Clearing the Smoke on Medical Marijuana Users in the Workplace

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ABSTRACT

Medical marijuana users are protected against criminal prosecution in 15 states, yet their protection as employees is much less certain. Courts in several states with medical marijuana statutes have refused to provide protection for medical marijuana-using employees, even where the use has had no effect on their performance. Yet these decisions may not control the rights of medical marijuana users in other states where the statutory wording differs. Employers looking for guidance should consider the protections of the Americans with Disabilities Act (ADA) and state disability nondiscrimination statutes. Many medical marijuana users may qualify for protection as persons with disabilities, or their employer may be regarding them as disabled, yet a disparate treatment claim may not arise under the ADA because marijuana use is still illegal under federal law. However, medical marijuana users may still succeed with a claim of disparate impact or inappropriate medical examination under the ADA. In addition, state disability protections may provide medical marijuana users with protection against disparate treatment and the right to accommodations. In analyzing such claims, employers should conduct an individualized analysis of the effects of the marijuana usage on the ability of the person’s ability to perform their job duties, based on a legitimate medical opinion, rather than assuming that any medical marijuana user is unfit for work.
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Wal-Mart employee Joseph Casias was discharged after testing positive for marijuana, despite his status as a former employee of the month. As a registered medical marihuana user for his sinus cancer & brain tumor, Mr. Casias thought that he was protected against discharge under Michigan’s Medical Marijuana Act (“MMMA”). Wal-Mart believes he is not. The trial court has agreed with Wal-Mart and dismissed Mr. Casias’ complaint, finding that Michigan’s statute was not intended to prevent the discharge of employees who use medical marijuana. Three other states with medical marijuana statutes have also failed to extend their protections to medical marijuana-using employees or applicants.

Despite these decisions in their favor, employers are still looking for concrete guidance regarding its employees who are medical marijuana users. Employers’ need for guidance was evident in the survey responses of employers attending a recent seminar on medical marijuana use by employees. The need for guidance comes in part from the limitations of the reasoning in the court decisions which have been made thus far. First, other courts may determine that Michigan’s medical marijuana statute and other statutes like it do provide protection against adverse action by employers, since employees’ rights depend heavily on the interpretation of the specific wording of each medical marijuana statute. Secondly, the discharge of medical marijuana users could violate protections against discrimination based on a disability, either under the Americans with Disabilities Act (“ADA”) or state disability nondiscrimination statutes. The protections of both the ADA and state protections will be explored in this article.

Fifteen states now provide a defense to criminal prosecution for users of medical marijuana.\(^4\) Thirteen other states have legislation pending in 2011 that would legalize medical use of marijuana, some of which include protections for marijuana-using employees.\(^5\) Adoption of these protections resulted from overwhelming public opinion in favor of the legalization of prescribed marijuana to treat pain and suffering.\(^6\) The benefits of marijuana as medicine for its analgesic effects, as well as its role as an anti-emetic and appetite stimulant, are well-accepted by many, if not all, within the medical community.\(^7\) For example, cannabinoids found in marijuana are known to relieve pain in patients who cannot find relief and/or suffer adverse side effects from other analgesics.\(^8\) Under these protective statutes, patients who have been recommended by a health care provider to use marijuana for various medical purposes are protected from prosecution under state criminal statutes.

A medical marijuana user may be able to find protection against discharge as a person with a disability, under at least some provisions of the ADA and state disability nondiscrimination protections. The ADA specifically covers individuals who are dependent on illegal drugs, so long as they are not a current user.\(^9\) Under these restrictions, a current medical marijuana user


\(^5\) Connecticut HB 5139, 5900, SB 329, 345, 1015; Kansas HB 2330; Maryland HB 291, SB 308; Massachusetts HB 625; Mississippi SB 2672; New York SB 2774; Oklahoma SB 573; West Virginia HB 3251. Bills including protections for employees or applicants: Delaware SB 17; Idaho HB 19; Illinois HB 0030; Iowa SB 266; New Hampshire HB 442. Summaries & links to bills available at http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481.


\(^8\) Institute of Medicine, Marijuana and Medicine, supra note 5, at 140.

\(^9\) 42 U.S.C. § 12114(a) (West 2011).
may be excluded from ADA’s protection against disparate treatment, since medical marijuana is still classified as a Schedule I controlled substance under federal law. At the same time, most state disability nondiscrimination laws do not specifically exclude users of a substance illegal under federal law, so medical marijuana users may still enjoy coverage under those statutes.

Medical marijuana users may also have a claim for disparate impact under the ADA and state disability nondiscrimination statutes. An employer policy which excludes users of medical marijuana could have a greater impact on persons with disabilities than on other applicants or employees. Given such an impact, employers would need to establish a job-related justification for excluding medical marijuana users.

In states with medical marijuana statutes, employers may be interested in screening applicants or employees to detect use of marijuana and other illegal substances. But employers must keep in mind that the ADA prohibits the requirement of medical examinations for applicants without a conditional offer or current employees unless the examination furthers a business necessity. Even though a drug test itself is not a medical examination, an employer may be limited in inquiring about the medical reasons underlying an applicant’s positive drug test. For current employees, an employer would need to establish a job-related necessity for requiring a medical examination that goes beyond a simple drug test.

Employers may assert that even if medical marijuana users are covered by the ADA or state nondiscrimination laws, they pose a direct threat or are not otherwise qualified to perform the duties of the position, either because they are impaired or because the employer does not tolerate any past use of illegal drugs by its employees. If the medical marijuana user is arguably protected by the ADA or state nondiscrimination laws, employers need to show that current medical marijuana use by a particular employee prevents him or her from performing essential job duties. This article will explore whether medical marijuana users are not otherwise qualified because they test positive on employers’ drug tests, and therefore lose protection against discrimination by employers.

Medical marijuana users who do not come to work in an impaired state should be provided with the protection of nondiscrimination laws under two main principles from those protections. First, disability protections continually emphasize an individual analysis related to the person’s abilities and their particular position. Under this approach, a medical marijuana user should be protected against discharge, unless their use has a direct effect on their ability to perform their essential job duties. Second, an employer’s conclusion that the medical marijuana user is unable to perform should be based on medical opinion, much like the need for a medical opinion to support a contention that other employees with disabilities pose a direct threat. Protections

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against discrimination should also extend to medical marijuana users under the reasoning of drug testing case law, which emphasizes the need for job-relatedness to justify a drug test and the importance of medical review of positive test results.

Under these guidelines, employers would still be allowed to reject an applicant or discharge an employee whose medical marijuana use actually interferes with their work performance. At the same time, users who can still perform well, and perhaps even better, because of their medical marijuana use would be protected. Such protection would fulfill the purposes of disability nondiscrimination statutes as well as the justifications for the passage of 15 medical marijuana statutes.

I. Employer Need for Guidance

Since most medical marijuana statues have been passed in recent years, many employers lack clarity on how to treat medical marijuana users. Questions arise particularly for employers who test applicants and employees for illegal drug use. Employers attending a one day seminar on employee use of medical marijuana in October 2010 in East Lansing, Michigan, were asked about their policies regarding drug testing and the treatment of medical marijuana users in particular. The results revealed a lack of understanding as to how to respond to positive drug test results from medical marijuana users, and whether disability nondiscrimination laws would apply to those applicants or employees.

Of the 58 responses received from employers, 29 (50%) indicated that they require drug testing of all applicants and 2 (3%) required testing for some positions. Drug testing was required of employees under the following circumstances:

- Random testing for all positions: 10 (17%)
- Random testing for some positions: 4 (7%)
- With suspicion of drug use only: 18 (31%)

All of the employers who only tested for some positions included only drivers under their mandatory testing policy.

Positive results from drug testing have a significant effect for both applicants and employees of these employers. Among the 25 who explained their policy for applicants, 22 (88%) do not hire applicants who test positive, 2 (8%) make a case-by-case determination, and only 1 (4%) may give an opportunity to retest. Employees who test positive are most likely discharged: of the 33 employers responding, 14 (42%) discharge any employee who tests positive, an additional eight
(32%) will respond with discipline up to and including discharge, and another three (12%) will suspend the employee. In addition, four (16%) employers treat a positive test on a case-by-case basis, two (8%) offer a last chance agreement, and two (8%) offer rehabilitation, at least for the first positive result.

Of those who test applicants and/or employees, 37.5% question the testee about medical marijuana use if they have a positive test result, whereas 41% do not ask if they are using medical marijuana. Another 22% of the employers indicated that they did not have a policy on asking about medical marijuana or that it was under review. Among these same employers, 87% ask about prescriptions or dietary habits that could have caused the positive test result. In response to a separate survey circulated two months following the seminar, 48% of the same group of employers indicated that those who test positive are asked about medical marijuana use, whereas 12.5% indicated they would not be asked, and 19% still did not have a definite policy. Clearly this group of employers are divided on how to handle a positive drug test from a medical marijuana user, and many are not treating medical marijuana like other prescription drugs.

Employers are also divided on providing nondiscrimination protection to medical marijuana users. Of the 29 employers responding prior to the seminar, 14% indicated that a medical marijuana user would be treated as a person with a disability, whereas 48% of the employers would not extend those protections to medical marijuana users, and 38% were undecided. Following the seminar, 30% of the 23 employers responding indicated that they would provide no accommodations to medical marijuana users, and 30% were at least willing to consider accommodations such as a leave of absence or change of position, while 39% were undecided. These responses indicate employers’ need for clarity on the protections which should be afforded to medical marijuana users. The survey also indicates that medical marijuana users may not be enjoying the protections of disability nondiscrimination laws.

II. State Medical Marijuana Statutes

The fifteen states with medical marijuana statutes all protect a valid user of medical marijuana from prosecution for any criminal charge connected with that use of marijuana, including possession of marijuana. These statutes condition this exemption from prosecution on the state’s approval of the person as a medical marijuana user, and their compliance with any restriction on use or possession, such as limits on amounts possessed.\(^\text{13}\) For example, the Michigan Medical Marijuana Act (MMMA) provides that a qualifying patient “shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege” for the medical use of marijuana in accordance with that Act.\(^\text{14}\)

\(^{13}\)See note 4, supra. In addition, Maryland requires that medical use of marijuana be considered in sentencing for marijuana possession. MD Crim. Law §5-402 (West 2011).

Four states which prohibit the prosecution of medical marijuana users also include some affirmative statement regarding the right to use marijuana for medical purposes. Under the reasoning of the Oregon case discussed below, the inclusion of an affirmative right plays an important factor in whether a state statute is preempted by the federal Controlled Substances Act. Eight of the states which prohibit prosecution of medical marijuana users also state that medical users of marijuana should not suffer any civil penalty or disciplinary action by a professional licensing board.

Four states allow prosecution for being under the influence or the use of medical marijuana “in the workplace.” Unfortunately, the term “under the influence” as used in most of these statutes is not defined. Arizona’s statute adopted in November 2010 states that an employer need not allow an employee to work under the influence of marijuana, but does explain that the protection that a registered patient shall not be considered to be under the influence “solely based on the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment.”

In three states, Arizona, Michigan, and Rhode Island, the prohibition against the denial of rights of medical marijuana users arguably extends to the employment setting. The MMMA provides that a qualifying patient “shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau.” This wording suggests that an employee should not be discharged or otherwise disciplined based only on their status as a medical marijuana user. However, the Casias opinion, discussed further below, held that “business” was a modifier for “professional licensing board or bureau” and therefore, the MMMA did not create separate protection for medical marijuana users as employees.

Rhode Island’s statute includes almost identical wording, which could be interpreted under the Casias court’s reasoning as only providing protection against loss of a license based on one’s status as a medical marijuana user. However, Rhode Island also includes a separate statement that “No school, employer or landlord may refuse to enroll, employ or lease to or otherwise penalize a person solely for his or her status as a cardholder.” This affirmative protection protects applicants and employees against adverse action based on their medical marijuana user status.

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15 Emerald Steel, supra note 3, 230 P.3d 518.
16 Montana, Nevada, New Jersey, Oregon, Arizona, Maine, Michigan, Rhode Island
18 Id.
Like Rhode Island, Arizona’s statute states that an “employer may not discriminate against a person in hiring, termination or imposing any term or condition or employment or otherwise penalize a person” based on their cardholder status or a positive drug test, unless the patient has “used, possessed or was impaired by marijuana” at the place of or during his employment.\(^{21}\) An Arizona employer may discipline or terminate an employee if it would “lose a monetary or licensing related benefit under federal law or regulations” if it failed to do so.\(^{22}\) This wording suggests that an employee should not be discharged or otherwise disciplined based only on their status as a medical marijuana user.

In Maine, an employee could not be subjected to “any disciplinary action by a business or occupation” based on his or her lawful use of medical marijuana. In addition, an employer in Maine could not refuse to employ someone based solely on that person’s status as a medical marijuana user, unless that employment would put the employer in violation of federal law or cause it to lose a federal contract or funding. Maine’s specific protection for employees was repealed effective January 1, 2011.

While the majority of medical marijuana states do not provide affirmative protections for employees, nine of the medical marijuana statutes explicitly state that an employer is not required to accommodate use of marijuana “in the workplace.”\(^{23}\) The Alaska statute, for example, provides that an employer is not required to accommodate the use of marijuana in any place of employment.\(^{24}\) Michigan’s statute goes one step further and also states that an employer is not required to accommodate an employee working under the influence of marijuana.\(^{25}\) This language limited to use or being under the influence at work could suggest that accommodation may be required for use outside of the workplace.

None of the medical marijuana statutes address the accommodation of medical marijuana users who do not use at work or come to work under the influence. These medical marijuana users may still face discharge, since THC metabolites can be detected long after a user is impaired or influenced by the use of marijuana.\(^{26}\) By negative inference, the failure to mention


\(^{22}\) Id.


\(^{26}\) See 49 C.F.R. § 219.309(2)(positive urine test does not measure impairment); People v. Feezel, 486 Mich. 184 (2010)(barring prosecution for being under the influence of marijuana based on presence of metabolites); California NORML Guide Interpreting Drug Test Results, available at http://www.canorml.org/healthfacts/drugtestguide/drugtestdetection.html;
accommodation for employees who tests positive on an employer-administered drug test but are not “under the influence” at work suggests that they could seek accommodations. Thus, a medical marijuana user could be entitled to accommodation in the form of an exception to a zero tolerance for positive drug tests.

**State Court Challenges to MMA Protections**

State courts in California, Washington and Oregon have refused to protect medical marijuana users from discharge or refusal to hire based on that use, largely because of its illegality under federal law. Most recently, a federal district court in Michigan dismissed the claim of Joseph Casias, finding that the MMMA did not provide protection against discharge of medical marijuana users.

The three state supreme courts heard claims by employees who were medical marijuana users when they were discharged or not hired by an employer. Each of these courts refused to allow the employee’s claim to continue for reasons specific to each state’s medical marijuana statute. However, these decisions may not have a determinative effect in states with different wording in their medical marijuana statutes.

A challenge by a medical marijuana-using employee may come out differently in other states with medical marijuana protections. First, unlike the California, Washington and Oregon medical marijuana laws, the rights of users in the three states providing specific protections against disciplinary action may not be affected by those decisions in states which did not include those protections. Second, the Oregon decision rested largely on the fact that its statute specifically authorizes marijuana use. In contrast, most other medical marijuana statutes only bar prosecution of medical marijuana users, which may undermine a finding that those statutes are preempted by the federal Controlled Substances Act (“CSA”).

California’s Supreme Court was the first to decide a claim by a medical marijuana-using employee in 2008. Under California’s Compassionate Use Act (“CUA”), Gary Ross was protected against criminal prosecution for his use of marijuana to treat chronic pain. However, nothing in the CUA protected him against discharge or required accommodation by his employer after his post-hire drug test was positive. In addition, California’s Fair Employment & Housing

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27 Ross, 42 Cal. 4th at 940; Roe, 152 Wash. App. 388; and Emerald Steel, 348 Or. 159, supra note 3.
29 Emerald Steel, 348 Or. At 169-86.
30 Ross, supra note 3, 42 Cal. 4th at 926.
31 Id.
32 Id.
Act ("FEHA") protects against discrimination based on one’s disability, but still allows employers to deny employment to persons who test positive for illegal drugs.\(^{33}\)

Ross had argued that an employer had an obligation to accommodate use of medical marijuana away from work, since the state nondiscrimination law required accommodation in general, and the medical marijuana statute only stated that employers need not accommodate the use of medical marijuana at the jobsite.\(^{34}\) Even though an employer could be required to accommodate a user of prescription drugs, no accommodation for medical marijuana was required under the CUA because state law could not “completely legalize marijuana for medical purposes because the drug remains illegal under federal law.”\(^{35}\)

The illegality of marijuana use under federal law was the basis for denying protection to Ross.\(^{36}\) Despite a lack of any evidence that he was under the influence or impaired by his marijuana use at work, the protections of FEHA were denied because marijuana continues to be listed as a controlled substance under the federal Controlled Substances Act and because the Drug Free Workplace Act prohibits employees from using controlled substances at work.\(^{37}\) Yet, as the dissent in *Ross* points out, the drug-free workplace laws do not address the possession or use of illegal drugs away from the jobsite, and “nothing in those laws would prevent an employer that knowingly accepted an employee's use of marijuana as a medical treatment at the employee's home from obtaining drug-free workplace certification.”\(^{38}\)

In addition to over-reading the Drug Free Workplace Act, the California Supreme Court inappropriately relied on the reasoning in one of its previous drug testing cases concerning a city’s attempt to test all applicants and employees seeking promotion for illegal drug use.\(^{39}\) That decision held that an employer’s drug testing program of current employees violated the Fourth Amendment by failing to consider “the nature of the position sought.”\(^{40}\) The "operational realities of the workplace"--including the legitimate interest in a drug-free workplace--did not provide a sufficient justification for requiring all public employees who apply for promotion to undergo drug testing.\(^{41}\) Rather, the reasonableness of such testing was dependent upon the nature and duties of the position in question.\(^{42}\)

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\(^{33}\) Id. at 927.  
\(^{34}\) Id. at 929.  
\(^{35}\) Id. at 926 (citing 21 U.S.C. §§ 812, 844(a)). See *Gonzales v. Raich*, 545 U.S. 1, 26–29 (2005); *United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483, 491–495 (2001).  
\(^{36}\) Id.  
\(^{37}\) Id. at 926-27 (citing *Loder v. City of Glendale*, 14 Cal.4th 846 (1997)).  
\(^{38}\) Id. at 938.  
\(^{39}\) *Loder*, 14 Cal.4th 846.  
\(^{40}\) 14 Cal. 4th at 877-78.  
\(^{41}\) Id. at 878.  
\(^{42}\) 14 Cal. 4th at 880.
As the Ross dissent pointed out, the court’s earlier reasoning dictates that only positive drug tests lacking a legitimate medical explanation are generally a sufficient basis to deny employment.\footnote{43} The focus should be on the likely impact of employee drug use on the employer’s business operations to determine whether drug testing is justified.\footnote{44} One commentator on the Ross decision was willing to assume that impact, stating that employers can justify the discharge of medical marijuana users based on Drug-Free Workplace Statutes, the potential adverse impact on employee performance, including more health problems and longer term effects such as respiratory ailments and decreased cognitive ability, and potential employer liability for harm caused by employees using marijuana.\footnote{45}

After an expansive reading of its earlier drug testing decision,\footnote{46} the Ross court concluded that an employer could discharge medical marijuana users based on “marijuana’s potential for abuse [and] the employer’s legitimate interest in whether an employee uses the drug,” and the fact that its use was still illegal under federal law.\footnote{47} This reasoning seems overly broad, given that the state’s nondiscrimination law only excludes from its definition of disability “psychoactive substances use disorders resulting from the current unlawful use of controlled substances or other drugs.”\footnote{48} In most situations a medical marijuana user would not have a disorder resulting from their use of marijuana. In addition, the nondiscrimination law’s lack of reference to federal law to define “illegal” supports medical marijuana users’ position that they are not excluded from its coverage. As it stands, however, the Ross decision would undermine the claims of medical marijuana users in other states with similar statutes that do not provide specific protection against adverse employment actions based on medical marijuana use.

The Supreme Court of California and the Court of Appeals in Washington have both addressed a potential public policy exception to employment at will based on their states’ medical marijuana statutes. In California, neither the right to refuse medical treatment not a broader right of medical self-determination supported a public policy exception for medical marijuana users.\footnote{49} The Ross court refused to hold that the Compassionate Use Act created a public policy exception giving an employee the right to retain employment despite use of medical marijuana.\footnote{50} Similarly, the Washington Court refused to recognize a public policy exception, because its medical

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\footnote{44} Id.
\footnote{46} Loder, supra note 33, 14 Cal. 4th at 883.
\footnote{47} Ross, supra note 3, 42 Cal. 4th at 927.
\footnote{48} CA Gov’t § 12926 (West 2011).
\footnote{49} 42 Cal. 4th at 932-33.
\footnote{50} Id. at 933.
\end{flushleft}
The marijuana statute was aimed only at protecting users from criminal prosecution. The reasoning in these decisions would undermine the wrongful discharge claims of medical marijuana-using employees in other states that do not provide specific protection against adverse employment actions based on their medical marijuana use.

Like the California statute, Washington’s statute does not address employment issues directly, only providing a defense to criminal prosecution related to marijuana. Immediately following the section providing this affirmative defense, the Washington statute states that “Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.” The claim by the medical marijuana user in Washington was based on an employer’s withdrawal of a job offer after he tested positive for marijuana on a drug screen.

Washington’s Supreme Court held that this provision does not prohibit private employers from discharging employees who use medical marijuana. Instead, because the penalization language immediately follows the reference to those charged with violating a state criminal law, this language only restricts the State from imposing penalties “ancillary to criminal prosecution,” rather than providing some broader protection of a user’s employment. This reasoning would undermine claims by medical marijuana users in other states which only prohibit criminal prosecution without any specific reference to employee rights.

A third claim by a medical marijuana user challenging an employment decision was decided by the Supreme Court of Oregon in April 2010. This medical marijuana user was discharged after testing positive on a drug test. He asserted a claim under Oregon’s statute that prohibits discrimination based on disability, but does not apply to “any job applicant or employee who is currently engaging in the illegal use of drugs if the employer takes action based on that conduct.”

This employee could not take advantage of his status as a medical marijuana user under the disability nondiscrimination statute’s definition of “illegal use of drugs”:

any use of drugs, the possession or distribution of which is unlawful

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51 Roe, supra note 3, 152 Wn. App. at 399.
54 Roe, 152 Wn. App. at 392.
55 152 Wn. App. at 397.
56 Id.
57 Emerald Steel, supra note 3, 348 Ore. 159.
58 Id. at 162-63.
under state law or under the federal Controlled Substances Act [...] but
does not include the use of a drug taken under supervision of a licensed
health care professional, or other uses authorized under the Controlled
Substances Act or under other provisions of state or federal law.\textsuperscript{60}

The Oregon Supreme Court held that the federal Controlled Substances Act ("CSA")\textsuperscript{61}
preempted the Oregon Medical Marijuana Act (OMMA) to the extent that state law affirmatively
authorized the use of medical marijuana.\textsuperscript{62} States are free to pass laws "on the same subject
matter" as the CSA unless there is a "positive conflict" between state and federal law "so that the
two cannot consistently stand together."\textsuperscript{63} Even though it is not impossible to comply with both
the CSA and Oregon’s OMMA, the Court held that the OMMA poses an obstacle to the
accomplishment and execution of the full purposes and objectives of Congress behind the
passage of the CSA, because the OMMA states that a medical marijuana user “may engage in ... the medical use of marijuana.”\textsuperscript{64}

The Oregon Supreme Court also concluded that coverage for those who use a controlled
substance “under supervision of a licensed health care professional” refers to those medical and
research uses that the CSA authorizes.\textsuperscript{65} Consequently, an employee who used marijuana for
medical purposes as permitted by the OMMA was still engaged in illegal drug use, because the
CSA does not authorize such use.\textsuperscript{66} Where the employer discharged the employee based on that
use, the protections of Oregon’s disability nondiscrimination statute\textsuperscript{67} did not apply.\textsuperscript{68}

The Oregon decision may have a direct impact on the rights of employees in three states which
have adopted medical marijuana statutes that include affirmative language. Specifically, these
states arguably provide the following affirmative right to use marijuana, rather than simply
prohibiting prosecution:

Colorado: “A patient may engage in the medical use of marijuana, with no more
marijuana than is medically necessary to address a debilitating medical
condition.”\textsuperscript{69}

Hawaii: “medical use of marijuana by a qualifying patient shall be permitted”\textsuperscript{70}

\textsuperscript{60} Id. at § 659A.122.
\textsuperscript{61} 21 U.S.C.S. § 801 et seq. (West 2011).
\textsuperscript{62} 348 Ore. at 169-186.
\textsuperscript{63} Id. at 175.
\textsuperscript{64} Id.
\textsuperscript{65} Id. at 188.
\textsuperscript{66} Id.
\textsuperscript{67} Or. Rev. Stat. § 659A.112 (West 2011).
\textsuperscript{68} Emerald Steel, 348 Ore. at 189-90.
\textsuperscript{69} Colo. Const. Art. XVIII, Section 14; 22.
Maine: registered patient “may possess up to 2 1/2 ounces”\(^{71}\)

A court reviewing the rights of a medical marijuana user in one of these states could follow the Oregon Supreme Court’s reasoning that the CSA preempts the medical marijuana statutes in those states to the extent that those state statutes stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the CSA.

At the same time, the Oregon decision should have little impact on the protection provided by disability nondiscrimination statutes in the other medical marijuana states. Since those other states only provide a defense to prosecution, and do not provide an affirmative right to use marijuana, a court would find it much more difficult to invalidate those medical marijuana statutes as preempted by the Controlled Substances Act. Statutes which simply prohibit the prosecution of medical marijuana use in that state do not prevent federal prosecution there, and consequently should not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the CSA. Therefore, a medical marijuana user’s protection as a person with a disability would depend on whether they are excluded from a state disability nondiscrimination law’s protections for other reasons, which are discussed below.

Most recently, a federal district court has refused to extend the protections of Michigan’s medical marijuana statute, the MMMA, to protect employees against discharge based on their medical marijuana use.\(^{72}\) That court refused to find an implied right of action despite the statute’s language that

> [a] qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act.\(^{73}\)

The court held that “business,” as used in this section, only modifies “licensing board or bureau” and does not provide employees with protection against disciplinary action by an employer.\(^{74}\)

Aside from the wording itself, the court relied on the absence of any reference to employment in the MMMA’s declarations, and the lack of "explicit legislative statements prohibiting the

\(^{72}\) Casias, supra note 2, 2011 U.S. Dist. LEXIS 15244 at *19-33.
\(^{73}\) Mich. Comp. Laws § 333.26424(a) (West 2011).
\(^{74}\) 2011 U.S. Dist. LEXIS 15244 at *24-25.
discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty.” 75 This narrow reading of the MMMA was justified because “the impacts of any private employment regulation in the MMMA would be broadly felt and would extend the statute's protections much further than the MMMA meant to do.” 76

The Cassis decision’s reasoning should not affect the rights of medical marijuana using employees in Arizona and Rhode Island, the other two states which mention discipline or discharge. Those medical marijuana statutes specifically protect employees and applicants based on their status as a medical marijuana cardholder, unless the employee used, possessed or was impaired at work. 77

These decisions demonstrate that in most states which prohibit prosecution for medical marijuana use, employees or applicants who use marijuana as treatment may lack any specific protection against discharge or rejection as an applicant. Therefore, these users may need to turn to protections potentially available under the Americans with Disabilities Act or their states’ disability nondiscrimination laws to obtain or retain employment with employers who choose to discharge or screen based on positive drug tests.

III. Americans with Disabilities Act Protections

The Americans with Disabilities Act (ADA) could provide protection to a medical marijuana user in a number of ways. The ADA covers employees or applicants who are substantially limited in a major life activity. 78 First, the user may be substantially limited in a major life activity by the impairment that warrants his or her use of medical marijuana. Even if the impairment itself is not substantially limiting, the user could be covered by the ADA if his or her medical treatment of medical marijuana substantially limits a major life activity. 79 That employee with a disability could potentially bring a disparate treatment claim if he or she was discharged because of that the use of medical marijuana as treatment for that condition.

Second, a medical marijuana user could be covered by the ADA because he or she is regarded as disabled by his or her employer. 80 This user would be protected against discrimination, but not entitled to accommodations, based on the employer’s perception that he or she is drug dependent or otherwise substantially limited in a major life activity, such as the ability to work. However, even if a medical marijuana user is a person with a disability or regarded as one, the ADA would

75 Id. at *30.
76 Id. at *32.
still not extend its protections to a medical marijuana user if he or she falls within the ADA’s exclusion of current illegal drug users.

Third, an employer may violate the ADA by using a positive drug screen to reject applicants or discharge employees who have a disability. Such a screen may have a disparate impact on persons with disabilities, and then the employer would need to establish the business necessity and job-relatedness of such a screen. 81

Lastly, an employer may violate the ADA by going beyond a drug test administered to a medical marijuana user to inquire into the reasons for a positive drug test. Such inquiries could violate the limitations on medical examinations included in the ADA. 82 For current employees, such a medical examination would only be justified based on business necessity. The ability to bring claims based disparate impact or the limitations on medical examinations arguably do not depend on the person also being a “qualified person” with a disability. Consequently, a medical marijuana user may be able to assert these claims even if he or she is considered to be a current illegal drug user under the ADA.

A. Regarded As Claims

A medical marijuana user could be covered by the ADA under the “regarded as” category based on an employer’s perception that his or her impairment or treatment for that impairment prevents him or her from working, when it does not. 83 Similarly, an applicant or employee who is erroneously regarded as being engaged in illegal drug use, but is not engaged in such use, could fit under the “regarded as disabled” protections of the ADA if the employer perceived the person as substantially limited in a major life activity because of the alleged drug use. 84 The “regarded as” protection against discrimination in the ADA intends to cover employer decisions based on “deeply rooted and seemingly rational presumptions about the abilities of the disabled.” 85 These “regarded as” cases demonstrate the importance of careful, individual consideration of medical information about an applicant or employee, rather than making blanket exclusionary decisions based on an employer’s perceptions.

A “regarded as” claim could arise if an employer mistakenly believes an employee’s use of medical marijuana substantially limits one or more major life activities, when in fact the impairment is not substantially limiting. 86 A medical marijuana user may be regarded by his or her employer as unable to work. Prior to the 2008 amendments to the ADA, to be regarded as disabled based on the major life activity of working, a medical marijuana user would need to

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84 42 U.S.C. § 12114(b)(3).
85 Taylor, 177 F.3d at 193.
establish that the employer perceived him or her as unable to work in a broad class or wide range of jobs as compared to the average person having comparable training, skills and abilities, rather than being unable to perform just one job. Where an employee’s medication were perceived as only preventing him or her from performing a particular job, such as operation of certain dangerous machinery, the employee was not regarded as disabled.

A “regarded as” claim by a medical marijuana user is similar to ADA coverage of an employee who was discharged after testing positive for methamphetamine. The positive test resulted from his use of a prescription drug, but resulted in his discharge. The claim survived a motion for summary judgment because a jury could conclude that the discharge which occurred shortly after that drug test was based on the employer’s belief that the employee was limited in the major life activity.

Other “regarded as” claims similarly have been established by employees who were using prescription drugs which the employer perceived as affecting their ability to work. In these cases, an employer’s refusal to employ someone in any job in their organization generally has established that the employer regarded him or her as disabled in their ability to work. For one drug-dependent employee, this type of ban meant that she was regarded as disabled, because the employer would not allow her to return to work in any position until she was completely off pain medications. These cases suggest that if an employer refuses to employ a medical marijuana user in any position, that person is being regarded as substantially limited in his or her ability to work, and would be protected against discrimination under the ADA.

An employer’s consideration or failure to consider medical information about an employee’s ability to work can help to establish a “regarded as” claim, especially where discipline or

87 Daugherty v. Sajar Plastics, Inc., 544 F.3d 696, 704-05 (6th Cir. 2008) (doctor’s opinion that employee was unable to perform previous job based on potential side effects of medications, his physical impairment, and the employer’s zero-drug policy applicable to narcotics as well as illegal drugs, considering his dosage levels and his job description). See also Schuler v. SuperValu, Inc., 336 F.3d 702, 705 (8th Cir. 2003)(employer did not view employee as unable to perform other positions), EEOC v. Hunt Transp., Inc., 321 F.3d 69, 76 (2d Cir. 2003)(applicants used medications with side effects perceived as impairing tractor trailer driving); Pittari v. Am. Eagle Airlines, Inc., 468 F.3d 1056, 1062 (8th Cir. 2006)(cognitive limitations from head injury not perceived as limiting employment in broad range of jobs with airline).
88 544 F.3d at 706.
90 Id.
91 Id. at 496.
93 Wysong v. Dow Chemical Co., 503 F.3d 441, 453 (6th Cir. 2007).
discharge was based on myths or stereotypes associated with a disability.\textsuperscript{94} For example, summary judgment was denied Verizon where it had imposed and retained restrictions on an employee even after her physicians had lifted restrictions on her work activities which prevented her from performing any field work.\textsuperscript{95} These cases suggest that if a medical marijuana user’s physician believes that he or she is capable of working, but the employer refuses to continue that employment, the employer may be regarding him or her as disabled.

An employer has an obligation to conduct an individualized review of the medical information on which it bases its conclusions, to avoid regarding someone as having a disability. For example, an automobile mechanic was able to establish questions of fact as to whether his employer regarded him as disabled where an employer rejected his application based on his use of two prescribed narcotic pain medications.\textsuperscript{96} The employer alleged that the position involved working in dangerous conditions.\textsuperscript{97} One examining physician determined that he could not perform those “safety sensitive” duties while on narcotics, while his physician believed that the low level narcotics would not affect his ability to work.\textsuperscript{98} The employer allegedly had a policy prohibiting people in safety-sensitive positions from taking narcotic medications while on duty or during specific periods prior to specific but broad categories of work.\textsuperscript{99} The court concluded that there was a question of fact as to whether the employer physician’s review of the employee’s medical records and her discussion with the various doctors, instead of performing an assessment on the applicant herself, amounted to an individual assessment under the ADA, particularly where one of the physicians testified that she would have liked the applicant to undergo an additional test to see if he was capable of doing the job.\textsuperscript{100}

Like this mechanic, another employee succeeded in showing that his city employer regarded him as disabled where the city was motivated by a physician’s opinion that potential side effects of medication limited firefighter’s ability to work in any safety sensitive position.\textsuperscript{101} That

\begin{footnotesize}
\begin{enumerate}
\item See Doebele v. Sprint/United Mgmt. Co., 342 F.3d 1117, 1134 (10th Cir. 2003); McKenzie v. Dovala, 242 F.3d 967, 971 (10th Cir. 2001). See also 29 C.F.R. §1630.2(l) (2011)(employer regards an employee as disabled if decision based on “myth, fear or stereotype”).
\item Id. at *19-20 (job involved working at heights and around moving engines, moving in and out of dangerous areas, use of tools, and required alertness and concentration at all times to avoid injuring himself or others).
\item Id.
\item Id. at *20.
\end{enumerate}
\end{footnotesize}
physician refused to release him to work in any safety sensitive position or for any job driving a
vehicle due to the potential side effects of the medications, even though the employee did not
actually experience such side effects and did not use the medications while on duty.\textsuperscript{102} The
physician mistakenly believed that either the potential side effects of medications or the
underlying anxiety disorder substantially limited his major life activity of working in any safety
sensitive position, meaning that he was regarded as being disabled in his ability to work.\textsuperscript{103}

These opinions establish that if a medical marijuana user were excluded from a group of
positions with an employer based on his or her marijuana use, that user could be protected under
the ADA because the employer has regarded him or her as disabled. If the employer lacks a
medical opinion to support its presumptions about the effects of that person’s marijuana use on
their ability to perform the duties of a particular position, then that employer will find it even
more difficult to avoid the protections of the ADA.

The ADA has been amended to expand the coverage of persons who do not have an impairment
but are perceived by the employer as having an impairment. Under the original ADA, the person
seeking protection would need to establish that the employer perceived him or her as being
substantially limited in a major life activity based on that perceived impairment. Under the ADA
Amendments Act (“ADAAA”), coverage can be based on an employer’s inaccurate belief that a
person has an impairment, regardless of whether the employer wrongly believed them to be
substantially limited in a major life activity. Therefore, a medical marijuana user who is
wrongly perceived as having a drug addiction or some other impairment would only need to
establish that perception, rather than also establishing that the employer believed that the
impairment was substantially limiting.

Under the ADAAA’s revised definition for being regarded as, an employer who disqualifies an
employee based on the use of prescription drugs may be required to comply with the ADA. The
ADAAA does not require that an employee establish that he is regarding as being substantially
limited in a major life activity – it is enough that the employer falsely regard him as having an
impairment. A medical marijuana user who is regarded as disabled could be protected against
discrimination even if the condition for which he or she uses marijuana does not constitute a
substantially limiting impairment under the ADA.

B. ADA’s Exclusion of Illegal Drug Users

Even if a medical marijuana-using employee or applicant is disabled or regarded as being
disabled, ADA coverage depends on that user being otherwise qualified for the position in

\textsuperscript{102} 2008 U.S. Dist. LEXIS 79992 at *7.
\textsuperscript{103} /d.
question. Generally, to be otherwise qualified, the applicant or employee must be able to perform the essential functions of the position, either with or without reasonable accommodation.\textsuperscript{104} More specifically, the ADA states that a “qualified individual with a disability” does not include “any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.”\textsuperscript{105}

In addition, the ADA provides that an employer may prohibit the illegal use of drugs at the workplace, and require that employees behave in conformance with the requirements of the Drug-Free Workplace Act of 1988.\textsuperscript{106} Illegal drug users can also be held to the same qualification standards for employment or job performance and behavior as required of other employees.\textsuperscript{107}

The exclusion of medical marijuana users from the ADA’s protections depends on whether their marijuana use should be considered illegal under the ADA. The ADA defines “illegal use of drugs” as the use of drugs which are unlawful to possess or distribute under the Controlled Substances Act (“CSA”).\textsuperscript{108} Yet the definition specifically excludes the use of a drug “taken under the supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.”\textsuperscript{109} In considering the appropriateness of excluding medical marijuana users from the ADA’s coverage, it is important to keep in mind that marijuana was not controlled at the federal level until the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970.\textsuperscript{110}

The legislative history of the ADA favors including medical marijuana users under its protections. In the Senate hearing, the Deputy Attorney General John P. Mackey noted that the ADA was not intended to penalize employees who are using "controlled substances" such as marijuana or morphine under the supervision of medical professionals as part of a course of treatment, and “these persons would fall under the same category as those who are users of legal

\begin{itemize}
\item \textsuperscript{104} 42 U.S.C. § 12112(a) (West 2011).
\item \textsuperscript{105} 42 U.S.C. § 12114(a) (West 2011).
\item \textsuperscript{106} 42 U.S.C. § 12114(c) (West 2011).
\item \textsuperscript{107} Id.
\item \textsuperscript{108} 42 U.S.C. § 12111(6) (citing 21 U.S.C. § 801 et seq.). The CSA defines marijuana as “all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. 21 U.S.C. § 802 (16)(West 2011).
\item \textsuperscript{109} 42 U.S.C. § 12111(6)(West 2011).
\end{itemize}
drugs.” Yet the House Committee stated that they, "[do] not intend to affect the Controlled Substances Act.”

There is no question that marijuana remains a Schedule I drug under the CSA. A substance can be designated as a Schedule I controlled substance if it meets these criteria:

1. high potential for abuse
2. no currently accepted medical use in treatment in the United States; and
3. lack of accepted safety for use of the drug or other substance under medical supervision.

Marijuana’s categorization as a schedule I drug has been supported by the Food and Drug Administration, which has continued to conclude that "there are no sound scientific studies" supporting the therapeutic use of cannabis.

Based on these findings, the Supreme Court has held that the federal CSA can continue to criminalize marijuana use as a Schedule I drug, even if a state allows its medical use. Congress had a rational basis for determining that the CSA fell within its authority to regulate interstate commerce under the Commerce Clause, because one state’s legalization statute had significant impact on both the supply and demand sides of the marijuana market. The basis for CSA’s coverage of marijuana includes marijuana’s high potential for abuse, and the lack of accepted medical use or any accepted safe use in medically supervised treatment.

In contrast to this decision, the Supreme Court has more recently rejected the U.S. Attorney General’s interpretation of the CSA which would have prohibited the use of prescription drugs to assist suicide, where state law specifically authorized such a use of prescription drugs. Like the medical marijuana statutes, the Oregon Death With Dignity Act exempts physicians from civil or criminal liability based on their dispensing or prescription of a lethal dose of drugs for a

115 Gonzales v. Raich, 545 U.S. 1, 29 (2005).
116 Id. at 22.
117 Id. at 12-14, n. 20.
terminally ill patient. The Court has also noted, in upholding the enforceability of the Driver’s Privacy Protection Act of 1994, that the CSA “does not require the [state legislature] to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.” These cases create some ambiguity as to whether a state medical marijuana law should be respected in the enacting state, even though marijuana remains illegal under the CSA.

Even though marijuana remains under the CSA’s Schedule I, the CSA allows for use of a controlled prescription or order, from a practitioner, while acting in the course of his professional practice…. The CSA allows prescription of drugs only if they have a "currently accepted medical use," and requires a "medical purpose" for dispensing the least controlled substances of those on the schedules. In its reporting provision, the CSA defines a "valid prescription" as one "issued for a legitimate medical purpose." Yet the Supreme Court has found that the CSA does not indicate any congressional intent to regulate the practice of medicine generally, leaving the states with latitude to legislate in this area. For this reason, the Court concluded that the Attorney General could not prevent a state from allowing its physicians to prescribe drugs to assist suicide.

Medical marijuana use could fall within the CSA’s exception for drugs taken under the supervision of a licensed healthcare professional. One federal district court assumed that medical marijuana was taken under the supervision of a healthcare professional, but still concluded that the physician-supervised drug must be an authorized drug use under the Controlled Substances Act or other provisions of Federal law. According to a brief submitted in Ross v. RagingWire on behalf of associations of physicians, nurses and other public health practitioners, "should a physician choose [to recommend the medical use of marijuana], a formal recommendation should be made in the context of a proper doctor-patient relationship and in

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119 Id. at 249; Or. Rev. Stat. § 127.800 et seq. (West 2011).
122 Gonzales v. Oregon, 546 U.S. at 257 (citing 21 U.S.C. § 812(b) and 829(c)).
124 Gonzales v. Oregon, 546 U.S. at 269.
125 Id. at 271-72. Note that the United States Attorney General has the authority under the CSA to reschedule substances based on their potential for abuse or dependence, their accepted medical use, and their accepted safety for use under medical supervision. Gonzales v. Raich, 545 U.S. 1, 14 (2005); 21 U.S.C. § 811.
126 Lieberman, supra note 110, 26 HOFSTRA LAB. & EMP. L.J. at 642.
compliance with the professional standards of the community.” Therefore, one can argue that if a doctor recommends the use of medical marijuana, that use is "under supervision," since its use is substantially similar to any other treatment a doctor may recommend or prescribe. 

The Ninth Circuit has rejected this argument in a claim by the medical marijuana user in California. The user argued that the CSA could not prohibit her possession of marijuana pursuant to a doctor’s order. The Court held that the Tenth Amendment did not prevent the criminalization of marijuana possession, even when possessed pursuant to a prescription. As one district court has since succinctly stated, “the federal government may criminalize behavior that is not criminalized under state law.”

These cases suggest that a medical marijuana user may be excluded from ADA protection against discrimination and its rights to accommodations as a person with a disability because marijuana use remains illegal under the CSA. However, this lack of protection does not prevent medical marijuana users from taking advantage of the ADA’s restriction on selection criteria with a disparate impact or its limitations on collection of medical information described below, which apply to persons without disabilities, or from turning to state disability nondiscrimination laws for protection.

C. Disparate Impact Claims under ADA

A medical marijuana user may have a claim for discrimination under Section 12112(b)(6) of the ADA, which states that an employer cannot use any selection criteria that results in the rejection of an individual with a disability or a class of individuals with disabilities “unless the standard, test or other selection criteria … is shown to be job-related for the position in question and is consistent with business necessity.” Since this section applies to any “individual with a disability” without the requirement that such an individual be “qualified,” it should apply to medical marijuana users even if they are considered to be illegal drug users. Two states with medical marijuana statutes also provide in their disability nondiscrimination statutes for claims based on the use of standards or criteria that discriminate on the basis of disability.

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128 Lieberman, supra note 110, 26 HOFSTRA LAB. & EMP. L.J. at 644.
129 Id.
130 Raich v. Gonzales, 500 F.3d 850, 867-68 (9th Cir. 2007).
131 Id.
132 Id.
One court has suggested that an ADA disparate impact claim may only be available to “qualified individuals with disabilities.”\(^{136}\) The Sixth Circuit explained that the ADA’s disparate impact prohibition should be limited to individuals with disabilities so as to “better give[] effect to Congress’s decision not to use the word "employees" in this subsection.”\(^{137}\) That court stated that the inclusion of the “qualified” modifier in Section 12112(a) of the statute means that only a “qualified individual with a disability” is covered by Section 12112(b)(6).\(^{138}\) Yet the decision does not turn on the distinction between qualified individuals with disabilities and other individuals with disabilities, since the plaintiffs in that action had no disabilities at all.\(^{139}\)

Standing to assert disparate impact claims by any individual with a disability, regardless of qualification, is supported by the inclusion of the “qualified” modifier in subsections (b)(2), (b)(4), and (b)(5). General rules of statutory construction would suggest that if Congress intended to limit disparate impact claims to qualified individuals with disabilities, it would have included the “qualified” modifier in Section (b)(6) as well.

Allowance of disparate impact claims by any person with a disability is also supported by decisions which have extended the protections of Section 12112(d)(2)\(^{140}\) and (d)(4)\(^{141}\) to employees or applicants who are not qualified persons with disabilities. Contrary to the Sixth Circuit’s reasoning, these claims by persons without disabilities have been allowed even though those sections fall under Section 12112(a).

In addition, the EEOC’s Enforcement Guidance states that the language of Section 12112(d) “makes clear that the ADA’s restrictions on inquiries and examinations apply to all employees, not just those with disabilities.”\(^{142}\) In contrast to the Sixth Circuit decision, those cases and Guidance attribute the use of “qualified” in Section 12112(a) as limiting claims under Section 12112(d) which, like the disparate impact section, further explains the term “discrimination” as

\(^{136}\) Bates v. Dura Auto. Sys., Inc., 625 F.3d 283, 2010 U.S. App. LEXIS 22903 at *8 (6th Cir. Nov. 3, 2010). See also Fuzzy v. S&B Engineers & Constructors, Ltd., 332 F.3d 301, 303 (5th Cir. 2003)(plaintiff without disability conceded he had no claim under 12112(b)(6)).

\(^{137}\) 625 F.3d at 285-86.

\(^{138}\) Id. at 285.

\(^{139}\) Id.

\(^{140}\) Roe v. Cheyenne Mountain Conf. Resort, Inc., 124 F.3d 1221, 1229 (10th Cir. 1997); Harrison v. Benchmark Elecs. Huntsville, Inc., 593 F.3d 1206, 1213-14 (11th Cir. 2010) (applying the ADA’s illegal inquiry provision as applying to applicants without proof of disability); Fredenburg v. Contra Costa County Dept of Health Servs., 172 F.3d 1176, 1182 (9th Cir. 1999).


\(^{142}\) Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), (EEOC, July 27, 2000), available at http://www.eeoc.gov/docs/guidance-inquiries.html
used in Section 12112(a). Therefore, a medical marijuana user should have standing to bring a disparate impact claim if he or she is a person with a disability.

A medical marijuana user could argue that an employer’s rejection or discharge based on their medical marijuana use has a disparate impact on persons with a disability for which medical marijuana is a viable treatment. A medical marijuana user would first need to show that an employer’s policy of excluding those who test positive for marijuana tends to screen out a greater proportion of persons with disabilities. If the testing excludes those who use medical marijuana as well as other prescription drugs, this disparate impact could be shown. This impact could be shown under the reasoning of the trial court in the Sixth Circuit case referenced above, which concluded that the practice of an employer that screened out individuals based on their prescription drug use, which are designed to treat serious physical and mental problems, tended to “screen out” individuals with disabilities.143

Such a qualification standard which screens out or tends to screen out an individual with a disability must be proven by the employer to be job-related and consistent with business necessity, and performance cannot be achieved through reasonable accommodation.144 Congress expressed its intention in the ADA that an employer can insist upon across-the-board qualification standards only if those standards "provide an accurate measure of an applicant's actual ability to perform the job . . . “145

Some federal courts have held that an employer can defend a safety-based qualification standard under this provision by showing a business necessity for the qualification, without proving that a particular employee who does not meet that qualification poses a direct threat.146 For example, Exxon established such a business necessity for a safety sensitive designation that would preclude employees who have participated in a substance abuse rehabilitation program based on 1) high exposure to catastrophic public, environmental, or employee incident; 2) a key and direct role in the operating process, if failure could cause a catastrophic incident; and 3) lack of direct supervision or very limited supervision.147

This business necessity requirement would apply to drug screens that tend to bar the employment of persons with disabilities, including medical marijuana users. To show “job-relatedness,” an employer must demonstrate that the qualification standard fairly and accurately measures the

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143 Bates, 650 F. Supp. 2d at 770.
146 EEOC v. Exxon, 203 F.3d 871, 873-74 (5th Cir. 2000).
individual's actual ability to perform the essential functions of the job. The qualification standard must have a predictive or significant correlation with performance of the job's essential functions. To be “consistent with business necessity,” the employer must show that the standard “substantially promote[s]” the business's needs. Further, the business necessity should not be met based only on “mere expediency.” To support a safety-based qualification standard that has an adverse impact, the employer must establish “the magnitude of possible harm as well as the probability of occurrence.”

Employers’ adverse actions based on prescription drug use have been challenged under the ADA’s disparate impact theory. In one such challenge, an employer was unable to justify screening out individuals whose prescription drug use violated the employer’s policy that an employee could not use legal prescription drugs if such use “adversely affected safety, company property, or job performance.” Despite prior accidents connected with workplace drug use, this employer was unable to establish on its motion for summary judgment that the drug testing was job related and consistent with business necessity. A reasonable juror could have concluded that this employer’s screening was “broader [and] more intrusive than necessary” because the employer automatically excluded all employees who took certain medications from working in any capacity for them, without any regard for individualized circumstances. The employer refused to even consider letters from an employee's physician stating that the employee was safe to perform his or her job while on a particular drug, because that doctor “doesn’t know what those essential functions and jobs are at every single aspect of our plant.”

This trial court rejected the employer’s position that it should be able to judge the risks at its plant and that it should not have to “wait for an accident to happen” before taking measures to protect employee safety. Despite that employer’s legitimate concerns, the employer needed to show “some realistic connection between the medical screening and the work performed,” for

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149 Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); Cf. Clady v. County of Los Angeles, 770 F.2d 1421, 1432 (9th Cir. 1985) (higher correlation required with greater adverse impact).

150 Cripe, 261 F.3d at 890 (quoting Bentivegna v. U.S. Dep’t of Labor, 694 F.2d 619, 621-22 (9th Cir. 1982) (interpreting term “business necessity” for purposes of the Rehabilitation Act of 1973)).

151 Id. at 890.

152 EEOC v. Exxon Corp., 203 F.3d at 875 (acceptable probability of incident will vary with potential hazard posed by particular position).

153 Bates, 650 F. Supp. 2d at 772. Even though this decision was reversed on appeal because these employees were not persons with disabilities, its reasoning is instructive for employers of medical marijuana users.

154 Id.

155 Id. at 771-72.

156 Id.

157 Id.
screening to be consistent with business necessity.\footnote{Id.} Employers should consider adopting a policy that balances the “health needs and individual circumstances of the employee with the legitimate needs of workplace safety.”\footnote{Id. at 772 n. 6.}

In a similar case, the court refused to affirm an employer’s policy that all insulin-dependent diabetics should be precluded from operating forklifts, and requiring an examination every three years to detect such conditions.\footnote{EEOC v. Murray, Inc., 175 F. Supp. 2d 1053, 1064-65 (M.D. Tenn. 2001).} The court refused to assume that all insulin-dependent diabetics -- or individuals with other specified medical conditions -- were incapable of meeting the need to stay alert while operating a forklift.\footnote{Id. at 1064.} By simply pointing out the dangers of operating forklifts generally, the employer failed to establish that these medical conditions always caused specific physical or mental limitations that prevented employees from operating forklifts safely.\footnote{Id. at 1064-65.} Instead, the employer needed to establish that all individuals with the specified medical conditions necessarily would be physically or mentally limited and consequently unable to perform the essential functions of the position.\footnote{Id. at 1065-66.}

These cases establish that where a screening tool used by an employer affects people with disabilities disproportionally, the employer must establish specifically that the tool is related to the positions for which it is used. 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. Reliance on drug screening with such a disparate impact should include consideration of any relevant medical opinions regarding an applicant that might establish that the tool is not in fact necessary and business-related. For medical marijuana users who are rejected or discharged based on their marijuana use, the employer should look to the medical evidence that might justify that adverse action, or might show that the use of marijuana outside of work has no negative impact on that user’s performance or safety in the workplace.

D. Medical Exams That Reveal Disabilities

In addition to barring screening tools that have disparate impact but no business necessity, the ADA limits the use of medical examinations by employers both during the hiring process and for current employees. A medical marijuana user who is questioned about their condition or treatment that resulted in a positive drug test could allege a violation of these limitations. The ADA prohibits the requirement of a medical examination prior to the presentation of a tentative
job offer, for persons with or without a disability.\textsuperscript{164} An employer may only make pre-employment inquiries of an applicant's ability “to perform job-related functions,” but not into whether the applicant is disabled.\textsuperscript{165}

Like the ADA, Vermont’s nondiscrimination statute prohibits a drug testing requirement unless an applicant has been given a conditional offer of employment.\textsuperscript{166} Applicants must be notified of the drug testing procedure and a list of the drugs to be tested, and the notice must state that therapeutic levels of medically-prescribed drugs tested will not be reported.\textsuperscript{167}

Employers who screen current employees for drug use may also need to justify testing of a medical marijuana user in their employ. For current employees, any inquiry as to whether an employee is an individual with a disability, or regarding the nature or severity of the disability should not occur unless such inquiry is “job-related and consistent with business necessity.”\textsuperscript{168} This requirement parallels the business necessity requirement for standards that have a disparate impact,\textsuperscript{169} but applies to persons with or without a disability.\textsuperscript{170} This limitation on the use of medical examinations protects employees who “may have good reasons for not wanting to reveal detailed information from their medical records which “could be embarrassing, and might actually exacerbate workplace prejudice.”\textsuperscript{171}

Administration of a test for illegal drug use alone would not be prohibited for pre-offer applicants or current employees. In fact, the ADA provides: “a test to determine the illegal use of drugs shall not be considered a medical examination.”\textsuperscript{172} The ADA also allows an employer to make “inquiries into the ability of an employee to perform job-related functions.”\textsuperscript{173}

\begin{itemize}
  \item \textsuperscript{164} 29 U.S.C. § 12112(d)(2) (West 2011). \textit{See} Harrison, supra note 138, 593 F.3d at 1212; Fredenburg v. Contra Costa County Dep’t of Health Servs., 172 F.3d 1176, 1182 (9th Cir. 1999); Murdock v. Washington, 193 F.3d 510, 512 (7th Cir. 1999); Griffin v. Steeltek, Inc., 160 F.3d 591, 594 (10th Cir. 1998); Conroy v. N.Y. State Dept. of Corr. Servs., 333 F.3d 88, 94 (2d Cir. 2003); Cossette v. Minn. Power & Light, 188 F.3d 964, 969-70 (8th Cir. 1999); Wice v. Gen. Motors Corp., 2008 U.S. Dist. LEXIS 106727, at *5; Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1229 (10th Cir. 1997).
  \item \textsuperscript{165} 42 U.S.C. § 12114(d)(1)(West 2011).
  \item \textsuperscript{167} Id. § 512(b)(2).
  \item \textsuperscript{168} 42 U.S.C. § 12112(d)(4)(A)(West 2011).
  \item \textsuperscript{169} See discussion at notes 142 - 162, supra.
  \item \textsuperscript{170} See note 148, supra.
  \item \textsuperscript{171} Taylor v. Phoenixville School District, 184 F.3d 296, 315 (3d Cir. 1999).
  \item \textsuperscript{172} 42 U.S.C. § 12114(d)(1)(West 2011).
  \item \textsuperscript{173} 42 U.S.C. § 12112(d)(4)(B)(West 2011).
\end{itemize}
In contrast, a medical examination is defined as “a procedure or test that seeks information about an individual's physical or mental impairments or health.” The EEOC’s Enforcement Guidelines provide seven factors tend to show that a test is a medical examination:

1. administered by a health care professional
2. interpreted by a health care professional
3. designed to reveal an impairment of physical or mental health
4. test is invasive
5. measures an employee's physiological responses to performing the task (as opposed to performance of a task)
6. normally is given in a medical setting
7. medical equipment is used

Even though a drug test alone is not a medical examination, questioning of an applicant or employee as part of a drug testing procedure can turn that test into a medical examination. The Sixth Circuit recently explained that, in contrast to requiring a doctor’s explanation as to the nature of an employee’s illness, inquiries as to whether an employee is taking prescription drugs or medication would constitute a medical examination. For example, an employee with depression and anxiety was subjected to a medical examination, rather than just job-related inquires, when he was asked to disclose past and present illnesses, mental conditions, other impairments and any drug use, and questions were overly broad, more intrusive than necessary, and not time limited.

Under this case law and the EEOC’s factors, a test that only reveals use of illegal drugs would not be prohibited. Yet a claim may arise where an employer gathers medical information in connection with a pre-offer drug test. Under this prohibition, an applicant whose job offer was withdrawn after she tested positive on a drug screen because of a prescription drug was allowed to proceed with her ADA claim even though the drug test itself was not a prohibited medical examination. Because the drug test detected the use of legal drugs in addition to illegal ones, it was considered to be a medical examination. The court refused to allow such a broad test, particularly where there was only a small cost associated with determining whether the detected drug was legal.

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178 Id. at 931.
179 Id.
one’s medical history, particularly if the employer then makes an employment decision based on that history.  

An employer can also violate Section 12112(d)(2) of the ADA by asking for a medical explanation as part of its drug testing procedure for applicants who have not been given a tentative job offer. An employer cannot ask an applicant targeted disability-related inquiries, including whether an applicant is an individual with a disability or about the nature or severity of such disability. In its ADA Enforcement Guidance, the EEOC has defined "disability-related" questions as those "likely to elicit information about a disability." Yet at the same time, no violation occurs where an employer asks a general question with many possible answers, and only some of those answers would contain disability-related information, because such a question is not 'disability-related.'

Employers may ask some questions to follow up on a positive drug test. The EEOC’s guidelines explain that an applicant who tests positive for illegal drug use may be asked about lawful drug use or possible explanations for the positive result other than the illegal use of drugs, including questions such as, “What medications have you taken that might have resulted in this positive test result?” or “Are you taking this medication under a lawful prescription?” Yet the legislative history of § 12112(d)(2) indicates that the drug-test exemption "should not conflict with the right of individuals who take drugs under medical supervision not to disclose their medical condition before a conditional offer of employment has been given." Under this guidance, an applicant who was questioned about his seizures following a pre-employment drug test established a violation of that section, where a supervisor was present during that questioning.

Under these standards, an applicant who is a medical marijuana user could be subjected to a prohibited medical examination if the employer requires a drug test prior to making a tentative job offer, and the testing includes follow up questions when the test comes back positive. Such

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180 Id. See also Rowles v. Automated Production Sys., 92 F. Supp. 2d 424 (M.D. Pa. 2000)(employer failed to give unequivocal indication that test was solely for detecting illegal drugs).
181 Harrison, supra note 139, 593 F.3d at 1212-13.
184 Id.
185 See 29 C.F.R. § 1630.3(a)(2011).
186 Enforcement Guidance, supra n. 181.
188 Harrison, supra note 139, 593 F.3d at 1216-17.
an examination would violate the ADA if the applicant is asked about his or her medical condition, or his or her prescribed or suggested use of marijuana. The alternatives would be for an employer to wait until after a tentative offer is made before requiring such an examination, or reject the applicant based on the positive drug test alone.

The medical examination of current employees, which would include medical-related questions that accompany a drug test, must be supported by business necessity. The business necessity for a medical examination of current employees can be established if that examination or inquiry is necessary to determine 1) whether the employee can perform job-related duties, if the employer can identify legitimate doubt regarding that employee’s capacity to perform his or her duties or 2) whether an employee’s absence or request for an absence is due to legitimate medical reasons, when the employer has reason to suspect abuse of an attendance policy.\(^{189}\)

The employer must carry its burden of showing that the asserted “business necessity” is vital to the business and that the examination or inquiry genuinely serves the asserted business necessity and is not broader or more intrusive than necessary.\(^{190}\) The examination or inquiry need not be the only way of achieving that business necessity, but the examination or inquiry must be “a reasonably effective method” of meeting that necessity.\(^{191}\)

Business necessity may be established if the employer needs to determine an employee’s fitness to return to duty.\(^{192}\) Yet an employer should only inquire if a person’s duties require certain traits that could be affected by that condition.\(^{193}\) If a medical inquiry relates to a concern for the safety of other employees, the employer may seek specific medical information or a physical examination designed to determine the person’s ability to work.\(^{194}\) In these circumstances, a court still requires an individual inquiry rather than a blanket policy requiring medical examinations.

Individualized inquiry saved the medical examination practices of General Motors (“GM”). For its employees with driving duties, GM referred employees with certain medical conditions, such

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\(^{189}\) *Conroy*, supra note 163, 333 F.3d at 97.

\(^{190}\) *Id.* at 97-98. *See also Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir. 2007) (employer bears burden to show ‘business necessity’ is vital to business and request for medical examination or inquiry is no broader or more intrusive than necessary).

\(^{191}\) *Id.*

\(^{192}\) *Wisbey v. City of Lincoln, Neb.*, 612 F.3d 667 (8th Cir. 2010)

\(^{193}\) *Id.* at 670. *See also Krocka v. City of Chicago*, 203 F.3d 507, 515 (7th Cir. 2000) (reasonable for city to require fitness-for-duty exam for police officer when employee was experiencing mental health issues); *Watson v. City of Miami Beach*, 177 F.3d 932, 935 (11th Cir. 1999) (fitness-for-duty exam of police officer that exhibited abnormal mental conditions was acceptable; city need not wait until perceived threat becomes real or questionable behavior results in injuries).

\(^{194}\) *Krocka*, 203 F.3d at 515.
as high blood pressure or diabetes, to their personal physicians. The personal physician then assured GM that the employee’s condition was under control and that the employees could perform the functions of the job. Thus, GM was not making employment decisions based upon generalized assumptions about physical and mental impairments without determining the individual capabilities of each employee with the specific impairment.

Unlike General Motors and the employer for the dispatcher position, a city was potentially liable under the ADA where it had ordered the medical examination of a firefighter. The city failed to establish that the examination was job-related and consistent with business necessity even though the doctor who reviewed the situation for the city had determined that he was not physically fit for duty, without conducting a physical examination. Despite his belief in the opinion of other doctors that he was not experiencing any side effects, and his belief that he was not taking any medications while on duty, the city’s doctor had merely speculated about the possible side effects from his medications.

This doctor’s inquiry was not individualized where he did not review and was not aware of any medical studies done on the side effects of these medications, he admitted that side effects vary from person to person, he did not do any further testing on the firefighter, and he did not attempt to discuss the possible side effects with the employee’s psychiatrist. The city’s doctor also admitted that the best information about his ability to safely perform his job is observation of him doing his job, which he failed to do.

In addition, an employer must show that the asserted “business necessity” is vital to the business. Business necessities may include ensuring workplace safety or curbing egregious absenteeism. Even if the reasons for the examination are valid, the employer must show that the examination or inquiry actually serves the business necessity asserted. For example, a city was required to show that medical questions asked of police officers were a reasonably effective method of achieving the goal of safe performance of an officer’s duties. These cases establish

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195 Wice, supra note 162, 2008 U.S. Dist. LEXIS 106727 at *8.
196 Id.
197 Id. See also Smith v. Chrysler Corp., 155 F.3d 799, 805 (6th Cir. 1998) (employees ought to be judged on abilities and relevant medical evidence, not “unfounded fear, prejudice, ignorance, or mythologies).
199 Id.
200 Id. at *14.
201 Id.
202 Id. at *15.
203 Conroy, supra note 153, 333 F.3d at 97; Thomas, supra note 177, 483 F.3d at 527.
204 Id.
205 Id. at 98.
206 Scott, supra note 175, 717 F. Supp. 2d at 1083. See also Watson v. City of Miami Beach, 177 F.3d 932 (11th Cir. 1999) (City acted properly in ordering fitness-for-duty examination where
that for an employer to justify a medical examination of a medical marijuana-using employee, the employer would need to establish a business justification for that examination based on the specific duties of the position.

Medical examinations consistent with business necessity should be limited to an evaluation of the employee's fitness for a specific type of work. The medical examination should not be broader or more intrusive than necessary to serve that interest. In a return to work situation, inquiries or examinations related to the specific medical condition for which the employee took leave typically will be justified, but the employer may not use the employee's leave as a justification for making “far-ranging disability-related inquiries or requiring an unrelated medical examination.”

Courts have made it clear that overly broad inquiries unrelated to an employee’s work violate the ADA. An employer should strive to use the least intrusive means possible to meet its reasons for gathering medical information. These cases suggest that employers who administer drug tests to medical marijuana – using employees should be cautious in requiring that those employees provide additional medical information to explain a positive drug test unless that information is directly related to that person’s job duties.

department reasonably perceived armed police officer to be mildly paranoid, hostile, and oppositional); Pennsylvania State Troopers Ass’n v. Miller, 621 F.Supp.2d 246 (M.D. Pa. 2008) (police asserted business necessity of detecting latent injuries that could impair members’ job performance); Brownfield v. City of Yakima, 612 F.3d 1140, 1146 (9th Cir. 2010).

207 Tice v. Centre Area Transp. Auth., 247 F.3d 506, 515 (3d Cir. 2001). See also EEOC v. Prevo’s Family Market, Inc., 135 F.3d 1089 (6th Cir. 1998), reh’g and suggestion for reh’g en banc denied, (Apr. 23, 1998)(food store’s request for medical examination of alleged HIV-positive produce clerk was job-related and consistent with business necessity where employee announced he was HIV-positive and job included frequent cuts and scrapes from using knives for cutting produce).

208 Conroy, supra note 162, 333 F.3d at 97-98. See also Rivera v. Smith, No. 07 Civ 3246, 2009 U.S. Dist. LEXIS 3523 at *4 (S.D.N.Y. Jan. 20, 2009)(employer’s requirement that employee submit to psychiatric examination before being allowed to return to work after co-worker complained that she felt threatened and unsafe by his behavior was appropriate business necessity to ensure safe work environment).


211 Conroy, supra note 162, 2005 U.S. Dist. LEXIS 12455 at *21. See also Garrison v. Baker Hughes Oilfield Operations, Inc., 287 F.3d 955, 960 (10th Cir. Okla. 2002) (results of medical inquiry or examination may not be used to disqualify persons who are currently able to perform essential functions of job based on fear or speculation that disability may indicate greater risk of future injury); Indegaard v. Georgia-Pacific Corp., No. Civ. 06-1317-PK 2010 U.S. Dist. LEXIS 69887 at *21 (D. Ore. June 14, 2010)(return to work following injury does not justify tests revealing information about physical impairments unrelated to any business necessity);
Important to potential claims by medical marijuana users, a question was overly intrusive and too broad where it asked employees about all types of drugs taken, including prescription and non-prescription, when the employer only need to know if the employee was using a drug that could affect his ability to do his job. To answer this question, an employee would need to disclose whether they were taking any medication, including over the counter medications and birth control. This employer failed to show that its inquiries were “no broader or more intrusive than necessary” to accomplish its goal of ensuring that the police officer could still safely do his job.

Employers may have a business necessity for medical inquiries if a particular employee poses a hazard. For example, blood tests for HIV and hepatitis did not violate ADA where the employee had disclosed after cutting himself while working that he had contracted hepatitis and other employees had come in contact with his blood. Therefore, the employer had a legitimate business concern to protect the health of its other employees, and the tests were job-related and consistent with the employer's need to ensure employee safety.

Similarly, an employer’s inquiries about an employee’s medications did not violate the ADA where he had previously discussed his nerve disorder and medications with co-workers and supervisors throughout his employment. This information led to the employer’s concern that the medications could have possible side effects including drowsiness. An actual history of drowsiness, accidents, or other poor driving behavior was not necessary to establish a business necessity for the inquiry, because “an employer should not have to wait for an accident to occur to justify taking preventative steps.”

These medical examination cases establish that an employer making decisions about medical marijuana users must not gather medical information, including use of legal drugs, prior to making an offer. Once an offer is made, a medical examination can be required but can only justify the withdrawal of the offer if the medical information demonstrates that the applicant is not qualified to perform the duties of the position, with or without reasonable accommodation.

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212 Id. at 1085 (citing Compliance Manual 902:0187-88: although police department could require armed officers to report when they are taking medications that may affect their ability to use firearm or perform other essential functions of their job, employer generally may not ask employees about prescription medications).

213 Id. at 1085.

214 Id.


216 Id.


218 Id. (citing Tice, 247 F.3d at 517).

219 Id. at *16 (citing Wice, 2008 U.S. Dist. LEXIS 106727, at *7-8).

This means that a medical marijuana user otherwise covered by the ADA could not be denied employment if his or her marijuana use did not interfere with the performance of essential job duties of the position.

Once hired, an employer can only collect medical information, including the use of legal drugs, unless that information is shown by the employer to be job-related and consistent with business necessity.\textsuperscript{221} As the cases above demonstrate, this job-relatedness prevents employers from requiring medical information from all employees regardless of its relevance to their ability to perform the duties of their positions. Instead, employers should only require the provision of medical information that is directly related to the person’s ability to perform the job duties in question. Therefore, a medical marijuana user should not be subjected to a medical examination in connection with a drug test unless there is some direct connection to his or her ability to perform his or her job duties.

\textbf{IV. Protection of State Disability Statutes}

Even if a medical marijuana user does not enjoy the protection of the ADA, he or she may be entitled to protection against discrimination and accommodations under a state’s disability nondiscrimination laws. As with the ADA, a medical marijuana user could assert protection of state disability nondiscrimination laws based on an impairment, which might be the basis for the marijuana use, or if he or she is regarded as disabled by the employer.

The protection first depends on whether the state’s disability law excludes coverage for illegal drug users, like the ADA, and if so, the scope of that exclusion. This in turn depends on whether the state’s medical marijuana is enforceable or preempted by the CSA. Even if a medical marijuana user can survive the exclusion of illegal drug users from a state’s disability protections, that employee may need to establish that he or she does not pose a direct threat to themselves or others and that he or she can perform the essential duties of the position.

The exclusion of illegal drug users from disability nondiscrimination statutes varies across the fifteen states with medical marijuana legislation. Among the states with medical marijuana statutes, three (Arizona, Michigan and California) have disability nondiscrimination statutes which exclude those with an impairment or disorder caused by their current use of illegal drugs.\textsuperscript{222} Similarly, Maine’s nondiscrimination law excludes protection for employees with psychoactive substance use disorders resulting from current illegal use of drugs.\textsuperscript{223}

\textsuperscript{223} 5 Me. Rev. Stat. § 4553-A (West 2011).
broadly, Colorado excludes protection for any person “currently involved in the illegal use or addition to” a controlled substance.\(^{224}\)

Some other states with medical marijuana statutes tie the exclusion of an illegal drug user to the effects of that use. Vermont excludes from protection a person whose current drug or alcohol abuse would constitute a direct threat.\(^{225}\) None of these statutes define “illegal” in terms of the Controlled Substances Act. Only Michigan’s reference to “controlled substance” is defined by state law, Michigan’s Public Health Code,\(^{226}\) which was amended by the Medical Marijuana Act.\(^{227}\)

Both Oregon and Rhode Island exclude nondiscrimination protection for any person with a disability who is engaging in the illegal use of drugs, if the employer’s action was based on that conduct or use.\(^{228}\) Oregon and Rhode Island are unique in defining illegal use specifically in terms of the Controlled Substances Act (CSA). These two may be the only states that would obviously exclude medical marijuana users from their protection.

The second question that affects the availability of protection under a state’s disability law is the enforceability of a state’s medical marijuana statute. If the state’s law is preempted by the CSA, then a person’s use of marijuana for medical purposes would still be considered illegal under the state’s disability nondiscrimination law.

Employers have taken the position that a state’s medical marijuana statute is preempted by the CSA. The CSA addresses this issue directly:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision . . . and that State law so that the two cannot consistently stand together.\(^{229}\)

\(^{224}\) Col. Rev. Stat. § 24-34-301(2.5)(b) (West 2011).
\(^{227}\) The presence of THC in one’s system will not be sufficient in Michigan to establish that someone is an illegal drug user. Rather, the Michigan Supreme Court has held that the presence of metabolites of 11-carboxyl-THC in a person’s system is not sufficient basis for conviction for possession of a controlled substance under Michigan’s Public Health Code. People v. Feezel, supra note 26, 486 Mich. at 215.
This issue was resolved in favor of employers in Oregon, because Oregon’s medical marijuana statute affirmatively provides for the right to use medical marijuana.\textsuperscript{230}

Since only three medical marijuana states provide such an affirmative right, the protection of medical marijuana users in other states should not be affected by the Oregon Supreme Court’s reasoning. In fact, other states’ courts have held that their medical marijuana statutes are not preempted by the CSA. For example, California’s Compassionate Use Act does not conflict with the CSA because “California did not ‘legalize’ medical marijuana, but instead exercised the state’s reserved powers to not punish certain marijuana offenses under state law when a physician has recommended its use to treat a serious medical condition.”\textsuperscript{231} The California court explained that “Congress does not have the authority to compel the states to direct their law enforcement personnel to enforce federal laws.”\textsuperscript{232}

At least in states that do not provide an affirmative right to use marijuana, the use of marijuana may not exclude a person with a disability from the protection of state nondiscrimination laws. However, if their medical marijuana use poses a direct threat or establishes their inability to perform the essential job duties of the position, they may still lose that protection. An exclusion on these grounds, however, is only appropriate based on individualized assessment of the employee or applicant in question, and expert proof that the person truly poses a direct threat or cannot perform the essential duties.

\textbf{A. Direct Threat}

Employers may turn to the direct threat defense to justify the failure to hire or discharge of a medical marijuana user. Under both the ADA and some state disability nondiscrimination statutes, an employer can justify an adverse action against an applicant or employee under the application of qualification standards which can include the requirement that the person not pose a direct threat to themselves or others.\textsuperscript{233} The ADA defines “direct threat” as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”\textsuperscript{234} The Supreme Court has expanded this definition to include threats to the employee with a disability.\textsuperscript{235}

\textsuperscript{230}\textit{Emerald Steel, supra} note 3, 348 Or. at 175.
\textsuperscript{231} \textit{California Attorney General’s “Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use” (citing County of San Diego v. San Diego NORML, 165 Cal. App. 4th 798 (2008)).}
\textsuperscript{232} 165 Cal. App. 4th at 827.
\textsuperscript{233} 42 U.S.C. § 12111 (3).
Four states (Arizona, California, Maine and Vermont) with medical marijuana statutes also exclude from their disability nondiscrimination protection those employees who pose a direct threat.\(^{236}\) Arizona defines “direct threat” as a “significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”\(^{237}\) Similarly, both Maine’s and California’s protections do not extend to an employee who, because of his or her physical or mental disability, is unable to perform their job duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations.\(^{238}\) Vermont’s exclusion is limited to employees whose current alcohol or drug abuse would “constitute a direct threat to property or the safety of others.”\(^{239}\) The disability nondiscrimination statutes in the other states with medical marijuana statutes do not specifically exclude persons who pose a direct threat.

An analysis of the direct threat defense under the ADA is helpful to determine whether medical marijuana users could enjoy the protection of state disability nondiscrimination statues that either explicit include or assume a direct threat defense for employers. Reliance on ADA analysis is appropriate since many state statutes are patterned after the ADA and many courts turn to ADA case law for guidance on the application of state disability nondiscrimination statutes.\(^{240}\)

Under the ADA, the employer’s proof that an individual poses a "direct threat" must be based on an "individualized assessment of the individual's ability to perform safely the essential functions of the job."\(^{241}\) The Supreme Court has required an expressly ‘individualized assessment of the individual's present ability to safely perform the essential functions of the job, reached after considering, among other things, the imminence of the risk and the severity of the harm portended.”\(^{242}\) Such an individualized assessment should include consideration of the following factors: 1) the duration of the risk; 2) the nature and severity of the potential harm; 3) the likelihood that the potential harm will occur; and 4) the imminence of the potential harm.\(^{243}\)


\(^{238}\) Cal. Gov’t § 12940 (West 2011); 5 Me. Rev. Stat. § 4573-A (West 2011).


\(^{241}\) 29 C.F.R. § 1630.2(r) (2011).

\(^{242}\) Chevron U.S.A. Inc., supra note 233, 536 U.S. at 86 (quoting 29 C.F.R. §1630.2(r) (2001)).

\(^{243}\) Id.
employer must prove that the person with a disability poses a direct threat under such an individualized assessment.

A speculative or remote risk is insufficient to establish a "direct threat" defense. More specifically, speculation regarding the limitations imposed by an employee’s medication may be insufficient to establish that the employee poses a direct threat. For example, an employer was unable to establish a direct threat based on the opinion of a physician who failed to conduct a physical examination of employee, and instead relied on possibility of his medication’s side effects, rather than testimony of employee and his physician that he did not experience side effects.

An employer should conduct an individualized inquiry to determine if an employee or applicant poses a high probability of potential harm. Claims that employees with diabetes pose a direct threat illustrate that a court will require an individual determination as to whether an employee poses a direct threat. Rather than finding that diabetics are unqualified as a matter of law, courts have required an individualized showing of the risk, including the risk level and the severity of the potential harm. For example, summary judgment was denied an employer despite its allegations that an employee with diabetes posed a direct threat as a full duty firefighter, where the employee with diabetes had not had difficulties performing those duties in the past. The court noted that the employer “must present more than speculation as to possible safety concerns” created by the employee's condition.

The Supreme Court has explained that the direct threat defense can only be invoked where a risk is significant, since “few, if any, activities in life are risk free.” This standard was applied to support a denial of summary judgment for an employer where the employee’s psychiatrist failed

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244 Id. See also Dipol v. New York City Transit Authority, 999 F. Supp. 309, 315-16 (E.D.N.Y. 1998)(Employer failed to establish that employee with diabetes posed direct threat where he had controlled condition for 40 years).
246 Bragdon v. Abbott, 524 U.S. 624, 649 (1998)(citing School Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 288 (1987)); Albertson’s, Inc. v. Kirkingburg, 527 U.S. 555, 569 (1999); Sutton, supra note 77, 527 U.S. at 483. See also Hamlin v. Charter Twp. of Flint, 165 F.3d 426, 433 (6th Cir. 1999); Doe v. County of Centre, PA, 242 F.3d 437, 447-51 (3d Cir. 2001); 28 C.F.R. § 36.301(b); aff’d in relevant part, 480 F.3 724, 731 (5th Cir. 2007)(employee with mobility impairment did not pose direct threat to herself despite her inability to safely evacuate plant, given small likelihood of need for evacuation); EEOC Technical Assistance Manual § 4.5; Department of Justice Technical Assistance Manual III-3.8000 (interpreting Title III of the ADA).
249 Id. at 405-06.
250 Id. at 649.
to state that his medications posed a danger to him or his coworkers, and the employer conceded that it never received any complaints from coworkers to show that his condition posed a potential threat. The court noted that “the probability of significant harm must be substantial, constituting more than a remote or slightly increased risk.” Under this reasoning, broad assumptions that result in the exclusion of anyone who tests positive on a drug screen, including medical marijuana users, may lack the individualized inquiry necessary to establish a direct threat.

Employers asserting the direct threat defense should have the support of the opinion of a health care provider who has assessed the risk based on “the objective, scientific information available to him and others in his profession.” Both the Supreme Court and the EEOC agree that an employer should base a direct threat defense upon “a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence.” The Interpretive Guidance section of the ADA supports the reliance on medical evidence in determining whether a direct threat exists, stating that such evidence may include “opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability.”

In interpreting the direct threat defense under the Rehabilitation Act, the Supreme Court has explained that employers should only take adverse actions based on “reasoned and medically sound judgments.” In contrast, a health care provider’s personal belief that a significant risk existed, even if that belief was reached in good faith, would not establish a direct threat for an employer relying on his or her opinion.

Without an in-depth inquiry into the actual medical effects of a person’s condition or treatment, an employer may not be able to establish that an employee poses a direct threat. For example, a double amputee mechanic who was denied employment based on a cursory medical examination 17 months earlier and assumptions about his lack of abilities could not be deemed unqualified for the position. Similarly, a former deputy sheriff who reapplied for her position was able to

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252 Id. (citing 29 C.F.R. §1630.2(f)). But see Burton v. Metropolitan Transportation Auth., 244 F. Supp. 2d 252 (S.D.N.Y. 2003)(city bus driver at risk of hemorrhaging posed direct threat).
253 Bragdon, supra note 232, 524 U.S. at 649. See also Lowe v. Ala. Power Co., 244 F.3d 1305, 1309 (11th Cir. 2003); Echazabal v. Chevron USA Inc., 336 F.3d 1023 (9th Cir. 2003).
254 Id.; Chevron U.S.A. Inc., supra note 233, 536 U.S. at 86 (quoting 29 C.F.R. §1630.2(r) (2001)).
257 Id.
258 Lowe, supra note 253, 244 F.3d at 1309.
survive a motion for summary judgment despite her admitted psychological illness, where the department failed to order the standard psychological evaluation for her.\footnote{259 McKenzie v. Dovala, 242 F.3d 967, 974 (10th Cir. 2001).}

This medical evidence requirement has been helpful to applicants with diabetes who allegedly posed a direct threat. The trial court was instructed to determine if “there exists new or improved technology…that could now permit insulin-dependent diabetic drivers in general, and [the applicant] in particular, to operate a vehicle safely.”\footnote{260 Id.} By failing to consider evidence of medical advancements that generally help to control diabetes as well as the plaintiff’s own condition, the court failed to conduct an appropriate direct threat inquiry.\footnote{261 Id. at 1029.} With guidance from federal employment “protocols” which now require that persons with diabetes be considered on a case by case basis, the trial court should have examined the continuing viability of a per se rule as applied to persons with diabetes or to this applicant in particular.\footnote{262 Id. at 1030.}

Similarly, the medical evidence requirement may even be used to challenge a medical expert’s basis for his or her own opinion. For example, Chevron was unable to establish that an employee’s exposure to chemicals in the workplace posed a direct threat to him.\footnote{263 Echazabal, supra note 241, 336 F.3d at 1028-29.} The opinions of two physicians that the tests of enzyme levels in his liver established a direct threat were insufficient where neither of those physicians had special training in liver disease, whereas the experts who did not find a direct threat were specialists in toxicology and liver disease.\footnote{264 Id. at 1029-30.} Their tests established that the applicant’s liver was functioning properly, and supported their opinions that he could work at the refinery without facing a substantial risk of harm, beyond the risk faced by other workers.\footnote{265 Id. at 1029.}

Given these medical opinions, a reasonable jury could conclude that Chevron failed to rely upon a “reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.”\footnote{266 Id.} The employer’s physician should have considered the specific chemical exposures the applicant would experience, to indicate the levels at which they would become dangerous or the likelihood that they would injure this particular applicant, and whether the risk to him was any greater than that for a healthy individual.\footnote{267 Id. at 1030.}
Individualized assessment of the threat posed by an employee based on medical opinion also has been required to establish a direct threat in a claim by drug users seeking the protection of the ADA. For example, a methadone user with a prior addiction to illegal opiates survived a motion for summary judgment in his challenge of his rejection for a position with a copper company.\textsuperscript{268} The methadone-using applicant was deemed unable to perform safety sensitive work by the doctor who examined him prior to hire.\textsuperscript{269} The doctor based his opinion on driving by the mill and information from the human resources manager about the specific job requirements and the working conditions in the mill, as well as the medical literature and his limited knowledge of the side effects of methadone showing a threat to the safety when a regular user of methadone performs safety-sensitive work.\textsuperscript{270}

The mill could not establish that the methadone user posed a direct threat since the doctor had never engaged in research nor published articles on the topic, and he could not cite to specific articles or studies which supported his conclusion.\textsuperscript{271} While the doctor admitted that every situation involving the use of opiates is unique and involves “various considerations,” he did not personally examine the applicant and he may not have considered the amount of methadone the applicant was taking, and the physical examination did not include any cognitive tests that could have measured the level of impairment caused by the methadone use.\textsuperscript{272} In contrast, the EEOC’s expert testified that cognitive impairment is not a side effect of methadone use among stabilized patients, relying on the President’s Office of National Drug Control Policy’s fact sheet, and she believed that this applicant was stabilized.\textsuperscript{273}

In some claims, medical experts disagree as to whether an employee poses a direct threat. Since the burden is on the employer to establish the direct threat defense, that employer should not be granted a motion for summary judgment when experts disagree regarding the existence of a threat. For example, summary judgment was inappropriate where one clinical psychologist

\textsuperscript{268} EEOC v. Hussey Copper Ltd., 696 F. Supp. 2d 505 (W.D. Pa. 2010).
\textsuperscript{269} Id. at 509.
\textsuperscript{270} Id. at 510-11.
\textsuperscript{271} Id. at 511.
\textsuperscript{272} Id. at 511-12. See also, Lewis v. Pennsylvania, 609 F. Supp. 2d 409 (W.D. Pa. 2008)(individualized assessment based on personal examination and evaluation of applicant); Taylor, 177 F.3d at 192-93 (employers must make individualized determinations about the disabilities of employees); EEOC v. Burlington Northern & Santa Fe Ry. Co., 621 F. Supp. 2d 587, 602 (W.D. Tn. 2009)(no direct threat where doctors failed to physically examine or observe employee); EEOC v. Overnite Transp. Co., No. 2:02-cv-00591, 2007 U.S. Dist. LEXIS 31175 (S.D. Ohio Apr. 27, 2007)(employer’s physician did not ask applicant with epilepsy about frequency of seizures or consult with applicants’ treating physicians or scientific studies, instead relying on personal judgment); Olson v. Int’l Bus. Mach., No. 05-118, 2006 U.S. Dist. LEXIS 8169 (D. Minn. Mar. 1, 2006)(employer’s medical expert opinion that employee posed direct threat to supervisor contradicted by opinion that he was ready to return to work).
\textsuperscript{273} Id. at 513.
concluded that the employee in question suffered from a major depressive disorder and paranoid personality disorder, and was therefore unfit for duty, but another clinical psychologist determined that the employee was fit for duty as a state trooper.\textsuperscript{274} A reasonable fact finder could conclude that there was no direct threat.\textsuperscript{275}

These cases establish that without individualized, well-supported medical testimony to support the existence of a direct threat, an employer should not be allowed to discipline or discharge an employee based on conditions associated with their disability, even that that employer sincerely believes that the employee poses a threat. Thus, employers who seek to reject applicants or discharge employees who are medical marijuana users with a disability should be required to establish the existence of a direct threat based on an individualized inquiry supported by medical evidence that the person does in fact pose a direct threat in the position they seek or hold. As with other direct threat allegations, employers should not be allowed rely on assumptions or generalizations about medical marijuana users to reject or discharge them.

Employers may attempt to rely on government standards to establish that a medical marijuana user poses a direct threat. In an analogous situation, an employer was allowed to discharge a 10 year employee based on his taking anti-seizure medication.\textsuperscript{276} The employer relied on Department of Transportation regulations that excluded persons with a history of seizures from the definition of persons qualified to drive a commercial vehicle, as well as the Department’s suggestion that persons taking anti-seizure medication should not drive.\textsuperscript{277} Similarly, an employer’s reliance on the government safety standard prohibiting hearing impaired drivers of larger vehicles was entitled to “some consideration as a safety benchmark.”\textsuperscript{278}

Despite this deference to government standards, employers should be cautious in relying on Department of Transportation standards to discharge or reject a medical marijuana user. Those regulations clearly prohibit driving by anyone under the influence of any CSA Schedule I substance, including marijuana.\textsuperscript{279} Drivers are prohibited from driving based on concentrations levels of marijuana metabolites in their system of more than 15 ng/ml on the confirmatory urine test.\textsuperscript{280} Yet these regulations do not establish any connection between failing to test below these cutoff levels and a driver’s actual impairment, since the test measures levels of metabolites rather

\textsuperscript{274} Broberg v. Illinois State Police, 537 F.Supp.2d 960, 963 (N.D. Ill. 2008).
\textsuperscript{275} Id. at 964-65.
\textsuperscript{276} Tate v. Framland Indus., Inc., 268 F.3d 989, 995-96 (10th Cir. 2001).
\textsuperscript{277} Id. See also Wilkerson v. Shinseki, 606 F.3d 1256 (10th Cir. 2010)(overweight & diabetic employee not otherwise qualified given federal guidelines excluding those with uncontrolled diabetes or lack of agility to respond to emergencies from operator position).
\textsuperscript{278} Bates v. UPS, 511 F.3d 974, 989-90 (9th Cir. 2007)(trial court must determine whether policy excluding hearing impaired drivers was based on business necessity given Department of Transportation certification standard for other categories of vehicles).
\textsuperscript{279} 49 C.F.R. § 392.4(a).
\textsuperscript{280} 49 C.F.R. § 40.87.
than intoxication. Conversely, someone can test below the regulatory cutoff and yet still be impaired, since the metabolites take some time to appear in one’s urine after the ingestion of marijuana.

In contrast with unsubstantiated opinions, past behavior of the employee claimed to pose a direct threat may be sufficient to establish or undermine the existence of a direct threat. An employee may be able to establish the lack of a direct threat if there have been no performance issues in the past. Conversely, courts have included consideration of relevant information about an employee's past work history in finding a direct threat. For example, the risk posed by a physician who had worked under the influence of alcohol met the ADA requirements for exclusion of coverage. Despite a lack of evidence that the physician provided poor patient care or exercised poor medical judgment, the ample evidence that she came to work smelling of alcohol was sufficient to establish that she posed a direct threat to patients because she could exercise poor medical judgment.

These cases establish that if a medical marijuana user has been successfully performing his or her job duties for this or some other employer, the employer may not be able to establish that he or she poses a direct threat based solely on a positive drug test result. At the same time, if the employee or applicant has exhibited dangerous behavior due to his or her medical marijuana use, the employer would be justified in relying on a direct threat defense.

B. Unable to Perform Essential Duties

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281 49 C.F.R. § 219.309(2).
282 Rizzo v. Children’s World Learning Ctrs., Inc., 173 F.3d 254, 260 (5th Cir. 1999), aff’d on rehearing, 213 F.3d 209 (5th Cir. 2000).
283 Echazabal, supra note 241, 336 F.3d at 1032. See also Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1248 (9th Cir. 1999); Mantolete v. Bolger, 767 F.2d 1416, 1423 (9th Cir. 1985) (employer must consider information regarding applicant’s work history and medical history); Anderson v. Little League Baseball, Inc., 794 F. Supp. 342, 345 (D. Ariz. 1992) (giving “great weight” to fact of disabled plaintiff’s 3 years of service without incident).
284 Bekker v. Humana Health Plan Inc., 229 F.3d 662, 671-72 (7th Cir. 2000).
285 Id. See also Martin v. Barnesville School District, 209 F.3d 931, 935 (6th Cir. 2000)(school was justified in refusing to hire a bus driver who had been disciplined three years earlier for drinking beer at his custodian job). But see Kaw v. School Dist. Of Hillsborough Co., No. 8:07-cv-2222-T-33TGW, 2009 U.S. Dist. LEXIS 11086 at *24-25 (M.D. Fla. Jan. 30, 2009)(school denied summary judgment where aide’s fainting had not caused harm to children or others); EEOC v. Hibbing Taconite Co., 720 F. Supp. 2d 1073, 1077 (D. Minn. 2010)(no summary judgment for employer where hearing impaired applicant for mining position had operated heavy equipment safely at another mine); EEOC v. Overnite Transportation Co., 2007 U.S. Dist. LEXIS 31175 (no summary judgment where employee with epilepsy had operated equipment with another employer without incident); EEOC v. Rite Aid Corp., No. CCB-08-2576, 2010 U.S. Dist. LEXIS 119569 (D. Md. Nov. 10, 2010)(factual issues existed as to whether epileptic warehouse employee posed a direct threat where previous seizures at work had only caused minor injuries).
Employers may take the position that use of medical marijuana prevents the user from meeting the essential requirements of his or her position, even if that person does not use marijuana at work or even report to work under the influence of marijuana. The ADA specifically provides that an employee with a disability who engages in the illegal use of drugs can be held to the same qualification standards as imposed on other employees.\textsuperscript{286} Similarly, the Rehabilitation Act provides that an alcoholic or drug addict may be held “to the same standard of performance and behavior” as others, and that, “while an alcoholic or drug addict may not be … disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.”\textsuperscript{287} Even if the use of marijuana is deemed legal at the state level, an employer try to establish that any use of marijuana prevents the user’s adequate performance.

Like the direct threat standard, the lack of qualification for a position based on the symptoms or treatment of a person’s disability must be based on a reliable medical opinion. For example, a mental health treatment specialist suffering from paranoia raised issues of fact regarding her ability to perform essential job duties based on the supportive opinions of two physicians.\textsuperscript{288} As in direct threat cases, a court reviewing a claim that the employee is not otherwise qualified to perform the essential duties of his or her position may challenge the reliability of a medical opinion that qualification is lacking.

Similarly, an applicant for an emergency medical technician position survived summary judgment even though the employer relied on a physician’s opinion that her lack of one functioning arm prevented her from performing the lifting duties of the position.\textsuperscript{289} The physicians had concluded that given her impairment, the applicant would be unable to maintain balance when transporting patients, at least in certain situations or with heavier patients.\textsuperscript{290} The court denied summary judgment for the employer based on the doctor’s failure to conduct further testing of the applicant’s strength or lifting mechanics before finding that she failed the pre-employment examination, as well as her successful completion of the practical portion of the EMT certification examination and her success in another EMT position after her rejection by this employer.\textsuperscript{291}

\textsuperscript{286} 29 U.S.C. § 12114(c)(4) (West 2011).
\textsuperscript{287} 29 U.S.C. § 706 (West 2011).
\textsuperscript{288} Fredenburg v. Contra Costa County Dept. of Health Servs., 172 F.3d 1176, 1179 (9th Cir. 1999).
\textsuperscript{289} Gillen v. Fallon Ambulance Serv. Inc., 283 F.3d 11, 19 (1st Cir. 2002).
\textsuperscript{290} Id.
\textsuperscript{291} Id. at 26-27. See also Rodriguez v. ConAgra Grocery Prod. Co., 436 F.3d 468, 481 (5th Cir. 2006) (employee with diabetes was qualified where already meeting employer’s expectations); Kingsbury v. Brown Univ., No. CA 02-068L, 2003 U.S. Dist. LEXIS 25792 at *65 (D.R.I. Sept. 30, 2003)(publication by faculty after nonrenewal of contract helped establish qualifications).
This employer failed to make “due inquiry” into the applicant's impairment to have a reasonable foundation for its belief that she was unqualified.\(^{292}\) The denial of summary judgment for the employer was supported by one physician’s recommendation for a strength test, and the lack of an examination by one of the physician’s who opined that she was not qualified.\(^{293}\) A reasonable fact finder could conclude that such an examination was vital to an understanding of how (and to what extent) the applicant could perform the essential job duties of the position.\(^{294}\)

Courts do recognize a lack of qualifications where the medical evidence supports such a conclusion. An employee’s use of prescribed medications, in particular, has established a lack of qualifications.\(^{295}\) For example, a medical opinion that an employee cannot perform the essential functions of a job supported the dismissal of a claim by an employee using narcotic pain medication.\(^{296}\) Such an opinion can come from a medical review officer (MRO) who reviews the results of a drug test establishing the use of the prescription, like the MRO who opined that the employee above should not operate company a vehicle while taking narcotic pain medication.\(^{297}\) That employer justifiably relied on that MRO where the employee’s own physician and another physician both refused to provide him with clearance to operate a vehicle while using the medication.\(^{298}\)

The ADA cases reviewing a person’s ability to perform their work support emphasis on the actual pharmacological effects of medical marijuana use outside of work. In one case, a job applicant with diabetes raised issues of fact regarding his qualification for the position of criminal investigator, where his physician testified that applicant would have no difficulty working long or irregular hours, reacting appropriately to crisis or emergency, and adapting to changing circumstances.\(^{299}\) His physician provided testimony that he had exceptional control over his condition, allowing a jury to conclude that duration of any risk and likelihood of harm would be insignificant.\(^{300}\) In addition, he had never experienced incapacitation due to

\(^{292}\) 283 F.3d at 27-28. See also, Holiday v. City of Chattanooga, 206 F.3d 637, 643 (6th Cir. 2000) (reversing an entry of summary judgment in analogous circumstances).
\(^{293}\) 283 F.3d at 30-31.
\(^{294}\) Id. at 31-32. See also Holiday, 206 F.3d at 645 (courts need not defer to individual doctor’s opinion that is not based on individualized inquiry mandated by ADA or supported by objective scientific and medical evidence); Calef v. FedEx Ground Packaging Systems Inc., 342 Fed. Appx. 891, 895 (4th Cir. 2009)(examining physician’s notes did not indicate that she was unable to work).
\(^{295}\) Wisbey v. City of Lincoln, Neb., 612 F.3d 667, 673 (8th Cir. 2010) (claim of city emergency dispatcher dismissed where her doctor testified that she needed to take leave because she could not perform duties).
\(^{297}\) Id.
\(^{298}\) Id. at *19-20.
\(^{299}\) Branham v. Snow, 392 F.3d 896, 905 (7th Cir. 2004).
\(^{300}\) Id.
hypoglycemia, so a jury could reasonably conclude that he could eliminate any imminence of harm by maintaining his treatment and blood sugar level testing.\textsuperscript{301}

Similarly, to determine if a former cocaine-using employee was otherwise qualified, one court considered “what conduct is symptomatic of the handicap, what conduct the job in question requires, and how these two interact.”\textsuperscript{302} Even though he may not have been a current user, the court granted the employer’s motion for summary judgment based on his history of cocaine addiction.\textsuperscript{303} His lack of qualifications was supported by the employer’s opinion as to the possibility of, and the risks inherent in, a relapse.\textsuperscript{304}

These decisions demonstrate the importance of individualized assessment and medical evidence to support an employer’s claim that an employee or applicant cannot perform the essential duties of the position. It is important to keep in mind that for a medical marijuana user, the use of marijuana may facilitate the performance of their job duties by reducing pain. For a medical marijuana user who does not come to work under the influence, an employer would need individualized medical testimony that his or her marijuana use still has a residual effect the performance of essential duties.

C. Drug Free as Essential Characteristic

Given the requirement of individualized inquiry and medical opinions for support, an employer may not always be able to establish that a medical marijuana user poses a direct threat or cannot perform essential job duties, especially if he or she does not come to work under the influence. Yet an employer could take the position that it can discipline or discharge a medical marijuana user based on a positive drug test alone, because a negative drug test is by itself an essential job qualification.

Generally, a job function may be considered essential where: (1) the position exists for the purpose of performing the function; (2) there are a limited number of employees among whom responsibility for the function can be distributed; and/or (3) the function is highly specialized and the incumbent was hired for his or her expertise or ability to perform it.\textsuperscript{305} The question of what characteristics are essential should be determined on a case-by-case basis.\textsuperscript{306} While the

\textsuperscript{301} Id. at 907-08.
\textsuperscript{302} D’Amico v. City of New York, 132 F.3d 145, 151 (2d Cir. 1998)(history of cocaine addiction coupled with risks inherent in potential relapse justified city’s termination of firefighter).
\textsuperscript{303} Id.
\textsuperscript{304} Id.
\textsuperscript{305} 29 C.F.R. § 1630.2(n)(2)(2011).
\textsuperscript{306} Gillen, supra note 289, 283 F.3d at 25. See also Richardson v. Friendly Ice Cream Corp., 594 F.3d 69, 76 (1st Cir. 2010); Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29, 35 (1st Cir. 2000) (regular and predictable schedule not essential function of position); Rooney v. Sprague Energy
employer’s judgment is considered,\textsuperscript{307} it is not dispositive.\textsuperscript{308} An employer’s judgment as to what is essential does not automatically control, even when made in good faith.\textsuperscript{309} The surrounding circumstances must also be considered so that “an employer’s asserted requirements are solidly anchored in the realities of the workplace, not constructed out of whole cloth.”\textsuperscript{310} Thus, an employer may not be able to exclude medical marijuana users based solely on a preference to exclude them.

An employer’s assertion that a clean drug screen is an essential characteristic may be supported by the ADA itself. The ADA specifically allows an employer to “prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees,”\textsuperscript{311} and “require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace.”\textsuperscript{312} At least some state disability laws also preserve the right of the employer to establish policies or work rules regarding illegal use of drugs.\textsuperscript{313}

Under these provisions, an employer might argue that a medical marijuana user could be disciplined under the ADA based on their violation of any “drug free workplace” standards that employer may have. This logic was sufficient to support the discharge of an employee who failed an alcohol test, even though he was otherwise protected under the ADA as an alcoholic.\textsuperscript{314} Even though the test may not have met Department of Transportation standards, it was sufficient to justify his discharge since it showed a blood-alcohol level in excess of the level tolerated under the employer’s drug and alcohol policy.\textsuperscript{315} It is important to note that this employee

\textsuperscript{307} 42 U.S.C. § 12111(8)(West 2011).
\textsuperscript{309} See Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 649 (1st Cir. 2000); Ward, supra note 306, 209 F.3d at 34.
\textsuperscript{310} Richardson, 594 F.3d at 76 (citing Gillen, 283 F.3d at 25). See also, Smith v. Burlington Co. of N.J., No. 02-5581 (JEL), 2004 U.S. Dist. LEXIS 18032 at *10 n. 5 (D.N.J. July 27, 2004)(overtime shown to be essential for corrections officers).
\textsuperscript{311} 29 U.S.C. § 12114(c)(1) (West 2011).
\textsuperscript{312} 29 U.S.C. § 12114(c)(2) (West 2011).
\textsuperscript{313} Mich. Comp. Laws § 37.1211 (West 2011)(employer “may establish employment policies, programs, procedures, or work rules regarding the use of alcoholic liquor or the illegal use of drugs.”)
\textsuperscript{314} Daft v. Sierra Pac. Power Co., 251 Fed. Appx. 480, 483 (9th Cir. 2007).
\textsuperscript{315} Id.
reported to work under the influence of alcohol after several instances of driving under the influence.\textsuperscript{316}

In a similar case, though, Raytheon could not rely on its alleged policy of not rehiring violators of its policies in refusing to rehire an employee who abused drugs and alcohol.\textsuperscript{317} The employee had resigned after testing positive for cocaine.\textsuperscript{318} On remand from the Supreme Court, questions of fact remained regarding whether the employer considered the employee’s history of drug and alcohol abuse in refusing to reinstate him, and the questions of fact regarding the existence and consistent application of the alleged “no rehire” policy.\textsuperscript{319}

An employer relying on its workplace standards must have a history of enforcing those standards consistently. For example, a second employee who was discharged by Raytheon after reporting to work intoxicated was able to survive a motion to dismiss under the ADA, despite a policy against intoxication on the job.\textsuperscript{320} An employer may not be able to rely on its own policy if it has enforced that policy in a discriminatory manner, such as Raytheon’s retention of other employees who came to work under the influence of alcohol and others charged with illegal drug use.\textsuperscript{321} The policy may still justify the employer’s discharge of an employee, but only if there are reasons for treating other employees differently.\textsuperscript{322}

Following this logic, an employer seeking to discharge a medical marijuana user based on some drug free workplace standard would need to have a history of discharging other employees who have engaged in illegal drug use as well as those who use prescription or over the counter medications with similar side effects. An employer could be accused of discriminating against medical marijuana users by retaining employees without long term disabilities who have used prescription drugs, while discharging medical marijuana users who have a disability that provides them with ADA and state disability law protections.

Employers may seek to justify the refusal to hire or discharge of medical marijuana users under a drug free policy that is enforced across the board. The Immigration & Naturalization Service (“INS”) asserted this argument against an attorney who was discharged based on his drug

\begin{itemize}
\item \textsuperscript{316}Id. at 482.
\item \textsuperscript{318}Id.
\item \textsuperscript{319}362 F.3d at 569-70.
\item \textsuperscript{321}Id. at 387-88.
\item \textsuperscript{322}Ibarra v. Sunset Scavenger Co., No. C012875SI, 2003 U.S. Dist. LEXIS 8711 at *27 (N.D. Cal. May 20, 2003)(employer discharged alcoholic driver who was involved in an accident while drunk and lost his license).
\end{itemize}
The attorney was discharged two days after he completed a rehabilitation program, and remained drug free after that time. Under the Rehabilitation Act, the INS failed to establish that the attorney could not meet the job requirement of “trust-worthiness, objectivity, and good judgment” based on his past drug use.

In addition, the INS could not establish that freedom from past illegal drug use alone was an essential qualification for the job, even though a general attorney’s duties include representing the INS in deportation proceedings, and some deportation proceedings are based on the alien’s use of illegal drugs. Such a clean history was not essential even though a general attorney could be asked to provide advice and assistance regarding drug laws to INS border patrol agents and other INS personnel who have responsibility for detaining aliens arrested on drug charges.

It was important to the court that the attorney had performed his job duties successfully, and the Drug-Free Workplace Executive Order and the INS plan provided exceptions for employees who have used illegal drugs but obtain counseling or rehabilitation. Even if the attorney was not otherwise qualified without an accommodation, the court found that it would be reasonable to accommodate him by reassigning cases that involved any drug offenses, since they made up no more than 10% of his case load and other attorneys in his office could be assigned those cases.

Like the INS attorney, a physician who had a history of drug dependence could proceed with a claim of discrimination despite the hospital’s position that his past drug use and resulting probation disqualify the physician from participating in its network because a drug-free history and a non-probationary status was an essential qualification for a participating physician. The court rejected the hospital’s reliance on general assumptions about past drug use, even though it noted the general failure of drug rehabilitation programs and the recidivism rate of drug abusers. The court concluded that “the use of such generalizations about a class of disabled persons instead of evaluating the actual qualification of a disabled individual is a prohibited form of discrimination on the basis of disability.” These cases establish that an employer must establish some specific reasons for excluding a medical marijuana user based only on a policy of not employing anyone who tests positive on a drug test.

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324 Id.
325 Id. at 1428.
326 Id. at 1428-29.
327 Id.
328 Id. at 1429 (citing 3 C.F.R. 224 (1987)).
329 Id. at 1432.
331 Id. at 444-45.
An employer’s desire to enforce and adhere to a drug free workplace policy may not be enough to justify refusing to accommodate a medical marijuana user by providing an exception to that policy. One court reviewing such a policy held that a leave of absence rather than discharge of an employee seeking time off for alcoholism treatment did not make the leave an unreasonable accommodation or impose an undue hardship on her employer. That court rejected the employer’s argument that her retention would undermine its substance abuse deterrence program and therefore cause an undue hardship, stating “[t]hat is not the sort of hardship the statute envisions.”

In discussing the dismissal of a medical marijuana user’s claim in California, one management attorney suggested several justifications for an employer’s refusal to employ medical marijuana users as a policy: employers’ potential loss of government funding for projects if they permit employees to use illegal drugs, attendance issues, propensity to make mistakes, and employer’s potential liability for misconduct. She argues that the side effects of medical marijuana use may justify employers’ decisions based on its use, where American Medical Association studies have found that marijuana ingested for medicinal purposes may have the same biological side-effects as marijuana ingested for recreational purposes.

Some of these side-effects, including apathy, lowered motivation, and impaired cognitive performance, altered perceptions, and time distortion followed by drowsiness and lethargy, as well as impairment of short-term memory, attention, motor skills, reaction time, and the organization and integration of complex information, could have a direct effect on job performance. Drug testing cases supply similar reasoning. Yet many of these opinions do not explain why it would be unreasonable for an employer to approach the question of ability to perform on a more individualized basis, using medical opinion to establish that the person cannot perform.

In fact, the medical community has been able to measure the acute effects of marijuana on active brain function for some time. Impaired performance is caused by a substantial reduction in

334 Id. at 997.
335 Lafetra, supra note 45, 12 CHAP. L. REV. at 73-74.
336 Id. (Marijuana increases the heart rate, decreased blood pressure when standing, intensified senses, increased talkativeness).
337 Id. at 75.
338 Dolan v. Svitak, 527 N.W.2d 621, 626 (Neb. 1995)(drug testing will improve work safety, ensure quality production for customers, and enhance employer’s reputation in the community); Smith v. Zero Defects, Inc., 980 P.2d 545, 550 (Idaho 1999) (employer has right to test employees to ensure restraint from conduct that may bring dishonor on business); Farm Fresh Dairy, Inc. v. Blackburn, 841 P.2d 1150, 1153 (Okla. 1992) (public policy supports drug testing to promote safety in the workplace).
339 Marijuana and Medicine, supra note 7, at 106.
blood flow to the temporal lobe of the brain, which governs auditory attention.\textsuperscript{340} Some studies indicate that heavy marijuana users make subtle mistakes in cognitive tasks, even after they abstain from the drug for several hours; other researchers have questioned the validity of this study because of preexisting differences in cognitive abilities among test subjects.\textsuperscript{341} While some effects on psychomotor performance have been shown, studies also show large individual differences attributable to the subject and other situational factors.\textsuperscript{342} Thus, the medical community also would support an individualized inquiry into whether a medical marijuana user cannot perform the essential duties of his or her position.

D. Drug Testing Cases

Drug testing case law provides additional guidance as to whether an employer should be allowed to rely on a positive drug test alone to discharge or reject medical marijuana users. Justification for employers’ drug testing practices often relies on the involvement of medical experts and individualized assessment in the testing process. The privacy interests of an employee or applicant subjected to random drug testing are balanced against an employer’s interests in engaging in such testing.\textsuperscript{343} The Supreme Court has recognized that drug testing implicates employees’ privacy interests to a significant degree because of concerns about bodily integrity.\textsuperscript{344} A person’s privacy is invaded both when he or she is required to produce the sample, as well as when the sample is chemically analyzed.\textsuperscript{345} A drug testing program may be inappropriate if intrusion upon the individual's privacy interest is excessive, including use of “an overly intrusive testing procedure.”\textsuperscript{346}

Medical review is an important aspect of ensuring that drug tests are not overly intrusive. The drug testing program upheld by the Supreme Court in \textit{Veronica School District v. Acton} included review of test results by a qualified physician, who considered “the test subject’s "medical history and any other relevant biomedical information.”\textsuperscript{347} Similarly, Department of Transportation regulations lay out specific procedures for review by a medical review officer, including no allowance for testing of Schedule IV and V drugs, and discussion of any legitimate medical

\textsuperscript{340} \textit{Id}; Institute of Medicine, Marijuana as Medicine? The Science Beyond the Controversy 59 (2000). \textit{See also} R.J. Mathew, et al., “Regional cerebral blood flow after marijuana smoking,” 12 JOURNAL OF CEREBRAL BLOOD FLOW AND METABOLISM 750-758.
\textsuperscript{341} \textit{Id}, at 60; Marijuana and Medicine, supra note 7, at 106-07.
\textsuperscript{345} Baron v. City of Hollywood, 93 F. Supp. 2d 1337, 1340 (S.D. Fla. 2000).
\textsuperscript{346} Int'l UAW v. Winters, 385 F.3d 1003, 1007-08 (6th Cir. 2004).
\textsuperscript{347} 515 U.S. 646, 662 (1995).
explanation for the presence of the drug(s)/metabolite(s) in his or her system which then requires verifying the test result as negative.  

In the drug testing relied upon by the California decision on a medical marijuana using employee, the city which had administered random drug tests to both applicants and current employees failed to justify such broad testing of current employees despite its strong interest in maintaining a drug-free workplace as to all employment positions. The city had justified testing based on problems of diminished efficiency, increased absenteeism, and added health expenses that frequently result when an employee abuses drugs or alcohol, as well as the preservation of the integrity of a workforce that is paid at public expense.

In this case, testing was deemed unnecessary where an employer could observe the employee at work, evaluate his or her work product and safety record, and check employment records to determine whether the employee has been excessively absent or late. The court also noted that the ADA’s limitations on medical examination of current employees “does accurately reflect the general societal understanding that a requirement that all job applicants submit to a medical examination prior to hiring does not violate a job applicant's reasonable expectation of privacy.”

The Loder Court did allow the testing of applicants for all positions with the city, because the city had a “significantly greater need for, and interest in, conducting suspicionless drug testing of job applicants than it does in conducting similar testing of current employees, and also that a drug testing requirement imposes a lesser intrusion on reasonable expectations of privacy when the drug test is conducted as part of a lawful pre-employment medical examination that a job applicant is, in any event, required to undergo. The employer had a sufficient interest in testing all applicants because an employer may lack confidence in the reliability of information supplied by a former employer or other references, the employer has no opportunity to observe an applicant in the workplace prior to hire, and discharge after hire involves significant costs.

Some state statutes also require medical expert involvement in drug testing. For example, Hawaii’s statute regulating all substance abuse testing in the state requires the state to develop regulations concerning the selection of a medical review officer and the procedures to be

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349 See discussion of Ross v. Ragingwire Telecomm, Inc., supra n. 30-41.
350 Loder, supra note 37, 14 Cal.4th 846.
351 Id. at 877.
352 Id.
353 Id. at 886.
354 Id. at 882.
355 Id. at 883.
followed by them.\textsuperscript{356} Under these regulations, testing facilities in Hawaii must employ a licensed medical review officer with knowledge of substance abuse disorders, who is responsible for determining whether a positive test result can be “attributable to factors other than substance abuse” including a medical interview with the tested individual.\textsuperscript{357} Similarly, Vermont requires by statute that any drug test required by an employer must be reported by a medical review officer as a negative result if the test reveals a drug taken at a therapeutic level.\textsuperscript{358}

Lower courts measuring intrusiveness of testing have held that testing is less intrusive where a medical review officer reviews any positive test results to discover any possible alternative medical explanation for the positive result.\textsuperscript{359} The medical review officer should interview the person tested and review his or her medical records and medical history to determine if the positive test result could have been caused by a legally prescribed medication.\textsuperscript{360} In a testing procedure that was approved by the Sixth Circuit, the medical review officer would conclude that a drug test was negative if there was a legitimate medical explanation for the positive result other than the use of a prohibited drug.\textsuperscript{361} Yet that court also noted concern that the testing procedure included testing for substances not covered by Department of Transportation regulations, because testing for the additional drugs increases the privacy intrusion by “revealing more in-depth information about the subject” and because of “the lack of uniform standards for testing for the additional drugs.”\textsuperscript{362}

Employers seeking to rely on a positive drug screen alone to justify exclusion of medical marijuana users may not be able to establish actual impairment of the person tested. In a criminal case involving a conviction for driving under the influence, the Michigan Supreme Court based its reversal of the conviction in part on the lack of any pharmacological effect of metabolites on the body, and the lack of correlation between the presence of metabolites and THC-related impairment.\textsuperscript{363} The court reasoned that given Michigan’s medical marijuana statute, a medical marijuana user could be prevented from driving “long after any possible impairment from ingesting marijuana has worn off” if conviction could be based on the presence of 11-carboxyl-THC alone.\textsuperscript{364}

\textsuperscript{357} W.C.H.R. §§ 11-113-20(a)-(c); 11-113-25(b).
\textsuperscript{360} Id.
\textsuperscript{361} Id. at 369.
\textsuperscript{362} Id. at 381-82.
\textsuperscript{363} People v. Feezel, supra note 26, 486 Mich. at 215.
\textsuperscript{364} Id.
These decisions and standards demonstrate that an employer seeking to defeat a medical marijuana user’s coverage by the ADA or state disability nondiscrimination protections should present medical evidence and individualized, job-related assessment of their inability to perform the specific essential job duties of the position in question. The employer should not rely on general assumptions or stereotypes about marijuana users to justify its discriminatory treatment of that employee or applicant. An individualized assessment may establish that a medical marijuana user poses a direct threat or cannot perform the duties of a particular position, but other users may be capable despite or even because of such use.

E. Current User Cases

The ADA only excludes “current illegal drug users;” former users who have completed rehabilitation may enjoy its protections. Cases determining the meaning of “current” are helpful in determining the appropriate coverage for medical marijuana users. Rather than focusing on the legality or illegality of the medical marijuana user’s conduct, application of federal and state disability law protections should require an individual inquiry as to whether the applicant or employee can effectively and safely perform the duties of the position.

If the medical marijuana use does not directly impair the employee’s ability to perform the job duties, an employer should not be permitted to discharge or refuse to hire that user unless their medical marijuana use otherwise interferes with their abilities as an employee. Courts have already applied this approach in determining coverage for past illegal drug users who have participated in a rehabilitation program.

The ADA provides a “safe harbor” for former illegal drug users who have participated in rehabilitation and are no longer engaging in the illegal use of drugs. Congress explained that employers should be allowed to seek assurances that “no illegal use of drugs has occurred recently enough so that continuing use is a real and ongoing problem.” Courts have applied a flexible approach to defining “current” so as to preserve the rights of employees whose drug use no longer affects their job performance, while preserving the right of an employer wishing to discipline or discharge an employee whose drug use was “current enough” to affect their performance.

One of the first cases interpreting the meaning of “current” as used in the ADA rejected the ADA claim of an employee who was discharged within weeks of her use of illegal drugs. The court

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366 Id.
368 Shafer v. Preston Memorial Hospital Corp., 107 F.3d 274 (4th Cir. 1997).
explained that Congress intended to exclude coverage where the employee’s illegal use of drugs occurred “recently enough to justify a reasonable belief that a person’s drug use is current.”

This logic was continued in a second “current use” case involving a pharmacist who was assured that his job would be available when he completed his rehabilitation program for cocaine addiction, but was discharged after he entered that program. His drug use was still “current” on the date of discharge, where he had used cocaine 36 days earlier. The ADA legislative history suggests that “currently” can include not just use within a matter of days or weeks of the adverse action, but also include drug use that was sufficiently recent to justify an employer’s reasonable belief that the employee’s drug abuse was an “ongoing problem.”

Individualized assessment is appropriate when determining if the drug use is current, and courts should consider the employee’s level of responsibility, job and performance requirements, the required competence to complete job tasks, as well as that employee's past performance. The court should determine if the employer could “reasonably conclude that the employee's substance abuse prohibited the employee from performing the essential job duties.” Under this logic, an employer would be required to establish that the use of the drug could be expected to continue to affect that employee’s exercise of responsibility as well as potential future performance.

This reasoning follows the lead of the Rehabilitation Act, which excluded protection for an alcoholic whose current use of alcohol “prevents such individual from performing the duties of the job in question.” Generally an employer’s justification for determining that an employee is unable to perform the essential duties of his position is considered a “fact-intensive determination.” Questions about “current use” supported the refusal to dismiss the claim of

370 Zenor, supra note 294, 176 F.3d at 855-86.
371 Id.
372 Id. at 856 (citing 143 Cong. Rec. H. 103-01(1997); EEOC Compliance Manual, § 8.3).
373 Id. at 856-57 (citing Teahan, 951 F.2d at 520; supra note 302, 132 F.3d at 150).
374 Id. at 857.
376 D’Amico, 132 F.3d at 150; Teahan, 951 F.2d at 520. See also Toscano v. NBC, Inc., No. 99 Civ. 10006, 2000 U.S. Dist. LEXIS 17030 at *10 (S.D.N.Y. Nov. 28, 2000) (motion to dismiss denied where employee had been in outpatient rehabilitation program for 2 months when discharged).
an employee who was discharged based on his cocaine use, under the Rehabilitation Act.\textsuperscript{377} That court stated that the drug use must have been “severe and recent enough” to justify classifying that employee as a current user.\textsuperscript{378}

These cases and state standards demonstrate that even in determining whether an addict is still currently using illegal drugs, a court will consider the medical evidence and the specific duties of the person in question. If such an individualized, expert-based analysis is required for admitted “current” or recent users of illegal substances, then medical marijuana users should be afforded the same level of review before facing discharge or rejection by an employer.

V. Conclusion

State protections against the prosecution of medical marijuana users may provide employees who use medical marijuana with additional protections in the employment arena. While some state medical marijuana statutes provide specific protection in employment decisions, most do not. Courts interpreting these statutes have taken a narrow view of their protections, although broader wording in other statutes may dictate stronger protection for employees.

Even if medical marijuana statutes do not by themselves provide protection against discharge or rejection of medical marijuana-using employees or applicants, their disabilities which cause their need for marijuana use may provide them with additional protection against discrimination. Courts reviewing claims of medical marijuana users who are discharged or not hired based on their marijuana use outside of work should bear in mind some basic principles from the protection of persons with disabilities.

First, the administration of a drug test to medical marijuana users and others could constitute a medical examination if the employer gathers information beyond illegal drug use, such as asking if the person is taking any prescription drugs. The ADA’s restrictions on medical examinations apply to any employee or applicant, even one without a disability. Withdrawing a job offer based on information gathered during a medical examination, such as a person’s use of medical marijuana for a medical condition, would require a showing that the person was unable to perform the essential job duties of the position. Reliance on drug testing may also require job-relatedness if that screening tool is shown to have a disparate impact on persons with disabilities.

Second, classification of an employee as unqualified or posing a direct threat should be based on medical evidence and that person’s specific job duties, not assumptions made by the employer. An employer should not be able to discharge an employee with a disability based only on the

\textsuperscript{377} D’Amico, supra note 302, 132 F.3d at 150.  
\textsuperscript{378} Id. at 150.
assumption that their use of medical marijuana has an impact on their job performance. Even cases reviewing drug testing policies for violation of privacy rights require some individualized analysis of whether a drug test is necessary, and require the involvement of a medical review officer to determine whether the positive test results can be explained by a prescription or some other legitimate activity.

Third, an employer should not be able to discharge or discipline an employee based on their medical marijuana use under the current drug use exclusion from nondiscrimination protections for persons with disabilities. Instead, employers should be required to follow the logic of “regarded as,” “otherwise qualified” and “current use” cases, all of which require a showing that the level and personal effects of the person’s drug use in combination with the characteristics of their position make it reasonable for the employer to take disciplinary action based solely on that usage.

Guidance from existing disability discrimination cases should help provide clarity to employers who are struggling with how to respond to medical marijuana-using applicants and employees. More importantly, individualized inquiry focusing on the effects of such use on the person’s ability to perform essential job duties, based on legitimate medical evidence, should help to fulfill the purposes of the ADA and state disability nondiscrimination protections, as well as the promise of the 15 medical marijuana statutes in place and the others which follow.