

## NO EMPLOYMENT PROTECTION FOR MEDICAL MARIJUANA USERS

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## I. INTRODUCTION

A Colorado federal judge dismissed a claim by a former MillerCoors employee, Paul Curry, who was fired after testing positive for medical marijuana.<sup>1</sup> Curry, who suffered from “hepatitis C, osteoarthritis, and pain, [was] licensed by the State of Colorado to use medical marijuana pursuant to the Medical Marijuana Amendment.”<sup>2</sup> Curry alleged that he “used medical marijuana within the limits of the license, never used marijuana on MillerCoors’ premises, and was never under the influence of marijuana at work.”<sup>3</sup> Nevertheless, MillerCoors fired him for testing positive for marijuana in violation of its drug policy.<sup>4</sup>

Dismissing Curry’s claim, the *Curry* court held that “[d]espite concern for Curry’s medical condition, anti-discrimination law does not extend so far as to shield a disabled employee from the implementation of his employer’s standard policies against employee misconduct.”<sup>5</sup> Furthermore, the court indicated that, because the use of marijuana continues to be illegal under federal law, employees have no protection under the Americans with Disabilities Act (“ADA”).<sup>6</sup> Specifically, under that statute, “for an activity to be lawful in Colorado, it must be permitted by, and not contrary to, both state and federal law.”<sup>7</sup>

The decision in *Curry* is not surprising. While medical marijuana has become legal in twenty-three states and the District of Columbia, it continues to be classified as a Substance I drug under the Federal Controlled Substance Act (“CSA”), placing many medical marijuana users at risk of being terminated from their employment for their choice of treatment.<sup>8</sup> Although it is legal to possess and consume marijuana for medical purposes in twenty-three states and the District of Columbia, only a few states, such as Arizona, have provided employee protection in

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<sup>1</sup> *Curry v. MillerCoors, Inc.*, No. 12–cv–0241, 2013 U.S. Dist. LEXIS 118730, at \*3 (D. Colo. Aug. 21, 2013).

<sup>2</sup> *Id.* at \*3.

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

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at \*8.

<sup>6</sup> *Id.* at \*16.

<sup>7</sup> *Curry*, 2013 U.S. Dist. LEXIS 118730, at \*16; *Coats v. Dish Network, L.L.C.*, 303 P.3d 147, 151 (Colo. App. 2013).

<sup>8</sup> See 21 U.S.C. § 812(c)(10) (2006); 21 C.F.R. § 1308.11(d)(23) (2011); *James v. City of Costa Mesa*, 684 F.3d 825, 827 (9th Cir. 2012); *Curry*, 2013 U.S. Dist. LEXIS 118730, at \*3; *Medical Marijuana*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Oct. 30, 2014, 12:29 PM).

their medical marijuana legislation.<sup>9</sup> In 2010, Arizona ultimately approved Proposition 203, which was on the ballot as an initiated state statute.<sup>10</sup> Other states have interpreted their anti-discrimination laws to preclude protection for medical marijuana users, similar to the ADA.<sup>11</sup> Consequently, employees are left with no protection in most jurisdictions because neither the ADA, nor the majority of state disability laws, have been amended to protect employees who use medical marijuana.

Moreover, employees using medical marijuana as treatment are not entitled to unemployment benefits when they are terminated for such use. Therefore, unless each state adopts some version of Arizona's Medical Marijuana Act employee protection provision, employees will ultimately have to choose between their occupation and their choice of treatment.

The Arizona statute states that an employee is not considered "impaired" merely because of the presence of marijuana metabolites that appear in the employee's system.<sup>12</sup> If a current employee tests positive for marijuana on a drug test, he cannot be automatically terminated for that reason, unless the employer determines he is using marijuana on the job or is impaired on the job.<sup>13</sup> Arizona specifies that "under the influence" does not include a registered qualifying patient who has a presence of metabolites or components of marijuana that appear insufficient to cause impairment."<sup>14</sup> An employer can, however, determine that an employee is under the influence by documenting signs of employee impairment and using witness testimony.<sup>15</sup> The Colorado National Organization Reforming Marijuana Laws ("CO NORML") has proposed that urine tests should not be allowed because they show positive results for marijuana use that could have occurred weeks ago, outside work hours.<sup>16</sup> The CO NORML further argues that drug testing

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<sup>9</sup> See ARIZ. REV. STAT. ANN. § 36-2813 (LexisNexis 2014), available at <http://www.azsos.gov/election/2010/info/pubpamphlet/english/prop203.htm>; see also *Medical Marijuana*, supra note 8.

<sup>10</sup> See ARIZ. REV. STAT. ANN. § 36-2813; see also *Medical Marijuana*, supra note 8.

<sup>11</sup> See *Casias v. Wal-Mart Store, Inc.*, 695 F.3d 428, 436 (6th Cir. 2012); *James*, 684 F.3d at 843-44; *Curry*, 2013 U.S. Dist. LEXIS 118730, at \*16-19.

<sup>12</sup> ARIZ. REV. STAT. ANN. § 36-2814(A)(3).

<sup>13</sup> Benjamin Little, *FAQ: Arizona Medical Marijuana Act*, INBUSINESS, <http://inbusinessmag.com/in-business/faqs-arizona-medical-marijuana-act#.VKwAIEu9Uds> (last visited Feb. 15, 2015).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Travis Khachatoorian, *Special Report: Marijuana Discrimination in the Workplace*, FOREX TALK (Feb. 21, 2014), <http://forextalk.us/special-report-marijuana-discrimination-in->

does not show any type of impairment.<sup>17</sup> Yet, CO NORML does not offer an alternative to determining whether one is “impaired.” A possible solution could be to establish an impairment threshold. Much like the legal alcohol threshold, whenever one’s metabolism exceeds the threshold, he or she would be considered “impaired” and could be terminated from their employment.

There has been recent discussion about whether medical marijuana users might be able to gain employment protection by bringing a disparate impact claim under the ADA.<sup>18</sup> Under such a claim, a showing that “a facially neutral employment practice has a disproportionately adverse impact on a protected group states a prima facie case of unlawful disparate impact discrimination.”<sup>19</sup> The premise of disparate impact claims “is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.”<sup>20</sup> Most commentators argue that medical marijuana users will be capable of raising an ADA disparate impact claim if they can prove that people with disabilities are being disproportionately affected.<sup>21</sup> However, most fail to recognize that, to prove a disparate impact claim, a plaintiff must obtain appropriate statistical evidence, which is extremely difficult to acquire.<sup>22</sup> Even assuming plaintiffs can adduce such proof, plaintiffs may still lose because of the “business necessity” defense available to employers.

After treating the ADA in Part II of this Note, Part III will analyze the difficulties in formulating a disparate impact claim. In Part IV, this Note will explore the medical marijuana acts in Arizona, California, Colorado, and New Jersey. Next, Part V will argue that states should

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the-workplace-krex-news-channel-5/.

<sup>17</sup> *Id.*

<sup>18</sup> See Stacy A. Hickox, *Clearing the Smoke on Medical Marijuana Users in the Workplace*, 29 QUINNIPIAC L. REV. 1001, 1003 (2011); Lindsey M. Tucker, Note, *High Stakes: How to Define “Disability” in Medical Marijuana States in Light of The Americans With Disabilities Act, Canadian Law, and The Impact on Employers*, 21 IND. INT’L & COMP. L. REV. 359, 368–74 (2011).

<sup>19</sup> Carla J. Rozycki & Emma J. Sullivan, *Disparate-Impact Claims under the ADEA*, AM. B. ASS’N, [http://www.americanbar.org/publications/gp\\_solo/2011/september/disperate\\_impact\\_claims\\_adea.html](http://www.americanbar.org/publications/gp_solo/2011/september/disperate_impact_claims_adea.html) (last visited Feb. 20, 2015).

<sup>20</sup> See *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1199 (10th Cir. 2006) (citing *Ortega v. Safeway Stores, Inc.*, 943 F.2d 1230, 1242 (10th Cir. 1991)).

<sup>21</sup> *See id.*

<sup>22</sup> *See Lopez v. Pac. Mar. Ass’n*, 657 F.3d 762, 768 (9th Cir. 2011).

look to Arizona's Medical Marijuana Act. Additionally, Part VI will explore whether individuals terminated for the use of medical marijuana are entitled to unemployment benefits. Finally, Part VII of this Note will conclude by demonstrating that Arizona's Medical Marijuana Act is ideal because it creates a balance between employer and employee protection.

## II. THE ADA AND MEDICAL MARIJUANA

Title I of the ADA of 1990 “prohibits employers, including state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedure, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.”<sup>23</sup> The ADA defines the term “disability” as “a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment.”<sup>24</sup> Further, “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, bending, speaking, breathing, learning, reading, concentrating, thinking, communication, and working.”<sup>25</sup> Major life activities also consist of essential bodily functions, such as “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”<sup>26</sup>

Even if an individual is disabled, he or she is not entitled to protection unless he or she is a “qualified individual”—that is, one who can perform the essential functions of the occupation in question, regardless of whether the employer provides reasonable accommodations.<sup>27</sup> Assuming a qualified disabled individual, an employer is not only prohibited from discriminating on account of the person's disability, but the employer must also make reasonable accommodations for the employee that do not impose an “undue hardship” on the employer.<sup>28</sup> An undue hardship is “an action requiring

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<sup>23</sup> *Facts About the Americans with Disabilities Act*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/facts/fs-ada.html> (last updated Sep. 9, 2008); see 42 U.S.C.S. § 12112(a) (LexisNexis 2013).

<sup>24</sup> 42 U.S.C.S. § 12102(1) (LexisNexis 2014).

<sup>25</sup> *Id.* § 12102(2)(A).

<sup>26</sup> *Id.* § 12102(2)(B).

<sup>27</sup> *Id.* § 12111(8).

<sup>28</sup> *Id.* § 12111(10).

significant difficulty or expense when considered in light of . . . the employer's size, [finances], and the . . . structure of its operation."<sup>29</sup> Nevertheless, an employer does not have to lower quality or production standards to make a reasonable accommodation, nor does the employer have to provide personal use items.<sup>30</sup>

A. *Is an Employer Allowed to Conduct a Medical Examination or Drug Test Before Hiring an Employee?*

In addition to the requirements of nondiscrimination and reasonable accommodation, the ADA prohibits an employer from requiring an employee to take a medical examination or from inquiring whether the employee has a disability before making a job offer.<sup>31</sup> An employer may, however, ask an employee about her ability to perform specific job-related functions and to describe or demonstrate how she would perform those functions.<sup>32</sup> Even after an offer is made, "[a] covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity."<sup>33</sup> To establish a business necessity, an employer can demonstrate that the individual would pose a direct threat in the workplace and that the employer would not be able to accommodate him or her.<sup>34</sup> If an individual is not hired because of a disability, "[t]he employer [must also] show that no reasonable accommodation was available that would enable the individual to perform the essential job functions, or that accommodation would impose an undue hardship."<sup>35</sup>

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<sup>29</sup> *Facts About the Americans with Disabilities Act*, *supra* note 23; see 42 U.S.C.S. § 12111(10)(B).

<sup>30</sup> *Facts About the Americans with Disabilities Act*, *supra* note 23; see 42 U.S.C.S. § 12111(10)(B).

<sup>31</sup> 42 U.S.C.S. § 12112(d)(4)(A) (LexisNexis 2013); *Americans with Disabilities Act Questions and Answers*, ADA.GOV, <http://www.ada.gov/qandaeng.htm> (last updated Oct. 9, 2008).

<sup>32</sup> 42 U.S.C.S. § 12112(d)(4)(A); *Americans with Disabilities Act Questions and Answers*, *supra* note 31.

<sup>33</sup> 42 U.S.C.S. § 12112(d)(4)(A).

<sup>34</sup> *Americans with Disabilities Act Questions and Answers*, *supra* note 31.

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

On the other hand, testing for illegal use of drugs is not considered a medical examination under the ADA and is not subject to the same restrictions.<sup>36</sup> Employers may drug test applicants or current employees and act based on positive results.<sup>37</sup> The ADA neither encourages nor prohibits drug tests.<sup>38</sup> Therefore, if an employer requires a drug test prior to hiring an employee, or the employer conducts random drug tests, employees like Curry will likely test positive for marijuana because while “[s]ome THC metabolites have an elimination half-life of 20 hours . . . [others] are stored in body fat and have a[n] elimination half-life of 10-13 days.”<sup>39</sup> Further, “there is anecdotal evidence that the length of time that marijuana remains in the body is affected by how often the person smokes, how much he smokes and how long he has been smoking.”<sup>40</sup> Regular consumers are reported to have positive drug test results as long as forty-five days since their last use and heavier smokers can test positive up to ninety days after.<sup>41</sup> Thus, although an employee might not be “impaired” at the moment a test is administered, he or she may still test positive for marijuana because of the THC metabolites stored in body fat.

#### B. *The ADA’s Definition of Illegal Drugs*

The ADA specifies that an “individual with a disability” does not include one currently engaging in the illegal use of drugs.<sup>42</sup> Section 12210(d)(1) defines “illegal use of drugs” as “the use of drugs, the possession or distribution of which is unlawful under the [CSA].”<sup>43</sup> Additionally, “[s]uch term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the [CSA] or other provisions of Federal Law.”<sup>44</sup>

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<sup>36</sup> 42 U.S.C.S. § 12112(d)(1); *Americans with Disabilities Act Questions and Answers*, *supra* note 31; *Facts About the Americans with Disabilities Act*, *supra* note 23.

<sup>37</sup> *Americans with Disabilities Act Questions and Answers*, *supra* note 31; *Facts About the Americans with Disabilities Act*, *supra* note 23.

<sup>38</sup> *Americans with Disabilities Act Questions and Answers*, *supra* note 31; *Facts About the Americans with Disabilities Act*, *supra* note 23.

<sup>39</sup> Buddy T, *How Long Does Marijuana Stay in the Body?*, ABOUT HEALTH, [http://alcoholism.about.com/od/pot/a/marijuana\\_test.htm](http://alcoholism.about.com/od/pot/a/marijuana_test.htm) (last updated Nov. 27, 2014).

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

<sup>41</sup> *Id.*

<sup>42</sup> *James v. City of Costa Mesa*, 684 F.3d 825, 829 (9th Cir. 2012).

<sup>43</sup> 42 U.S.C.S. § 12210(d)(1) (LexisNexis 2013); *see James*, 684 F.3d at 829.

<sup>44</sup> 42 U.S.C.S. § 12210(d)(1).

In *James v. City of Costa Mesa*, the court held that the ADA did not protect the plaintiffs' medical marijuana use because "Congress has made clear . . . that the ADA defines 'illegal drug use' [in] reference to federal law, rather than state law, and federal law does not authorize the [use of] medical marijuana."<sup>45</sup> The severely disabled plaintiffs in *James* alleged that traditional medical treatments did not alleviate the pain caused by their impairments.<sup>46</sup> In fact, a doctor recommended that each of the plaintiffs use marijuana for medical treatment.<sup>47</sup> Although medical marijuana is permissible under California state law, the Federal Controlled Substances Act ("CSA") prohibits it<sup>48</sup>

The *James* court further stated "the context reveals Congress' intent to define 'illegal use of drugs' by reference to federal, rather than state, law."<sup>49</sup> Because Section 12210(d)(1) mentions the CSA twice, the court concluded that Congress did not want the statute to reach medical marijuana.<sup>50</sup> While plaintiffs, like Curry, have argued that they fall under "supervision by a health care professional," *James* rejects any such interpretation.<sup>51</sup> However, as will be developed, Judge Berzon dissented in part arguing that the language in Section 12210(d) should be interpreted to mean that the ADA protects the use of drugs under the supervision of a medical professional.<sup>52</sup>

i. Why an employee should be covered under § 12210(d):

The dissent in *James* argued that "use of a drug taken under supervision by a licensed health care professional" should be interpreted to mean that the ADA protects the use of drugs under supervision of a medical professional.<sup>53</sup>

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<sup>45</sup> 21 U.S.C. § 812(c)(10) (2006); *James*, 684 F.3d at 828.

<sup>46</sup> *James*, 684 F.3d at 827.

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

<sup>48</sup> *Id.* at 828.

<sup>49</sup> *Id.* at 830.

<sup>50</sup> *Id.*; see 42 U.S.C.S. §12210(d)(1) (LexisNexis 2013).

<sup>51</sup> *James*, 684 F.3d at 838 (Berzon, J., dissenting) (describing Congress' intent to define "illegal use of drugs" in reference to federal, rather than state law).

<sup>52</sup> *Id.* at 836–37.

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



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## a. Textual Arguments

The dissent in *James* interprets the two phrases in Section 12210(d)(1) “use of a drug taken under supervision by a licensed health care professional” and “other uses authorized by the CSA” as creating two different exceptions to the “illegal use of drugs.”<sup>54</sup> Similar to the dissent’s interpretation, the statute should be construed to mean that the ADA protects the use of drugs under supervision of a doctor, even when that use is not authorized by the CSA.<sup>55</sup> If Congress intended the ADA to cover only drug use authorized by the CSA, then the first clause of the statute would essentially be meaningless.<sup>56</sup> Further, the use of the comma after “professional” and before “or” demonstrates that the two clauses should be separated. The dissent in *James* cited to The Chicago Manual of Style to interpret the significance of the comma:

A dependent clause that follows a main clause should not be preceded by a comma if it is restrictive, that is, essential to the meaning of the main clause. And here, ignoring the comma and tacking the modifier onto the phrase before the comma yields an exceedingly awkward—indeed, incoherent—locution: “such term does not include the use of a drug taken under supervision by a licensed health care professional . . . authorized by the [CSA].”<sup>57</sup>

Arguably, the language excluding “other uses authorized by the [CSA] or other provisions of Federal Law” would protect an employee using medical marijuana.<sup>58</sup> The CSA states that “it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance”<sup>59</sup> Thus, the CSA does not make the “use” of medical marijuana illegal. This is problematic, however, because anyone consuming medical marijuana necessarily illegally possesses it under the CSA.

Nevertheless, the CSA also states that “[i]t shall be unlawful for any person knowingly or intentionally 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

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

<sup>55</sup> *Id.* (interpreting the phrases “use of a drug taken under supervision by a licensed health care professional” and “other uses authorized by the CSA” as creating two different exceptions to the “illegal use of drugs”).

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

<sup>57</sup> *James*, 684 F.3d at 838 (Berzon, J., dissenting).

<sup>58</sup> 42 U.S.C.S. § 12210(d)(1) (LexisNexis 2013).

<sup>59</sup> 21 U.S.C.S. § 841(a)(1)–(2) (LexisNexis 2014).

professional practice.”<sup>60</sup> Similar to the ADA, the CSA allows an individual to use an otherwise illegal substance as long as it is obtained pursuant to a valid prescription from a practitioner.

Section 829 of the CSA sets out the permissible methods through which controlled substances may be prescribed.<sup>61</sup> But, this section sets out prescription methods only as to Schedule II through Schedule V substances and is silent as to Schedule I substances.<sup>62</sup> The silence is generally understood as a ban on the prescription of Schedule I substances, but an alternate reading of the silence can be seen as a reservation of the states’ right to enact legislation allowing the prescription of these substances.<sup>63</sup> Generally, state law regulates the prescribing of drugs and governs the licensing of its doctors.

Because the CSA itself does not define “prescription,” a court will then need to determine whether a medical professional’s recommendation to use marijuana is a prescription.<sup>64</sup> The Southern District of Florida found that Webster’s and Dorland’s Illustrated Medical Dictionary defines “prescription” as:

only a 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—and does not include pieces of paper by which physicians are directing the issuance of a medicine, remedy, or drug to patients who not need it, persons they have never met, or individuals who do not exist.<sup>65</sup>

If this definition were applied to the CSA for medical marijuana, then the mere recommendation of a doctor to use marijuana will be a “prescription.”<sup>66</sup> Nevertheless, since medical marijuana is illegal under federal law and pharmacies are prohibited from supplying it, doctors do not “prescribe” it as that word is generally used.<sup>67</sup> Instead, they can only “recommend” it to patients.<sup>68</sup> Patients then can either grow the marijuana

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<sup>60</sup> 21 U.S.C.S. § 844(a) (LexisNexis 2014).

<sup>61</sup> 21 U.S.C.S § 829 (LexisNexis 2014); Ari Lieberman & Aaron Soloman, Note, *A Cruel Choice: Patients Forced to Decide Between Medical Marijuana and Employment*, 26 HOFSTRA LAB. & EMP. L.J. 619, 646 (2009).

<sup>62</sup> 21 U.S.C.S § 829; Lieberman & Soloman, *supra* note 61, at 646.

<sup>63</sup> 21 U.S.C.S § 829; Lieberman & Soloman, *supra* note 61, at 646.

<sup>64</sup> *See generally* 21 U.S.C. § 829 (2000).

<sup>65</sup> *United States v. Nazir*, 211 F. Supp. 2d 1372, 1375 (S.D. Fla. 2002).

<sup>66</sup> Lieberman & Soloman, *supra* note 61 at 647.

<sup>67</sup> Jacob Silverman, *How Medical Marijuana Works*, HOWSTUFFWORKS, <http://science.howstuffworks.com/medical-marijuana4.htm> (last visited Feb. 15, 2015).

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

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themselves or obtain it from dispensaries.<sup>69</sup>

b. *James v. City of Costa Mesa*

The *James* court interpreted the ADA to mean that state-authorized medical marijuana use is not covered by any exception because such use is not authorized by the CSA or any other provision of federal law.<sup>70</sup> The court's interpretation of section 12210(d)(1) is problematic because, had Congress intended the exception to cover only uses authorized by the CSA, then Congress would have omitted the words "taken under supervision."<sup>71</sup> The plaintiff's interpretation also failed to recognize that, had Congress wanted the language "other uses authorized by the [CSA] or other provisions of Federal law" to be entirely independent from the first clause, Congress would have omitted the word "other."<sup>72</sup> The majority in *James* considered the argument that, unless the word "other" is omitted, the plaintiff's interpretation would make the statute awkward.<sup>73</sup> The court stated that "one would not naturally describe 'the use of a drug taken under supervision by a licensed health care profession, or other uses authorized by the [CSA] . . . unless the supervised uses were a subset of the uses authorized by the CSA and other provisions of federal law.'"<sup>74</sup>

Moreover, the court held that the defendants' interpretation made the most sense when viewed in light of Congress' intent to define "illegal use of drugs" by referring to federal law in section 12210(d)(1).<sup>75</sup> This section mentions the CSA twice and further specifies that "[t]he term 'drug' means a controlled substance, as defined in schedules I through V of section 2020 of the [CSA]."<sup>76</sup>

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<sup>69</sup> *Id.* ("Although § 12210(d)(1)'s language lacks a plain meaning and its legislative history is not conclusive, we hold, in light of the text and legislative history of the ADA, as well as the relationship between the ADA and the CSA, medical marijuana use is not covered by any exception.").

<sup>70</sup> *James v. City of Costa Mesa*, 684 F.3d 825, 829 (9th Cir. 2012).

<sup>71</sup> *Id.* at 830.

<sup>72</sup> *Id.*

<sup>73</sup> *See id.*

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

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

<sup>76</sup> *James*, 684 F.3d at 830.

Lastly, the court reviewed the legislative history of the CSA and stated that in 1970, notwithstanding marijuana's known use for medical purposes, Congress still listed it as a Schedule I drug.<sup>77</sup> The court interpreted this to mean that there is “no currently accepted medical use in treatment in the United States’ and ‘a lack of accepted safety [standards] for use . . . under medical supervision.’”<sup>78</sup> Ultimately, the court concluded that the statutory interpretation and historical context demonstrated that marijuana use is unlawful under the ADA, even when a medical professional supervises one's marijuana use.<sup>79</sup>

c. Legislative History of the Exception

In contrast, the ADA's legislative history suggests the opposite of the *James* holding. A House Committee report clarified that, in regard to illegal drugs, the ADA's revised provision was not intended to negatively affect disabled individuals using drugs under the supervision of a licensed health care professional.<sup>80</sup> The House Committee stated, “[t]he term illegal use of drugs does not include the use of controlled substances, including experimental drugs, taken under the supervision of a licensed health care professional. It also does not include uses authorized by the [CSA] or other provisions of federal law.”<sup>81</sup> Agreeing with the House Committee, Assistant Attorney General John Mackey wrote a letter to the Senate Committee stating that the Bush administration did not intend to exclude from the ADA individuals who were using controlled substances for treatment.<sup>82</sup> Therefore, the legislative history conflicts with the *James* holding.

### III. THE DIFFICULTIES OF A DISPARATE IMPACT CLAIM

Medical marijuana users could conceivably make a claim of unlawful discrimination under section 12112(b)(6) of the ADA. It is extremely unlikely, however, that a plaintiff could successfully establish a disparate impact claim under the ADA for medical marijuana use.

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<sup>77</sup> *Id.* at 832.

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

<sup>79</sup> *Id.* at 833.

<sup>80</sup> H.R. REP. NO. 101-485, at 79 (1990).

<sup>81</sup> *James*, 684 F.3d 825 at 839 (Berzon, J., dissenting) (internal quotation marks omitted).

<sup>82</sup> See Russell Rendall, Note, *Medical Marijuana and the ADA Removing Barriers to Employment For Disabled Individuals*, 22 HEALTH MATRIX 315, 328 (2012) (citing Hearing on S. 933 Before the S. Comm. on Labor & Human Resources, 101st Cong. 828 (1989) (statement of John P. Mackey, Deputy Assistant Att’y Gen.)).

Generally, plaintiffs may pursue claims of employment discrimination based upon disparate impact under the ADA, which prohibits employers from discriminating against qualified persons with disabilities who can perform essential functions of the employment position.<sup>83</sup> A disparate impact claim involves employment practices that are facially neutral in their treatment of protected employees, but in fact fall more harshly on some group of employees than other groups and cannot be justified by business necessity.<sup>84</sup> In addition, under the disparate-impact theory, a facially neutral employment practice may be considered discriminatory even without evidence that the employer intentionally discriminated against the employee.<sup>85</sup> To sufficiently plead a disparate impact claim of disability discrimination, plaintiffs must allege: (1) the existence of a facially neutral policy or practice by the defendants; and (2) facts demonstrating that the policy or practice has a significantly adverse or disproportionate impact on qualified disabled individuals.<sup>86</sup>

A. *Who is a Qualified Individual?*

Only qualified individuals have standing to plead a disparate impact claim based on disability discrimination. A qualified individual is one “who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”<sup>87</sup> On the other hand, a qualified individual does not include an individual who is currently engaging in “illegal use of drugs.”<sup>88</sup> Therefore, if “illegality” means illegal under either state or federal law, medical marijuana patients will never be able to make a disparate impact

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<sup>83</sup> See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003); *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1225 (11th Cir. 2005).

<sup>84</sup> *Raytheon Co.*, 540 U.S. at 52 (citing *Teamsters v. United States*, 431 U.S. 324, 335–36, n.15 (1977)); see 42 U.S.C.S. § 12112(b)(3) (LexisNexis 2014) (defining discrimination as “utilizing standards, criteria, or methods of administration—that have the effect of discrimination on the basis of disability” and “using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability”); *Kintz v. United Parcel Serv., Inc.*, 766 F. Supp. 2d 1245, 1254 (M.D. Ala. 2011); see also *Hickox*, *supra* note 18, at 1003.

<sup>85</sup> *Raytheon Co.*, 540 U.S. at 52.

<sup>86</sup> *Grider v. City & Cnty. of Denver*, No. 10-cv-00722, 2012 U.S. Dist. LEXIS 44463, at \*5–6 (D. Colo. Mar. 30, 2012) (citing *Tsombanidis v. West Haven Fire Dept.*, 352 F.3d 565, 574–75 (2d Cir. 2003)).

<sup>87</sup> *D'Angelo*, 422 F.3d at 1225; see 42 U.S.C.A. § 12111(8) (LexisNexis 2014).

<sup>88</sup> *James v. City of Costa Mesa*, 684 F.3d 825, 829 (9th Cir. 2012) (holding the ADA specifies the term “individual with a disability” does not include an individual who is currently engaging in the illegal use of drugs).

claim because marijuana users are not qualified individuals with standing to plead such a case.

Even assuming that a court did not consider medical marijuana use an “illegal use of drugs,” it would be extremely difficult for the plaintiff to adduce evidence of a disparate impact claim because he must be an individual “with or without reasonable accommodation, [who] can perform the essential functions of the employment position.”<sup>89</sup> If one successfully pleads a disparate impact claim, it can be resolved through reasonable accommodation.<sup>90</sup> The question then becomes whether the employer has an obligation to accommodate the disability and its treatment in the workplace.

Employers have a duty to accommodate disabilities.<sup>91</sup> However, one must ask whether medical marijuana warrants accommodation, and courts will likely reject this proposition because marijuana continues to be listed as Substance I drug.<sup>92</sup> In *James*, the court reviewed the legislative history and stated that in 1970, notwithstanding marijuana’s known use for medical purposes, Congress still listed marijuana as a Schedule I drug, signifying that at that time there was no acceptable medical use.<sup>93</sup> If the court believes that Congress’s maintaining marijuana as a Substance I drug indicates that there is no federally accepted medical use, then the court will likewise hold that such use is not a “reasonable accommodation” for an individual with a disability.

On the contrary, there is an argument that the CSA does not cover the use of illegal substances, but only the possession, distribution, or manufacture thereof.<sup>94</sup> Furthermore, much like the ADA, the language of the CSA indicates that an individual is allowed to use an illegal substance as long as it is obtained pursuant to a valid prescription or order from a practitioner. The CSA states that “it shall be unlawful for any person knowingly or intentionally 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

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<sup>89</sup> 42 U.S.C.A. § 12111(8).

<sup>90</sup> See Terence P. McCourt, *What Medical Marijuana Act means for employers*, NEW ENGLAND IN-HOUSE (July 2, 2013), <http://newenglandinhouse.com/2013/07/02/what-medical-marijuana-act-means-for-employers/>.

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

<sup>92</sup> *See id.*

<sup>93</sup> *James*, 684 F.3d at 832.

<sup>94</sup> *See discussion supra* Part II.B.i.a.

practice.”<sup>95</sup> Therefore, one can construe the statutory language of both the CSA and ADA to exclude medical marijuana as an illegal drug.

Even if the use of marijuana is considered an accommodation, it might not be a “reasonable accommodation.” Marijuana can have negative effects on attention, memory, and learning that can last for days or weeks even “after the acute effects of the drug wear off.”<sup>96</sup> An individual who consumes marijuana regularly may be functioning at a reduced intellectual level.<sup>97</sup> A study conducted on postal workers uncovered that “employees who tested positive for marijuana on a pre-employment urine drug test had 55 percent more industrial accidents, 85 percent more injuries,” and a 75 percent increase in absenteeism compared to those who tested negative.<sup>98</sup> Furthermore, research has demonstrated that other side effects of marijuana include slowed reaction time, distorted perceptions of time, sounds and sights, cognitive problems, short-term memory loss, anxiety and depression, and coordination loss.<sup>99</sup> Therefore, it is improbable that a court will consider medical marijuana a “reasonable accommodation.” The court will likely find that medical marijuana is in fact an undue hardship because it is accompanied by many negative side effects. An employer does not have to lower quality or production standards to make a reasonable accommodation.<sup>100</sup>

i. Defining “Facts Showing That The Policy or Practice Has a Significantly Adverse or Disproportionate Impact on Qualified Individuals”

To satisfy the second element, facts showing that the policy or practice has “a significantly adverse or disproportionate impact on qualified individuals,” the plaintiff must use “statistical evidence [showing] disparity in outcome between groups” or a qualitative

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<sup>95</sup> See discussion *supra* Part II.B.i.a.

<sup>96</sup> *How Does Marijuana Use Affect School, Work, and Social Life?*, NAT’L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/publications/research-reports/marijuana/how-does-marijuana-use-affect-school-work-social-life> (last updated Dec. 2014).

<sup>97</sup> *Id.*

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

<sup>99</sup> Kiran Molli, *How Long Does Marijuana Stay in your System-Facts, Effects, Uses, Tests and Withdrawal*, HEALTHBLOGGER, <http://www.ihealthblogger.com/2013/05/how-long-does-marijuana-stay-in-your-system.html> (last visited Feb. 15, 2015).

<sup>100</sup> See *id.*

showing.<sup>101</sup> It is highly unlikely that an employee consuming medical marijuana will be capable of satisfying this element.

Several researchers have explored this area and seem to think that medical marijuana users “may be able to establish that a drug screen that prevents their employment has a disproportionate negative effect on persons with disabilities, or at least on those who use marijuana as treatment.”<sup>102</sup> These researchers conducted a survey, followed by an informative seminar, which demonstrated that 48 percent of employers interviewed indicated that they asked employees who tested positive if they were using medical marijuana.<sup>103</sup> In contrast, 12.5 percent of employers indicated they did not ask and 19 percent did not have a definitive policy.<sup>104</sup>

Employers were also divided on providing anti-discrimination protection to medical marijuana users.<sup>105</sup> Thirty percent of the employers indicated that they do not provide accommodations to medical marijuana users, and another 30 percent were willing to consider accommodations such as a leave of absence or a change of positions.<sup>106</sup> Thirty-nine percent were undecided on the situation.<sup>107</sup>

These researchers, however, failed to acknowledge the statistical evidence requirement and how difficult it may be to satisfy. In addition, they failed to realize that employers might not have to provide accommodations because of an undue hardship. Based on these surveys, it becomes apparent that some employers do not document whether the employee tested positive due to medical marijuana or recreational use, thus making it extremely difficult to prove a disparate impact. The court in *Lopez* held that, in order to satisfy this element, the plaintiff must introduce evidence to demonstrate how many recovering addicts or recovered addicts the particular employer has disqualified.<sup>108</sup>

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<sup>101</sup> *Grider v. City & Cnty. of Denver*, No. 10-CV-00722(MSK-MJW), 2012 U.S. Dist. LEXIS 44463, at \*6, \*8 (D. Colo. Mar. 30, 2012) (internal citations omitted).

<sup>102</sup> *Hickox*, *supra* note 18, at 1032 (stating that “an employer may violate the ADA by using a positive drug screen to reject applicants or discharge employees who have a disability, if such a screen has a disparate impact on persons with disabilities” and if this discrimination has occurred, the employer will need to demonstrate a business necessity); *see Tucker*, *supra* note 18, at 368–69.

<sup>103</sup> *Hickox*, *supra* note 18, at 1005–06.

<sup>104</sup> *Id.* at 1006.

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

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

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

<sup>108</sup> *Lopez v. Pac. Mar. Ass’n*, 657 F.3d 762, 768 (9th Cir. 2012).



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a. *Lopez v. Pacific Maritime Association*

In *Lopez*, the plaintiff aspired to be a longshoreman, and applied in 1997 to work at a port in Long Beach, California.<sup>109</sup> The plaintiff, however, tested positive for marijuana when the defendant-employer administered its standard drug test and was therefore disqualified from further consideration under the employer's one-strike policy.<sup>110</sup> After the plaintiff stopped using marijuana, he reapplied to be a longshoreman; however, because of the one-strike policy, the employer rejected him.<sup>111</sup> The court granted summary judgment in favor of the defendant because the plaintiff failed to establish that the defendant intentionally discriminated against him on the basis of his protected status or that the one-strike rule disparately affected recovered drug addicts.<sup>112</sup> The plaintiff contended that the law placed an unfair burden on him because he had no way of knowing how many recovering or recovered drug addicts the defendant had disqualified, nor could he determine the proportion of recovering or recovered drug addicts in the relevant labor market because such information is confidential.<sup>113</sup> The court "recognize[d] the challenge involved in bringing a disparate impact claim of this kind, but both logic and precedent require [plaintiffs] to produce *some* evidence that tends to show that the one-strike rule excludes . . . recovered . . . drug addicts disproportionately."<sup>114</sup>

*Lopez* makes it difficult for employees to formulate a disparate impact claim because (1) it is extremely difficult to find the number of people who have been rejected from a job in an entire state because they tested positive for marijuana, (2) it is equally as hard to identify how many marijuana users an individual employer has rejected, and (3) it is even more difficult to determine who out of those rejected applicants are disabled and use medical marijuana as treatment for their disability.<sup>115</sup> Obtaining these records is extremely difficult because "information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record."<sup>116</sup> It is true that employers

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<sup>109</sup> *Id.* at 764.

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

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 764–65.

<sup>113</sup> *Id.* at 768.

<sup>114</sup> *Lopez*, 657 F.3d at 768.

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

<sup>116</sup> 42 U.S.C.S. § 12112(d)(3)(B) (LexisNexis 2014).

inform their supervisors and managers of necessary restrictions on an employee's work or duties and whether the employee requires accommodations.<sup>117</sup> Furthermore, first aid and safety personnel have access to the files in case the employee's disability requires the employee to receive emergency treatment.<sup>118</sup> Lastly, "government officials investigating compliance with this Act shall be provided relevant information on request."<sup>119</sup> Despite this, obtaining the necessary data for a claim is daunting. Not only might this information be confidential, but there may not be any documentation as to who was rejected for using medical marijuana. It is very likely that drug test might well have ended the application and no further inquiry was made.

For example, recall Curry, the employee with hepatitis C and osteoarthritis who used medical marijuana for treatment and was terminated for violating MillerCoors' drug-free workplace policy. If he wanted to make a disparate impact claim, he would either have to determine the proportion of employees terminated for using medical marijuana (a qualitative finding) or determine how many (if any others) were terminated from MillerCoors for using marijuana recreationally, as opposed to disabled employees using medical marijuana for treatment. This information would be extremely difficult for Curry to obtain because it is doubtful that MillerCoors has any documentation as to which employees were using medical marijuana specifically for treatment. The article *Clearing the Smoke on Medical Marijuana Users in the Workplace* demonstrates through surveys that employers who conduct urine analyses do not often inquire as to why an employee tested positive for medical marijuana.<sup>120</sup> This common practice makes it highly unlikely that employers will have any of this documentation recorded.

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<sup>117</sup> *Id.* § 12112(d)(3)(B)(i).

<sup>118</sup> *Id.* § 12112(d)(3)(B)(ii).

<sup>119</sup> *Id.* § 12112(d)(3)(B)(iii).

<sup>120</sup> Hickox, *supra* note 18, at 1005–06.

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## b. Rough Statistical Evidence

In 2009, a survey determined that 15.09 percent of Colorado's population regularly uses marijuana.<sup>121</sup> The survey did not attempt to determine whether the use of marijuana was recreational or medical.<sup>122</sup> In 2012, Colorado had an estimated population of 5,187,582.<sup>123</sup> Furthermore, in that same year Colorado reported 107,666 registered medical marijuana patients.<sup>124</sup> Applying the 15.09 percent figure, about 782,806 people used marijuana recreationally and/or medically in Colorado. Subtracting the 107,666 registered medical marijuana patients, the statistics suggest that 675,140 people were recreational users, a figure roughly six times greater than the amount of medical users. The above calculations represent very rough statistical data, in part because of the discrepancy in dates. It is likely that there has been an increase in marijuana users since Colorado officially became the first state in the country to finalize and adopt rules for recreational marijuana sales.<sup>125</sup> Examining this kind of statistic, it is unlikely that flat one-strike policies disparately affect medical marijuana users, even if that is the proper class.

However, the self-selection problem arises with any drug test. Recreational users may not subject themselves to drug screens while under the influence, or with marijuana in their system (including remaining metabolites), because they are aware of the employment consequences of doing so. If this is true, perhaps most of those not hired or fired would be medical marijuana users who depend on the drug for treatment. Further, such users may not be aware that, although they may legally consume marijuana for medicinal purposes, they are not protected under the ADA from adverse employment actions as a result of their medical marijuana consumption. As discussed in Part II of this Note, the statutory language of the ADA is ambiguous; therefore, medical marijuana users who turn to the statute for clarification could easily be

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<sup>121</sup> 17 *Stoner States: Where's Marijuana Use Highest?*, CBSNEWS, [http://www.cbsnews.com/2300-204\\_162-10008747-18.html](http://www.cbsnews.com/2300-204_162-10008747-18.html) (last visited Feb. 15, 2015).

<sup>122</sup> *See id.*

<sup>123</sup> 2012 *State Population Census Estimates*, GOVERNING DATA, <http://www.governing.com/gov-data/state-census-population-migration-births-deaths-estimates.html> (current as of July 2012).

<sup>124</sup> *Medical Marijuana*, *supra* note 8.

<sup>125</sup> Matt Ferner, *Colorado First State In U.S. To Adopt Rules for Legal, Recreational Marijuana*, HUFFINGTON POST (Sep. 10, 2013), [http://www.huffingtonpost.com/2013/09/10/colorado-first-state-rules-marijuana\\_n\\_3902602.html](http://www.huffingtonpost.com/2013/09/10/colorado-first-state-rules-marijuana_n_3902602.html).

confused about whether they are protected.<sup>126</sup> Likewise, many individuals are not aware of the difference between federal and state law and probably do not understand that, although medical marijuana is legal in their state, it continues to be illegal under federal law. These confusions and ambiguities could lead a person consuming medical marijuana to submit to employment-related drug tests under the influence because he or she is ignorant of the negative consequences.

c. Business Necessity

The last step in proving a disparate impact claim (after determining that the individual is qualified and proving discrimination through statistics) is to prove that a neutral employment practice tends to screen out an individual with a disability.<sup>127</sup> Once an employee displays the disparity of impact, it is then the employer's burden to prove business necessity.<sup>128</sup> To demonstrate business necessity, an employer must show that the standard or policy—such as a drug test—accurately and fairly measures the employees' ability to perform essential functions of the job.<sup>129</sup> An employer will probably be able to prove that a drug test accurately and fairly evaluates the employees' ability to perform essential functions of the job because, as mentioned above, marijuana's side effects are potentially severe, and an employer can point to those to establish that the skills diminished by these side effects are essential to the occupation in question<sup>130</sup> This will be particularly easy for the employer to prove because marijuana side effects touch upon both manual labor (loss of coordination) and any occupation that involves cognitive abilities (essentially all other occupations).<sup>131</sup> Therefore, it is unlikely that an employee will be able to prevail in a disparate impact case.

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<sup>126</sup> See discussion *supra* Part II.B.i.a–b.

<sup>127</sup> 42 U.S.C.S. §§ 12112(b)(5)(A)–(B), (b)(6) (LexisNexis 2014).

<sup>128</sup> See Hickox, *supra* note 18, at 1036.

<sup>129</sup> *Id.* at 1030 (citing *Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir. 2001)).

<sup>130</sup> See discussion *supra* Part III.A.i (Side effects include slowed reaction time, distorted perceptions of time, sounds and sights, cognitive problems, short-term memory loss, anxiety and depression, and loss of coordination.).

<sup>131</sup> See discussion *supra* Part III.A.i.

#### IV. STATE MEDICAL MARIJUANA ACTS

Twenty-three states and the District of Columbia have legalized possession and consumption of marijuana for medical purposes. However, only a few states, such as Arizona, have included employee protection in their Medical Marijuana Acts.

##### A. California

California passed the Compassionate Use Act of 1996 to decriminalize the use and sale of medical marijuana.<sup>132</sup> The Act's purpose is "[t]o ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction."<sup>133</sup> The Act specifically states that "[n]othing 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>134</sup>

According to the Supreme Court of California, medical marijuana patients do not have a claim for discrimination on the basis of disability under the Fair Employment and Housing Act ("FEHA") because the California Compassionate Use Act is only directed at decriminalizing the use and sale of medical marijuana.<sup>135</sup> In *Ross v. Ragingwire Telecommunications, Inc.*, an applicant was not hired because he failed a pre-employment drug test because he was using medical marijuana as treatment for his disability.<sup>136</sup> The plaintiff sought protection under the FEHA by alleging that he had a disability that caused him to suffer back pain, and that he used marijuana to treat the pain.<sup>137</sup> He asked the employer to accommodate his use of medical marijuana at home "by waving its policy requiring a negative drug test of new employees."<sup>138</sup> The court, however, held that the Compassionate Use Act does not give

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<sup>132</sup> CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

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

<sup>134</sup> *Id.* § 111362.785.

<sup>135</sup> *Ross v. Ragingwire Telecomms., Inc.*, 174 P.3d 200, 204 (Cal. 2008) (stating that the FEHA does not require employers to accommodate the use of illegal drugs); see Holi Hartman, Baker & Hostetler, *Medical Marijuana in the Workplace*, DRITODAY (Feb. 15, 2013), <http://www.dritoday.org/feature.aspx?id=510>.

<sup>136</sup> *Ross*, 174 P.3d at 202.

<sup>137</sup> *Id.* at 204.

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

medical marijuana the same status as a legal prescription drug.<sup>139</sup> According to the court, no state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law.<sup>140</sup> The court further stated that California's Medical Marijuana Act "does not speak to employment law."<sup>141</sup> Therefore it does not require employers to accommodate employees using the drug.

### B. Colorado

Colorado's Compassionate Use Act, much like California's, removes only state-level criminal penalties on documented patients for the use, possession, and cultivation of marijuana.<sup>142</sup> Article XVIII, Section 14 of the Colorado Constitution specifically states that "[n]othing in this section shall require any employer to accommodate the medical use of marijuana in any work place."<sup>143</sup>

In *Coats v. Dish Network*,<sup>144</sup> the plaintiff filed a complaint against his former employer because the employer terminated him for using medical marijuana.<sup>145</sup> He claimed that his termination violated Colorado's Lawful Activities Statute.<sup>146</sup> The appellate court held that federally prohibited, but state-licensed medical marijuana does not constitute lawful activity.<sup>147</sup> The rationale was that, since state law cannot override federal law, and federal law prohibits medical marijuana, state-licensed medical marijuana is unlawful.<sup>148</sup> Consequently, since activities conducted in Colorado are subject to both federal and state law, for an activity to be lawful in Colorado, both state and federal law must permit it.<sup>149</sup>

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

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

<sup>141</sup> *Id.* at 208; see Dustin Stark, Comment, *Just Say No: Foreclosing a Cause of Action for Employees Seeking Reasonable Accommodation Under the New Jersey Compassionate Use Medical Marijuana Act*, 43 SETON HALL L. REV. 409, 432 (2013).

<sup>142</sup> See *Medical Marijuana*, *supra* note 8.

<sup>143</sup> COLO. CONST. art. XVIII, § 14(10)(b) (amended 2000).

<sup>144</sup> *Coats v. Dish Network*, L.L.C., 303 P.3d 147 (Colo. App. 2013).

<sup>145</sup> *Id.* at 149.

<sup>146</sup> *Id.*; see COLO. REV. STAT. § 24-34-402.5 (West 2012).

<sup>147</sup> *Coats*, 303 P.3d at 150–51.

<sup>148</sup> *Id.* at 151.

<sup>149</sup> *Id.* at 150–51. "While we agree that the general purpose of section 24-34-402.5 is to keep an employer's proverbial nose out of an employee's off-site off hours business we can find no legislative intent to extend employment protection to those engaged in activities that violate federal law." *Id.* at 151.

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*C. New Jersey*

Similar to California and Colorado's state medical marijuana acts, New Jersey does not explicitly protect employees using medical marijuana.<sup>150</sup> The purpose of New Jersey's Compassionate Use Medical Marijuana Act is primarily 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>151</sup> The Act also specifically provides, "nothing in this act shall be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace."<sup>152</sup> Although this provision has yet to be litigated, it is likely that the results will be the same as those in California and Colorado.

Plaintiffs may argue that "use of marijuana in any workplace" could mean that they are either impaired at work or are consuming marijuana while at work.<sup>153</sup> Therefore, a plaintiff may avoid adverse employment action if he or she used medical marijuana at home and did not show up to work impaired. Being "impaired," however, may also have two different meanings because "[s]ome THC metabolites have an elimination half-life of 20 hours. However, some are stored in body fat and have a[n] elimination half-life of 10-13 days."<sup>154</sup> Thus, metabolites may still be detected in a drug test because they are stored in body fat, even if the plaintiff is not in other sense "impaired." It is probable that a court will not accept this interpretation of the Act; otherwise, employers would be forced to change their policies, such as drug testing, to accommodate medical marijuana users. As a result, an employee is again attempting to establish that there is a disparate impact and that he or she deserves a reasonable accommodation. Again, an employer is required to make only reasonable accommodations for the employee if the accommodations do not impose an "undue hardship."<sup>155</sup> An employer will argue that it would be an "undue hardship" to determine whether the employee is "impaired" at the time of employment or if it is only the THC metabolites stored in the body fat that are causing him or her to test positive.

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<sup>150</sup> See Stark, *supra* note 141, at 412.

<sup>151</sup> N.J. STAT. ANN. § 24:6I-2 (West 2011).

<sup>152</sup> *Id.* § 24:6I-14; see Stark, *supra* note 141, at 414.

<sup>153</sup> See Stark, *supra* note 141, at 414–15.

<sup>154</sup> Buddy, *supra* note 39.

<sup>155</sup> 42 U.S.C.S. § 12111(10) (LexisNexis 2014).

*D. Arizona*

The Arizona Medical Marijuana Act allows registered patients to obtain marijuana from a registered nonprofit dispensary and to possess and use medical marijuana to treat their disability.<sup>156</sup> The Act also specifies that:

[u]nless 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 or imposing any term or condition of employment or otherwise penalize a person based upon either:

1. The person's status as a cardholder.
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.<sup>157</sup>

Under the Arizona Act, an employee is not considered "impaired" merely because marijuana metabolites are detected in the employee's system.<sup>158</sup> Nothing, however, prohibits an employer from terminating an employee for consuming marijuana in the workplace or for working while under the influence of marijuana.<sup>159</sup> If an applicant tests positive in a pre-employment drug test, an employer cannot refuse to hire the applicant for that reason, as long as the applicant is a registered cardholder.<sup>160</sup> Nonetheless, if an employer would lose federal licensing, he is not required to hire the applicant.<sup>161</sup>

Similarly, if a current employee tests positive for marijuana on a drug test, the employer cannot terminate him or her for that reason.<sup>162</sup> If the employee is not using marijuana at work and was not impaired on the job, then the employer may not terminate him or her because of the presence of marijuana metabolites in the employee's system. Under the Arizona Medical Marijuana Act, marijuana is treated like any other lawful drug that "may impair an employee's functioning at work."<sup>163</sup> The Arizona statute specifies that "impairment" does not include a registered qualifying patient with metabolites or components of marijuana that

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<sup>156</sup> ARIZ. REV. STAT. ANN. § 36-2801 (2010).

<sup>157</sup> *Id.* § 36-2813(B).

<sup>158</sup> *Id.* § 36-2814(A)(3).

<sup>159</sup> *Id.* § 36-2814(B).

<sup>160</sup> Little, *supra* note 13.

<sup>161</sup> ARIZ. REV. STAT. ANN. § 36-2813(B).

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

<sup>163</sup> *Id.* § 36-2813(C).



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appear insufficient to cause impairment.<sup>164</sup> An employer can determine that an employee is impaired by documenting signs of impairment and using witness testimony.<sup>165</sup>

**V. ARE PEOPLE UNDER THE INFLUENCE OF MEDICAL MARIJUANA ENTITLED TO UNEMPLOYMENT BENEFITS?**

Every state administers its own unemployment insurance program within the guidelines established by federal law.<sup>166</sup> Further, state law determines eligibility requirements for unemployment benefits.<sup>167</sup> Therefore, every state's unemployment benefits and requirements vary.

In Colorado, Service Group, Inc. discharged an operator for violating its "zero-tolerance drug policy" after he tested positive for marijuana in a random drug test.<sup>168</sup> The Colorado Court of Appeals held that such an individual is disqualified from receiving unemployment benefits if he or she tests positive for a controlled substance that is "not medically prescribed."<sup>169</sup> Applying the court's holding, one may believe that such an employee is protected because of the words "medically prescribed," but, "[u]nder article XVIII, section 14, a physician does not *prescribe* marijuana, but may only provide 'written documentation' stating that the patient has a debilitating medical condition and might benefit from the medical use of marijuana."<sup>170</sup> In addition, Colorado physicians are still subject to federal law, which "requires a practitioner prescribing controlled substances to be registered with the Drug Enforcement Administration."<sup>171</sup> A registration for the prescription of controlled substances under federal law may be obtained only for Schedule II through Schedule V drugs.<sup>172</sup> Therefore, federal law disqualifies marijuana, a Schedule I drug.

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<sup>164</sup> *Id.*

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

<sup>166</sup> *State Unemployment Insurance Benefits*, U.S. DEP'T OF LAB. EMP'T & TRAINING ADMIN., <http://workforcesecurity.doleta.gov/unemploy/uifactsheet.asp> (last updated May 23, 2013).

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

<sup>168</sup> *Benior v. Indus. Claim Appeals Office*, 262 P.3d 970, 972 (Colo. App. 2011) ("[I]f a current employee is substance tested for any reason . . . and the results of the screening are positive for . . . illegal drugs, the employee will be terminated.>").

<sup>169</sup> *Id.* at 972–73 (citing C.R.S. § 8-73-108(5)(e) (IX.5) (LexisNexis 2014)).

<sup>170</sup> *Id.* at 973.

<sup>171</sup> *Id.* (internal parenthesis omitted).

<sup>172</sup> *Id.* at 973–74.

## VI. POLICY ARGUMENT FOR WHY STATES SHOULD ADOPT ARIZONA'S INTERPRETATION

Twenty-three states and the District of Columbia have adopted medical marijuana statutes, but a few states extend protections to employees. Consequently, employees have nowhere to look for protection—they are left with no unemployment benefits and are required to choose between their well-being and choice of treatment.

### A. *Occupation v. Well-being*

Although medical marijuana has several negative effects, it can also relieve pain, combat nausea, and stimulate appetite.<sup>173</sup> If employees are not protected under the ADA or their state medical marijuana acts, they will be forced to choose between remaining employed or treating their pain by consuming marijuana. Congress continues to list marijuana as a Schedule I drug, and courts have interpreted this to mean that there is “no currently accepted medical use in treatment in the United States’ and ‘a lack of accepted safety [standards] for use . . . under medical supervision.”<sup>174</sup> Therefore, states must act to protect their employees.

The government should not force an individual to choose between her well-being, and her employment. For example, Curry, who was diagnosed with osteoarthritis, likely suffers from a myriad of painful symptoms including sensations of tightening, crushing, throbbing, and burning of his joints.<sup>175</sup> Medical marijuana helps to alleviate that pain, but if he chooses employment, he will unfortunately suffer through these symptoms without effective relief. Even if Curry could make a disparate impact claim, which as discussed is difficult, his employer may not have the duty to reasonably accommodate him if it can prove undue hardship. A showing of an undue hardship will likely be an easy burden to meet.<sup>176</sup>

Furthermore, if an employee decides not to use medical marijuana, it is possible that he or she may not be able to work through the pain regardless of whether an employer provides a reasonable accommodation. An employer is required only to make reasonable

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<sup>173</sup> See Mitch Wallick & Earl R. Henslin, *Medical Marijuana Pros and Cons: Expert Opinions*, SURVIVAL DOCTOR (Feb. 14, 2013), <http://www.theurvivaldoctor.com/2013/02/14/medical-marijuana-pros-and-cons-doctors-debate-opinions/>.

<sup>174</sup> *James v. City of Costa Mesa*, 684 F.3d 825, 832 (9th Cir. 2012).

<sup>175</sup> See Amelia Swift, *Osteoarthritis 3: Impact On Patients*, NURSINGTIMES.NET (Feb. 28, 2012), <http://www.nursingtimes.net/osteoarthritis-3-impact-on-patients/5042032.article>.

<sup>176</sup> See discussion *supra* Part III.A.

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accommodations for the employee if it does not impose an “undue hardship.”<sup>177</sup> Again, a “reasonable accommodation” does not include allowing one to use medical marijuana.<sup>178</sup> Thus, Curry will be left choosing between treatment and an occupation. Even if he chooses his occupation, he may be physically incapable of working. If, however, Curry had been an Arizona resident, he would be able to take advantage of the Arizona Medical Marijuana Act, which allows registered patients to obtain marijuana from a registered nonprofit dispensary and to possess and use medical marijuana to treat their disability without being terminated from their occupation.<sup>179</sup>

*B. Leaving the Individual with No Source of Income*

Forcing an individual to choose between his well-being and employment, the way the ADA has been interpreted, leaves individuals with no source of income. In Curry’s situation, Colorado neither protects him from termination when he is under the treatment of medical marijuana, nor does it allow him to recover unemployment benefits.<sup>180</sup>

However, if Curry lived in Arizona, he would have an income because he could continue using medical marijuana as long as he did not consume it in the workplace, or was not “impaired” at work.<sup>181</sup> Furthermore, if Curry were terminated from his employment for any other reason, he would be entitled to unemployment benefits even if he used medical marijuana at home. The Arizona Department of Economic Security Appeals Board held that as long as an employee is not fired for consuming medical marijuana in the workplace or for being “impaired,” he or she will be entitled to unemployment benefits.<sup>182</sup>

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<sup>177</sup> 42 U.S.C.S. § 12111(10) (LexisNexis 2014).

<sup>178</sup> See discussion *supra* Part III.A.

<sup>179</sup> See discussion *supra* Part IV.D.

<sup>180</sup> See *Curry v. MillerCoors, Inc.*, No. 12–cv–0241, 2013 U.S. Dist. LEXIS 118730, at \*8 (D. Colo. Aug. 21, 2013); *Benior v. Indus. Claim Appeals Office*, 262 P.3d 970, 973 (Colo. App. 2011); discussion *supra* Part V.

<sup>181</sup> See Jeffrey S. Kaufman, *Important Employment Law News*, ARIZ. MARIJUANA LAW (Oct. 1, 2013), <http://arizonamarijuanalawyers.com/important-employment-law-news/>.

<sup>182</sup> *Id.*

*C. Promoting Unproductivity*

America is known for incentivizing individuals to work and providing many opportunities. According to a proposed welfare reform step, “welfare reform today should continue to promote personal responsibility by encouraging work.”<sup>183</sup> But, by allowing employers to terminate individuals using medical marijuana as treatment, and forcing them to choose between their employment and their well-being, the state and the federal governments are discouraging these individuals from working. In an inaugural address, President Obama stated, “the God-given promise that all are equal, all are free, and all deserve a chance to pursue their full measure of happiness.”<sup>184</sup> Curry also deserves a chance to pursue his measure of happiness, even if it means that he must use medical marijuana outside of his employment setting to be able to work. Without reform, the government is encouraging, and even forcing, individuals to be unproductive.

## VII. CONCLUSION

Although twenty-three states and the District of Columbia have each adopted a medical marijuana statute, only few states extend protections to employees. Employees have nowhere to look for protection and likely cannot formulate a disparate impact claim because they are not qualified employees, cannot meet the statistical evidence requirement, and may fail to satisfy business necessity. As a result, employees are left with no unemployment benefits and must choose between their well-being and treatment. Therefore, states should adopt a statute similar to Arizona’s Medical Marijuana Act. However, given that Arizona does not offer an alternative to determining whether one is “impaired,” a new statute should create an “impairment threshold.” Much like the alcohol threshold limits, whenever one’s metabolism exceeds the threshold, he or she would be considered “impaired” and could be terminated from his or her job by their employer. Without such legislative initiatives, medical marijuana users will continue to face unwarranted discrimination in the workplace.

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<sup>183</sup> *Welfare Reform The Next Steps*, HERITAGE FOUND (Mar. 17, 2011), <http://www.heritage.org/research/factsheets/2011/03/welfare-reform-the-next-steps>.

<sup>184</sup> Kate Ellis & Ellen Guettler, *A Better Life*, AM. RADIOWORKS, <http://americanradioworks.publicradio.org/features/americanream/a3.html#part10> (last visited Feb. 15, 2015).