February 25, 2010

Should Employees Have to Choose Between Enduring Pain and Keeping Their Jobs?

Reka Bala

Available at: https://works.bepress.com/reka_bala/2/
SHOULD EMPLOYEES HAVE TO CHOOSE BETWEEN ENDURING PAIN AND KEEPING THEIR JOBS?

REKA BALA†

Introduction

Despite medical advances and the plethora of powerful prescription painkillers available to the general public, few medications provide complete relief for patients who have constant pain. For many of these individuals, the only substance that even remotely alleviates their symptoms is marijuana. Historically known for its therapeutic benefits for a variety of ailments, marijuana has increasingly become a medication of last resort for individuals whose efforts to eradicate pain through other methods have consistently failed. Hence, as news about marijuana’s effectiveness to cure pain spreads, states continue to adopt laws to allow individuals to freely use the substance for medical reasons. So far, fourteen states have enacted statutes that permit medical marijuana use, with the most recent passages in Michigan and New Jersey. Illinois and New York may soon follow suit as they both have introduced medicinal marijuana legislation. Since federal law still prohibits marijuana use for any purpose, state medical marijuana laws can only guarantee users limited protection. Consequently, residents of states

† J.D. Candidate, 2010, City University of New York School of Law. This author is grateful to Professor Paula Berg for her assistance and insight in writing this article.


4 A. 07542, 230th Leg., Reg. Sess. (N.Y. 2009), available at http://assembly.state.ny.us/leg/?bn=A07542 (Assembly proposal). As of June 2009, the bill was ordered for a third reading. Id.

5 ProCon.Org, supra note 1.
that have legalized medical marijuana only have the right to avoid state-based criminal sanctions if they use medical marijuana.\(^6\)

California residents, however, face an even greater obstacle thanks to a recent California Supreme Court decision that forces users of medical marijuana to choose between their jobs and a life of constant pain. Though the court in *Ross v. RagingWire Telecommunications, Inc.*, which precluded a patient from questioning his employer’s decision to discharge him because of his marijuana use, intended only to have a narrow holding, the consequences of this decision are severe.\(^7\) In this case, the majority strictly interpreted California’s Compassionate Use Act of 1996 ("CUA") and upheld the defendant employer’s decision to terminate the plaintiff, who used marijuana to alleviate his chronic back pain, because he failed an employment drug test even though he had legitimate reasons for using the substance.\(^8\) This narrow interpretation of the statute places medical marijuana users in a no-win situation of having to choose between pain alleviation and gainful employment.\(^9\)

Though *Ross* remains good law, many lawmakers have vehemently opposed the court’s interpretation of the CUA, because it starkly contradicts legislative intent and public opinion. Just one month after *Ross*, legislators attempted to overturn the decision with a bill that would have protected cannabis patients from employment disputes similar to the one Gary Ross had faced and permitted them to sue employers for violating their rights.\(^10\)

---

\(^6\) *Id.*

\(^7\) See generally *Ross v. RagingWire Telecommunications, Inc.*, 42 Cal. 4th 920 (2008). Prior to this decision few cases discussed the effect of combining supplement drug testing with medical marijuana use. Thus, this decision raises a potentially new problem for medical marijuana patients.

\(^8\) *Id.* at 931.

\(^9\) See *id.* at 937 (George, C.J., concurring and dissenting). The dissenting judges stated that the statute was not designed to force users to make this "cruel choice." *Id.*

This article will argue that Ross and its narrow construction of the CUA frustrates the overall purpose of the statute and original intent of both voters and legislators. This note will also demonstrate the decision’s inconsistencies with prior California Supreme Court decisions, state employment law, and the Americans With Disabilities Act. Finally, this note will offer recommendations on how to transform the statute or design a judicial remedy to protect patients from the fear of losing their jobs because they use medical marijuana.

**The History of Marijuana as a Medicine**

The name ‘marijuana’ refers to the dried parts of the Cannabis sativa plant and contains at least 400 different compounds.\(^1\) The chemical compounds responsible for the physiological side-effects stem from the resin in the flowers of the female plant.\(^2\) The most well-known compound in marijuana is delta-9-tetrahydrocannabinol, or THC, which although is often associated with producing mind-altering effects, is also connected with treating a number of medical conditions and alleviating pain, because it is rapidly absorbed in the bloodstream once inhaled.\(^3\)

For thousands of years, medical practitioners have recommended marijuana to cure a variety of ailments because of the substance’s renowned therapeutic effects. Originally labeled “cannabis” for the plant, marijuana was regularly used by physicians to treat patients as early as 2700 B.C.\(^4\) The substance was commonly prescribed for many conditions, including

---


\(^2\) Id. (citing that a man-made version of THC called ‘Marinol’ is currently available by prescription).

\(^3\) Id. (citing that a man-made version of THC called ‘Marinol’ is currently available by prescription).

dysmenorrheal, chronic rheumatism, asthma and migraines. Even Western medicine eventually accepted the cannabis plant as an effective source of treatment because of its analgesic and sedative properties. The United States Pharmacopoeia, which sets quality standards for over-the-counter and prescription medications, listed cannabis as a medicine until the early 1940s.

While the AMA opposes the legalization of marijuana as a medicine, it has recognized the substance’s potential therapeutic effects. The AMA reported that some patients who suffer from headaches, menstrual cramps or abdominal pain from tubal ligation may benefit from “smoked marijuana.” Moreover, the medical organization’s studies show that 15 mg doses of THC could provide “significant analgesic effects.” Furthermore, cancer patients who ingested about 20 mg of THC, which the AMA analogized to a dosage of codeine, could experience a respite in pain. Finally, the AMA acknowledged that marijuana can be effective in treating the following conditions: AIDS-wasting syndrome, chemotherapy-induced nausea and vomiting,

---

16 ProCon.org, supra note 14 (discussing that even in the 1700s, some Western countries began using cannabis for many conditions, including inflammation and migraine headaches).
17 Id. (chronicling that the U.S. Pharmacopoeia first added the substance as a medicine in 1870).
18 AMERICAN MEDICAL ASSOCIATION, REPORT 6 OF THE COUNCIL ON SCIENTIFIC AFFAIRS, http://www.ama-assn.org/ama/no-index/about-ama/13625.shtml. The AMA strongly opposes legalization of marijuana because the Federal Drug and Food Administration still has not approved marijuana as a drug and because marijuana has many adverse effects, including increased heart rate and blood pressure. Id. The AMA also argues that marijuana produces side-effects, such as impairment and short-term memory loss, which are similar to those due to intoxication. Id.
19 AMERICAN MEDICAL ASSOCIATION, REPORT 10, supra note 12. (discussing many of the analgesic effects of THC and smoked marijuana). See also ProCon.org, How Does Marijuana Compare to Marinol in the Treatment of Appetite and Nausea?, http://medicalmarijuana.procon.org/viewanswers.asp?questionID=000136 (last visited Dec. 4, 2009) (discussing that nausea patients complain that using the pill form, Marinol, is not as effective because relief usually does not occur for at least an hour and Marinol produces stronger adverse side-effects than its smoked counterpart).
20 AMERICAN MEDICAL ASSOCIATION, REPORT 10, supra note 12.
21 Id. (citing that oral 10 mg of THC was less effective than 20 mg but was similar to 60 mg of codeine). The AMA acknowledged that 20 mg of smoked marijuana was equivalent to about 120 mg of codeine in the same patient and was more effective than marijuana taken orally. Id.
side-effects from advanced cancer, multiple sclerosis and other conditions involving chronic pain.\(^{22}\)

Other medical professionals also support the use of marijuana to treat chronic conditions. In 1999, the Institute of Medicine (“IOM”) published a book to encourage physicians to recommend marijuana to patients because of marijuana’s positive side-effects, including euphoria, laughter, increased talkativeness and an overall sense of well-being.\(^{23}\) According to the IOM, these side-effects, and not the “high” generally associated with marijuana, actually augment marijuana’s medicinal properties and therapeutic value.\(^{24}\) Moreover, not all medicinal marijuana users experience a high as symptomatic relief can still come even after only a few puffs,\(^{25}\) and through smaller doses than would be ingested if marijuana were used recreationally\(^{26}\) or through its pill form, Marinol.\(^{27}\)

Even if adverse effects result, they are generally no worse or dangerous than those caused by prescription medications. In its study, the IOM stated that marijuana’s adverse effects are “within the range of effects tolerated for other medications.”\(^ {28}\) Unlike other prescription

\(^{22}\) Id.


\(^{24}\) Id. at 84. According to the U.S. Drug and Enforcement Administration, the “high feeling” that a user experiences when smoking marijuana occurs when THC reaches the brain and releases dopamine to produces a euphoric-type sensation. See ProCon.Org, What is -- and What Causes -- the Marijuana “High?,” http://medicalmarijuana.procon.org/viewanswers.asp?questionID=642 (last visited Dec. 4, 2009).

\(^{25}\) See ProCon.org, supra note 24 (showing a listing of opinions by medical professionals, some of whom state that a small amount of marijuana will provide relief without producing any adverse mental effects).


\(^{27}\) See ProCon.org, supra note 19 (discussing the effects of Marinol).

\(^{28}\) MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE, supra note 23, at 5. Many physicians have praised marijuana for having fewer adverse effects than other commonly-used medications, such as Aspirin or acetaminophen, saying that patients can even fatally overdose on these drugs while they usually do not with marijuana. ProCon.org, Is Marijuana More Dangerous Than Legal Drugs?, http://medicalmarijuana.procon.org/viewanswers.asp?questionID=000230 (last visited Dec. 4, 2009). Moreover, doctors have said that withdrawal symptoms from marijuana are much lower than with caffeine or nicotine. Id.
painkillers, marijuana users usually will not become dependent on the substance. Moreover, reducing a patient’s dosage could easily control some negative side-effects. Those adverse reactions will also quickly subside as the effects of marijuana fade after one or two hours. Thus, the adverse consequences of marijuana’s side-effects are slight when compared with other frequently prescribed medications.

A. The Legality of Marijuana Use Under Federal Law

Individuals could legally use marijuana in the U.S. until 1937. However, in 1970, Congress passed the Controlled Substances Act, which criminalized marijuana and labeled it as a narcotic, imposing serious fines and penalties for mere possession. Marijuana, along with heroin, is categorized as a Schedule I drug, which is described as having the following three properties: a high potential for abuse; no currently accepted medical use in treatment in the United States; and a lack of accepted safety for use of the drug under medical supervision. Cocaine and morphine, however, are classified as Schedule II drugs, which calls for fewer

29 MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE, supra note 23, at 96. The Institute stated that only 9 percent of marijuana users have a risk of addiction, compared with 15 percent for alcohol users, 17 percent for cocaine users and 23 percent for heroin users. See also Sarah Kershaw and Rebecca Cathcart, Marijuana is Gateway Drug for Two Debates, N.Y. TIMES, July 17, 2009, at ST1, http://www.nytimes.com/2009/07/19/fashion/19pot.html?_r=1&pagewanted=print.
30 See AMERICANS FOR SAFE ACCESS, ASA’S GUIDE TO USING MARIJUANA, http://www.safeaccessnow.org/article.php?id=2533 (last visited Dec. 11, 2009) (discussing that decreasing dosage amounts could improve the uneasiness that marijuana may often cause).
32 ProCon.org, supra note 28. As the substance is still illegal under federal law, scientists are unable to obtain access to the substance or more funding to learn more about the substance’s therapeutic value. MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE, supra note 23, at 215, 219. For example, the National Institute of Neurological Disorders and Stroke (NINDS), which found that some pain receptors in the brain respond to marijuana, ceased its study because it lacked resources. See NATIONAL INSTITUTE OF NEUROLOGICAL DISORDERS AND STROKE, PAIN: HOPE THROUGH RESEARCH, http://www.ninds.nih.gov/disorders/chronic_pain/detail_chronic_pain.htm#125253084.
33 ProCon.org, supra note 14.
35 Tiersky, supra note 15, at 549. Possession of marijuana would result in a five-year prison sentence and a $2,000 fine. Id.
restrictions and recognizes these substances as having a medical use. Although advocates have called for the rescheduling of marijuana as a Schedule II drug, their efforts have so far failed. However, recent law enforcement and legislative actions suggest that federal officials are becoming more tolerant of marijuana as a medicine.

B. The Legality of Marijuana Use in California

In 1996, California became the first state to depart from the federal approach to marijuana by enacting a law that allowed use of marijuana for medical reasons. Proposition 215, which was codified as the Compassionate Use Act, ensures that “seriously 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 the person’s health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.” The statute immunizes “patients and their primary caregivers” from criminal

37 Id. §§ 812 (a) (4), (b) (placing these substances within the “Schedule II” list). Schedule II drugs differ from Schedule I because they have a currently “accepted medical use in treatment in the United States.” Id. § (a) (2) (B).
38 Tiersky, supra note 15, at 550-51. Only Marinol, the pill form of marijuana, is classified as a Schedule II drug and many states have modified their own laws to consider marijuana as a Schedule II drug. Id. at 551.
39 In October 2009, the U.S. Department of Justice released a memorandum that instructed federal prosecutors to avoid prosecuting individuals legitimately using medicinal marijuana because such efforts would be an inefficient use of federal resources. DAVID W. OGDEN, supra note 10, at 1. The DOJ stated that federal dollars should not be used on individuals who are “in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.” Id. at 2.
40 In June, U.S. Representative Barney Frank introduced the Medical Marijuana Patient Protection Act, which, if passed, would safeguard medicinal marijuana users against federal prosecution, exempt them from sanctions under the Controlled Substances Act and reschedule marijuana as a Schedule II drug. Medical Marijuana Patient Act of 2009, H.R. 2835, supra note 10. If this bill passes, physicians may legally prescribe marijuana and patients may legally use it in all 50 states, as with morphine. AMERICANS FOR SAFE ACCESS, MEDICAL CANNABIS POLICY UPDATE: FALL 2009, http://www.safeaccessnow.org/article.php?id=5813#7 (last visited Dec. 4, 2009).
41 Allison L. Bergstrom, Medical Use of Marijuana: A Look at Federal & State Responses to California’s Compassionate Use Act, 2 DEPAUL J. HEALTHCARE L. 155, 166 (1997).
42 CAL. HEALTH & SAFETY CODE § 11362.5 (b) (1) (A) (Deering, LEXIS through Ch. 643 of the 2009-2010 Reg. Sess.).
prosecution or sanction and defines the meaning of a primary caregiver.\footnote{Id. § 11362.5 (b) (1) B.} Finally, the statute obligates state and federal government entities to provide an adequate supply of marijuana.\footnote{Id. § 11362.5 (b) (1) (C).}

Although the statute purports to legalize the use of marijuana for medical purposes, it actually only provides limited protection to both physicians and their patients. Specifically, primary caregivers are free from criminal prosecution or sanction only if they make a “recommendation” of marijuana. They face charges if they officially write a prescription.\footnote{Id. § 11362.5 (b) (1) (B); Bergstrom, supra note 41, at 161.}

Furthermore, a recommendation of marijuana may only occur where its usage would not “endanger others.”\footnote{CAL. HEALTH & SAFETY CODE § 11362.5 (b) (2) (Deering, LEXIS through Ch. 643 of the 2009-1010 Reg. Sess.). See also People v. Tilekkooh, 113 Cal.App.4th 1433 (2003) (holding that the patient exhibited no conduct that could endanger others as he had proof he was a registered cannabis user with a signed doctor’s note and a cannabis card). The endangerment of others could occur where marijuana is combined with other drugs to make the patient violent without provocation. People v. Berry, 146 Cal.App.4th 20 (2006).} Thus, the statute only protects patients who use marijuana in a way that would not harm another individual.

The Act’s passage followed years of lobbying by advocate groups and recommendations from physicians who all believed marijuana should be legalized for medical use.\footnote{Bergstrom, supra note 44, at 166.} The campaign to push for Proposition 215 was led by the Californians for Medical Rights, which secured 850,000 signatures – twice as many as needed – and more than $1,000,000 in sponsorship funds to get the bill on the ballot.\footnote{Michael Vitiello, Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy, 31 U. MICH. J. L. REF. 707,715 (1998). See also National Families in Action, A Guide to Drug-Related State Ballot Initiatives, http://www.nationalfamilies.org/guide/california215.html (last visited Dec. 13, 2009).} Despite legislative history reports that suggest many legislators were conflicted about the bill and believed it had ambiguous language, the bill swiftly passed in 1996 because of the public’s overwhelming support for medical marijuana usage.\footnote{Vitiello, supra note 48, at 707, 709.}
Plaintiff Gary Ross suffered from strain and muscle spasms in his back resulting from injuries he sustained as a member of the United States Air Force.\(^50\) Those injuries qualified him to receive disability status and benefits under the California Fair Employment and Housing Act of California (“FEHA”).\(^51\) In 1999, following years of unsuccessful attempts to reduce his pain through prescription painkillers, Ross’ physician recommended marijuana.\(^52\) He continued to perform everyday tasks and maintained regular employment while on medical marijuana treatment.\(^53\)

However, when Ross accepted a position two years later as a lead systems administrator for RagingWire Telecommunications, Inc., he was forced to disclose his medical history due to a company policy of requiring drug tests.\(^54\) Before taking the test, Ross informed his employer he was using medical marijuana and provided a copy of a doctor’s note that explained Ross’ reasons for using the substance.\(^55\) Ross subsequently took the test and began working, but was soon told that his test results came back positive for THC.\(^56\) Ross again informed his employer and human resource director that his usage was legitimate.\(^57\) The defendant assured Ross it would speak with his doctor first and then make a decision but it fired Ross just one day after receiving the drug test results.\(^58\) Upon his termination, Ross filed a suit against the employer and claimed the

\(^{50}\) Ross, 42 Cal.4th at 924.  
^{51}\) Id.  
^{52}\) Id.  
^{53}\) Id. at 925 (discussing that plaintiff had shown he had worked in the same field using marijuana with satisfactory results).  
^{54}\) Id.  
^{55}\) Id.  
^{56}\) Id.  
^{57}\) Id. Ross also told his employer that his usage of marijuana had no effect on his ability to perform the “essential functions” of the job. Id.  
^{58}\) Id.
defendant had violated the California FEHA, the CUA, and public policy. The court ruled in favor of the defendant on each of these arguments.

Despite Ross’ claims that the FEHA precluded his employer from terminating him for using medical marijuana, the court found the defendant’s reasons for discharging the plaintiff valid. The defendant had argued that the FEHA entitled it to terminate someone who failed a drug test because alcohol and illegal drug users are habitually known for having problems with absenteeism and diminished productivity, and creating health and safety concerns among other employees. Relying on precedent in Loder v. City of Glendale, the court held the defendant could condition an offer of employment based on the results of a drug test, and that the FEHA did not obligate the defendant to retain Ross once his test showed the presence of illegal substances.

The court also found Ross’ contention that the CUA required his employer to accommodate his use of medical marijuana without merit. First, the court rejected Ross’ theory that the Medical Marijuana Program Act (MMPA) applied to him as that statute was enacted two years after Ross was terminated. Second, the court would not interpret the CUA as giving Ross employment protection because no provision mentioned employment law or implied that voters 

59 Id.
60 Id. at 931-33.
61 Id. at 925-26. Under the FEHA, an employer is required to make reasonable accommodations to disabled employees who are able to perform the required duties of the position. See also CAL. GOV. CODE § 12940 (a) (1) (2) (Deering, LEXIS through Ch. 643 of the 2009-2010 Reg. Sess.). As a qualified individual with a disability under the FEHA, Ross argued he was entitled to a reasonable accommodation because the FEHA would naturally preclude termination for using a medicine “deemed legal by the California electorate” since it already bars the firing of an employee who uses a legitimate medication like insulin or Zoloft. Ross, 42 Cal.4th at 926. Finally, Ross claimed his firing was wrong because he never planned to use or possess marijuana while he was at work. Id.
62 Ross, 42 Cal.4th at 927. The defendant contended that a top priority was to protect its employees from working with someone under the influence of drugs. Id.
63 Id.; See also Loder v. City of Glendale, 14 Cal.4th 846 (1997) (holding that the FEHA permits employers to rely on the results of a medical examination before making a final decision about employment).
64 Ross, 42 Cal.4th at 926.
65 Id. at 930-31; See CAL. HEALTH & SAFETY CODE § 11362.785 (a) (Deering, LEXIS through Ch. 643 of the 2009-2010 Reg. Sess.).
wanted to expand the CUA to cover employment issues. Finally, the court rejected plaintiff’s argument that the CUA allowed for home or off-duty marijuana use because the only right the statute protects is an immunity to criminal liability. The court therefore held that it could not foster such a broad construction absent explicit instruction from the Legislature.

Ross’ final argument that the defendant’s actions constituted wrongful termination and violated public policy also lost. There, the court disagreed that the CUA, the FEHA and the Privacy Clause of the California Constitution supported a fundamental public policy requiring employers to accommodate medical marijuana use because none of these laws expressly referred to employment issues. Moreover, neither the FEHA nor the CUA used express language to give notice to employers that they might be subject to tort liability. Finally, the court rejected Ross’ argument under the Privacy Clause, which gave Ross the right to “determine whether or not to submit to lawful medical treatment,” because the defendant’s decision to terminate Ross did not stop the plaintiff from having access to marijuana and receiving treatment.

**Critique of Ross**

Ross contradicts both state and federal law. First, and most importantly, Ross ignores many of the reasons the CUA was enacted in the first place and undermines legislative history,

66 Ross, 42 Cal.4th at 930-31. Ross had demanded a broad construction of the CUA because it would “promote the democratic process.” The court, however, held a broad construction of the CUA would negate the voters’ formally expressed intent. Id. at 930.

67 Id. at 930. The court also held the CUA does not give marijuana the same status as other legal prescription medicines because it was still illegal under federal law. Id. at 927; See Gonzales v. Raich, 545 U.S. 1 (2005).

68 Ross, 42 Cal.4th at 931.

69 Id. at 931-32. Under this theory, Ross had to satisfy four criteria: first, that his employer’s decision to discharge violated a state policy that was supported by either constitutional or statutory provisions; second, that the policy benefited the public and not just his own interests; third, that the policy was articulated at the time of the discharge; and finally, that the policy was “fundamental” and “substantial.” Id.

70 Id. at 932.

71 Id. (stating that the provision that bolsters the public policy must “sufficiently describe the type of prohibited conduct to enable an employer to know the fundamental public policies that are expressed in that law”) (quoting Grinzi v. San Diego Hospice Corp., 120 Cal.App.4th 72 (2004)).

72 Id. at 932-33 (citing Cobbs v. Grant, 8 Cal.3d 229, 242 (1972)). See CAL. CONST. art. I § 1.

73 Id. at 933. Ross had argued that by firing him, he was being forced to forego his medical treatment for the sake of keeping his job. Id.
which calls for giving more rights to medical marijuana patients. Second, Ross misconstrued
the plain meaning of the CUA. Third, the decision is inconsistent with prior case law,
specifically the California Supreme Court’s decision in Loder v. City of Glendale, which Ross
itself partly relied upon. And finally, Ross contradicts the Americans With Disabilities Act and
the California FEHA statute by refusing to obligate the defendant employer to conduct an
individualized inquiry to determine whether Ross’ disability and the reasonable accommodation
of medical marijuana posed a threat to the health or safety of its workplace.

A. Legislative Intent of the CUA

Ross negates the overall purpose of the CUA and misinterprets the statute’s legislative
intent. The decision expressly ignored public statements made by prominent legislators who
urged the court to rule in favor of the petitioner Gary Ross because the statute was never
intended to preclude cannabis patients from gainful employment. In an amicus brief authored
by Assembly Member Mark Leno and several others, state legislators instructed the court to
reverse the Court of Appeals decision because it “misstates the intent of the Legislature.”
Furthermore, legislators wrote that the CUA, as applied to the state’s FEHA laws, did require
accommodation of medical cannabis patients.

74 See A.B. 2279, 2008–2009 Leg., Reg. Sess. (Cal. 2008). Although the bill passed in both the Senate and the
75 CAL. HEALTH & SAFETY CODE § 11362.5 (b) (1) (A) (Deering, LEXIS through Ch. 643 of the 2009-2010 Reg.
Sess.).
77 See 42 U.S.C.S. § 12112 (b) (5) (A) (LEXIS through PL. 111-112); CAL. GOV. CODE § 12940 (a) (1) (2) (Deering,
LEXIS through Ch. 643 of the 2009-2010 Reg. Sess).
78 See Ross, 42 Cal. 4th at 934 (George, C.J., concurring and dissenting). The dissenting judges opposed ruling in
favor of the defendant employer because such a result would imply the statute was meant to “disqualify [users] from
employment.” Id.
79 Brief for Gary Ross, et. al. as Amici Curiae Supporting Petitioner at 8, Ross v. RagingWire Telecommunications,
80 Id. The brief also supported off-duty usage of marijuana and acknowledged employers’ concerns that individuals
would be smoking marijuana “on the job.” Id. at 6.

12
Ross’ affirmation of the lower court decision prompted legislators to propose a bill that would answer any doubt regarding the statute’s authority over employment law issues. Introduced by Leno in February 2008, A.B. 2279 attempted to overturn the controversial decision and redefine the purpose of the California Health and Safety Code. This bill barred an employer from discriminating against employees who legitimately used medicinal marijuana and protected them from wrongful termination on the basis of their status as cannabis patients. More specifically, the bill would have supplemented the California Health and Safety Code with new language that explicitly spoke to medical marijuana use in the workforce. It also made it unlawful for employers to discriminate medical marijuana patients because of their status and allowed users to sue if their rights had been violated as long as they did not use marijuana while at work or during employment hours.

Lawmakers incorporated language to quell opposition by addressing at least three of the concerns raised by the court in Ross. First, the bill acknowledged Ross’ reservations about employees being under the influence while at work by only permitting marijuana usage outside the workplace and during off-duty hours. Second, A.B. 2279 expressly allowed employers to terminate employees or take corrective measures against individuals impaired at work or during

81 A.B. 2279, 2007 – 2008 Leg., Reg. Sess. (Cal. 2008), available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2251-2300/ab_2279_bill_20080702_amended_sen_v95.pdf. This proposal was not the first time legislators have amended the California Health and Safety Code. In 2003, legislators enacted the Medical Marijuana Program Act, which offered more detailed explanations of CUA provisions. See supra note 65. Proposed as S.B. 420, it provided definitions for terms, including “physician” and “primary caregiver,” and also categorized the types of ailments and symptoms that would generally be alleviated through medical marijuana. Id.; See also Cameron Mostaghim, Roadside Seizures of Medical Marijuana: Public Safety and Public Policy as Limitations Upon Transporting and the Return of Lawfully Seized Medical Marijuana, 36 W. St. U. L. Rev. 89, 92 (2008).
83 Id. The bill states 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.” Id.
84 Id.
85 Id. By limiting a person’s access inside the workplace, employers could feel secure that fewer employees were coming into work high or under the influence of marijuana. Id.
work hours. Finally, the bill reduced workplace health and safety concerns by excluding certain users in “safety-sensitive” positions from the CUA’s protection. Legislators hoped that by resolving the doubts raised in Ross, the bill would balance both the employer’s and patient’s interests.

The creation of A.B. 2279 proved that legislators had intended for the CUA to offer protection to marijuana patients beyond the criminal context. Considering that many users are still productive members of the workforce, the bill could never have been designed to solely support unemployed medical cannabis patients or exclude the people it aimed to protect. By construing the CUA the way it did, Ross suggests that users should anticipate the possibility of losing their jobs if they continue using the substance, a prospect legislators had never supported. The enactment of a proposition like A.B. 2279, may still involve either taking the bill to the voters, as legislators did with Proposition 215, or eliciting the help of federal officials.

86 Id. Legislators made the decision optional as to whether certain employees should be reasonably accommodated, recognizing that some employees who used marijuana off-duty could still be impaired at work and could endanger the health and safety of others. Id.
87 Id. A safety-sensitive position is a “position in which medical cannabis-affected performance could endanger the health and safety of others.” Examples of safety-sensitive positions include jobs that involve duties with a great level of trust or responsibility, or where any kind of errors “in judgment, inattentiveness or diminished coordination, dexterity,” could result in mistakes that would jeopardize another’s safety. Id.
89 Brief for Gary Ross, supra note 79, at 4.
90 AMERICANS FOR SAFE ACCESS, supra note 88. Assembly Member Leno said the bill provided the “clarification” needed by the Court and also reversed “a decision that puts every medical cannabis patient in jeopardy of losing their job without due cause.” Moreover, more unemployed workers would put a strain on the state’s already weakened state resources, such as MediCal and other social services programs. Id. at 2.
91 Opponents of A.B. 2279 criticized the bill for its lack of precision because it did not list all the types of occupations that would qualify as being safety-sensitive and it neglected to guide employers on what to do with employees who were still under the effects of off-duty consumption of marijuana when they first arrived to begin their workdays. See Cathleen S. Yonahara, Medical Marijuana Patients Score Legislative Victory, CALIFORNIA EMPLOYMENT LAW LETTER, Apr. 25, 2008, available at 18. No. 2. Cal. Emp. L. Letter 4 (Westlaw 2009).
B. The Plain Meaning of the CUA

Ross also deviated from the plain language of the CUA by permitting the defendant to discharge Gary Ross because of his status. Under Section B of the CUA, the statute indicates that users and their physicians are protected against “criminal prosecution or sanction.” As the words ‘criminal prosecution’ stand separately from the word ‘sanction,’ the statute could be interpreted as prohibiting all forms of sanctions, including those that exist beyond criminal law. Since the statute merely prohibits sanctions, but does not classify what types of sanctions are excluded, punishments arising from even employment disputes should not be permitted. Thus, Ross incorrectly interpreted this provision when it permitted an employment sanction.

C. Prior Case Law and Precedent

Ross also incorrectly applied a prevailing judicial test to determine whether an employer should accommodate an employee’s disability. In Loder, a California resident challenged the city’s policy for mandatory drug tests for all government positions as violating privacy laws and the Fourth Amendment. Even though the plaintiff contended the California Confidentiality of Medical Information Act protected him from disclosing medical information to outside parties, the court held the employer’s right to ensure the health and safety of its employees outweighs any privacy concerns where the applicant is currently “engaging in [illegal] conduct before the employer finalizes any hiring decision.”

The Loder majority reached this conclusion by articulating a two-prong standard that employers must follow while testing their applicants. First, applicants must provide a urine

---

92 CAL. HEALTH & SAFETY CODE § 11362.5 (b) (1) (B) (Deering, LEXIS through Ch. 643 of the 2009-2010 Reg. Sess.).
93 See Ross, 42 Cal.4th at 936.
94 See id.
96 Id. at 859. See CAL CIV CODE § 56 (Deering, LEXIS through Ch. 643 of the 2009-2010 Reg. Sess.).
97 Loder, 14 Cal.4th at 897.
sample to look for the following substances: 1) amphetamines and methamphetamines 2) benzodiazepines, such as Valium 3) barbiturates 4) cocaine 5) methadone 6) methaqualone 7) opiates, including codeine, heroin and morphine 8) phencyclidine 9) THC, the compound found in marijuana and 10) alcohol. 98 Second, if the test reveals any of these substances, then the burden shifts to the applicant to provide a legitimate medical explanation for the presence of these substances or otherwise face disqualification. 99

Using this standard, the court in Ross could have easily arrived at the opposite conclusion and held that medical marijuana users satisfy this test. Under Loder, assuming an applicant tests positive for one of the enumerated substances, the burden shifts to the applicant to provide a legitimate medical explanation for the presence of drugs.100 If an applicant can provide that explanation, then an employer would not be justified in taking adverse employment actions, unless the employer’s reasons outweighed the employee’s reasons.101 Gary Ross had provided a medical explanation for his usage of marijuana when he handed his employer a doctor’s note describing his condition and treatment.102 Assuming this doctor’s note qualified as a legitimate medical explanation, the plaintiff would have met his burden under Loder, making his termination illegal. 103

D. Ross Is Inconsistent With Federal Disability Law

Finally, Ross conflicts with the Americans With Disabilities Act. Cases decided under the ADA and its legislative history strongly suggest that this federal statute offers employment

98 Id. at 855.
99 Id.
100 Id. 855-56.
101 Id.
102 Ross, 42 Cal.4th at 936-37 (discussing that patients with a doctor’s recommendation have protection under the statute).
103 Id.
protection to medical marijuana patients.\textsuperscript{104} In order to sue an employer under the ADA, a medical marijuana user must establish that he or she is disabled within the meaning of the statute.\textsuperscript{105} This would require the plaintiff to prove that he or she falls under the definition of the term, “disability,” which requires that the plaintiff has 1) a physical or mental impairment which substantially limits one or more of that person’s major life activities; or 2) has a record of such an impairment; or 3) is regarded by the employer as having such an impairment.\textsuperscript{106} In the employment context, an individual would qualify if he or she can show the impairment restricts the ability to perform either a “class of jobs or a broad range of jobs” when compared to an average person with comparable training, skills and abilities.\textsuperscript{107}

Even under the ADA’s strict definition, many medical marijuana users should easily classify as being disabled. Though the ADA does not apply to anyone using illegal drugs, the statute should protect these users because cannabis has been legalized in several states for

\textsuperscript{104} Vitiello, supra note 48, at 735. According to 1989 records from a Senate hearing with the Committee on Labor and Human Resources and the Subcommittee on the Handicapped, a Deputy Attorney General wrote the ADA should not be construed in a way that would “penalize” persons who were using controlled substances under the supervision of medical professionals as part of treatment, especially to alleviate the side-effects of chemotherapy. As long as such persons qualified as legal drug users of another program, such as the Compassionate Use Act, the ADA permitted use of marijuana for medical purposes. \textit{Id.}

\textsuperscript{105} 42 U.S.C.S. § 12102 (1) (LEXIS through PL. 111-112).

\textsuperscript{106} \textit{Id.} §§ 12102 (1) (A) – (C); 29 C.F.R. §§ 1630.2 (g-j) (2009) (discussing that major life activities are basic activities, such as walking, working, speaking, breathing and caring for oneself). The term “substantially limits” does not include any temporary or non-chronic impairment and involves a balancing of the following factors: the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long-term impact, or expected permanent or long-term impact of, or resulting from, the impairment. 29 C.F.R. §1630.2 (j)(2) (2009). See 29 C.F.R. §§ 1630.2 (k), (l) (2009). The amended ADA now states that the substantial limitation component must be evaluated “without regard to the ameliorative effects of mitigating measures such as medications.” 42 U.S.C.S. § 12102 (4) (E) (i) (I) (LEXIS through PL. 111-112).

\textsuperscript{107} 29 C.F.R. § 1630.2 (j) (3) (i) (2009). For example, a person with a back condition would qualify because he or she could not perform all types of heavy labor jobs. \textit{Id.} But an inability to perform a single, particular job does not qualify, for example, a pilot who must wear eyeglasses is only restricted from flying commercial airliners but may still act as a co-pilot or pilot for a courier service. \textit{See} 29 C.F.R. pt. 1630 appx. § 1630.2 (j) (2009). There are also other factors a court may use in assessing whether the ability to work has been affected and they include: the geographical area to which the individual has reasonable access; and the number and types of other jobs that utilize both similar and different training and knowledge from which the individual would be disqualified in that area. 29 C.F.R. §§ 1630.2 (j) (3) (ii) (A), (B) (2009).
medicinal purposes. Moreover, a medical marijuana patient would probably be able to prove the impairment substantially limited some major life activity given that cannabis is generally used to treat serious conditions, such as cancer, AIDS and chronic pain, which typically involve severe adverse symptoms, that cannot be controlled by more traditional treatment methods.

Once medical marijuana users have proven they are disabled under the ADA, their employers must engage in an individualized inquiry to determine whether they deserve reasonable accommodations. This individualized inquiry should include assessing whether the patient needs to take medications to alleviate his or her condition. For example in *Brooks v. General Nutrition Co.*, a California federal court held the plaintiff, who suffered from cerebral palsy and needed marijuana for his pain, should have the opportunity to prove that his employer terminated him for using the substance and that he deserved reasonable accommodations.

Likewise, in *Alvarez v. Fountainhead, Inc.*, a California federal court upheld the plaintiff student’s request to carry an asthma inhaler despite the defendant school’s “no medications

---

108 29 C.F.R. §§ 1630.3 (a) - (c) (2009). Those who are wrongly perceived as using illegal drugs will not be excluded. Id.

109 See Dvorak v. Clean Water Services, 319 F. App’x 538 (9th Cir. 2009) (holding that a cannabis user should be allowed to sue under the ADA for allegedly being terminated for using medicinal marijuana). The Ninth Circuit Court of Appeals also granted disability status to medical marijuana patients under the ADA for their conditions. Id. The plaintiff in this case held a job that involved the usage of heavy machinery and long hours in physically demanding situations. See Dvorak v. Clean Water Services, 432 F.Supp.2d 1090 (D. Oregon 2006).

110 A reasonable accommodation is any modification or adjustment to the job application process or work environment that would allow the individual with a disability to enjoy “benefits and privileges” and employment opportunities without stereotype or prejudices. 29 C.F.R. § 1630.2(o) (2009). Only individuals who possess the necessary prerequisites for the position in question and can perform the essential functions of the job with or without reasonable accommodations will qualify. 29 C.F.R. § 1630.2 (n) (2009); See also 29 C.F.R. pt. 1630 appx. § 1630.2 (n) (2009).

111 Such an individualized inquiry should involve a case-by-case analysis where both the employee and employer engage in a “flexible, interactive process” that includes the following: analyzing the particular job involved and its essential functions; consulting with the individual to discover the exact job-related limitations imposed by the disability and how an accommodation can overcome those limits; identifying the types of accommodations available; and considering the individual’s preference in accommodations. 29 C.F.R. pt. 1630 appx. § 1630.9 (2009) See also Calero-Cerezo, 355 F.3d 6 (1st Cir. 2004) (barring an employer from denying reasonable accommodations to the attorney employee because the employer failed to engage in an individualized inquiry after discovering the employee was on clinical depression medication).

112 Brooks v. General Nutrition Co., 2009 WL 635706 (S.D. Cal. 2009). The court also came to its decision because GNC had consistently deemed the employee an “exemplary employee” despite his condition. Id. at 2.
policy.” And in a later case, even though the Ninth Circuit held for a defendant employer, which fired an airline employee for using Marinol, the court acknowledged an employee’s right to have the opportunity to explain positive results from a drug test.

The ADA would not protect medical marijuana patients whose use created an “undue hardship” or threatened the safety or health of others. Where employers believe an individual poses a direct threat to the health and safety of others, they must show that the risk is significant, which means there is a high probability of substantial harm. Jurisdictions have dismissed plaintiffs’ claims to use medications on the job that would cause serious side-effects. But these jobs have typically involved the operation of heavy machinery, which would endanger others if the medications caused drowsiness or significant impairment that would likely lead to some injury or harm.

Off-duty use of medical marijuana should not exempt a cannabis patient from ADA protection, unless the employer can prove that a safety or health risk still exists during the work

---

114 Saridakis v. United Airlines, 24 F.App’x 813, 815 (9th Cir. 2001). See also Smartt v. Charlotte Hous. Auth., 1998 WL 760866 (W.D.N.C. 1998) (holding that defendant employer need not accommodate an employee’s request to push back her start time but should accommodate her need to take the medication, Effexor).
116 29 C.F.R § 1630.2 (r) (2009). If the accommodation would not eliminate the threat or reduce it to an acceptable level, then the employer is not obligated to obey the request. 29 C.F.R. pt. 1630 appx. § 1630.2 (r) (2009). Employers should also consult with the opinion of medical doctors, who have specific knowledge of the disability, and the experiences of the individuals themselves. Id.; See Alvarez, 55 F.Supp.2d at 1055-56 (rejecting the defendant’s argument that changing its policy to accommodate one student would create an undue hardship and expense on the school’s budget when there was no evidence that such an accommodation would be a direct threat to the health and safety of the other students).
117 See Quinney v. Swire Coca-Cola, USA, 2009 U.S. Dist. LEXIS 42098 (2009) (holding that no reasonable accommodation must be given to a plaintiff whose prescription medications made him drowsy while on the job, which required him to operate a motor vehicle).
118 Id.
119 See Darnell v. Thermafiber, Inc., 417 F.3d 657 (7th Cir. 2004) (affirming an employer’s decision to terminate a diabetic employee whose inability to control his own disease supported the employer’s claim there was a substantial likelihood for harm if the employee continued working as a machine operator as he often became unconscious, confused and used impaired judgment); Hill v. Kansas City Area Transp. Auth., 181 F.3d 891 (8th Cir. 1999) (denying the plaintiff’s ADA claim because the plaintiff was taking medications that consistently caused her to fall asleep while on the job as a school bus driver).
day. Even under the FEHA, the California statute under which Ross was decided, employers can modify their companies’ rules to accommodate marijuana consumption outside of work. 120 Thus, the court in Ross erred when it allowed the employer to discharge the plaintiff without considering how the employer could accommodate his disability. 121

Had Ross obligated the defendant to engage in an individualized inquiry as the ADA commands, it would have likely found that his off-duty usage did not pose a health or safety risk. If Ross had only used marijuana outside of work or off-duty, then his conduct would have posed the same risks as if he had used other types of prescription medications. 122 As marijuana is not different from other prescription medications, such as Vicodin, Ritalin or Valium, that also have a potential for abuse and cognitive impairment, employees using medical marijuana would experience similar side-effects as those that result from these other medications. 123

Furthermore, an individualized inquiry would have also shown that Ross was no more likely to be excessively absent or unproductive than prescription medication users. 124 The employer had not shown conclusive evidence that positive testers would not perform satisfactorily on the job and become bad employees. 125 Moreover, off-duty use would have minimal consequences on the health and safety of other employees, weakening the employer’s argument against accommodation. 126 Thus, Ross would have had a cause of action under the

120 See Ross, 42 Cal. 4th at 939. The FEHA’s provisions were modeled after the ADA and allow plaintiffs to sue under California law for disability claims. See Cal. Gov. Code §§ 12940 (a) (1), (2) (Deering, LEXIS through Ch. 643 of the 2009-2010 Reg. Sess.).
121 See Ross, 42 Cal. 4th at 939.
122 See id. at 941.
123 See id.
124 See id. The dissenting judges stated that “no evidence before this court establishes that use of a controlled substance under a doctor’s recommendation poses the same risks of excessive absences and diminished productivity that a majority of this court relied on…” Thus, only where an employer finds that an employee is abusing drugs should the employer’s concerns for health and safety prevail. Id.
125 See id.
126 See id.
ADA that his off-duty usage of medical marijuana would not pose a significant threat to the safety and health of his employees.

**Amend the CUA or Devise a Judicial Solution**

A minor amendment to the California Health and Safety Code could give cannabis patients the immediate legal protection they were intended to have under that statute. One possible solution is to amend the CUA by simply expanding upon one word. Under Section B, the statute states that patients and their primary caregivers are not subject to “criminal prosecution or sanction.” As previously stated, the word ‘or’ implies that legislators intended for users and doctors to be immune from all sanctions rather than only criminal sanctions. However, to strengthen this provision, legislators should change that phrase to “criminal prosecutions or any form of public or private sanction.” Even this small change would clarify that adverse employment actions based on medical marijuana usage would classify as a sanction under the statute.

Until the statute is amended, courts may have to devise a test to determine whether an employment decision based on cannabis use violates the CUA. A revised version of the test articulated in _Loder_ may provide a better solution to this problem. The _Loder_ court stated that where an individual can provide a “legitimate medical explanation” for the presence of any unusual substances found in urine samples, the employer is not justified to take adverse action

---

127 CAL. HEALTH & SAFETY CODE § 11362.5 (b) (1) (B) (Deering, LEXIS through Ch. 643 of the 2009-2010 Reg. Sess.) (emphasis added).
128 See Ross, 42 Cal.4th at 936.
129 It could take years of active lobbying by medical marijuana advocates before an amendment gets passed, especially given the setback of A.B. 2279. See AMERICANS FOR SAFE ACCESS, ACTIVIST NEWSLETTER, OCTOBER 2008 1, http://www.safeaccessnow.org/downloads/ASA_oct08_newsletter.pdf.
130 Although A.B. 2279 provided a solution – allow marijuana usage away from the workplace – it still raised many concerns and never fully instructed courts on what they should do with employers who may have valid reasons for discharging their employees, despite off-duty usage. See Yonahara, _supra_ note 91.
against that individual.\(^\text{131}\) Thus, once a California resident shows medical proof from a physician that he or she is using marijuana for medical purposes, the person should technically be exempt from being discharged.\(^\text{132}\)

An expansion of the *Loder* test would balance competing interests and thwart individuals from using medical marijuana to deceive employers. Weighing the employer’s reasons against the employee’s reasons could settle disputes as to whether the patient’s marijuana usage adversely affects the employer’s business or exposes other employees to health and safety concerns. An example of such a test could be as follows:

“Where an employee has a legitimate medical explanation from a licensed physician that he or she is using marijuana for medical purposes and is engaging in such usage while off-duty, then an employer may not discharge that employee unless the employer can show that the employee’s on-the-job conduct substantially harms the workplace environment or substantially affects the health and safety of other employees.”

By using the words, “substantially harms” and “substantially affects,” an employer would have to meet a high burden of proving that medical marijuana usage negatively impacted the work environment and posed a significant risk to the health and safety of others. Thus, once the employee showed that a licensed physician approved of the marijuana usage and consumption of the substance only occurs off-duty, the burden would shift to the employer to refute the employee’s claims.\(^\text{133}\)

**CONCLUSION**

*Ross v. RagingWire Telecommunications Inc.* does not comport with both state and federal law. First, its narrow construction of the CUA undermines the statute’s overall purpose

\(^{131}\) *Loder*, 14 Cal.4th at 856.

\(^{132}\) See id. Such a test would have to be tailored to screen individuals who are either using marijuana for nonmedical purposes or obtaining falsified notes from individuals posing as physicians. *Id.*

\(^{133}\) If this modified *Loder* test were applied to *Ross*, it would show that Ross’ employer wrongly terminated him. The defendant did not discuss whether off-duty usage subjected other employees to health and safety risks. *Ross*, 42 Cal.4th at 939-40. But Ross had evidence that his usage would not affect the workplace nor reduce his ability to be an efficient and productive employee. Ross also had proof that his work ethic and productivity would not be impaired by marijuana as he had held several similar positions in the past with no negative consequences. *Id.*
and directly contradicts both legislative and voter intent. Second, the Court misused state case law and precedent to arrive at its conclusion. Finally, Ross misinterpreted disability laws, which strongly suggest that medical marijuana users have a cause of action against employers who terminate them for using the substance.

The best protection for medical marijuana users against sanctions outside the criminal context would be to amend the CUA. If such an amendment is not possible, then the CUA must be judicially remedied to safeguard legitimate cannabis patients whose use of medical marijuana alleviates their pain and does not threaten the health and safety of the workplace.