Current State of the NJCUMMA*<sup>58</sup>

The NJCUMMA is in its fledgling stage. Although the statute is in effect, as of the time of this Comment's publication, medical marijuana has not been distributed in New Jersey.<sup>59</sup> The NJCUMMA was intended to become effective six months after it was enacted.<sup>60</sup> Despite this intention, the New Jersey Department of Health and Senior Services (DHSS), the State Legislature, and New Jersey Governor Chris Christie have struggled to reach a consensus on the details of running the program.<sup>61</sup> The DHSS website FAQs section once indicated that medical marijuana patient registration would begin in the latter part of 2011.<sup>62</sup> After some delay, and as of August 8, 2012, the patient registry is open.<sup>63</sup>

On July 19, 2011, Governor Christie announced his authorization for the state to begin dispensing medical marijuana to patients who qualify, despite his concern over whether federal authorities could prosecute state employees or state-approved growers.<sup>64</sup> Governor Christie explained that the delay was caused in part by his desire to roll out the program in a way that would "withstand legal scrutiny" and simultaneously help those in need of medical marijuana.<sup>65</sup> Governor Christie also expressed a desire to avoid "the type of real societal problems that you see . . . [in] Colorado or California."<sup>66</sup> Governor Christie expressed a belief that the medical marijuana programs in these states "are significantly out of control and leading to other problems in society that they were never intended to cause or contribute to."<sup>67</sup> Governor Christie

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<sup>58</sup> This section is current as of September 2012. For up to date information on the NJCUMMA, visit the New Jersey Department of Health's Medical Marijuana Program website at <http://www.state.nj.us/health/medicalmarijuana/>.

<sup>59</sup> *Medical Marijuana: 18 Legal Medical Marijuana States and DC, supra* note 1.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Medicinal Marijuana Program: Frequently Asked Questions*, STATE OF NEW JERSEY, DEPARTMENT OF HEALTH (July 19, 2011), <http://www.state.nj.us/health/medicalmarijuana/faqs.shtml>.

<sup>64</sup> *N.J. Medical Marijuana Gets Green Light by Gov. Christie*, N.J. NEWS ROOM (July 19, 2011), <http://www.newjerseynewsroom.com/healthquest/nj-medical-marijuana-gets-green-light-by-gov-christie>.

<sup>65</sup> Chris Christie, Governor of New Jersey, Comments on the Resumption of New Jersey's Medical Marijuana Program (July 19, 2011), *transcript available at* <http://www.newjerseynewsroom.com/state/gov-chris-christies-comments-of-the-resumption-of-new-jerseys-medical-marijuana-program>.

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

<sup>67</sup> *Id.* It is likely that Governor Christie used the phrases "out of control" and

expressed a desire to limit the exposure of all parties involved to any risk of federal prosecution.<sup>68</sup> New Jersey towns have also been dragging their feet in approving permits for medical marijuana centers.<sup>69</sup>

Despite these delays, the slow progress of implementing the Act is unlikely to stop the Act from coming to fruition. Eventually, medical marijuana will be distributed in New Jersey and litigation will arise out of adverse employment actions taken against medical marijuana patients. It is best to amend the Act for clarification on this topic and to preserve an employer's right to maintain a drug-free workplace before this type of litigation begins. While uncertainty in the employment context is not the sole problem with the NJCUMMA,<sup>70</sup> it is among the major problems with the Act that calls for resolution through decisive legislative action rather than through unnecessary litigation. The New Jersey state government and local townships' hesitation and resistance could be reduced if issues such as these are resolved by amending the Act before its full-blown implementation. The resulting reduction in uncertainty would benefit all parties involved.

#### D. Rules & Regulations

Rules promulgated under the NJCUMMA may be helpful in the Act's interpretation. Unfortunately, as of the time of this Comment's publication, the limited promulgated rules do not clarify the issue of medical marijuana in the employment law context.<sup>71</sup> The DHSS released draft rules outlining the registration and application process on October 6, 2010.<sup>72</sup> The DHSS held a public hearing to discuss the proposed rules on December 6, 2010.<sup>73</sup> In response, on December 20, 2010, Senator Nicholas Scutari, lead sponsor of the medical

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"other problems in society" in reference to the ease of obtaining marijuana in these states and the clashes that have occurred with federal authorities. *See, e.g., Teens' Ease Of Getting Marijuana Blamed On Medical Pot Cards*, 10NEWS.COM (Mar. 30, 2011), <http://www.10news.com/news/27378646/detail.html>; *Debbi Baker, Medical marijuana shop raided in Kearny Mesa*, UTSANDIEGO.COM (Jan. 10, 2012), <http://www.utsandiego.com/news/2012/jan/18/clairmont-marijuana-shop-raidec>.

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

<sup>69</sup> Amy Brittain, *2 Years after Being Approved, N.J. Medical Marijuana Program Still at Seedling Stage*, NJ.COM (Jan. 16, 2012), [http://www.nj.com/news/index.ssf/2012/01/2\\_years\\_after\\_being\\_approved\\_n.html](http://www.nj.com/news/index.ssf/2012/01/2_years_after_being_approved_n.html).

<sup>70</sup> *See* Brown, *supra* note 36, for a discussion of other pitfalls of the Act.

<sup>71</sup> *See* N.J. ADMIN. CODE § 8:64 et seq.

<sup>72</sup> *Medical Marijuana: 18 Legal Medical Marijuana States and DC*, *supra* note 1.

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

marijuana bill, submitted Senate Concurrent Resolution (SCR) 140 declaring that the “Board of Medical Examiners proposed medicinal marijuana program rules are inconsistent with legislative intent.”<sup>74</sup> Additionally, the New Jersey Senate Health, Human Services and Senior Citizens Committee held a public hearing to discuss SCR 140 and a similar bill, SCR 130, on January 20, 2011.<sup>75</sup>

In response to the negative feedback on the draft version of the rules, the DHSS proposed new rules<sup>76</sup> that clarified the permit process for growing and dispensing marijuana, barred home delivery by alternative treatment centers, and mandated that “conditions originally named in the Act be resistant to conventional medical therapy in order to qualify as debilitating medical conditions.”<sup>77</sup> The new rules were adopted and became effective as of December 19, 2011.<sup>78</sup> Notably, the rules require the six Alternate Treatment Centers—the six state-sanctioned sources of medical marijuana—to “establish, implement and adhere to a written alcohol, drug-free and smoke-free workplace policy.”<sup>79</sup> Such policies would be required to address “[t]he policy’s inapplicability if an employee, who is also a qualifying patient, fails the drug test solely because of the presence of marijuana in a confirmed positive test result.”<sup>80</sup> The section of the rules addressing exemption from state criminal and civil penalties for the medical use of marijuana does not clarify this issue.<sup>81</sup>

### III. THE EXISTING CANON OF NEW JERSEY EMPLOYMENT LAW

The potential impact of the NJCUMMA cannot be fully understood without an examination of New Jersey’s laws regarding drug testing and protection from discrimination in the employment context. With some limited restrictions, private employers are permitted to use drug testing in New Jersey.<sup>82</sup> This means it is very likely that some employer will eventually encounter a situation in which an employee or potential employee tests positive for THC as a result of his or her medical marijuana use. When this occurs, the employer may choose to fire or refuse to hire that employee. If that

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

<sup>75</sup> *Id.*

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

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

<sup>78</sup> See N.J. ADMIN. CODE § 8:64 et seq.

<sup>79</sup> *Id.* at § 8:64-9.6(a).

<sup>80</sup> *Id.* at § 8:64-9.6(c)(1).

<sup>81</sup> See *id.* at § 8:64-13.11.

<sup>82</sup> See discussion *infra* Part III.A.

employee chooses to sue over this adverse employment action, he or she is likely to bring claims for failure to make a reasonable accommodation and for termination in violation of public policy.<sup>83</sup> The limited definition of conditions that qualify a patient for medical marijuana under the NJCUMMA<sup>84</sup> means that it is likely that this plaintiff-employee would fall under New Jersey's expansive definition of "disabled,"<sup>85</sup> and such a qualification is a pre-requisite to a reasonable accommodation claim.<sup>86</sup> The NJCUMMA is also likely to stand as a clear source of public policy, opening the door for plaintiffs to bring a "discharge in violation of public policy" claim.<sup>87</sup> Despite these apparent pitfalls, a closer assessment of New Jersey's employment law suggests that an employer is still likely to successfully defend against these types of claims.<sup>88</sup> This conclusion rests largely on the limited scope of the NJCUMMA.<sup>89</sup>

A. *Drug Testing under New Jersey Law*

New Jersey does not have statutory regulation of private-sector drug testing.<sup>90</sup> The New Jersey Supreme Court has placed some limits on drug testing in the employment context.<sup>91</sup> In *Hennessey v. Coastal Eagle Point Oil Co.*,<sup>92</sup> the court implied "that common law privacy rights forbid 'random' drug testing in the private sector except for employees in 'safety-sensitive' positions."<sup>93</sup> Employees in non-safety-sensitive positions "may be tested only 'for cause,' and *all* testing programs must conform to certain procedural 'due process' guidelines . . . ."<sup>94</sup> Pre-employment applicant drug testing is neither prohibited under New Jersey law, nor restricted by the decision in *Hennessey*.<sup>95</sup>

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<sup>83</sup> This is what plaintiffs did in other states. See discussion *infra* Part IV.

<sup>84</sup> See N.J. STAT. ANN. § 24:6I-3 (West 2011).

<sup>85</sup> See discussion *infra* Part III.B.1.

<sup>86</sup> See discussion *infra* Part III.B.2.

<sup>87</sup> See discussion *infra* Part III.B.3.

<sup>88</sup> See discussion *infra* Parts III.B.1–3.

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

<sup>90</sup> *Drug/Alcohol Testing of Employees in New Jersey*, FOX ROTHSCHILD LLP (2011), available at [http://www.foxrothschild.com/uploadedFiles/newspublications/PA\\_LE\\_DrugAlcoholTesting\\_NewJersey.pdf](http://www.foxrothschild.com/uploadedFiles/newspublications/PA_LE_DrugAlcoholTesting_NewJersey.pdf).

<sup>91</sup> See, e.g., *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11 (N.J. 1992).

<sup>92</sup> *Id.*

<sup>93</sup> *Drug/Alcohol Testing of Employees in New Jersey*, *supra* note 90.

<sup>94</sup> *Id.* (emphasis in original).

<sup>95</sup> See *Vargo v. Nat'l Exch. Carriers Ass'n, Inc.*, 870 A.2d 679, 686 (N.J. Super. Ct. App. Div. 2005) (Noting a finding of no invasion of privacy expectations due to a

These limited restrictions allow for the creation of numerous opportunities for medical marijuana patients to test positive for marijuana and either be denied employment (at the pre-employment application phase) or terminated (for those in safety-sensitive positions or those tested for cause in accordance with procedural guidelines). For example, a medical marijuana patient in New Jersey could be denied employment due to a routine pre-employment drug screening that revealed the presence of THC in his or her system.<sup>96</sup> This type of drug test would be legal under New Jersey law, and it is likely that the employer would refuse to hire that person as a result of evidence indicating that he or she uses a federally illegal drug. Clearly, “[f]rom an employer’s perspective, an employee’s use of illegal drugs presents multiple problems.”<sup>97</sup> The use of drugs that are illegal under federal law “can affect an employee’s performance . . . , endanger co-workers, and increase health-care costs.”<sup>98</sup> Still, the potential employee is likely to feel that he or she is being discriminated against because of his or her status as a medical marijuana user. As a result, the potential employee is likely to bring a suit against the employer for its refusal to hire.<sup>99</sup> This obvious conflict between company drug policies and what is permitted under the NJCUMMA is yet another reason why the Legislature should amend the Act to allow companies to keep their existing drug testing policies in place.

*B. The New Jersey Law Against Discrimination*

Medical marijuana users who believe they were discriminated against are likely to rely on New Jersey’s employee protection statute, the New Jersey Law Against Discrimination (NJLAD), to support their claim. Creative plaintiffs may argue that they were discriminated against because of the underlying disability that led to their medical marijuana use. Plaintiffs may also argue that a potential employer is refusing to make a reasonable accommodation for their underlying handicap that led to their medical marijuana use. The text of the

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waiver on the part of the prospective employee where employer had “a long-standing drug-free workplace policy and pre-employment drug screening policy for all applicants for permanent positions,” and the potential employee knew of the policy when he signed the “Terms and Conditions of Employment” and “voluntarily submitted to the non-intrusive drug test in a private bathroom.”).

<sup>96</sup> This was a subject of litigation in California. See discussion *infra* Part IV.A.

<sup>97</sup> *Hennessey*, 609 A.2d at 27 (Pollock, J., concurring).

<sup>98</sup> *Id.*

<sup>99</sup> This was a subject of litigation in California. See discussion *infra* Part IV.A.

NJCUMMA, however, does not support these arguments, and exposing employers to these types of liabilities and obligations has no foundation in the purpose underlying the Act.<sup>100</sup> The NJCUMMA should be amended to include language that limits the obligations of employers and eliminates the confusion resulting from the conflict between what is protected by the NJLAD and what is permitted under the NJCUMMA.

### 1. Disability under the NJLAD

To constitute a protected class—the first element of a prima facie case for disability discrimination—a plaintiff must demonstrate that he or she qualifies as an individual with a disability, or is perceived as having a disability, as defined under the statute.<sup>101</sup> This burden is “rather modest.”<sup>102</sup> As a result, it is likely that a plaintiff would fall within a protected class because of his or her underlying disability that requires the use of medical marijuana. This chance is compounded by the fact that the definition of “disability” in the NJLAD has some overlap with the definition of “debilitating medical condition” in the NJCUMMA.<sup>103</sup>

Under the NJLAD’s federal counterpart, the Americans With Disabilities Act (ADA), a person “currently engaging in the illegal use of drugs” is not a “qualified individual with a disability,”<sup>104</sup> and marijuana is still an “illegal drug” for the purposes of federal law.<sup>105</sup> The NJLAD, however, is dissimilar.<sup>106</sup> Disability under the NJLAD is expansively defined.<sup>107</sup> Under the NJLAD, the definition of

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<sup>100</sup> See discussion *infra* Part II.A, II.B.

<sup>101</sup> *Victor v. State*, 4 A.3d 126, 140 (N.J. 2010).

<sup>102</sup> *Id.*

<sup>103</sup> Compare N.J. STAT. ANN. § 10:5-5(q) (West 2011), with N.J. STAT. ANN. § 24:6I-3 (West 2011).

<sup>104</sup> 42 U.S.C.A. § 12114(a) (West 2006) (Under the ADA, “a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use”).

<sup>105</sup> See 21 U.S.C.A. § 812 (listing “Marihuana” as a Schedule I drug, defined as a substance with “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.”).

<sup>106</sup> See N.J. STAT. ANN. § 10:5-5(q) (West 2011).

<sup>107</sup> *Id.*

[P]hysical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination,

“disability” does not explicitly carve out illegal drug use.<sup>108</sup> Accordingly, users of illegal drugs—such as marijuana—are not automatically barred from a claim of disability if they are subject to an adverse employment action resulting from such use.

More importantly, many of the conditions that qualify as a “disability” under the NJLAD overlap with the definition of “debilitating medical condition” under the NJCUMMA.<sup>109</sup> For example, like the NJCUMMA, the NJLAD also lists epilepsy, other seizure disorders, AIDS, and HIV as qualifying disorders.<sup>110</sup> This means that, in New Jersey, a medical marijuana patient’s ailment is likely to fall under the definition of “disability” for purposes of the NJLAD. A positive result for the presence of THC in a drug test would be directly linked to the patient’s disability because a patient uses medical marijuana for the purpose of alleviating his or her disability. It is likely, then, that a plaintiff will be able to argue that an adverse employment action in response to a positive drug test on account of his or her use of medical marijuana was an adverse employment action taken as a result of the disability itself.

Further supporting this notion is the fact that the NJLAD has “broad remedial purposes and the wide scope of its coverage for disabilities as compared to the ADA support an expansive view of protecting rights of persons with disabilities in the workplace.”<sup>111</sup> Courts should construe the NJLAD “to prohibit any unlawful discrimination against any person because such person is or has been at any time disabled [as well as] any unlawful employment practice against such person, unless the nature and extent of the disability reasonably precludes the performance of the particular

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blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological or developmental disability, including autism spectrum disorders, resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection.

*Id.*

<sup>108</sup> *See id.*

<sup>109</sup> *Compare* N.J. STAT. ANN. § 10:5-5(q) (West 2011), *with* N.J. STAT. ANN. § 24:6I-3 (West 2011).

<sup>110</sup> *Id.*

<sup>111</sup> *Victor v. State*, 4 A.3d 126, 143 (N.J. 2010).

employment.”<sup>112</sup> The expansive reading and remedial purpose of the NJLAD may supply plaintiffs with the argument that when an employer takes an adverse employment action against them as a result of their medical marijuana use, they were discriminated against because of their disability.

## 2. Reasonable Accommodation under the NJLAD

A medical marijuana user may request that an employer accommodate his or her underlying disability in the form of a “free pass” on a drug test.<sup>113</sup> Judicial interpretations of the NJLAD will help provide guidance for analyzing a reasonable accommodation claim arising from a medical marijuana user. The NJLAD does not specifically address reasonable accommodation, but New Jersey courts “have uniformly held that the law nevertheless requires an employer to reasonably accommodate an employee’s handicap.”<sup>114</sup>

To prevail on a failure to accommodate claim under the NJLAD, a plaintiff must demonstrate that: “(1) the employer knew about the employee’s disability; (2) the employee requested accommodations or assistance for her disability; (3) the employer did not make a good faith effort to assist; and (4) the employee could have been reasonably accommodated.”<sup>115</sup> Unlike the ADA, the NJLAD “[is] intended to cover more than just severe disabilities, and, accordingly, does not require that the handicap substantially limit a major life activity.”<sup>116</sup> New Jersey case law takes a very broad view of handicap, expanding the definition to a point where almost anything can preclude a grant of summary judgment for the employer.<sup>117</sup> Legal precedent states that the NJLAD defines “handicap” more broadly than the ADA’s comparable definition of “disability.”<sup>118</sup> The NJLAD’s statutory definition of “handicapped” is “very broad in its scope,”<sup>119</sup>

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<sup>112</sup> N.J. STAT. ANN. § 10:5-4.1 (West 2011).

<sup>113</sup> Medical marijuana users have made similar accommodation requests in other states. *See* discussion *infra* Part IV.

<sup>114</sup> *Tynan v. Vicinage 13 of Super. Ct.*, 798 A.2d 648, 654 (N.J. Super. Ct. App. Div. 2002).

<sup>115</sup> *Peacock v. Albertsons Acme Mkts.*, 607 F. Supp. 2d 694, 700 (D.N.J. 2009).

<sup>116</sup> *Santiago v. City of Vineland*, 107 F. Supp. 2d 512, 547 (D.N.J. 2000) (internal quotations omitted).

<sup>117</sup> *See, e.g., Nieves v. Individualized Shirts*, 961 F. Supp. 782, 795 (D.N.J. 1997) (issues of material fact existed as to whether employee’s varicose veins were a handicap under NJLAD, precluding summary judgment).

<sup>118</sup> *Tynan*, 798 A.2d at 655.

<sup>119</sup> *Clowes v. Terminix Int’l, Inc.*, 538 A.2d 794, 803–04 (N.J. 1988) (holding that alcoholism falls within the NJLAD’s definition of “handicapped”).

and has been held to encompass ailments such as back ailment,<sup>120</sup> heart attack,<sup>121</sup> alcoholism,<sup>122</sup> obesity,<sup>123</sup> and drug addiction.<sup>124</sup> Regarding the applicability of the NJLAD to “handicapped” persons, the statute states that “[a]ll persons shall have the opportunity to obtain employment . . . without discrimination because of . . . disability . . . subject only to conditions and limitations applicable alike to all persons.”<sup>125</sup> Under the NJLAD, unless it is shown that “a person’s disability would prevent such person from performing a particular job,”<sup>126</sup> it is unlawful to take an adverse employment action “solely because such person is a person with a disability.”<sup>127</sup> In sum, termination of an employee for a covered condition that does not prevent the employee from doing his or her job is actionable under the NJLAD.<sup>128</sup>

With regard to making a reasonable accommodation for a person with a disability or handicap, employers are required to conduct their employment procedures in such a manner as to [ensure] that all people with disabilities are given equal consideration [as] people who do not have disabilities for all aspects of employment including, but not limited to, hiring, promotion, tenure, training, assignment, transfers, and leaves on the basis of their qualifications and abilities.<sup>129</sup>

An employee or potential employee’s ability to perform a particular job “must be assessed on an individual basis.”<sup>130</sup> Suggested reasonable accommodations include, but are not limited to, job restructuring and acquisition or modification of equipment or devices.<sup>131</sup>

An employer must make a reasonable accommodation “unless the employer can demonstrate that the accommodation would

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<sup>120</sup> Andersen v. Exxon Co., U.S.A., 446 A.2d 483, 494 (N.J. 1982).

<sup>121</sup> Panettieri v. C.V. Hill Refrigeration, 388 A.2d 630, 639 (N.J. Super. Ct. App. Div. 1978).

<sup>122</sup> Clowes, 538 A.2d at 804.

<sup>123</sup> Gimello v. Agency Rent-A-Car Sys., Inc., 594 A.2d 264, 276 (N.J. Super. Ct. App. Div. 1991).

<sup>124</sup> In re Cahill, 585 A.2d 977, 979 (N.J. Super. Ct. App. Div. 1991).

<sup>125</sup> N.J. STAT. ANN. § 10:5-4 (West 2011) (the statute goes as far as to say that “[t]his opportunity is recognized as and declared to be a civil right”).

<sup>126</sup> § 10:5-29.1.

<sup>127</sup> Id.

<sup>128</sup> See, e.g., Svarnas v. AT&T Commc’ns, 740 A.2d 662, 670 (N.J. Super. Ct. App. Div. 1999).

<sup>129</sup> N.J. ADMIN. CODE § 13:13-2.5 (2011).

<sup>130</sup> Id.

<sup>131</sup> Id.

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impose an undue hardship on the operation of its business.”<sup>132</sup> This determination is made on a case-by-case basis.<sup>133</sup> An employer is required to “consider the possibility of reasonable accommodation”<sup>134</sup> before taking an adverse employment action against an employee or potential employee.<sup>135</sup> When determining whether the accommodation would impose an undue hardship on the employer’s business, courts will consider the nature of the accommodation needed and “the extent to which accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement.”<sup>136</sup> A recent regulation change adds the language: “In determining whether an accommodation would impose undue hardship on the operation of an employer’s business, factors to be considered include . . . [t]he nature and cost of the accommodation needed, *taking into consideration the availability of tax credits and deductions and/or outside funding.*”<sup>137</sup> As a practical concern, an employer may worry about loss of federal funding if employees are using medical marijuana (which is still illegal under federal law).<sup>138</sup> If this proposed language is adopted, employers will be allowed to refuse accommodation of medical marijuana use if they could stand to lose federal funding or tax benefits by employing medical marijuana users.

There is a chance that an employer would be required to take preemptive accommodation action for a medical marijuana user.<sup>139</sup> Regarding the need for an employee’s request for a reasonable accommodation:

An employer must participate in an interactive process when an employee makes a request for an accommodation. An employer also may have to engage in the interactive process even when the employee has not requested a reasonable accommodation. In addition, an employer must consider making a reasonable accommodation before firing, demoting, or refusing to hire or promote a person

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

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

<sup>134</sup> *Id.*

<sup>135</sup> § 13:13-2.5(b)(2).

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

<sup>137</sup> § 13:13-2.5(b)(3)(iii) (emphasis added).

<sup>138</sup> See Susan K. Livio, *Rutgers Declines Growing Medical Marijuana to Not Risk Federal Funding* (NJ.COM), July 24, 2010, [http://www.nj.com/news/index.ssf/2010/07/rutgers\\_declines\\_growing\\_medic.html](http://www.nj.com/news/index.ssf/2010/07/rutgers_declines_growing_medic.html).

<sup>139</sup> See § 13:13-2.5(b)(2).

with a disability because the disability precludes job performance, regardless of whether the employee requested an accommodation.<sup>140</sup>

An employer can reject an employee if his or her handicap makes him or her unable to perform the job.<sup>141</sup> “For example, if an applicant has a disability that prevents him from working certain hours of the day, the employer must consider whether the applicant can be accommodated by changing the hours or job duties.”<sup>142</sup> A possible argument is that if an employee is in a safety-sensitive position, an employee that uses medical marijuana for medical purposes or otherwise would be unqualified for the position. As a result, the employer would be able to deny or terminate employment of medical marijuana employee-patients for these types of positions. For employees working in non-safety-sensitive positions, the result may not be as clear. How could it be said that the presence of THC metabolites in a medical-marijuana patient makes them unable to perform a job that entails, for example, jockeying spreadsheets in a cubicle?

### 3. Discharge Contrary to Public Policy

In *Pierce v. Ortho Pharm. Corp.*,<sup>143</sup> the New Jersey Supreme Court created a cause of action for wrongful discharge for any employee discharged “contrary to a clear mandate of public policy.”<sup>144</sup> The source of public policy for purposes of a *Pierce* claim is expansive in New Jersey and can include “legislation; administrative rules, regulations or decisions; and judicial decisions.”<sup>145</sup> If an employee fails to identify a “specific expression of public policy,” he or she “may be discharged with or without cause.”<sup>146</sup> An alleged source of public policy will “not constitute a clear mandate” if it is “vague,

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<sup>140</sup> Michael D. Homans, *Anti-discrimination Laws: New Jersey*, THE PRACTICAL LAW COMPANY (2011), at 4 [http://www.flastergreenberg.com/media/site\\_files/344\\_Anti\\_discrimination\\_Laws\\_New\\_Jersey.pdf](http://www.flastergreenberg.com/media/site_files/344_Anti_discrimination_Laws_New_Jersey.pdf) (citing N.J. ADMIN. CODE § 13:13-2.5(b)(2) (2011)).

<sup>141</sup> *Harris v. Middlesex Cnty. Coll.*, 801 A.2d 397, 405 (N.J. Super. Ct. App. Div. 2002) (“The [NJLAD] allows an employer freedom to reject those applicants who are unable to do the job, whether because they are generally unqualified or because they have a handicap that in fact impedes job performance. There should be no second-guessing the employer.”) (internal quotations omitted).

<sup>142</sup> Homans, *supra* note 140, at 4.

<sup>143</sup> *Pierce v. Ortho Pharm. Corp.*, 417 A.2d. 505 (N.J. 1980).

<sup>144</sup> *Id.* at 512.

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

<sup>146</sup> *Id.*

controversial, unsettled, and otherwise problematic.”<sup>147</sup> Although the NJCUMMA constitutes adopted legislation and a clear mandate of public policy, the policy that it establishes has nothing to do with protecting medical-marijuana patients from adverse employment action.<sup>148</sup> The Act merely establishes a protection from state criminal prosecution for medical marijuana patients in New Jersey. The Act says nothing about protecting the employment rights of these patients.<sup>149</sup> Therefore, an employer who fires or chooses not to hire a medical marijuana patient due to the results of a routine drug screening is not denying the patient any right the NJCUMMA creates. In this context, the employer is merely exercising its option not to employ that person. Without an amendment extending this protection to potential patients, a *Pierce* claim related to a discharge for a positive drug test stemming from medical marijuana use should fail.

Regarding the interaction of *Pierce* public policy claims and employee drug testing, the court in *Hennessey* indicated that the discharge of an employee for “failing (or refusing to take) a random test for illegal drug use implicates a clear mandate of public policy protecting individual privacy rights,” but ultimately held that the “discharge was lawful where [the] employee served in a safety-sensitive position.”<sup>150</sup> The *Hennessey* court engaged in a balancing analysis, weighing the employee’s individual privacy against the public’s interest in safety.<sup>151</sup> The court found that the “public’s interest in ensuring that workers in safety-sensitive positions are drug-free outweighs any individual right to privacy,” and that “safety outweighs a right to privacy in off-duty activities.”<sup>152</sup> *Hennessey*, however, dealt with a random drug screening<sup>153</sup> and not mandatory pre-employment drug screenings for all employees, and, as such, may be limited to its facts. The court did note, however, that issues regarding drug testing in the workplace are better addressed through “legislative action or labor-relations agreements” than extensive litigation.<sup>154</sup> This provides further support for the proposition that

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<sup>147</sup> *MacDougall v. Weichert*, 677 A.2d 162, 167 (N.J. 1996).

<sup>148</sup> See discussion *supra* Parts II.A–B.

<sup>149</sup> See discussion *supra* Part II.A.

<sup>150</sup> *MacDougall*, 677 A.2d at 168 (discussing *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11 (N.J. 1992)).

<sup>151</sup> *Hennessey*, 609 A.2d at 20.

<sup>152</sup> *Id.* at 21.

<sup>153</sup> See *id.*

<sup>154</sup> *Id.* at 23.

the Legislature should amend the NJCUMMA to clarify that employers are still free to maintain a drug-free work environment and continue to implement drug-screening policies that may produce adverse employment consequences for medical marijuana patients.

#### IV. LITIGATION IN OTHER STATES ON THIS ISSUE

Looking at litigation in other states can help predict how litigation on this issue will unfold in New Jersey courts. To date, there have been four major cases involving medical marijuana in the employment context.<sup>155</sup> The court in each of these cases refused to extend protection to plaintiffs who suffered adverse employment action as a result of medical marijuana use. In line with these other cases, and given the limited text and purpose of the NJCUMMA, a New Jersey court is likely to, and correctly should, arrive at the conclusion that the NJCUMMA does not create a new cause of action for employees to use against their employers.

##### A. *California* (Ross v. Ragingwire Telecommunications, Inc.)

In *Ross v. Ragingwire Telecommunications, Inc.*, the California Supreme Court dealt with a claim from a plaintiff who was fired for failing a pre-employment drug test.<sup>156</sup> On the advice of his physician, the plaintiff was using medical marijuana to treat chronic pain.<sup>157</sup> The plaintiff brought claims alleging that he was discharged because of his disability, that his employer failed to make a reasonable accommodation for his disability, and that his employer discharged him in violation of public policy.<sup>158</sup> The plaintiff was a qualified individual with a disability under California law, and was receiving governmental disability benefits.<sup>159</sup>

The court concluded that neither the text nor the history of California's medical-marijuana act suggested an intention to "address the respective rights and duties of employers and employees."<sup>160</sup>

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<sup>155</sup> *Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d 914 (W.D. Mich. 2011); *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200 (Cal. 2008); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010); *Roe v. TeleTech Customer Care Mgmt.*, 257 P.3d 586 (Wash. 2011).

<sup>156</sup> *Ross*, 174 P.3d at 202.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 203.

<sup>159</sup> *Id.* (The plaintiff in this case suffered from chronic pain in the form of strain and muscle spasms in his back. The plaintiff sustained these injuries while serving in the armed forces.).

<sup>160</sup> *Id.*

Therefore, under California law, it is permissible for an employer to take failed pre-employment drug tests into consideration when making employment decisions.<sup>161</sup> As was the case in *Ross*, an employer may fire an employee that tests positive for THC in a required drug test, even if the employee furnishes a copy of a physician's recommendation that the employee use medical marijuana.<sup>162</sup>

The court noted that if California's medical marijuana act had given medical marijuana the same status as a legal prescription drug, then the result of the case might have been different.<sup>163</sup> The court, however, emphasized that the Act's reach was not that broad.<sup>164</sup> Specifically, the Act exempted medical marijuana users from criminal liability under state statutes and was not intended to address "the respective rights and obligations of employers and employees."<sup>165</sup> Like the NJCUMMA, California's medical marijuana statute fails to address problems that arise in the employment context—namely, whether it offers any protection to employees who use marijuana for medicinal purposes.<sup>166</sup> Furthermore, employer refusal to accommodate does not affect the goal of the Act, which is to provide immunity from state criminal liability—which, again, is the primary purpose of the NJCUMMA as well.<sup>167</sup>

California's medical-marijuana act contains similar language to the NJCUMMA on the issue of employer accommodation.<sup>168</sup> The plaintiff's argument in *Ross*, though ultimately unsuccessful, was that this language should be read "as if it articulated express exceptions to a general requirement of accommodation that appears only implicitly."<sup>169</sup> The court stated that this interpretation might have merit "if the failure to infer a requirement of accommodation would

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<sup>161</sup> *Id.*

<sup>162</sup> *See Ross*, 174 P.3d at 203.

<sup>163</sup> *Id.* at 204.

<sup>164</sup> *See id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 205.

<sup>167</sup> *Id.* at 206.

<sup>168</sup> *Compare* N.J. STAT. ANN. § 24:6I-14 (West 2011) (stating that "[n]othing in this act shall be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace"), *with* CAL. HEALTH & SAFETY CODE, § 11362.785(d) (West 2011) (stating that "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").

<sup>169</sup> *Ross*, 174 P.3d at 207.

render the statute meaningless.”<sup>170</sup> Yet, the court held that this was not the case, as the statute “can be given literal effect as negating any expectation” that the protection from criminal liability under the Act would give medical marijuana users “a civilly enforceable right to possess the drug at work or in custody.”<sup>171</sup>

The *Ross* court also rejected the plaintiff’s public policy argument.<sup>172</sup> Under California law, the public policy exception to the general at-will employee regime requires the policy to be: (1) supported by either a constitutional or statutory provision; (2) for the benefit of the public as a whole rather than only the individual; (3) in place at the time the employee is fired; and (4) “fundamental and substantial.”<sup>173</sup> The court noted that California’s medical marijuana act “does not speak to employment law” and in no way established a public policy requiring employers to accommodate for employees using the drug.<sup>174</sup> In dicta, the court also noted that the employer had not prevented the plaintiff from having access to medical treatment, but merely decided not to employ him.<sup>175</sup> These requirements differ from the requirements under New Jersey’s public policy exception.<sup>176</sup>

The decision in *Ross* helps predict the result of litigation on this issue in a New Jersey court. Like California’s act, the NJCUMMA does not specifically address the rights and duties of employers and employees.<sup>177</sup> Further, like California’s statute, the Act does not give medical marijuana the same status as a legal prescription drug—it merely provides a protection from state criminal prosecution.<sup>178</sup> A New Jersey court is likely to agree with the reasoning in *Ross* because of these similarities. The limited protections the NJCUMMA creates also provide support for rejecting any reasonable accommodation claims or *Pierce* public policy claims.

B. *Washington* (Roe v. Teletech Customer Care Management, LLC)

In *Roe v. Teletech Customer Care Management*, the Supreme Court

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

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

<sup>172</sup> *Id.* at 209.

<sup>173</sup> *Id.* at 208.

<sup>174</sup> *Id.*

<sup>175</sup> *Ross*, 174 P.3d at 209.

<sup>176</sup> *See supra* Part III.B.3.

<sup>177</sup> *See supra* Part II.A.

<sup>178</sup> *See id.*

of Washington held that Washington's medical-marijuana act did not provide a private cause of action for a plaintiff-employee discharged for the use of medical marijuana.<sup>179</sup> The court also held that the Act did not create a "clear public policy that would support a claim for wrongful discharge in violation of such a policy."<sup>180</sup> Therefore, employers in Washington may discharge an employee for medical marijuana use.

Regarding employee accommodation, Washington's medical marijuana act uses language similar to the language in the NJCUMMA.<sup>181</sup> The *Roe* court found that the language of the Act was unambiguous.<sup>182</sup> The court rejected the plaintiff's argument that because the statute "explicitly [did] not require an employer to accommodate medical marijuana use 'in any place of employment,' the statute implicitly requires an employer to accommodate an employee's medical marijuana use *outside* the workplace."<sup>183</sup> The court stated that such an implicit obligation did not stem from the explicit statement in the statute.<sup>184</sup> Instead, the court held that the statute's silence supported the conclusion that the employer was *not* required to accommodate off-site medical marijuana use.<sup>185</sup>

Turning to the history of the Act, the court found no support for "reading an employment protection into the statute."<sup>186</sup> The court examined extrinsic evidence<sup>187</sup> and determined that the evidence did not support an interpretation that would require an employer to accommodate off-site use of marijuana.<sup>188</sup>

In rejecting the plaintiff's public policy argument, the court noted that, under Washington law, courts are instructed to "proceed cautiously if called upon to declare public policy absent some prior

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<sup>179</sup> *Roe v. TeleTech Customer Care Mgmt.*, 257 P.3d 586, 588 (Wash. 2011).

<sup>180</sup> *Id.*

<sup>181</sup> Compare N.J. STAT. ANN. § 24:6I-14 (West 2010) (stating that "[n]othing in this act shall be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace"), with WASH. REV. CODE ANN. § 69.51A.060 (West 2011) (stating that "[n]othing in this chapter requires any accommodation of any on-site medical use of cannabis in any place of employment . . .").

<sup>182</sup> *Roe*, 257 P.3d at 590.

<sup>183</sup> *Id.* at 591 (emphasis in original).

<sup>184</sup> *Id.* at 592.

<sup>185</sup> *Id.* at 593.

<sup>186</sup> *Id.* at 592.

<sup>187</sup> The examined evidence included the Drafter's Declaration, the 2007 Amendments to the Act, and the voter pamphlet that went out when the Act was passed.

<sup>188</sup> *Roe*, 257 P.3d at 592.

legislative or judicial expression on the subject.”<sup>189</sup> Washington courts construe this exception narrowly in an effort to avoid “swallow[ing] the general rule of at-will employment.”<sup>190</sup> These requirements appear to be stricter than the requirements of the public policy exception under New Jersey law.<sup>191</sup>

New Jersey and Washington have similar language in their medical-marijuana statutes regarding employers’ accommodation of employee use of marijuana in the workplace.<sup>192</sup> As such, a court in New Jersey is likely to find, as the court did in *Roe*, that this limited language is insufficient to establish an implicit requirement that an employer accommodate an employee’s use of the drug outside the workplace. Washington has amended its medical marijuana statute to reflect the decision in *Roe*.<sup>193</sup> The statute now includes the language “[e]mployers may establish drug-free work policies. Nothing in this chapter requires an accommodation for the medical use of cannabis if an employer has a drug-free work place.”<sup>194</sup> This is exactly the type of language that the Legislature should add into the NJCUMMA. By adding this language to the Act before medical marijuana is distributed in New Jersey, the State can avoid fruitless litigation like *Roe* in Washington.

C. *Oregon (Emerald Steel Fabricators v. Bureau of Labor & Industries)*

The plaintiff in *Emerald Steel Fabricators v. Bureau of Labor & Industries*

<sup>189</sup> *Id.* at 595 (quoting *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1088 (Wash. 1984)).

<sup>190</sup> *Id.* (citing *Sedlacek v. Hillis*, 36 P.3d 1014, 1019 (Wash. 2001)).

<sup>191</sup> Compare discussion *supra* Part III.B.3, with *Roe*, 257 P.3d at 595. Under Washington law, the public-policy exemption to the at-will employment doctrine contains four requirements:

(1) The plaintiffs must prove the existence of a clear public policy . . . [;] (2) The plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy . . . [;] (3) The plaintiffs must prove that the public-policy-linked conduct caused the dismissal . . . [; and] (4) The defendant must not be able to offer an overriding justification for the dismissal . . . .

*Roe*, 257 P.3d at 595.

<sup>192</sup> Compare N.J. STAT. ANN. § 24:6I-14 (West 2010) (stating that “[n]othing in this act shall be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace”), with WASH. REV. CODE ANN. § 69.51A.060 (West 2011) (stating that “[n]othing in this chapter requires any accommodation of any on-site medical use of cannabis in any place of employment . . .”).

<sup>193</sup> See WASH. REV. CODE ANN. § 69.51A.060 (West 2011).

<sup>194</sup> *Id.*

*Industries* was a former part-time employee who had been anticipating an offer of permanent employment.<sup>195</sup> The plaintiff knew that he would have to pass a drug test as a condition of permanent employment, so he revealed to his supervisor that he was a medical marijuana patient.<sup>196</sup> One week later, the supervisor discharged the plaintiff.<sup>197</sup> The court ultimately concluded that federal preemption supported the conclusion that an employer was not required to accommodate an employee's off-site use of medical marijuana.<sup>198</sup>

Oregon's employee-protection statute does not apply to employees who are "currently engaged in the illegal use of drugs, if the employer takes an adverse action based on that use."<sup>199</sup> The court reasoned that if medical marijuana use is an illegal use of drugs within the meaning of Oregon's employee-protection statute, then an employer would be excused from engaging "in a meaningful interactive process or otherwise accommodat[ing] employee's use of medical-marijuana."<sup>200</sup> The court concluded that the Federal Controlled Substances Act, which explicitly prohibits marijuana use without regard to medicinal purpose, preempted the provision of the Oregon Medical Marijuana Act that affirmatively authorizes the use of medical marijuana.<sup>201</sup>

A New Jersey court is unlikely to conclude that federal preemption is the deciding factor in a case similar to *Emerald Steel*. Under New Jersey law, there is no explicit carve-out for illegal drug use regarding an employer making a reasonable accommodation.<sup>202</sup> New Jersey courts have held that employee accommodation may still be required in cases involving addiction or dependency on legal or illegal drugs.<sup>203</sup> A New Jersey court is unlikely to adopt the same "federal preemption" reasoning employed by the court in *Emerald Steel*, but a New Jersey court is likely to arrive at the same *conclusion*—that an employer is not required to accommodate an employee's off-site use of medical marijuana. The text, history, and purpose of the

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<sup>195</sup> *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 520 (Or. 2010).

<sup>196</sup> *Id.* at 521.

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

<sup>198</sup> *Id.* at 520 ("Under Oregon's employment discrimination laws, employer was not required to accommodate employee's use of medical marijuana.").

<sup>199</sup> *Id.* at 524.

<sup>200</sup> *Id.* (citations omitted).

<sup>201</sup> *Emerald Steel*, 230 P.3d at 536.

<sup>202</sup> *See supra* Part III.B.

<sup>203</sup> *See supra* Part III.B.

NJCUMMA are sufficient grounds to find that an employer is not required to accommodate an employee's off-site use of marijuana if the employer wishes to maintain a drug-free workplace. The option to maintain a drug-free workplace notwithstanding the adoption of the NJCUMMA should be preserved through an amendment to the Act preserving this right.

*D. Michigan (Casias v. Wal-Mart Stores, Inc.)*

The plaintiff in *Casias v. Wal-Mart Stores, Inc.*, a case from the Western District of Michigan, was an at-will employee who was fired after testing positive for marijuana in a mandatory drug test following a workplace injury.<sup>204</sup> Unlike the court in *Emerald Steel*, the court in *Casias* never reached the issue of federal preemption.<sup>205</sup> The court instead rested its holding on the fact that none of the protections the plaintiff sought were found in the text of Michigan's medical marijuana statute.<sup>206</sup>

The plaintiff advanced two theories in support of his wrongful discharge claim.<sup>207</sup> The first claim was that the Michigan Medical Marijuana Act (MMA) created an implied right of action.<sup>208</sup> The second claim was a cause of action based on a violation of the public policy created by the Act.<sup>209</sup> The court noted that the test for an implied private right of action under Michigan case law is stringent.<sup>210</sup> The court also discussed the apparent overlap of these two theories, stating that "if the alleged public policy at issue is created by statute, and if the statute does not itself create a private cause of action to enforce the policy, where does a court receive the power to create a remedy . . . ?"<sup>211</sup> The court concluded that both claims failed because under either of plaintiff's theories he would have to show that "the statutory policy at issue applies to this case."<sup>212</sup> The court concluded that the plaintiff could not meet this requirement because Michigan's medical marijuana act only addresses adverse actions by the state, and

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<sup>204</sup> *Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d 914, 915 (W.D. Mich. 2011).

<sup>205</sup> *Id.* at 920.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 921.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Casias*, 764 F. Supp. 2d at 920 (citing *Lash v. City of Traverse City*, 735 N.W.2d 628, 636–37 (Mich. 2007) (a private right of action cannot be inferred without evidence of legislative intent)).

<sup>211</sup> *Id.* at 921.

<sup>212</sup> *Id.*

does not regulate private employment.<sup>213</sup>

The court examined the plain language of the MMMA and found that it nowhere “state[d] that the statute regulates private employment, that private employees are protected from disciplinary action should they use medical marijuana, or that private employers must accommodate the use of medical marijuana outside of the workplace.”<sup>214</sup> The court also addressed language in the MMMA that is similar to the language in the NJCUMMA.<sup>215</sup> The MMMA states that nothing in the act requires “[a]n employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana.”<sup>216</sup> The language of the act did not directly address employees who do not use marijuana in the workplace or come to work under the influence but still test positive for the drug.<sup>217</sup> Nevertheless, the court refused to hold that this “sole mention of employment” operated as a “negative inference, prohibiting private employers from disciplining an employee who uses medical marijuana away from the workplace.”<sup>218</sup> The court stated that it could not “draw a negative inference about employment protections when the remainder of the statute is silent on the rights of employees.”<sup>219</sup> While the act provided protection from criminal prosecution on state law, it did not provide employment protections to medical marijuana users.<sup>220</sup>

The *Casias* court also refused to create a new protected class under Michigan law. The court stated that the argument the plaintiff advanced would allow medical-marijuana users to “enjoy the kind of employment safeguards offered to only a very few groups under Michigan law.”<sup>221</sup> The court refused to do this because it “would create a new protected employee class in Michigan and mark a radical departure from the general rule of at-will employment in Michigan.”<sup>222</sup> Given New Jersey’s expansive protections for many classes of employees,<sup>223</sup> the argument exists that a court in New Jersey

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 922.

<sup>215</sup> *Id.* at 924.

<sup>216</sup> MICH. COMP. LAWS ANN. § 333.26427(c)(2) (West 2011).

<sup>217</sup> *Casias*, 764 F. Supp. 2d at 924.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 925.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 922.

<sup>223</sup> See discussion *supra* in Part III.B (possible protection against discrimination

should consider creating a new protected class for qualified patients with diseases and disabilities that are resistant to traditional treatments and necessitate the use of medical marijuana. The limited language of the NJCUMMA is similar enough to the language in the MMMA that a court in New Jersey could adopt the reasoning in *Casias* that the statute is limited to providing protection from state criminal prosecution and does not create new employment protections for medical marijuana users.

#### V. SUGGESTIONS

To avoid fruitless litigation, the issues regarding medical marijuana in the employment law context must be clarified. This clarification can be achieved by amending the text of the Act to clearly state that employers are still permitted to establish drug-free work policies. Additional language should be added to reinforce the principle that nothing in the NJCUMMA requires accommodation for medical-marijuana patients if the employer wishes to maintain its drug-free workplace. This will allow for the grant of a motion to dismiss on these claims and prevent a drain on the resources of both the courts and defendant-employers.

The Legislature should amend the NJCUMMA to include language that allows employers to maintain drug-screening policies that may inadvertently lead to the termination of medical-marijuana patients. It would be too extreme to allow discrimination against employees based solely on their status as a medical-marijuana patient, and some protection could be provided against refusing to hire someone based solely on this status.<sup>224</sup> This limited form of protection need not address limiting adverse action against employees or potential employees with marijuana metabolites in their system as revealed in a drug screening. If an employer wishes to maintain a drug-free work environment, and requires this for all employees—medical marijuana patients and non-patients alike—the employer should be allowed to do so. States that have included overly protective language for employees have since retreated.<sup>225</sup> New

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for employees with, e.g., varicose veins, drug addiction).

<sup>224</sup> See, e.g., R.I. GEN. LAWS ANN. § 21-28.6-4 (West 2011) (“No . . . employer . . . may refuse to . . . employ . . . or otherwise penalize a person solely for his or her status as a cardholder.”).

<sup>225</sup> See Hickox, *supra* note 7, at 1008–09 (noting that Maine’s medical marijuana statute originally forbade subjecting an employee to “any disciplinary action by a business or occupation based on his or her lawful use of medical marijuana,” but this section was repealed effective January 1, 2011).

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*COMMENT*

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Jersey would be wise to follow the lead of Washington<sup>226</sup> and amend the NJCUMMA to protect employers' freedom to maintain a drug-free workplace.

#### VI. CONCLUSION

The existing canon of New Jersey employment law gives discharged medical marijuana patients ample arguments to present to the court. Due to the limited scope, language, and intent of the NJCUMMA, however, none of these arguments are ultimately likely to be successful.

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<sup>226</sup> See WASH. REV. CODE ANN. § 69.51A.060 (West 2011) ("Employers may establish drug-free work policies. Nothing in this chapter requires an accommodation for the medical use of cannabis if an employer has a drug-free work place.").