PROGRAM MATERIALS
Program #31231
September 28, 2021

Clearing the Haze Around Workplace Marijuana Rules

- Kerrie Heslin, Esq. – Nukk-Freeman & Cerra, P.C.
- Nivritha Ketty, Esq. – Nukk-Freeman & Cerra, P.C.

Celesq® AttorneysEd Center
www.celesq.com

5255 North Federal Highway, Suite 100, Boca Raton, FL 33487
Phone 561-241-1919

CLEARING THE HAZE AROUND WORKPLACE MARIJUANA RULES

September 28, 2021

Presented by:

Kerrie R. Heslin, Esq.

Nivritha C. Ketty, Esq.

TEAMING WITH EMPLOYERS TO BUILD A BETTER WORKPLACE

NUKK-FREEMAN & CERRA, P.C.
EMPLOYMENT ATTORNEYS

MARIJUANA USE IN THE WORKPLACE

- 12.8% full-time US workers reported using marijuana during the past month
  - 2.7% positivity rate for marijuana in US workforce
    - Up 8% over the prior year and 35% in 4 years
- Marijuana positivity increased in states with new legalization statutes, especially where recreational use is permitted

Legal History of Marijuana in America

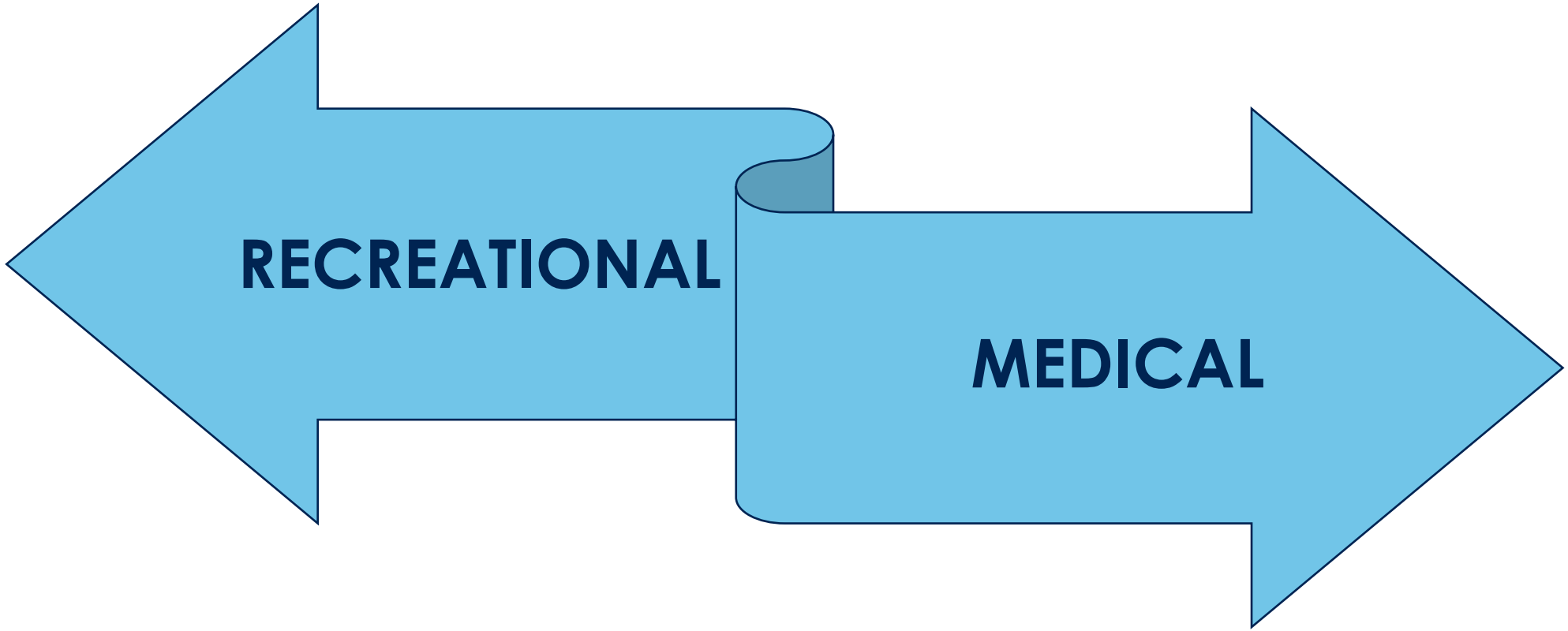
- First national regulation of marijuana was the Marihuana Tax Act of 1937
- Cannabis was officially outlawed by the Controlled Substances Act of 1970
- California was the first state to legalize medicinal use in 1996
- Colorado and Washington were the first states to legalize recreational use in 2012

Terminology

- Cannabis is a plant of the Cannabaceae family and contains more than eighty biologically active chemical compounds. The most commonly known compounds are delta-9-tetrahydrocannabinol ("THC") and cannabidiol ("CBD").
  - "Hemp", which refers to cannabis plants and derivatives that contain no more than 0.3 percent THC on a dry weight basis, is legal under federal law.
  - "Marihuana" (commonly referred to as "marijuana"), which refers to cannabis plants and derivatives that contain more 0.3 percent THC on dry weigh basis, is illegal under federal law

See https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd#whatare

TYPES OF USE:



CANNABIS FOR FUN

Federal

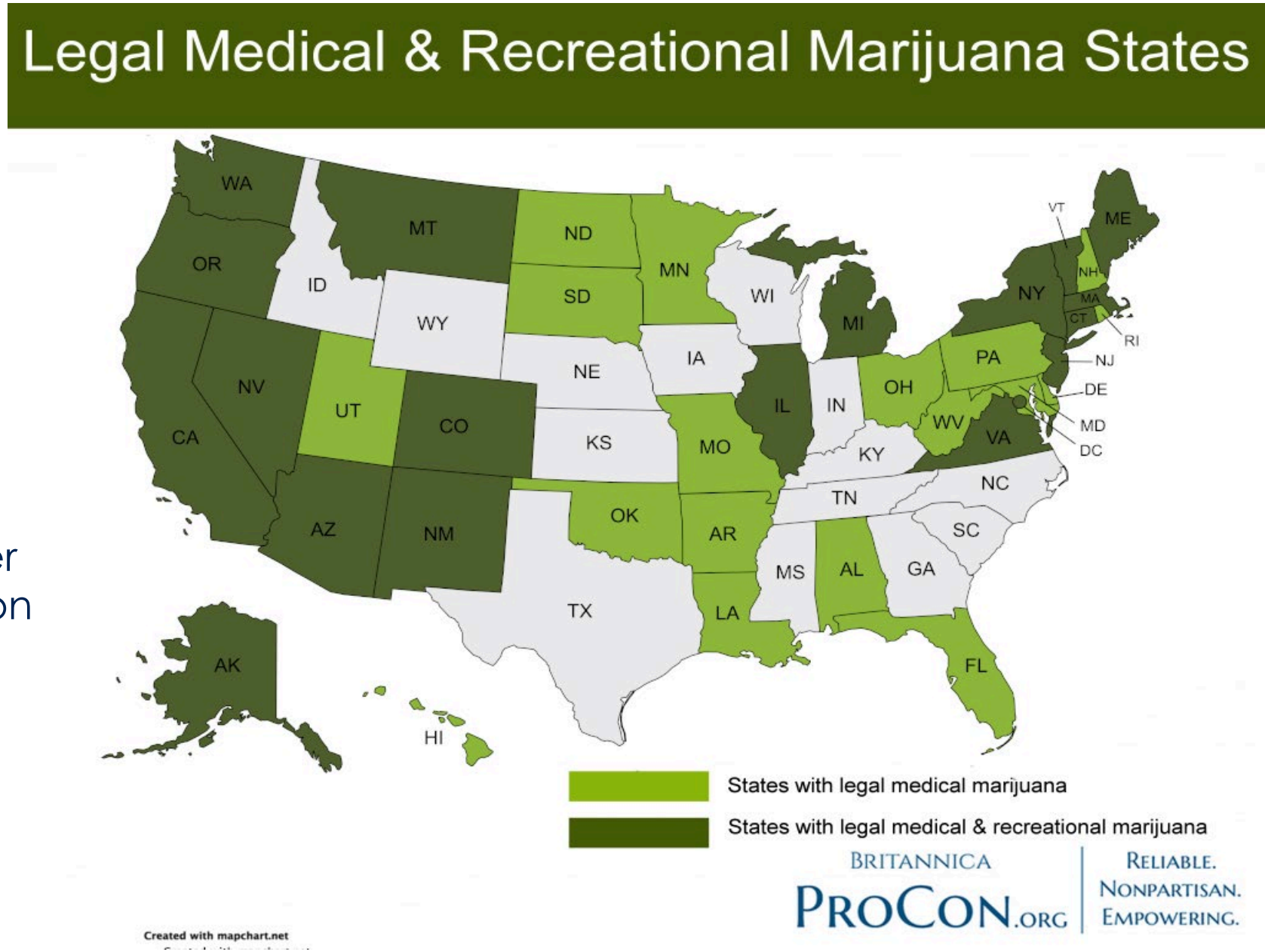
- Marijuana remains illegal under federal law and still a Schedule I drug, though there is pending federal legislation to move it to Schedule III. It has not been approved by the FDA or been the subject of any FDA-approved clinical trial.

- Remains DEA Schedule I Controlled Substance
  - Controlled Substances criteria:
    i. The drug or substance has a high potential for abuse
    ii. The drug or substance has no currently accepted medical use in treatment in the US
    iii. There is a lack of accepted safety for use of the drug or other substance under medical supervision

CANNABIS FOR FUN

State

- Adult recreational usage legal in 18 states, plus DC
  - Four states passed by voter referendum in 2020 election
  - Additional states have decriminalized
  - Stay tuned: Rhode Island



CANNABIS FOR FUN

This year a number of states passed recreational use laws:

- Arizona
- Connecticut
  - May not take adverse action for cannabis use outside of the workplace
  - May take adverse action if reasonable suspicion used cannabis while performing duties or on call or exhibit specific articulable symptoms that lessen performance
  - Testing restrictions

CANNABIS FOR FUN

New to the Party in 2020/21 *cont.*

- Montana
  - May not take adverse action because the employee lawfully uses marijuana off the employer's premises during nonworking hours
  - Employees who refuse to take drug test and are discharged are disqualified from unemployment benefits
- New Jersey
  - May not take adverse action "solely" due to the presence of cannabinoid metabolites or because an individual does or does not use cannabis
  - Testing restrictions

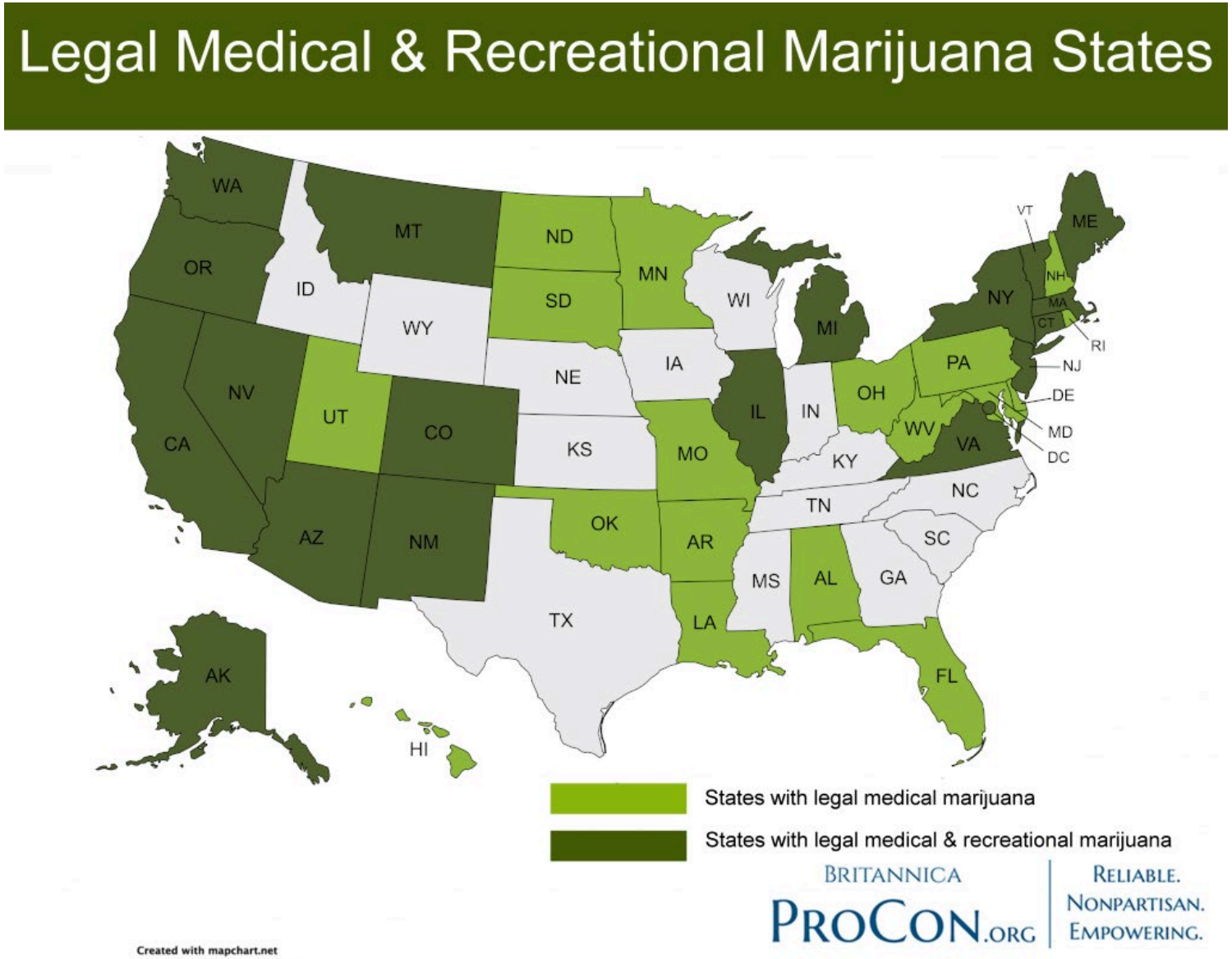
CANNABIS FOR FUN

New to the Party in 2020/21 *cont.*

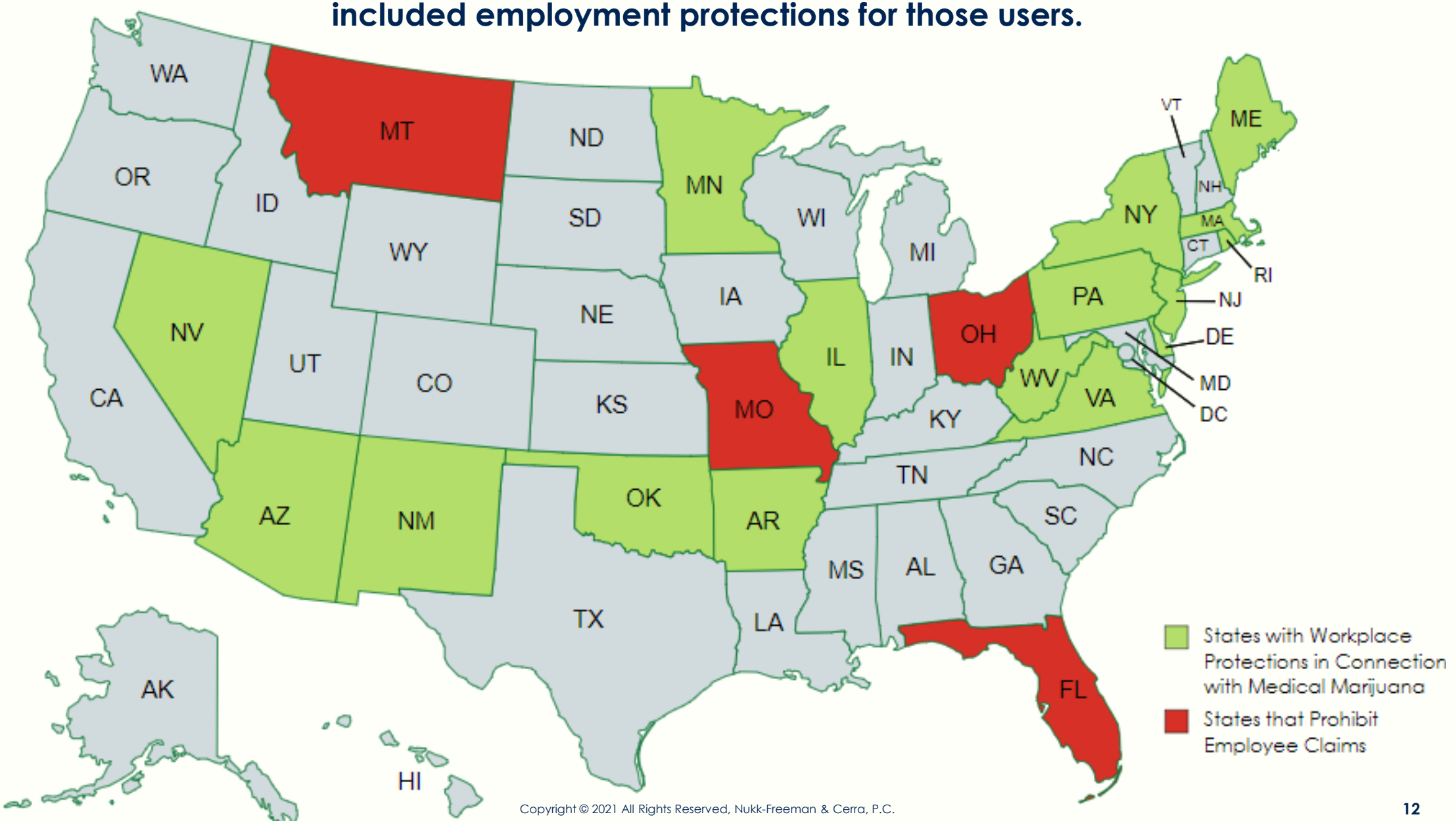
- New Mexico
- New York
  - May not take adverse action based on use of cannabis before or after working hours where it is off premises and without the use of employer's property
- Virginia

CANNABIS FOR Medicine

Adult medicinal usage is legal in 36 States, plus DC



Many of the states that have legalized cannabis for medical use also have included employment protections for those users.



CANNABIS FOR FUN/MEDICINE

To sum it up:

- If an employee tests positive for marijuana or is known to be a user, do not take immediate disciplinary action.
- If the employee is a medical marijuana user, engage in the interactive process.
  - Can the employee safely perform the job?
  - Are there any other considerations?

MARIJUANA USE IS STILL ILLEGAL UNDER FEDERAL LAW

- **Illegal** to grow, distribute, use, or possess under federal law
  - Controlled Substances Act - Schedule 1 DEA ("CSA")
  - **No acceptable medical use**
- **OSHA requires employers to keep the workplace free of recognized hazards**
- **Conflicts at multiple levels** between state and federal laws!

CONFLICTS BETWEEN STATE AND FEDERAL LAW

- **US AG William Barr:** Following Obama-era policy of **not** pursuing DOJ prosecution of marijuana offenses in states that have legalized medical and/or recreational use of marijuana

- Bills have been introduced in both the House and Senate seeking to amend the CSA to "**reduce the gap between Federal and State marijuana policy**" and provide certain exceptions for marijuana usage in compliance with state laws

Case Law: Federal Law vs. State Law

Hager v. M& K Construction, 246 N.J. 1 (N.J. 2021)

- Workers' compensation case
- Employer argued that requiring it to cover cost of medical marijuana would give rise to aiding and abetting liability because marijuana is still illegal under federal law
- New Jersey Supreme Court found that federal law did not preempt medical marijuana law
- Court recognized that, "state law may not permit what federal law forbids, a principle as true for our recreational use legislation as for our Compassionate Use Act."
- Held that preemption did not apply because of the following provision in the Controlled Substances Act:

> 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, including criminal penalties, 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 of this subchapter and that State law so that the two cannot consistently stand together.

Case Law: Federal Law vs. State Law

But not all courts agree:

- Bourgoin v. Twin Rivers Paper Co, LLC, 187 A.3d 10 (ME 2018) (Because the CSA preempts the [Maine Medical Use of Marijuana Act] when the [Act] is used as the basis for requiring an employer to reimburse an employee for the cost of medical marijuana, the order based on the [Act] must yield).

INTERPLAY WITH THE ADA

- Current medical marijuana users are **excluded** from being "qualified individuals with a disability" and therefore **NOT** protected under the ADA
- Courts have confirmed:
  - "The **ADA does not protect medical marijuana users** who claim to face discrimination on the basis of their marijuana use." *James v. City of Costa Mesa*, 700 F. 3d 394, 408 (9th Cir. 2012)
  - Regardless of whether a marijuana user would be protected under the ADA, the **ADA does not preempt a state marijuana law** from providing such protection. *Noffsinger v. SSC Niantic Operating Co., 273 F.Supp.3d 326 (D. Conn. 2017)*

IMPACT ON DRUG TESTING

- Federal district courts in NJ and NM have ruled that neither states' medical marijuana law would require an employer to waive drug tests as a condition of employment for a medical marijuana user
  - Courts distinguished the treatment (marijuana use) from the disability.
  - *Cotto, Jr. v. Ardagh Glass Packaging, Inc., 2018 WL 3814278 (D.N.J. Aug. 10, 2018); Garcia v. Tractor Supply Co., 154 F. Supp.3d 1225, 1230 (D. N.M. 2016)*
- However, federal district courts in AZ and CT recently have found employers in violation of state medical marijuana law for adverse employment action based on positive drug test results
  - Noffsinger v. SSC Niantic Operating Co., et.. al, 338 F.Supp.3d 78 (D. Conn. 2018) (rescind of job offer)
  - *Whitmire v. Wal-Mart Stores Inc., 2019 WL 479842 (D. Az 2019) (termination)*

WHAT DO WE KNOW TODAY?

NO PROTECTION for marijuana use at work.

NO PROTECTION for marijuana possession at work.

NO PROTECTION for marijuana intoxication at work.

Kerrie R. Heslin, Esq.
kheslin@nfclegal.com

Nivritha C. Ketty, Esq.
nketty@nfclegal.com

(973) 665-9100

nfclegal.com

- The materials contained in this presentation were prepared by Nukk-Freeman & Cerra, P.C. for informational purposes only and do not constitute legal advice.

- The information contained herein is not intended to create, and does not create, an attorney-client relationship between this firm and any recipient of the information. Recipients or readers of this information should not act upon any information contained herein without first seeking professional counsel.

TEAMING WITH EMPLOYERS TO BUILD A BETTER WORKPLACE

NUKK-FREEMAN & CERRA, P.C.
EMPLOYMENT ATTORNEYS

246 N.J. 1
Supreme Court of New Jersey.

Vincent HAGER, Petitioner-Respondent,
v.
M&K CONSTRUCTION, Respondent-Appellant.

A-64 September Term 2019
|
084045
|
Argued December 1, 2020
|
Decided April 13, 2021

Synopsis

Synopsis

Background: Employer appealed workers' compensation judge's order requiring employer to reimburse claimant for claimant's use of medical marijuana prescribed pursuant to state Compassionate Use Act for chronic pain following work-related accident, and claimant cross-appealed judge's determination that he did not have 100% total and permanent disability. The Superior Court, Appellate Division, Currier, J.A.D., 462 N.J.Super. 146, 225 A.3d 137, affirmed. Employer appealed.

Holdings: The Supreme Court, Solomon, J., held that:

[1] legislature clearly did not intend for workers' compensation insurers to be treated as private health insurers or government medical assistance programs under the Compassionate Use Act;

[2] sufficient credible evidence in workers' compensation court record supported order that employer was obliged to reimburse claimant under Workers' Compensation Act (WCA);

[3] express and field preemption did not apply;

[4] Compassionate Use Act did not conflict, under impossibility preemption doctrine, with federal Controlled Substances Act (CSA);

[5] employer could not be subject to aiding and abetting liability; and

[6] employer could not be convicted for engaging in drug conspiracy.

Affirmed.

Procedural Posture(s): On Appeal; Judgment.

West Headnotes (49)

[1] Workers' Compensation Sufficiency of Evidence in Support

Supreme Court's review of workers' compensation decisions is limited to whether findings made could have been reached on sufficient credible evidence present in record.

[2] Workers' Compensation Conclusiveness of administrative findings in general

Workers' Compensation Weight of evidence and credibility of witnesses

Supreme Court reviews the factual and credibility findings by the workers' compensation court with substantial deference.

[3] Workers' Compensation In general; questions of law or fact

Supreme Court reviews workers' compensation court's legal findings and construction of statutory provisions de novo.

[4] Labor and Employment Rules, Regulations, Orders, and Standards

In employment context, Compassionate Use Act, which protects authorized individuals from criminal and civil penalties in connection with medical marijuana use, does not alter preexisting employment rights and obligations. N.J. Stat. Ann. § 24:6I-6.1(a).

[5] **Statutes** Purpose

Statutes Exceptions, Limitations, and Conditions

Exceptions in a legislative enactment are to be strictly but reasonably construed, consistent with the manifest reason and purpose of the law.

[6] **Workers' Compensation** Offenses and responsibility therefor

Legislature clearly did not intend for workers' compensation insurers to be treated as private health insurers or government medical assistance programs under the Compassionate Use Act, which protects authorized individuals from criminal and civil penalties in connection with medical marijuana use; if legislature sought to treat workers' compensation and private health coverage in the same manner under Compassionate Use Act, it could have expressly included workers' compensation insurance in its exhaustive list or broadened exception more generally, as other states had explicitly done, and legislature decided not to either list workers' compensation carriers or generally broaden exclusion, while at the same time included "chronic pain" as a qualifying medical condition under the Act, when the WCA covers palliative care. N.J. Stat. Ann. §§ 24:6I-3, 24:6I-14.

1 Cases that cite this headnote

[7] **Workers' Compensation** Extent of Right

The Workers' Compensation Act (WCA) requires employers to provide medical treatment to relieve a worker of the effects of an injury incurred in the course of employment. N.J. Stat. Ann. § 34:15-15.

[8] **Workers' Compensation** Liberal or strict construction in general

The Workers' Compensation Act (WCA) is remedial in nature and is to be liberally construed.

[9] **Workers' Compensation** Extent of right; amount

Under the Workers' Compensation Act (WCA), treatment or services sought by an injured worker must be shown by competent medical testimony to be such as are reasonable and necessary for the particular worker. N.J. Stat. Ann. § 34:15-15.

[10] **Workers' Compensation** Extent of right; amount

Competent medical testimony is the touchstone of determining what is reasonable and necessary medical treatment for an injured worker under the Workers' Compensation Act (WCA). N.J. Stat. Ann. § 34:15-15.

[11] **Workers' Compensation** Extent of Right

The injured worker's desires or beliefs as to what treatment or service will be most beneficial is not determinative of entitlement to compensation under the Workers' Compensation Act (WCA). N.J. Stat. Ann. § 34:15-15.

[12] **Workers' Compensation** Extent of Right

It must be shown that the chosen treatment is reasonable and necessary to cure or relieve an injury of a worker; a mere showing that the injured worker would benefit from the treatment is not enough to warrant compensation under the Workers' Compensation Act (WCA). N.J. Stat. Ann. § 34:15-15.

[13] **Workers' Compensation** Treatment to relieve from effects of permanent injury

Palliative care may be properly authorized under Workers' Compensation Act (WCA), and workers who are permanently disabled and beyond hope of being cured are still entitled to continued treatment and services. N.J. Stat. Ann. § 34:15-15.

[14] **Workers' Compensation** Extent of right; amount

Competent medical testimony that particular treatment or service will reduce symptoms or restore function for an injured worker is sufficient to satisfy requirement of reasonable and necessary care under Workers' Compensation Act (WCA). N.J. Stat. Ann. § 34:15-15.

[15] **Workers' Compensation** Extent of Right

Workers' Compensation Extent of right; amount

Medical marijuana may be found, subject to competent medical testimony, to constitute reasonable and necessary care under New Jersey's workers' compensation scheme. N.J. Stat. Ann. § 34:15-15.

[16] **Workers' Compensation** Extent of right; amount

Sufficient credible evidence in workers' compensation court record, including medical records and hearing testimony, supported order that employer was obliged to reimburse claimant under Workers' Compensation Act (WCA) for claimant's use of medical marijuana prescribed pursuant to state Compassionate Use Act for treatment of chronic pain following work-related accident; medical marijuana had ability to both provide pain relief and help claimant conquer addiction to opioids, which had placed claimant on a likely path of worsening addiction and ultimately death. N.J. Stat. Ann. § 34:15-15.

[17] **States** Conflicting or conforming laws or regulations

Under the Supremacy Clause, state laws that interfere with, or are contrary to the laws of congress, made in pursuance of the constitution are invalid. U.S. Const. art. 6, cl. 2.

[18] **States** Conflicting or conforming laws or regulations

The principles of federal preemption are rooted in the Supremacy Clause, which unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. U.S. Const. art. 6, cl. 2.

[19] **States** Preemption in general

Preemption may be either expressed or implied.

[20] **States** Congressional intent

Congress may choose to preempt state law with the express language of an enactment.

[21] **States** Conflicting or conforming laws or regulations

States Occupation of field

There are two forms of implied preemption: field and conflict.

[22] **States** Occupation of field

Field preemption applies where scheme of federal regulation is so pervasive as to make reasonable inference that Congress left no room for states to supplement it.

[23] **States** Unemployment compensation and workers' compensation

Workers' Compensation Preemption

Workers' Compensation Extent of Right

Federal Controlled Substances Act (CSA) explicitly leaves room for state law to operate, and thus express and field preemption did not apply to bar workers' compensation claim for reimbursement for claimant's use of medical marijuana under state Compassionate Use Act to manage chronic pain following work-related accident. Comprehensive Drug Abuse

Prevention and Control Act of 1970 § 708, 21 U.S.C.A. § 903.

1 Cases that cite this headnote

[24] **States** Conflicting or conforming laws or regulations

In the absence of express language or implied congressional intent to occupy the field, a court must find state law to be preempted to the extent that it actually conflicts with federal law.

[25] **States** Conflicting or conforming laws or regulations

"Conflict preemption" requires actual, rather than hypothetical or speculative, conflict between federal and state law.

[26] **States** Conflicting or conforming laws or regulations

Conflict preemption occurs in two scenarios: (1) where it is impossible for private party to comply with both state and federal requirements, and (2) when state law stands as obstacle to accomplishment and execution of full purposes and objectives of Congress.

[27] **States** Conflicting or conforming laws or regulations

Importance of state law is immaterial to conflict preemption analysis when valid federal statute is present.

[28] **States** Preemption in general

Preemption is not to be lightly presumed.

[29] **States** Congressional intent

Case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to tolerate whatever tension there is between them.

[30] **States** Congressional intent

Central to preemption analysis is deciphering congressional intent.

[31] **States** Congressional intent

In a preemption analysis, the court must examine not only the plain language of the federal statute, but also the purposes Congress sought to serve through its enactment.

[32] **States** Preemption in general

In a preemption analysis, courts must look beyond the language of the federal statute to the broader framework in which the statute resides.

[33] **States** Conflicting or conforming laws or regulations

A determination of whether a state law stands as an obstacle to the accomplishment of a federal objective ultimately requires a court to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.

[34] **Controlled Substances** Substances regulated; definitions and schedules

The federal Controlled Substances Act (CSA) separates controlled substances into five schedules based on their accepted medical uses, risk of abuse, and physical and psychological effects. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 708, 21 U.S.C.A. § 903.

[35] **Controlled Substances** Substances regulated; definitions and schedules

The federal Controlled Substances Act (CSA) has delegated the authority to add, remove, and reschedule substances to the Drug Enforcement Administration (DEA). Comprehensive Drug

Abuse Prevention and Control Act of 1970 § 708, 21 U.S.C.A. § 903; 28 C.F.R. § 0.100(b).

[36] **Controlled Substances** Medical necessity or assistance

Controlled Substances Act (CSA) prevents marijuana from being validly prescribed. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 404(a), 21 U.S.C.A. § 844(a).

[37] **Controlled Substances** Medical necessity or assistance

For purposes of the federal Controlled Substances Act (CSA), marijuana has no currently accepted medical use at all. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 309, 21 U.S.C.A. § 829.

[38] **States** Operation and effect

Although repeals by implication are especially disfavored in appropriations context, Congress nonetheless may amend substantive law in appropriations statute, as long as it does so clearly.

[39] **States** Operation and effect

Statutes Construing together; harmony

Statutes Conflict

Harmonizing conflicting statutes is preferred, but courts are not required to approach the statutes with blinders and reconcile them at all costs, even when the second enactment is an appropriations measure.

[40] **States** Unemployment compensation and workers' compensation

Workers' Compensation Preemption

Compassionate Use Act, requiring workers' compensation insurer to pay reasonable medical treatment causally related to a work injury did not conflict, under impossibility preemption doctrine, with federal Controlled Substances Act (CSA) as applied to workers' compensation court order requiring reimbursement for claimant's purchase of prescription medical marijuana to treat chronic pain arising from work-related injury, notwithstanding employer's contention that payment would render it criminally liable for aiding and abetting or conspiring with claimant to possess a controlled substance in violation of CSA; CSA was effectively suspended as applied to Compassionate Use Act by the most recent appropriations rider for at least the duration of federal fiscal year. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 404, 708, 21 U.S.C.A. §§ 841(a), 844(a), 903; N.J. Stat. Ann. §§ 24:6I-6(a), 34:15-28.2.

1 Cases that cite this headnote

[41] **United States** In general; necessity

Congress is empowered to amend a statute via an appropriations action provided it does so clearly.

[42] **Controlled Substances** Aiders and abettors

Workers' Compensation Offenses and responsibility therefor

Employer did not have intent to aid and abet in claimant's marijuana possession by virtue of workers' compensation court order requiring reimbursement for claimant's medical marijuana use prescribed pursuant to state law for claimant's chronic pain arising from work-related injury, and thus employer could not be subject to aiding and abetting liability; employer's participation was being compelled by the courts, and employer made it clear that it did not wish to participate in claimant's possession of marijuana contrary to federal law by appeals to both Appellate Division and Supreme Court. 18 U.S.C.A. § 2.

[43] **Criminal Law** Aiding, abetting, or other participation in offense

To aid and abet a crime, a defendant must not just in some sort associate himself with the venture, but also participate in it as in something that he wishes to bring about and seek by his action to make it succeed.

[44] **Criminal Law** Aiding, abetting, or other participation in offense

Proof is required that a defendant had the specific intent to facilitate the crime to be subject to aiding and abetting liability.

[45] **Criminal Law** Aiding, abetting, or other participation in offense

To support an aiding-and-abetting conviction, the Government must prove: (1) that another committed a substantive offense; and (2) the one charged with aiding and abetting knew of the commission of the substantive offense and acted to facilitate it.

[46] **Criminal Law** Aiding, abetting, or other participation in offense

Whether a defendant participates with a happy heart or a sense of foreboding is of no matter when determining whether aiding and abetting liability applies, provided the accomplice knowingly elected to aid in the commission of the offense.

[47] **Conspiracy** Knowledge, intent, and participation

To extent that workers' compensation court order requiring reimbursement for medical marijuana prescribed to claimant pursuant to state law for chronic pain following work-related accident created a conspiracy between claimant and employer, employer's membership was not intentional, and thus employer could not be convicted for engaging in drug conspiracy; employer repeatedly attempted to disassociate itself from claimant's marijuana possession and use, parties were of two competing minds on the subject, and employer presented testimony before compensation court that claimant does not require any treatment at all, let alone the ongoing prescription of medical marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 406, 21 U.S.C.A. § 846.

[48] **Conspiracy** Knowledge, intent, and participation

A drug conspiracy charge can only be sustained if the defendant knowingly and intentionally became a member of the conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 406, 21 U.S.C.A. § 846.

[49] **Conspiracy** Controlled Substances

To establish a drug conspiracy, the government must show that the alleged conspirators shared a unity of purpose, the intent to achieve a common goal, and an agreement to work together toward the goal. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 406, 21 U.S.C.A. § 846.

****869** On certification to the Superior Court, Appellate Division, whose opinion is reported at, 462 N.J. Super. 146, 225 A.3d 137 (App. Div. 2020).

Attorneys and Law Firms

Matthew Gitterman argued the cause for appellant (Biancamano & DiStefano, attorneys; James E. Santomauro, on the brief).

Victor B. Matthews argued the cause for respondent (Victor B. Matthews, Denville, on the brief).

Alan Silber argued the cause for amici curiae National Organization for the Reform of Marijuana Laws, Garden State-NORML, Coalition for Medical Marijuana-NJ and Doctors for Cannabis Regulation (Pashman Stein Walder Hayden, attorneys; Alan Silber, of counsel and on the brief, and Dillon J. McGuire, Hackensack, on the brief).

Elizabeth R. Leong submitted a brief on behalf of amicus curiae of American Property Casualty Insurance Association (Robinson & Cole, attorneys; Elizabeth R. Leong, on the brief).

Opinion

JUSTICE SOLOMON delivered the opinion of the Court.

****870** ***11** Vincent Hager injured his back in a work-related accident in 2001 while employed by M&K Construction (M&K). For years thereafter, Hager received treatment for chronic pain with opioid medication and surgical procedures to no avail. In 2016, he enrolled in New Jersey's medical marijuana program both as a means of pain management and to overcome an opioid addiction. Thereafter, a workers' compensation court found that Hager "exhibit[ed] Permanent Partial Total disability" and ordered M&K to reimburse him for the ongoing costs of his prescription marijuana (the Order). The Appellate Division affirmed.

***12** Before us, M&K contends that New Jersey's Jake Honig Compassionate Use Medical Cannabis Act (Compassionate Use Act or the Act) is preempted as applied to the Order by the federal Controlled Substances Act (CSA). Compliance with the Order, M&K claims, would subject it to potential federal criminal liability for aiding-and-abetting or conspiracy. M&K also asserts that medical marijuana is not reimbursable as reasonable or necessary treatment under the New Jersey Workers' Compensation Act (WCA). Finally, M&K argues that it fits within an exception to the Compassionate Use Act and is therefore not required to reimburse Hager for his marijuana costs.

We conclude that M&K does not fit within the Compassionate Use Act's limited reimbursement exception. We also find that Hager presented sufficient credible evidence to the compensation court to establish that the prescribed medical marijuana represents, as to him, reasonable and necessary treatment under the WCA. Finally, we interpret Congress's appropriations actions of recent years as suspending application of the CSA to conduct that complies with the Compassionate Use Act. As applied to the Order, we thus find that the Act is not preempted and that M&K does not face a credible threat of federal criminal aiding-and-abetting or conspiracy liability. We therefore affirm the judgment of the Appellate Division.

I.

A.

The appellate record reveals the facts and procedural history pertinent to this appeal, and we begin in August 2001, when Hager was employed as a laborer for M&K. While working on a residential basement, Hager sought to retrieve cement in a wheelbarrow he was using. Something "like an explosion" resulted in the cement truck overpouring cement, "hurl[ing Hager] into the air" and "smashing [him] and flattening [him] back out like a pancake." Thereafter, Hager experienced sharp back pain that radiated ***13** down his legs, and he was transferred to light duty. ****871** Hager never returned to full duty before leaving M&K in December 2001 due to his persistent back pain.

An MRI revealed spinal disc herniations and bulging and, in November 2003, Hager underwent a laminectomy and decompression of nerve roots in his back. He subsequently underwent a two-level lumbar fusion in September 2011, but his pain persisted and Hager continued to take prescribed opioid medication. [1]

In April 2016, Hager began treating with Dr. Joseph Liotta, M.D., a hospice and palliative care physician, who enrolled Hager in New Jersey's medical marijuana program both as an alternative pain treatment and as a means to wean him off of opioids. Initially prescribed one ounce per month, Hager was later prescribed two ounces per month -- the maximum allowable prescription -- costing him more than six hundred dollars each month.

B.

The procedural history of this matter is somewhat murky and largely irrelevant to the issues before us. In sum, Hager petitioned for workers' compensation benefits in February 2002. M&K denied the claim the following month, stating that the accident was being investigated. It was not until November 2016 that M&K stipulated that Hager was in its employ and suffered a work-related injury. The workers' compensation trial to determine the nature and extent of Hager's work-related injuries, and any unpaid medical benefits to which he was entitled began in November 2016 and continued over several scattered days until March 2018.

At trial, Hager presented the expert testimony of Dr. Liotta, who testified that he had diagnosed Hager with post-laminectomy syndrome resulting in chronic pain. Hager was also experiencing ***14** adverse side effects from his opioid medication, according to Dr. Liotta, and was "motivated" to cease its use. Hager stopped using opioids after about a month of treatment with marijuana. Dr. Liotta noted a "very weak" risk of chemical addiction to marijuana and fewer serious, and potentially fatal, side effects as compared to opioids. Also, Hager testified on his own behalf that medical marijuana helped wean him off opioids, took "the edge off" his pain, and helped with muscle spasms.

Hager also presented the testimony of orthopedist Dr. Cary Skolnick, M.D., who testified that Hager required long-term pain management due to his "chronic lumbar strain, lumbar herniated discs[,] ... [and] post-laminectomy syndrome." Dr. Skolnick attributed Hager's condition to the August 2001 accident and concluded that he was 100% totally and permanently disabled, 65% attributable to his back injury and 35% attributable to the effects of his medication.

M&K presented the testimony of orthopedic surgeon Dr. Gregory Gallick, M.D., who concluded that Hager was only 12.5% permanently disabled and still capable of performing jobs such as driving. Dr. Robert Brady, D.O., also testified on behalf of M&K and described the potential side effects of medical marijuana, including cognitive difficulties, hallucinations, emphysema, chronic obstructive pulmonary disease, and lung cancer. Risks associated with opioids, according to Dr. Brady, include overdose, death, tolerance, depression, and sexual dysfunction. Though Dr. Brady opined that opioids are more physically addictive than marijuana, he represented ****872** that the two are equally psychologically addictive.

Citing medical literature, Dr. Brady testified that he did not prescribe his patients medical marijuana and added that medical marijuana had not been proven effective for conditions such as Hager's. Dr. Brady opined that brief physical therapy followed by a home-exercise regimen represented Hager's "best option" for relief. Dr. Brady did not recommend continued physician treatment or pain management because "[u]nfortunately, sometimes people have pain."

***15** C.

At the time of the compensation court's decision, the parties had already reached an agreement regarding medical bills, most out-of-pocket medical expenses, temporary disability benefits, and third-party lien credits -- leaving the court to determine only the nature and extent of Hager's permanent disability and the necessary course of future treatment. The court concluded that Hager "exhibit[ed] Permanent Partial Total disability totaling 65%, approximately 50% attributable to his orthopedic condition and 15% attributable to the effects of the medical marijuana." The court also found no support for M&K's contention that Hager did not require further treatment.

Identifying medical marijuana and opioids as the only two choices for pain management, the court concluded that "marijuana is the clearly indicated option" and ordered M&K to reimburse the costs of Hager's medical marijuana and reasonably related expenses. The court found the testimony of Dr. Liotta and Hager to be credible as compared to that of Dr. Brady. Also important to the compensation court was Hager's ability to "conquer his addiction" to opioids. The court concluded that "the best interests of the injured worker must be a prime consideration under our workers' compensation scheme. It is likewise clear that the legislature intended to make available the benefits of medical marijuana to persons displaying a medical need, despite the federal attitude toward the substance." The compensation court also rejected M&K's claim that, like a private health insurer or government medical benefit program, M&K could not be required to reimburse the cost of medical marijuana.

The Appellate Division affirmed both the compensation court's Order and, in response to Hager's cross-appeal, the court's finding that Hager "had a 65% permanent partial total disability." Hager v. M&K Constr., 462 N.J. Super. 146, 153, 171-72, 225 A.3d 137 (App. Div. 2020). After conducting a thorough analysis to determine whether the Compassionate Use Act is preempted by the CSA in the context of the Order, the Appellate Division concluded ***16** that the Act did not require employers to do what the CSA proscribes -- possess, manufacture, or distribute marijuana. Id. at 162-65, 225 A.3d 137. Compliance with both laws was thus possible, resulting in no positive conflict. Id. at 165, 225 A.3d 137. The Appellate Division also rejected M&K's contentions that compliance with the Order created potential aider-and-abettor liability that both preempted the Compassionate Use Act and placed

M&K at risk of federal prosecution for assisting in Hager's possession of marijuana. Id. at 165-67, 225 A.3d 137. The court concluded that M&K lacked the requisite intent and active participation to support an aiding-and-abetting charge, and did not face a credible threat of federal prosecution. Id. at 166-67, 225 A.3d 137.

The Appellate Division also rejected M&K's argument that it should be treated like a private health insurer under the Compassionate Use Act and be exempt ****873** from reimbursing the cost of Hager's medical marijuana. Id. at 168, 225 A.3d 137. Finally, citing the testimony of Hager and Drs. Liotta and Skolnick, the court was satisfied that medical marijuana represents reasonable and necessary treatment for Hager. Id. at 170, 225 A.3d 137.

We granted M&K's petition for certification. 241 N.J. 484, 229 A.3d 208 (2020). We also granted leave to participate as amici curiae to the American Property Casualty Insurance Association (APCIA) and to a group of jointly participating organizations -- the National Organization for the Reform of Marijuana Laws; Garden State - NORML; the Coalition for Medical Marijuana - New Jersey; and Doctors for Cannabis Regulation -- which we refer to collectively here as "Other Amici."

II.

Before us, M&K reiterates its position that, as applied to the compensation court's Order, the Compassionate Use Act is in actual conflict with the CSA because it compels M&K to do what the CSA prohibits -- assist in Hager's possession of marijuana. By reimbursing Hager, M&K argues it would be risking federal criminal charges for conspiracy and aiding-and-abetting because it ***17** will know that Hager is using the reimbursement to pay for medical marijuana. Although the Appellate Division concluded that one cannot be liable for aiding-and-abetting a completed crime, M&K notes that Hager purchases marijuana on a monthly basis and characterizes the offense as ongoing.

M&K also sees no reason to differentiate between private health insurers and workers' compensation insurers; it argues that workers' compensation insurers should be afforded similar protection under the Compassionate Use Act and should not be required to reimburse an employee's medical marijuana costs. M&K further contends that medical marijuana is per se an unreasonable and unnecessary medical treatment because it is illegal under federal law. It adds that marijuana has not been proven to cure or improve back pain and that, unlike other medications, the quantity of a given dose of marijuana is at the discretion of the patient rather than the prescribing physician.

The APCIA reiterates M&K's general assertions, urging us to focus our attention on the fact that the Order impermissibly requires what federal law prohibits and directing our attention to the recent decision of the Maine Supreme Court in Bourgoin v. Twin Rivers Paper Co., 187 A.3d 10 (Me. 2018), which found in favor of a similarly situated employer. Marijuana use, in addition to having unproven medical value, is inconsistent with the safety goals of New Jersey's workers' compensation scheme, according to the APCIA, and affirmance here would hamper employer enforcement of drug-free-workplace policies and efforts to prevent employees from being impaired on the job.

Hager counters that the Compassionate Use Act and the CSA are not in direct conflict because M&K can comply with both statutes. M&K is not itself being asked to engage in conduct violative of the CSA and is not subject to liability as an aider-and-abettor because it lacks specific intent, according to Hager. Hager adds that M&K faces no credible threat of federal prosecution and refers us to the fact that employers and workers' compensation carriers in New Mexico have not faced federal prosecution after ***18** being required to reimburse employees' medical marijuana costs. Citing the remedial purpose of the WCA and the New Jersey Legislature's recognition of the medical benefits of marijuana in alleviating chronic pain, Hager contends that he is entitled to reimbursement.

****874** Other Amici likewise contend that the CSA and the Compassionate Use Act are not in conflict because the latter does not interfere with federal enforcement of the CSA, and does not require an employer to possess, manufacture, or distribute marijuana in violation of federal law. They describe M&K's aiding-and-abetting argument as a "legal impossibility" because the offense is completed by the time of reimbursement. Stressing that the compensation court's finding that marijuana is an appropriate treatment for Hager is supported by the medical records and testimony provided, Other Amici ask us to affirm.

III.

[1] **[2]** **[3]** As we turn to M&K's challenges to the determinations of the compensation court, affirmed by the Appellate Division, we are mindful that our review of workers' compensation decisions is "limited to whether the findings made could have been reached on sufficient credible evidence present in the record." Hersh v. County of Morris, 217 N.J. 236, 242, 86 A.3d 140 (2014) (quoting Sager v. O.A. Peterson Constr., Co., 182 N.J. 156, 164, 862 A.2d 1119 (2004)). We acknowledge the compensation court's expertise and the valuable opportunity it has had in hearing live testimony, and we thus review its factual and credibility findings with "substantial deference." Goulding v. NJ Friendship House, Inc., 245 N.J. 157, 167, 244 A.3d 725 (2021) (quoting Ramos v. M & F Fashions, Inc., 154 N.J. 583, 594, 713 A.2d 486 (1998)). However, we review the court's legal findings and construction of statutory provisions de novo. Hersh, 217 N.J. at 243, 86 A.3d 140.

The issues presented in this appeal require consideration of New Jersey's Compassionate Use Act and the WCA on their own terms and in relation to one another, as well as the potential ***19** impact of the federal CSA on both state statutes. We begin by considering M&K's state-law based claims.

IV.

A.

The Compassionate Use Act, N.J.S.A. 24:6I-1 to -30, was enacted by the New Jersey Legislature in 2010 in recognition of the beneficial uses of marijuana and to protect authorized individuals from criminal and civil penalties. Wild v. Carriage Funeral Holdings, Inc., 458 N.J. Super. 416, 427, 205 A.3d 1144 (App. Div. 2019), aff'd, 241 N.J. 285, 227 A.3d 1206 (2020). The Act articulates legislative findings that: (1) "[m]odern medical research has discovered a beneficial use for cannabis in treating or alleviating the pain or other symptoms associated with certain medical conditions"; (2) ninety-nine out of every hundred marijuana arrests are made under state law, providing an opportunity to protect from arrest many seriously ill individuals in need of marijuana treatment; (3) though prohibited under federal law, many other states have legalized medical marijuana; and (4) states are not required to enforce federal law, meaning that the Act does not place New Jersey in violation of federal law. N.J.S.A. 24:6I-2(a) to (d).

Further, the Legislature, through the Act, seeks to make a "distinction ... between medical and non-medical uses" of marijuana -- a distinction that it stresses "[c]ompassion dictates." Id. at -2(e). Accordingly, the Act has "the purpose ... to protect from arrest, prosecution, ... and criminal and other penalties, those patients who use cannabis to alleviate suffering from qualifying medical conditions, as well as their health care practitioners, designated caregivers, institutional caregivers, and those who are authorized to produce cannabis for medical purposes." Ibid.; see also ****875** Wild, 458 N.J. Super. at 427, 205 A.3d 1144; State v. Myers, 442 N.J. Super. 287, 298, 122 A.3d 994 (App. Div. 2015). "Qualifying medical condition[s]" include "chronic pain." N.J.S.A. 24:6I-3.

***20** The Compassionate Use Act, perhaps most notably, applies the provisions of N.J.S.A. 2C:35-18 -- which establishes an affirmative defense to criminal liability under state law -- to patients, practitioners, caregivers, and others operating in accordance with the Act. N.J.S.A. 24:6I-6(a); see also Wild, 458 N.J. Super. at 427, 205 A.3d 1144; Myers, 442 N.J. Super. at 300, 122 A.3d 994. Similarly, patients, practitioners, caregivers, and others abiding by the Act cannot be subject to any civil or administrative penalties or loss of any right or privilege. N.J.S.A. 24:6I-6(b).

[4] In the employment context, the Compassionate Use Act does not alter preexisting employment rights and obligations. See Wild, 458 N.J. Super. at 428, 205 A.3d 1144 (discussing the Act as it relates to the New Jersey Law Against Discrimination). The Act prohibits an adverse employment action against a registered patient "based solely on the employee's status as a registrant." N.J.S.A. 24:6I-6.1(a). However, the Act does not "require an employer to commit any act that would cause the employer to be in violation of federal law, that would result in a loss of a licensing-related benefit pursuant to federal law, or that would result in the loss of a federal contract or federal funding." Id. at -6.1(c)(2).

Of relevance to the present matter, the Act provides that reimbursement for medical marijuana costs is not required of "a government medical assistance program or private health insurer." N.J.S.A. 24:6I-14. M&K argues that it is exempt

from reimbursing Hager for his medical marijuana under that provision.

B.

Based on the plain language of the statute, we agree with the compensation court's determination, affirmed by the Appellate Division, that N.J.S.A. 24:6I-14 does not apply to M&K.

[5] A provision of the statute, entitled "Construction of act," specifies in relevant part that "[n]othing in [the Compassionate Use Act] shall be construed to require a government medical assistance program or private health insurer to reimburse a ***21** person for costs associated with the medical use of cannabis." Ibid. (emphasis added). We read "or" as limiting the applicability of the exception to only those two kinds of entities. See Guttenberg Sav. & Loan Ass'n v. Rivera, 85 N.J. 617, 623, 428 A.2d 1289 (1981) ("The use of the words 'lessee or tenant' indicates the Legislature had in mind those occupants of residential dwelling units who had a certain correlative relationship with someone else, namely, a landlord or lessor. Otherwise the Legislature would have used a broader terminology."). It is "[a] general principle of statutory interpretation ... that 'exceptions in a legislative enactment are to be strictly but reasonably construed, consistent with the manifest reason and purpose of the law.' " Prado v. State, 186 N.J. 413, 426, 895 A.2d 1154 (2006) (quoting Serv. Armament Co. v. Hyland, 70 N.J. 550, 558-59, 362 A.2d 13 (1976)). Here, reading "or" as a limitation to the coverage exemption advances the Act's overarching and compassion-driven recognition of the potential health benefits of medical marijuana. See N.J.S.A. 24:6I-2(e).

[6] The reading, further, is supported by the definition of "Health insurance" in the Life and Health Insurance Code, which unambiguously states "[h]ealth insurance does not include workmen's compensation coverages." N.J.S.A. 17B:17-4. If the Legislature ****876** sought to depart from that general definition and treat workers' compensation and private health coverage in the same manner under the Compassionate Use Act, it could have expressly included workers' compensation insurance in its exhaustive list or broadened the exception more generally, as other states have explicitly done. See Fla. Stat. § 381.986(15)(f) ("Marijuana ... is not reimbursable ...."); 410 Ill. Comp. Stat. 130/40(d) ("Nothing in this Act may be construed to require a government medical assistance program, employer, property and casualty insurer, or private health insurer to reimburse a person for costs associated with the medical use of cannabis."); Mich. Comp. Laws § 418.315a ("[A]n employer is not required to reimburse or cause to be reimbursed charges for medical marihuana treatment."); Mont. Code Ann. § 39-71-407(6)(c) ("Nothing in this chapter may be ***22** construed to require an insurer to reimburse any person for costs associated with the use of marijuana ...."); Okla. Stat. tit. 63 § 427.8(I) ("Nothing in this act ... shall ... [r]equire an employer, a government medical assistance program, private health insurer, worker's compensation carrier or self-insured employer providing worker's compensation benefits to reimburse a person for costs associated with the use of medical marijuana[.]"); R.I. Gen. Laws § 21-28.6-7(b)(1) (excepting from the requirement to reimburse medical marijuana costs a "workers' compensation insurer, workers' compensation group self-insurer, or employer self-insured for workers' compensation"); Utah Code Ann. § 26-61a-112 ("Nothing in this chapter requires an insurer, a third-party administrator, or an employer to pay or reimburse for cannabis, a cannabis product, or a medical cannabis device.").

We find that the Legislature's decision not to either list workers' compensation carriers or generally broaden the exclusion -- while at the same time including "chronic pain" as a qualifying medical condition under the Act, N.J.S.A. 24:6I-3, when the WCA covers palliative care, as discussed in the next section of this opinion -- places our conclusion here within the clear contemplation of the Legislature.

In sum, we conclude that the Legislature clearly did not intend for workers' compensation insurers to be treated as private health insurers or government medical assistance programs under the Compassionate Use Act. M&K is therefore not exempt from its reimbursement obligation.

V.

A.

We next consider M&K's argument that medical marijuana is not a "reasonable and necessary treatment" for which the WCA provides coverage, and we begin with the WCA's

legislative history and purpose. The WCA, N.J.S.A. 34:15-1 to -146, was enacted in 1911 to compensate workers injured in industrial accidents. ***23** Richard C. Henke, Workers' Compensation in New Jersey: Toward a Removal of Workers from the Sacrificial Altar of Production Quotas, 56 Rutgers L. Rev. 789, 796 (2004). The scope of the WCA thereafter expanded over the decades, id. at 796-97, and benefits payable to injured workers increased.

[7] When it was first enacted, the WCA provided for "reasonable medical and hospital services and medicines" up to one hundred dollars during the two weeks following an injury. L. 1911, c. 95, § 14. Today, the WCA requires employers to provide "such medical, surgical and other treatment ... as shall be necessary to cure and relieve the worker of the effects of the injury," N.J.S.A. 34:15-15, incurred ****877** "in the course of employment," Univ. of Mass. Mem'l Med. Ctr., Inc. v. Christodoulou, 180 N.J. 334, 344, 851 A.2d 636 (2004). The statute specifies that "[a]ll fees and other charges for such physicians' and surgeons' treatment and hospital treatment shall be reasonable." N.J.S.A. 34:15-15. If an employer refuses or neglects to provide requested necessary treatment or services, the injured worker "may secure such treatment and services as may be necessary ... and the employer shall be liable to pay therefor." Ibid.

[8] Additionally, the WCA, as enacted and amended, is remedial in nature and is to be liberally construed. See, e.g. Squeo v. Comfort Control Corp., 99 N.J. 588, 604, 494 A.2d 313 (1985) ("[T]he construction of an apartment addition may be within the ambit of N.J.S.A. 34:15-15."); Howard v. Harwood's Rest. Co., 25 N.J. 72, 88, 94, 135 A.2d 161 (1957) (finding that continued nursing-home care was "necessary to cure and relieve" the worker's injuries). Failure to comply with a compensation court's order to pay benefits may lead to imposition of costs, fines, and other penalties. N.J.S.A. 34:15-28.2.

[9] **[10]** **[11]** **[12]** Still, the treatment or services sought by the injured worker "must be shown by competent medical testimony to be such as are reasonable and necessary for the particular" worker. Howard, 25 N.J. at 93, 135 A.2d 161. Such evidence is the ***24** "touchstone" of determining what is reasonable and necessary. Squeo, 99 N.J. at 606, 494 A.2d 313; accord Martin v. Newark Pub. Schs., 461 N.J. Super. 330, 339, 221 A.3d 148 (App. Div. 2019) (finding that "there was sufficient, credible evidence in the record to support the compensation judge's determination that further treatment with opioid medication would not cure or relieve" the worker's condition). The injured worker's desires or beliefs as to what treatment or service will be most beneficial is not determinative. Squeo, 99 N.J. at 606, 494 A.2d 313. Further, "it must be shown that [the chosen] treatment is 'reasonable' and 'necessary' to cure or relieve the injury of the worker. A mere showing that the injured worker would benefit from the ... treatment is not enough." Raso v. Ross Steel Erectors, Inc., 319 N.J. Super. 373, 383, 725 A.2d 690 (App. Div. 1999).

[13] **[14]** Nevertheless, palliative care may be properly authorized under the WCA, and workers who are permanently disabled and beyond hope of being cured are still entitled to continued treatment and services. Howard, 25 N.J. at 88, 93-94, 135 A.2d 161; Hanrahan v. Township of Sparta, 284 N.J. Super. 327, 333, 665 A.2d 389 (App. Div. 1995). Competent medical testimony that a particular treatment or service will reduce symptoms or restore function is sufficient to satisfy the requirement of reasonable and necessary care. Hanrahan, 284 N.J. Super. at 336, 665 A.2d 389.

B.

[15] Like the compensation court and the Appellate Division, we too conclude that medical marijuana may be found, subject to competent medical testimony, to constitute reasonable and necessary care under New Jersey's workers' compensation scheme. See Howard, 25 N.J. at 93-94, 135 A.2d 161. Our decision in Squeo instructs our analysis here.

The petitioner in Squeo lost the use of his arms and legs at age twenty-four following a work-related fall; he argued that a self-contained apartment attached to his parents' home could constitute "other treatment" or "other appliance" under ***25** N.J.S.A. 34:15-15. 99 N.J. at 590-91, 494 A.2d 313. We affirmed the compensation court's order in favor of the petitioner, ****878** finding "that under certain unique circumstances, when there is sufficient and competent medical evidence to establish that the requested 'other treatment' or 'appliance' is reasonable and necessary to relieve the injured worker ... the construction of an apartment addition may be within the ambit of

N.J.S.A. 34:15-15." Id. at 604, 607, 494 A.2d 313. In arriving at that conclusion, we looked beyond the petitioner's physical condition and also considered the psychological harm resulting from his work-related injuries; that harm was "aggravated" by the then-offered treatment -- placement in a nursing home -- which resulted in multiple suicide attempts. Id. at 605, 494 A.2d 313.

[16] In this appeal, Drs. Skolnick and Liotta persuaded the compensation court that Hager remains in chronic pain and that ongoing treatment is necessary. Identifying medical marijuana and opioids as the two treatment options available, the court concluded, after thoughtful consideration of the medical testimony discussing the risks and benefits of each, that marijuana was "the clearly indicated option." Persuasive to the court was marijuana's ability to both provide pain relief and help Hager "conquer his addiction" to opioids.

Reimbursement payments for the cost of Hager's prescribed medical marijuana -- the treatment ordered here -- may not yet be common, but they are certainly less unique than the construction we found appropriate in Squeo. Indeed, marijuana's ability to relieve pain has been expressly recognized by the Legislature in the Compassionate Use Act. N.J.S.A. 24:6I-2(a), -3. Thus, competent evidence relating to medical marijuana's ability to restore some of a worker's function or, as in Hager's case, relieve symptoms such as chronic pain and discomfort, is sufficient to find such a course of treatment appropriate. See Hanrahan, 284 N.J. Super. at 336, 665 A.2d 389.

As in Squeo, we recognize the potential harm that may be inflicted on Hager by the alternative available treatment. The ***26** compensation court noted that the record reflected that treatment with opioids had placed Hager on a "likely path ... [of] worsening addiction and ultimately death." It favored the testimony of Hager's experts over that of M&K's, which was within its discretion to do, that marijuana was comparatively the "appropriate" option to address both Hager's chronic pain and the adverse effects of years of opioid use. Rather than "throw [Hager] back to the trash heap," the court entered its Order to reimburse Hager's marijuana use, both to manage his pain and support his efforts to overcome his addiction.

We agree with the compensation court and Appellate Division that exempting workers' compensation insurance carriers from responsibility for workers' medical marijuana costs would be antithetical to the Legislature's express findings in the Compassionate Use Act and the traditional broad, liberal application of New Jersey's workers' compensation scheme. Sufficient credible evidence in the compensation court record -- medical records and hearing testimony -- supported the Order. We will not disturb it. Goulding, 245 N.J. at 167, 244 A.3d 725.

Having found that M&K is obliged to reimburse Hager under the Compassionate Use Act and the WCA, we next consider whether the federal CSA -- which classifies marijuana among the most rigorously controlled substances and criminalizes the possession and distribution of marijuana, as discussed in Section VI.C. below -- extinguishes M&K's obligations under state law.

****879** VI.

A.

We begin our discussion of the intersection of federal and state law here with the recognition that New Jersey law diverges from federal law not just as to medical marijuana but as to its recreational use as well. Indeed, at present, New Jersey's marijuana laws are undergoing a tectonic shift. In November 2020, New Jerseyans voted to legalize recreational marijuana via constitutional ***27** amendment by a two-to-one margin. Troy Closson, Marijuana Is Legal in New Jersey, but Sales Are Months Away, N.Y. Times (Feb. 22, 2021), https://www.nytimes.com/2021/02/22/nyregion/new-jersey-marijuana-legalization.html. As of January 1, 2021, the "growth, cultivation, processing, manufacturing, preparing, packaging, transferring, and retail purchasing and consumption of cannabis, or products created from or which include cannabis, by persons 21 years of age or older ... shall be lawful and subject to regulation by the Cannabis Regulatory Commission." N.J. Const. art. IV, § 7, ¶ 13.

In February 2021, Governor Philip D. Murphy signed three bills into law, giving practical effect to New Jersey's marijuana legalization. See Press Release: Governor Murphy Signs Historic Adult-Use Cannabis Reform Bills Into Law (Feb. 22, 2021), https://nj.gov/governor/news/news/562021/approved/20210222a.shtml. Though the ability to purchase recreational marijuana remains months away, the legislation ended arrests for possession of small amounts of marijuana, which numbered in the thousands even after the amendment's effective date. Amanda Hoover, Murphy Signs N.J. Legal Weed Bills, Ending 3-Year Saga, NJ.com (Feb.

22, 2021), https://www.nj.com/marijuana/2021/02/murphy-signs-nj-legal-weed-bills-ending-3-year-saga.html.

The most expansive of the three bills, the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act, amended the Code of Criminal Justice to exempt from any criminal or civil punishment possession of six ounces or less of marijuana or seventeen grams or less of hashish. L. 2021, c. 16, § 56. Possession of greater quantities is a fourth-degree offense. Ibid. A separate bill set forth penalties for the possession and use of marijuana by those under the age of twenty-one. See S. 3454 (2021). The new legislation also prohibits state law enforcement from cooperating with federal authorities in enforcing the CSA. L. 2021, c. 16, § 52.

While workers may be drug tested under this new regime, an employer may not take adverse action against an employee due to ***28** the employee's consumption of marijuana or the presence of cannabinoid metabolites in their bodily fluid resulting from permitted conduct. Id. § 48. Presence of such metabolites may, however, result in penalties or refusal to employ if it causes the employer to violate a federal contract or lose federal funding. Id. § 47. Those express deferential references to federal law recognize that state law may not permit what federal law forbids, a principle as true for our recreational use legislation as for our Compassionate Use Act.

B.

[17] **[18]** Notwithstanding New Jersey's legalization of the medical and recreational use of marijuana, the CSA must be considered because, under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, "state laws that 'interfere with, or are contrary to the laws of congress, made in pursuance of the constitution' are invalid." Puglia v. Elk Pipeline, Inc., 226 N.J. 258, 274, 141 A.3d 1187 (2016) (quoting ****880** Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 604, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991)). The principles of federal preemption are rooted in the Supremacy Clause, In re Reglan Litig., 226 N.J. 315, 328, 142 A.3d 725 (2016), which "unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail," Gonzales v. Raich, 545 U.S. 1, 29, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005).

[19] **[20]** **[21]** **[22]** **[23]** "Pre-emption may be either expressed or implied ...." Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992). Congress may choose to preempt state law with the express language of an enactment. Franklin Tower One, L.L.C. v. N.M., 157 N.J. 602, 615, 725 A.2d 1104 (1999). In the alternative, there are two forms of implied preemption: field and conflict. Reglan, 226 N.J. at 328, 142 A.3d 725. "Field preemption applies 'where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." ' " Ibid. (quoting Gade, 505 U.S. at 98, 112 S.Ct. 2374). Express and ***29** field preemption do not apply to the present matter, because the CSA explicitly leaves room for state law to operate:

> 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, including criminal penalties, 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 of this subchapter and that State law so that the two cannot consistently stand together.
>
> [21 U.S.C. § 903.]

[24] **[25]** We therefore focus on conflict preemption. "[I]n the absence of express language or implied congressional intent to occupy the field, a court must find state law to be preempted 'to the extent that it actually conflicts with federal law.' " Maher v. N.J. Transit Rail Operations, Inc., 125 N.J. 455, 464, 593 A.2d 750 (1991) (quoting Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Local 54, 468 U.S. 491, 501, 104 S.Ct. 3179, 82 L.Ed.2d 373 (1984)). Conflict preemption requires an actual -- rather than hypothetical or speculative -- conflict between federal and state law. Feldman v. Lederle Labs., 125 N.J. 117, 135, 592 A.2d 1176 (1991).

[26] **[27]** Conflict preemption occurs in two scenarios. First, conflict preemption arises "where it is 'impossible for a private party to comply with both state and federal requirements.' " PLIVA, Inc. v. Mensing, 564 U.S. 604, 618, 131 S.Ct. 2567, 180 L.Ed.2d 580 (2011) (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 287, 115 S.Ct.

1483, 131 L.Ed.2d 385 (1995)). The second context in which conflict preemption applies is when "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " Reglan, 226 N.J. at 329, 142 A.3d 725 (quoting Gade, 505 U.S. at 98, 112 S.Ct. 2374). "When there is a conflict, 'the federal law must prevail.' " Feldman, 125 N.J. at 135, 592 A.2d 1176 (quoting Free v. Bland, 369 U.S. 663, 666, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962)). The importance of the state law is immaterial to a conflict preemption analysis when a valid federal statute is present. Maher, 125 N.J. at 465, 593 A.2d 750.

***30** **[28]** **[29]** "[P]re-emption is not to be lightly presumed." Franklin Tower One, 157 N.J. at 615, 725 A.2d 1104 (quoting Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987)). "The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the ****881** operation of state law in a field of federal interest, and has nonetheless decided to ... tolerate whatever tension there [is] between them." Wyeth v. Levine, 555 U.S. 555, 575, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009) (alteration in original) (quoting Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 166-67, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989)).

[30] **[31]** **[32]** **[33]** Central to our preemption analysis, therefore, is deciphering congressional intent. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) ("[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. ' "The purpose of Congress is the ultimate touchstone." ' " (quoting Malone v. White Motor Corp., 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978))). We must approach that task by examining not only the CSA's plain language, see United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1, 11, 128 S.Ct. 1511, 170 L.Ed.2d 392 (2008), but also "the purposes Congress sought to serve" through its enactment, see Chapman v. Hous. Welfare Rts. Org., 441 U.S. 600, 608, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979). We must also look beyond the language of the statute to the broader framework in which the statute resides. See Village of Ridgefield Park v. N.Y., Susquehanna & W. Ry. Corp., 163 N.J. 446, 453, 750 A.2d 57 (2000). Ultimately, a determination of "[w]hether a state law stands as an obstacle to the accomplishment of a federal objective[ ] requires a court to consider 'the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.' " R.F. v. Abbott Labs., 162 N.J. 596, 618, 745 A.2d 1174 (2000) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 526, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977)).

With those principles in mind, we turn to the CSA.

***31** C.

[34] **[35]** Enacted by Congress in 1970, the CSA sought "to conquer drug abuse and to control the legitimate and illegitimate traffic [of] controlled substances." Raich, 545 U.S. at 12, 125 S.Ct. 2195. The CSA replaced a network of drug laws with a "comprehensive regime." Ibid.; see also 116 Cong. Rec. 33,300 (statement of Rep. Springer) ("[T]he purpose of this act is to bring together the various laws affecting drugs in order to codify and consolidate them. It is intended to make enforcement more uniform ...."). "Congress intended [for] the CSA to strengthen rather than to weaken the prior drug laws." United States v. Moore, 423 U.S. 122, 139, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975). The CSA separates controlled substances into five schedules based on their accepted medical uses, risk of abuse, and physical and psychological effects. Raich, 545 U.S. at 13, 125 S.Ct. 2195. Substances may not be placed on a particular schedule without specific findings. 21 U.S.C. § 812(b). The Attorney General is empowered to add, remove, and reschedule substances, id. § 811(a), and has delegated that authority to the Drug Enforcement Administration, United States v. Kelly, 874 F.3d 1037, 1042 (9th Cir. 2017); 28 C.F.R. § 0.100(b).

Marijuana was placed in the strictest schedule -- Schedule I -- at the time of the CSA's enactment. Raich, 545 U.S. at 14, 125 S.Ct. 2195. Substances on Schedule I must be found to have a high potential for abuse, no currently accepted use for medical treatment, and a lack of accepted safety measures for use under medical supervision. 21 U.S.C. § 812(b)(1). Marijuana remains a Schedule I drug today, id. § 812(c), Schedule I(c)(10), despite repeated efforts to petition

for its rescheduling, **882 Nation v. Trump, 395 F. Supp. 3d 1271, 1275 (N.D. Cal. 2019). That original placement reflected concerns among legislators at the time about the increasing prevalence of marijuana, particularly among young people, see 116 Cong. Rec. 33,649-50 (statements of Reps. Anderson and Keith), although not all members of Congress agreed that it warranted such classification, see 116 Cong. Rec. 33,660 (statement of Rep. Ryan) ("[M]arihuana is found on schedule *32 I with such drugs as heroin, morphine, and LSD .... [T]he studies which have thus far been completed show that whatever harmful effects marihuana may have, they are not comparable to the effects of the other drugs on schedule I.").

Except as otherwise authorized, the CSA makes it unlawful to knowingly or intentionally "possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). The CSA also makes unlawful, subject to exceptions, the knowing or intentional possession of a controlled substance "unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice." Id. § 844(a).

[36] [37] The "valid prescription" language contained in § 844(a) cannot, however, apply to marijuana because the CSA prevents marijuana from being validly prescribed. See United States v. Johnson, 228 F. Supp. 3d 57, 62 (D.D.C. 2017) (citing United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001)); United States v. Harvey, 794 F. Supp. 2d 1103, 1105-06 (S.D. Cal.), aff'd, 659 F.3d 1272 (9th Cir. 2011). Thus, marijuana is not included in the CSA's prescription requirements, see 21 U.S.C. § 829, because "for purposes of the [CSA], marijuana has 'no currently accepted medical use' at all," Oakland Cannabis Buyers' Coop., 532 U.S. at 491, 121 S.Ct. 1711 (quoting one of the Schedule I criteria).

On the enforcement front, guidance from senior personnel in the Department of Justice (DOJ) to the offices of the United States Attorneys issued over the past decade or so has, at times, deprioritized -- but not prohibited -- federal prosecution of marijuana activities that are legal under state law. For example, in 2009, Deputy Attorney General David Ogden advised United States Attorneys that they "should not focus federal resources ... on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana," but rather prioritize larger-scale trafficking operations. Memorandum for Selected United States Attorneys 1-2 (Oct. 19, 2009).

*33 Four years later, as state ballot initiatives sought to legalize possession of small quantities of marijuana, Deputy Attorney General James Cole reiterated the DOJ's commitment to enforcing the CSA but provided eight priorities in light of limited DOJ resources, which included preventing: distribution to minors, marijuana revenue from reaching criminal enterprises, violence or the use of firearms in marijuana cultivation and distribution, and growth of marijuana on public lands. Memorandum for All United States Attorneys 1-2 (Aug. 29, 2013) (2013 Cole Memo). Cole acknowledged the DOJ's traditional reliance on state and local authorities in addressing lower-level marijuana activity through enforcement of their own laws and advised that states with strong regulatory and enforcement systems were less likely to threaten federal priorities. Id. at 2-3.

Following the change of administrations, Attorney General Jefferson B. Sessions, III, advised that "[g]iven the Department's **883 well-established general principles, previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately." Memorandum for All United States Attorneys 1 (Jan. 4, 2018). Attorney General William Barr reversed course to some extent, stating that he was "accepting the Cole Memorandum for now," but that he had "generally left it up to the U.S. Attorneys in each state to determine what the best approach is in that state." Sara Brittany Somerset, Attorney General Barr Favors A More Lenient Approach to Cannabis Prohibition, Forbes (Apr. 15, 2019), https://www.forbes.com/sites/sarabrittanysomerset/2019/04/15/attorney-general-barr-favors-a-more-lenient-approach-to-cannabis-legalization/?sh=6e82d477c4c8.

Significantly, it is not only the Executive Branch that has muddied the waters between state marijuana laws and federal enforcement; more importantly, Congress has also deprioritized prosecution for possession of medical marijuana while leaving the CSA otherwise unchanged.

In the relevant rider to the most recent federal Appropriations Act, Congress prohibited the DOJ from using allocated funds to *34 prevent states, including New Jersey, from implementing their medical marijuana laws. See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260,

§ 531, 134 Stat. 1182, 1282-83 (2020). Specifically, § 531 provides that

> [n]one of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.
>
> [Ibid.]

Similar language has been included in appropriations riders dating back to the 2015 federal budget, although the list of states and territories with medical marijuana legislation has been expanded over the years to reflect new enactments. See Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, § 531, 133 Stat. 2317, 2431 (2019); Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 537, 133 Stat. 13, 138 (2019); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 538, 132 Stat. 348, 444-45 (2018); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 537, 131 Stat. 135, 228 (2017); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014); see also United States v. Kleinman, 880 F.3d 1020, 1027 (9th Cir. 2017) (noting that the riders for the years 2015 through 2017 were "essentially the same" (quoting United States v. Nixon, 839 F.3d 885, 887 (9th Cir. 2016))).

It appears from the Congressional Record that the impetus for these riders has its origins in the Tenth Amendment -- reserving to the states powers not granted to the federal government -- and they reflect ****884** Congress's intention to limit the role of federal policy ***35** in matters of criminal justice. See 160 Cong. Rec. H4878 (daily ed. May 28, 2014) (statement of Rep. Rohrabacher) ("It should be disturbing to any constitutionalist that the Federal Government insists on the supremacy of laws that allow for the medical use of marijuana."). These continuing riders have "changed" federal law by prohibiting the DOJ "from spending appropriated funds to prosecute individuals who are acting in compliance with their State's medical marijuana laws" and "restrict[ing] the Federal Government from superseding State law when it comes to the use of medical marijuana." 163 Cong. Rec. H311 (daily ed. Jan. 11, 2017) (statement of Rep. Rohrabacher).

The tension between Congress's appropriations riders and the CSA's classification and criminalization of marijuana is manifest. Mindful that preemption analysis turns on legislative intent, see Lueck, 471 U.S. at 208, 105 S.Ct. 1904, we turn to case law examining whether and under what circumstances appropriations acts -- reflecting a shift in intent with respect to earlier legislation -- are deemed to impliedly suspend or supplant the earlier law.

D.

In considering the effect of the recent appropriations riders on the CSA as applied to the Order, we find particularly instructive guidance from the United States Supreme Court and several circuit courts. See Glukowsky v. Equity One, Inc., 180 N.J. 49, 64, 848 A.2d 747 (2004) ("[T]he principle of comity instructs state courts to give due regard to a federal court's interpretation of a federal statute.").

[38] **[39]** For example, in United States v. Dickerson, the Supreme Court stated that "[t]here can be no doubt that Congress could suspend or repeal [an] authorization ... and it could accomplish its purpose by an amendment to an appropriation bill, or otherwise." 310 U.S. 554, 555, 60 S.Ct. 1034, 84 L.Ed. 1356 (1940); accord United States v. Will, 449 U.S. 200, 222, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980). And "although repeals by implication are especially disfavored in the appropriations context, Congress ***36** nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly." Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 440, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992) (citation omitted); see also Me. Cmty. Health Options v. United States, 590 U.S. ——, 140 S. Ct.

1308, 1323-27, 206 L.Ed.2d 764 (2020) (concluding that Congress's failure to fund Patient Protection and Affordable Care Act obligations did not impliedly repeal the ACA). Harmonizing conflicting statutes is preferred, but courts are not required to "approach the statute[s] with blinders and reconcile them at all costs, even when the second enactment is an appropriations measure." Preterm, Inc. v. Dukakis, 591 F.2d 121, 133 (1st Cir. 1979).

Though it did not discuss implied repeal, United States v. McIntosh tasked the Ninth Circuit with resolving an issue similar to the one at hand -- determining whether the 2016 appropriations rider prohibiting DOJ interference with state medical marijuana laws prevented the DOJ from prosecuting activities allegedly compliant with state law. 833 F.3d 1163, 1168-70 (9th Cir. 2016). The court concluded that it did, stating that "at a minimum, [the rider] prohibit[ed the] DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws." Id. at 1176-77. In so concluding, the Ninth Circuit recognized the "temporal nature" of the issue -- Congress could restore funding for such prosecutions any day or never again **885 -- but concluded that, if the DOJ sought to continue prosecuting the appellants, the appellants were entitled to evidentiary hearings to determine whether they strictly complied with state law. Id. at 1179; see also Tin Cup, LLC v. U.S. Army Corps of Eng'rs, 904 F.3d 1068, 1073 (9th Cir. 2018) ("There is ... 'a very strong presumption' that if an appropriations act changes substantive law, it does so only for the fiscal year for which the bill was passed." (quoting Bldg. & Constr. Trades Dep't, AFL–CIO v. Martin, 961 F.2d 269, 273 (D.C. Cir. 1992))); Strawser v. Atkins, 290 F.3d 720, 734 (4th Cir. 2002) (" 'Where Congress chooses' to amend substantive law in an appropriations rider, *37 '[courts] are bound to follow Congress's last word on the matter even in an appropriations law.' " (quoting City of Los Angeles v. Adams, 556 F.2d 40, 49 (D.C. Cir. 1977))).

Those federal decisions ring familiar because they mirror our own reading of appropriations acts as signifiers of legislative intent to suspend earlier statutory enactments. See City of Camden v. Byrne, 82 N.J. 133, 154-55, 411 A.2d 462 (1980). In Byrne, a collection of municipalities and counties brought actions against Governor Brendan T. Byrne, the Legislature, and other government officials for failure to appropriate and expend state funds allotted by several statutes to municipalities and counties. Id. at 141-44, 411 A.2d 462. The allocations were not made because they were excluded from the Legislature's general appropriations acts or eliminated by Governor Byrne's line-item veto. Id. at 142-44, 411 A.2d 462.

After discussing the constitutional issues implicated in the matter, we moved to the defendants' contention that the statutes had been suspended, supplanted, or repealed by the subsequent passage of annual appropriations acts, which intentionally excluded the expenditures. Id. at 153, 411 A.2d 462. The appropriations acts and original statutes were irreconcilable because they made different uses of the same limited funds. Ibid. Although we recognized a strong presumption against any implied nullification of statutes, we concluded that "this presumption may be overcome when there is a clear showing that two legislative measures are patently repugnant or inconsistent." Id. at 154, 411 A.2d 462. To so find, we looked to the intent of the Legislature. Ibid.

Applied to the facts presented in Byrne, we found that the failure to appropriate the funding called for in the statutes was an intentional act of the Legislature, as was its decision not to override the Governor's line-item vetoes. Ibid. Such unmistakable legislative intent reflected in the appropriations laws "necessarily supersede[d] any previously expressed legislative desires at least for the duration of the particular appropriation act." Ibid. We thus read the appropriations acts as the manifested intent of the *38 Legislature to give no effect at all to the earlier statutes, stating that "[t]he earlier statutes [could not] coexist with the enacted appropriation and, consequently, must be deemed [to have been] suspended by adoption of the later appropriation acts." Id. at 154-55, 411 A.2d 462.

We noted, as well, the limited applicability of appropriations laws -- confined to a particular fiscal year -- and concluded that their effect on the previously enacted statutes was best expressed as implied suspension as opposed to implied repeal, even though that limitation did not change our general analysis. Id. at 153-54, 411 A.2d 462; see also

McIntosh, 833 F.3d at 1179 (recognizing the "temporal nature" of Congress's appropriations rider as applied to DOJ enforcement of the CSA). Our courts continue to recognize appropriations acts as expressions of legislative intent. See ****886** Guaman v. Velez, 421 N.J. Super. 239, 258, 23 A.3d 451 (App. Div. 2011); Mid-Atl. Solar Energy Indus. Ass'n v. Christie, 418 N.J. Super. 499, 505-06, 14 A.3d 760 (App. Div. 2011).

E.

[40] With federal case law and Byrne as our guides to deciphering congressional intent here, we conclude that it is possible for M&K to abide by both the CSA and the Compassionate Use Act at the present time, and that the latter does not currently create an obstacle to the accomplishment of congressional objectives. As such, the Compassionate Use Act is not preempted by the CSA as applied to the Order.

The perceived tension, as stated, stems from the Order entered against M&K. See N.J.S.A. 34:15-28.2 (providing for penalties that may be imposed on employers and insurers that fail to comply with compensation court orders). Though the Compassionate Use Act shields those acting in compliance with its provisions from criminal liability, see N.J.S.A. 24:6I-6(a), marijuana possession remains illegal under federal law, 21 U.S.C. §§ 841(a), 844(a). This despite Congress's present will to defund DOJ actions that prevent states from implementing their own medical marijuana laws, ***39** Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 531, 134 Stat. 1182, 1282-83 (2020), including prosecuting those complying with state law, see McIntosh, 833 F.3d at 1176-77.

Byrne instructs us to read statutes and subsequent appropriations acts in tandem. To do as M&K asks -- to focus purely on whether state law permits and, in this case, demands what federal law forbids -- would be to completely disregard the most recent expression of Congress's intent in its appropriations acts. See Strawser, 290 F.3d at 734. We find that doing so would be incongruous with the task before us and do not so limit ourselves here. We must also consider the broader framework in which the statutes exist. See Village of Ridgefield Park, 163 N.J. at 453, 750 A.2d 57.

Here, the CSA expressly contemplates a role for state law absent a "positive conflict" with the CSA. See 21 U.S.C. § 903; see also Gonzales v. Oregon, 546 U.S. 243, 251, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006) (discussing Schedule II controlled substances). DOJ guidance has acknowledged both federal prosecutors' historic reliance on state and local laws and law enforcement in addressing lower-level marijuana offenses and the fact that state marijuana laws generally do not conflict with federal investigative and prosecutorial priorities. 2013 Cole Memo, supra, at 2-3. The Compassionate Use Act thus seeks to operate in the space afforded to it by federal law and federal priorities. See N.J.S.A. 24:6I-2(c) to (d) (noting the collection of other states that have enacted similar medical marijuana programs and finding that the Act does not place New Jersey in violation of federal law).

[41] Congress has, for seven consecutive fiscal years, prohibited the DOJ from using funds to interfere with state medical marijuana laws through appropriations riders. The present rider and its predecessors have "changed" federal law and "restrict[ed] the Federal Government from superseding State law when it comes to the use of medical marijuana." See 163 Cong. Rec. H311 (daily ed. Jan. 11, 2017) (statement of Rep. Rohrabacher). The rider language leaves "no doubt" as to its effect by "forbid[ding] ***40** the use of funds" to interfere with state medical marijuana schemes. See The Last Best Beef, LLC v. Dudas, 506 F.3d 333, 339-40 (4th Cir. 2007) (holding that "Congress intended to enact a discrete and narrow exception to the Lanham Act" via an appropriations action). ****887** Despite McIntosh's inviting correction by Congress, 833 F.3d at 1179 ("If Congress intends to prohibit a wider or narrower range of DOJ actions, it certainly may express such intention, hopefully with greater clarity, in the text of any future rider."), those riders have used substantially the same language year after year. It appears to us that this repeated language is Congress speaking with complete awareness of McIntosh and absolute approval of its reasoning. See 163 Cong. Rec. H311 (daily ed. Jan. 11, 2017) (statement of Rep. Rohrabacher) ("Importantly ... the Ninth Circuit Court of Appeals ruled in [McIntosh] that Federal funds cannot be used to prosecute those in compliance with their State's medical marijuana laws. This provision will be part of American law as long as it is renewed and Congress makes it part of the law."). Congress is empowered to amend the CSA via an appropriations action provided "it does so clearly," see Robertson, 503 U.S. at 440, 112 S.Ct. 1407,

and the most recent appropriations rider, in our view, "clearly is intended as a substitute" to the CSA as applied to the Compassionate Use Act, see Miccosukee Tribe of Indians of Fla. v. U.S. Army Corps of Eng'rs, 619 F.3d 1289, 1299 (11th Cir. 2010). Therefore, we find that Congress has spoken through the most recent appropriations rider and give it the final say. Strawser, 290 F.3d at 734; Adams, 556 F.2d at 48-49.

We thus conclude that the CSA, as applied to the Compassionate Use Act and the Order at issue, is effectively suspended by the most recent appropriations rider for at least the duration of the federal fiscal year and that it would be "inappropriate for this Court to give any legal effect whatsoever to the earlier statutory enactment[ ]." Byrne, 82 N.J. at 154-55, 411 A.2d 462. "The earlier statute[ ] cannot coexist with the enacted appropriation and, consequently, must be deemed to be suspended by adoption of the later appropriation act[ ]." Id. at 154, 411 A.2d 462. We repeat that "[t]he case for federal pre-emption is particularly weak where ***41** Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to ... tolerate whatever tension there [is] between them." Wyeth, 555 U.S. at 575, 129 S.Ct. 1187 (second alteration in original) (quoting Bonito Boats, Inc., 489 U.S. at 166-67, 109 S.Ct. 971).

As in Byrne, we find here that this clear, volitional act in the form of appropriations law takes precedence over the earlier legislation. Because DOJ enforcement of the CSA may not, by congressional action, interfere with activities compliant with the Compassionate Use Act, we find that there is no "positive conflict" and that the CSA and the Act may coexist as applied to the Order. See 21 U.S.C. § 903. Qualified patients may continue to possess and use medical marijuana, and related compensation orders may be entered while federal authorities continue to enforce the CSA to the extent Congress permits. The federal and state acts can thus "consistently stand together," see ibid., and it is possible for M&K to comply with both, see Mensing, 564 U.S. at 618, 131 S.Ct. 2567. The Compassionate Use Act does not currently present an obstacle to Congress's objectives as articulated in the recent appropriations riders, see Reglan, 226 N.J. at 329, 142 A.3d 725, and so the CSA does not preempt the Compassionate Use Act as applied to the Order. As we have previously recognized, and we find to be the case here with respect to the recent appropriations riders' effect on the CSA, "legislative intent through appropriation actions ... sometimes speak[s] louder than words." State v. Cannon, 128 N.J. 546, 568, 608 A.2d 341 (1992).

****888** We acknowledge that our decision here departs from the holdings of other state supreme courts that have come to different conclusions when faced with the precise issue before us -- whether state medical marijuana laws are preempted as applied to workers' compensation orders compelling employers to reimburse workers' medical marijuana costs. See Bourgoin, 187 A.3d at 22 ("Because the CSA preempts the [Maine Medical Use of Marijuana Act] when the [Act] is used as the basis for requiring an employer to reimburse an employee for the cost of medical ***42** marijuana, the order based on the [Act] must yield."); Wright's Case, 486 Mass. 98, 156 N.E. 3d 161, 175 (2020) (concluding that the plain language of the state reimbursement limitation provision prohibited compelling workers' compensation insurers to reimburse the cost of medical marijuana).

We are urged to follow suit with Bourgoin and Wright's Case. However, while we may find their reasoning instructive, they in no way bind our Court or predetermine our analysis. See Matthews v. City of Atl. City, 84 N.J. 153, 162, 417 A.2d 1011 (1980). Our decision today is consonant with our reading of the relevant federal authorities and our settled principles of preemption analysis and deciphering legislative intent.

Additionally, after oral argument, the New Hampshire Supreme Court concluded that there is "no direct conflict" between the CSA and a state order to reimburse a worker's medical marijuana costs and that reimbursement did not represent an obstacle to congressional objectives. Appeal of Panaggio, ___ N.H. ___, ___, ___, ___ A.3d ___, ___, ___, 2021 WL 787021 (N.H. 2021) (slip op. at 6, 11). Agreeing with the Bourgoin dissent and our Appellate Division's decision in this case, Panaggio also found that the insurer would lack the active participation and mens rea necessary for aiding-and-abetting liability, id. ___ (slip op. at 8), which we will address in the next section.

We close by repeating the "temporal nature" of the issue before us and its dependence on the future acts of Congress. See McIntosh, 833 F.3d at 1179. Funding to support

federal prosecution of those acting within the scope of the Compassionate Use Act may be restored soon, or never again. We regard the CSA as suspended, rather than repealed, with respect to orders like the one at issue here because the appropriations rider on which we rely is of a limited lifespan and may be repeated, removed, or changed within the year. See Byrne, 82 N.J. at 153, 411 A.2d 462.

F.

[42] Our preemption analysis notwithstanding, we address M&K's contention that its compliance with the Order would ***43** subject it to aiding-and-abetting liability under 18 U.S.C. § 2 on the theory that it would be assisting in Hager's possession of marijuana, contrary to the CSA. M&K counters the Appellate Division's conclusion "that 'one cannot aid and abet a completed crime,' " Hager, 462 N.J. Super. at 166, 225 A.3d 137 (quoting United States v. Ledezma, 26 F.3d 636, 642 (6th Cir. 1994)), by claiming that the offense at issue here is ongoing as opposed to completed. It similarly argues that its compliance risks conspiracy liability under 21 U.S.C. § 846. We are unpersuaded.

[43] **[44]** **[45]** **[46]** "To aid and abet a crime, a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as in something that he wishes to bring about' and 'seek by his action to make it succeed.' " Rosemond v. United States, 572 U.S. 65, 76, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014) (quoting ****889** Nye & Nissen v. United States, 336 U.S. 613, 619, 69 S.Ct. 766, 93 L.Ed. 919 (1949)). Proof is required "that the defendant had the specific intent to facilitate the crime." United States v. Centeno, 793 F.3d 378, 387 (3d Cir. 2015). To support an aiding-and-abetting conviction, "the Government must prove: '(1) that another committed a substantive offense; and (2) the one charged with aiding and abetting knew of the commission of the substantive offense and acted to facilitate it.' " Ibid. (quoting United States v. Mercado, 610 F.3d 841, 846 (3d Cir. 2010)). "[W]hether he participates with a happy heart or a sense of foreboding" is of no matter, provided the accomplice "knowingly elected to aid in the commission of" the offense. Rosemond, 572 U.S. at 79-80, 134 S.Ct. 1240 (emphasis added).

By the very nature of its appeals to both the Appellate Division and this Court, M&K has made it clear that it does not wish to "participate" and "act[ ] to make ... succeed" the federal offense in question here -- Hager's possession of marijuana. It has gone to great pains to avoid facilitating an offense. We trust that our affirmance of the compensation court's Order will not change M&K's position. Likewise, reimbursing Hager under court mandate can hardly be interpreted as M&K "elect[ing]" to aid in ***44** Hager's possession of marijuana, contrary to federal law. Rather, it is being compelled to do so by the Order.

Even accepting M&K's contention that the court-mandated reimbursement payments constitute an ongoing offense in which the reimbursement for one illegal purchase and possession enables the next, it fails to show -- and we strain to find -- how its compliance with the Order exhibits a specific intent to aid-and-abet Hager's marijuana possession. M&K's position that it faces aiding-and-abetting liability because it will reimburse Hager while knowing what the funds will be used for does not persuade us that it satisfies the specific intent requirement when the facts so clearly indicate that it will be doing so against its will and at the behest of this Court.

[47] **[48]** **[49]** M&K's argument that compliance with the Order places it at risk of conspiracy liability must also fail for similar reasons. Any individual who conspires to commit an offense prohibited by the CSA "shall be subject to the same penalties as those prescribed for the offense." 21 U.S.C. § 846. A conspiracy charge under § 846 "can only be sustained if the defendant 'knowingly and intentionally became a member of the conspiracy.' " United States v. Ruiz, 932 F.2d 1174, 1182 (7th Cir. 1991) (quoting the Seventh Circuit's Pattern Criminal Federal Jury Instructions for conspiracy). "[T]he government must show ... that the alleged conspirators shared a 'unity of purpose[,'] the intent to achieve a common goal, and an agreement to work together toward the goal." United States v. Korey, 472 F.3d 89, 93 (3d Cir. 2007) (quoting United States v. Cartwright, 359 F.3d 281, 286 (3d Cir. 2004)).

Again, we are unable to discern a "unity of purpose" from M&K's repeated attempts to disassociate itself from Hager's marijuana possession and use. The parties are of two competing minds on the subject and M&K went as far as to present testimony before the compensation court that Hager does not require any treatment at all -- let alone the ongoing prescription of medical marijuana. Likewise, to the extent that

the Order requiring reimbursement ***45** payments creates a conspiracy between Hager and M&K, M&K's membership cannot be said to be intentional. Rather, its participation is being compelled by the courts.

****890** VII.

The judgment of the Appellate Division is affirmed. M&K is ordered to reimburse costs for, and reasonably related to, Hager's prescribed medical marijuana.

CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ-VINA, and PIERRE-LOUIS join in JUSTICE SOLOMON'S opinion.

All Citations

246 N.J. 1, 247 A.3d 864, 2021 IER Cases 134,643

Footnotes

1 The record shows that since approximately 2006 Hager has received, in addition to any medical benefits that may have been provided by M&K, Supplemental Security Income and Medicaid benefits.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Smith v. 116 S Market LLC, 9th Cir.(Cal.), December 16, 2020

700 F.3d 394
United States Court of Appeals,
Ninth Circuit.

Marla JAMES; Wayne Washington; James Armantrout; Charles Daniel Dejong, Plaintiffs–Appellants,
v.
CITY OF COSTA MESA, a city incorporated under the laws of the State of California; City of Lake Forest, a city incorporated under the laws of the State of California, Defendants–Appellees.

No. 10–55769.
|
Argued and Submitted May 6, 2011.
|
Filed May 21, 2012.
|
Amended Nov. 1, 2012.

Synopsis
Background: Persons who had obtained medical marijuana through collectives filed action against municipalities that had opposed those collectives alleging violation of Title II of Americans with Disabilities Act (ADA) that prohibited discrimination in provision of public services. The United States District Court for the Central District of California, Andrew J. Guilford, J., 2010 WL 1848157, denied preliminary injunctive relief for plaintiffs, and they appealed.

Holdings: The Court of Appeals, Fisher, Circuit Judge, held that:

[1] doctor-supervised marijuana use was federally prohibited use of drugs that was not covered by ADA's supervised use exception;

[2] medical marijuana use did not come within ADA exception for drug use "authorized by other provisions of Federal law"; and

[3] plaintiffs had not been denied equal protection.

Affirmed.

Berzon, Circuit Judge, filed opinion concurring in part and dissenting in part.

Opinion, 684 F.3d 825, amended and superseded on denial of rehearing en banc.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

West Headnotes (6)

[1] **Civil Rights** Alcohol or drug use

Doctor-supervised marijuana use was federally prohibited use of drugs that was not covered by ADA's supervised use exception; thus, exception did not protect medical marijuana users who claimed to face discrimination on basis of their marijuana use. Controlled Substances Act, §§ 202(b)(1)(B), 401(a), 404(a), 21 U.S.C.A. §§ 812(b)(1)(B), 841(a), 844(a); Americans with Disabilities Act of 1990, § 511(a), (d)(1), 42 U.S.C.A. § 12210(a), (d)(1); West's Ann.Cal.Health & Safety Code § 11362.5(d).

28 Cases that cite this headnote

[2] **Statutes** Giving effect to statute or language; construction as written

If the statutory language is unambiguous and the statutory scheme is coherent and consistent, judicial inquiry must cease.

[3] **Statutes** Purpose and intent; determination thereof

Statutes Subject or purpose

Statutes Plain, literal, or clear meaning; ambiguity

If a statute is ambiguous, a court may use canons of construction, legislative history, and the statute's overall purpose to illuminate Congress's

intent; a court also may look to other related statutes because statutes dealing with similar subjects should be interpreted harmoniously.

8 Cases that cite this headnote

[4] **Statutes** Relative and qualifying terms and provisions, and their relation to antecedents

"Rule of the last antecedent," under which a limiting clause or phrase in a statute should ordinarily be read as modifying only the noun or phrase that it immediately follows is not an absolute and can be overcome by other indicia of meaning.

1 Cases that cite this headnote

[5] **Civil Rights** Alcohol or drug use

Medical marijuana use did not come within ADA exception for drug use "authorized by other provisions of Federal law" by virtue of congressional inaction that allowed for implementation of Washington, D.C. medical marijuana initiative; although legislative power of District of Columbia Council was derived from Congress, Council enactments were not "federal" laws in usual sense because it was not sovereign and D.C. Code, unlike most congressional enactments, was comprehensive set of laws equivalent to those enacted by state and local governments. Americans with Disabilities Act of 1990, § 511(d)(1), 42 U.S.C.A. § 12210(d)(1); West's Ann.Cal.Health & Safety Code § 11362.5(d).

17 Cases that cite this headnote

[6] **Constitutional Law** Other particular issues and applications

Controlled Substances Medical necessity or assistance

Persons in California who had obtained medical marijuana through collectives were not denied equal protection by prior decision of Congress under Controlled Substances Act (CSA) to prohibit medical marijuana use and subsequent decision of Congress to not block implementation of District of Columbia medical marijuana initiative; actions of Congress allowed those jurisdictions to determine for themselves whether to suspend their local prohibitions and unambiguous federal prohibitions continued to apply equally in both jurisdictions. U.S.C.A. Const.Amend. 14; Controlled Substances Act, §§ 202(b)(1)(B), 401(a), 404(a), 21 U.S.C.A. §§ 812(b)(1)(B), 841(a), 844(a); West's Ann.Cal.Health & Safety Code § 11362.5(d).

24 Cases that cite this headnote

Attorneys and Law Firms

***395** Matthew Pappas, Law Office of Matthew Pappas, Mission Viejo, CA, for the appellants.

James R. Touchstone and Krista MacNevin Jee, Jones & Meyer, Fullerton, CA, for appellee City of Costa Mesa.

Jeffrey V. Dunn (argued), Daniel S. Roberts and Lee Ann Meyer, Best Best & Krieger LLP, Irvine, CA, for appellee City of Lake Forest.

Thomas E. Perez and Tony West, Assistant Attorneys General, and Mark L. Gross and Roscoe Jones, Jr., Attorneys, Department of Justice, Washington, D.C., for the United States as amicus curiae.

Appeal from the United States District Court for the Central District of California, Andrew J. Guilford, District Judge, Presiding. D.C. No. 8:10–cv–00402–AG–MLG.

Before: HARRY PREGERSON, RAYMOND C. FISHER and MARSHA S. BERZON, Circuit Judges.

Opinion by Judge FISHER; Partial Concurrence and Partial Dissent by Judge BERZON.

ORDER

Judge Pregerson and Judge Fisher have voted to deny the petition for rehearing and rehearing en banc. Judge Berzon has ***396** voted to grant the petition for rehearing and rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

Appellants' petition for rehearing and rehearing en banc, filed June 4, 2012, is **DENIED**.

The amended opinion and amended partial concurrence/partial dissent filed May 21, 2012, will be filed concurrently with this order.

No further petitions for rehearing will be considered.

OPINION

FISHER, Circuit Judge:

The plaintiffs are severely disabled California residents. They alleged that "[c]onventional medical services, drugs and medications" have not alleviated the pain caused by their impairments. Each of them has therefore "obtained a recommendation from a medical doctor" to use marijuana to treat her pain. This medical marijuana use is permissible under California law, *see* Cal. Health & Safety Code § 11362.5(d) (suspending state-law penalties for marijuana possession and cultivation for seriously ill Californians and their caregivers who "possess[ ] or cultivate[ ] marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician"), but prohibited by the federal Controlled Substances Act (CSA), *see* 21 U.S.C. §§ 812(b)(1)(B), 812(c) sched. I(c)(10), 841(a), 844(a).

The plaintiffs obtain medical marijuana through collectives located in Costa Mesa and Lake Forest, California. These cities, however, have taken steps to close marijuana dispensing facilities operating within their boundaries. Costa Mesa adopted an ordinance excluding medical marijuana dispensaries completely in 2005. *See* Costa Mesa, Cal., Ordinance 05–11 (July 19, 2005). Some marijuana dispensing facilities, including the Costa Mesa collectives, have apparently continued to operate despite the ordinance, but the plaintiffs alleged that Costa Mesa police have recently "raided operating marijuana collectives and detained collective members." [1] Lake Forest has also allegedly raided medical marijuana collectives operating within city limits, and has brought a public nuisance action in state court seeking to close them. *See City of Lake Forest v. Moen,* No. 30–2009–298887 (Orange Cnty. Super. Ct. filed Sept. 1, 2009).

Concerned about the possible shutdown of the collectives they rely on to obtain medical marijuana, the plaintiffs brought this action in federal district court, alleging that the cities' actions violate Title II of the Americans with Disabilities Act (ADA), which prohibits discrimination in the provision of public services. [2] District Judge ***397** Guilford sympathized with the plaintiffs, but denied their application for preliminary injunctive relief on the ground that the ADA does not protect against discrimination on the basis of marijuana use, even medical marijuana use supervised by a doctor in accordance with state law, unless that use is authorized by federal law.

[1] We affirm. We recognize that the plaintiffs are gravely ill, and that their request for ADA relief implicates not only their right to live comfortably, but also their basic human dignity. We also acknowledge that California has embraced marijuana as an effective treatment for individuals like the plaintiffs who face debilitating pain. Congress has made clear, however, that the ADA defines "illegal drug use" by reference to federal, rather than state, law, and federal law does not authorize the plaintiffs' medical marijuana use. We therefore necessarily conclude that the plaintiffs' medical marijuana use is not protected by the ADA. [3]

DISCUSSION

Title II of the ADA prohibits public entities from denying the benefit of public services to any "qualified individual with a disability." 42 U.S.C. § 12132. [4] The plaintiffs alleged that, by interfering with their access to the medical marijuana they use to manage their impairments, Costa Mesa and Lake Forest have effectively prevented them from accessing public services, in violation of Title II. As the district court recognized, however, the ADA also provides that "the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." *Id.* § 12210(a). This case turns on whether the plaintiffs' medical marijuana use constitutes "illegal use of drugs" under § 12210. [5]

Section 12210(d)(1) defines "illegal use of drugs" as

> the use of drugs, the possession or distribution of which is unlawful under the ***398** Controlled Substances Act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Id. § 12210(d)(1). The parties agree that the possession and distribution of marijuana, even for medical purposes, is generally unlawful under the CSA, and thus that medical marijuana use falls within the exclusion set forth in § 12210(d)(1)'s first sentence. They dispute, however, whether medical marijuana use is covered by one of the exceptions in the second sentence of § 12210(d)(1). The plaintiffs contend their medical marijuana use falls within the exception for drug use supervised by a licensed health care professional. They alternatively argue that the exception for drug use "authorized by ... other provisions of Federal law" applies. We consider each argument in turn.

I.

We first decide whether the plaintiffs' marijuana use falls within § 12210' s supervised use exception.

There are two reasonable interpretations of § 12210(d)(1)'s language excepting from the illegal drug exclusion "use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law." The first interpretation—urged by the plaintiffs—is that this language creates *two* exceptions to the illegal drug exclusion: (1) an exception for professionally supervised drug use carried out under *any* legal authority; and (2) an independent exception for drug use authorized by the CSA or other provisions of federal law. The second interpretation—offered by the cities and adopted by the district court—is that the provision contains a *single* exception covering all uses authorized by the CSA or other provisions of federal law, including both CSA-authorized uses that involve professional supervision (such as use of controlled substances by prescription, as authorized by 21 U.S.C. § 829, and uses of controlled substances in connection with research and experimentation, as authorized by 21 U.S.C. § 823(f)), and other CSA-authorized uses. Under the plaintiffs' interpretation, their state-sanctioned, doctor-recommended marijuana use is covered under the supervised use exception. Under the cities' interpretation, the plaintiffs' state-authorized medical marijuana use is not covered by any exception because it is not authorized by the CSA or another provision of federal law. Although § 12210(d)(1)'s language lacks a plain meaning and its legislative history is not conclusive, we hold, in light of the text and legislative history of the ADA, as well as the relationship between the ADA and the CSA, that the cities' interpretation is correct.

The meaning of § 12210(d)(1) cannot be discerned from the text alone. Both interpretations of the provision are somewhat problematic. The cities' reading of the statute renders the first clause in § 12210(d)(1)'s second sentence superfluous; if Congress had intended that the exception cover only uses authorized by the CSA and other provisions of federal law, it could have omitted the "taken under supervision" language altogether. But the plaintiffs' interpretation also fails to "giv[e] effect to each word" of § 12210(d)(1), *United States v. Cabaccang,* 332 F.3d 622, 627 (9th Cir.2003) (en banc), for if Congress had really intended that the language excepting "other uses authorized by the Controlled Substances Act or other provisions of Federal law" be entirely independent of the preceding supervised use language, it could have omitted the word "other," thus excepting "use of a drug ***399** taken under supervision by a licensed health care professional, *or uses* authorized by the Controlled Substances Act." Moreover, unless the word "other" is omitted, the plaintiffs' interpretation renders the statutory language outright awkward. One would not *naturally* describe "the use of a drug taken under supervision by a licensed health care professional, or *other* uses authorized by the Controlled Substances Act or other provisions of Federal law" unless the supervised uses were a *subset* of the uses authorized by the CSA and other provisions of federal law. The plaintiffs' reading thus results not only in surplusage, but also in semantic dissonance. *Cf. Coos Cnty. Bd. of Cnty. Comm'rs v. Kempthorne,* 531 F.3d 792, 806 (9th Cir.2008) (declining to adopt the plaintiff's "tortured reading of the statute's plain text"). [6]

The cities' interpretation also makes the most sense of the contested language when it is viewed in context. *See*

United States v. Havelock, 664 F.3d 1284, 1289 (9th Cir.2012) (en banc) ("Statutory interpretation focuses on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.' " (quoting *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997))). Here, the context reveals Congress' intent to define "illegal use of drugs" by reference to federal, rather than state, law. Section 12210(d)(1) mentions the CSA by name twice, and § 12210(d)(2) provides that "[t]he term 'drug' means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act." 42 U.S.C. § 12210(d)(2).

[2] **[3]** **[4]** We therefore conclude that the cities' interpretation of the statutory text is the more persuasive, though we agree with the dissent that the text is ultimately inconclusive.[7] We therefore look to legislative history, including related congressional activity.[8]

***400** The legislative history of § 12210(d), like its text, is indeterminate. It is true, as the plaintiffs point out, that Congress rejected an early draft of the "taken under supervision" exception in favor of a broader version. *Compare* S. 933, 101st Cong. § 512(b) (as passed by the Senate, Sept. 7, 1989) ("The term 'illegal drugs' does not mean the use of a controlled substance *pursuant to a valid prescription* or other uses authorized by the Controlled Substances Act or other provisions of Federal law." (emphasis added)), *with* H.R. 2273, 101st Cong. § 510(d)(1) (as passed by the House, May 22, 1990) ("Such term does not include the use of a drug *taken under supervision by a licensed health care professional,* or other uses authorized by the Controlled Substances Act or other provisions of Federal law." (emphasis added)), *and* H.R. Conf. Rep. No. 101–596, at 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 596 (explaining that the House version of the illegal drug exclusion was chosen over the Senate version). We are not persuaded, however, that this history compels the plaintiffs' interpretation of § 12210(d)(1). Although the expansion of the supervised use exception suggests Congress wanted to cover more than just CSA authorized *prescription-based* use, it does not demonstrate that the exception was meant to extend beyond the set of uses authorized by the CSA and other provisions of federal law. The CSA does authorize some professionally supervised drug use that is not prescription based, *see* 21 U.S.C. § 823(f) (providing for practitioner dispensation of controlled substances in connection with approved research studies), and Congress could have intended simply to expand the supervised use exception to encompass all such uses.

One House Committee Report does include a brief passage that arguably supports the notion that § 12210(d)(1)'s supervised use language and its authorized use language are independent. *See* H.R.Rep. No. 101–485, pt. 3, at 75 (1990), 1990 U.S.C.C.A.N. 445, 498 ("The term 'illegal use of drugs' does not include the use of controlled substances, including experimental drugs, taken under the supervision of a licensed health care professional. It *also* does not include uses authorized by the Controlled Substances Act or other provisions of federal law." (emphasis added)). This discussion is of limited persuasive value, however, because it may rest on the unstated assumption—quite plausible at the time—that professionally supervised use of illegal drugs would always be consistent with the CSA. In fact, the experimental drug use listed in the House Committee Report as an example of the sort of use covered by the supervised use exception is itself CSA-authorized. *See* 21 U.S.C. § 823(f). There is no reason to think that the 1990 Congress that passed the ADA would have anticipated later changes in state law facilitating professional supervision of drug use that federal law does not permit. The first such change came six years later, when California voters ***401** passed Proposition 215, now codified as the Compassionate Use Act of 1996. *See* *Gonzales v. Raich,* 545 U.S. 1, 5, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005).

Although it is true, as the dissent points out, that use of marijuana for medical purposes "was not unthinkable" in 1990, before, during and after adoption of the ADA there has been a strong and longstanding federal policy against medical marijuana use outside the limits established by federal law itself. *See* *id.* at 5–6, 10–14, 125 S.Ct. 2195 (contrasting California's historical tolerance for medical marijuana with comprehensive federal limits on marijuana possession imposed by Congress in 1970). In 1970, despite marijuana's known historical use for medical purposes, Congress listed marijuana as a Schedule I drug, designating it as a substance having "a high potential for abuse," "no currently accepted medical use in treatment in the United States" and "a lack of accepted safety [standards] for use ... under medical supervision." Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91–513, tit. II, § 202(b)(1), 84 Stat. 1236, 1247 (codified at 21 U.S.C. § 812(b)(1)). In 1989, the Administrator of the Drug Enforcement Agency (DEA) rejected an administrative

law judge's recommendation that marijuana be relisted from Schedule I to Schedule II because of its therapeutic advantages. The Administrator said that "marijuana has not been demonstrated as suitable for use as a medicine." 54 Fed. Reg. 53,767, 53,768 (Dec. 29, 1989). The DEA once again rejected rescheduling in 1992, reaffirming the absence of accepted medical use of marijuana. *See* 57 Fed. Reg. 10,499 (Mar. 26, 1992). It did so again in 2001. *See* 66 Fed. Reg. 20,038 (Apr. 18, 2001). In 1992, the Federal Drug Administration (FDA) *closed* the Investigational New Drug (IND) Compassionate Access Program, which had begun in 1978 and had allowed a few dozen patients whose serious medical conditions could be relieved only by marijuana to apply for and receive marijuana from the federal government. *See* *Conant v. Walters,* 309 F.3d 629, 648 (9th Cir.2002); Mark Eddy, Cong. Research Serv., RL 33211, Medical Marijuana: Review and Analysis of Federal and State Policies 8 (2010). In 1998, Congress passed the Omnibus Consolidated and Emergency Supplemental Appropriations Act for 1999, Pub. L. No. 105–277, 112 Stat. 2681 (1998). Under the heading "Not Legalizing Marijuana for Medicinal Use," this provision stated in part, "Congress continues to support the existing Federal legal process for determining the safety and efficacy of drugs and opposes efforts to circumvent this process by legalizing marijuana, and other Schedule I drugs, for medicinal use without valid scientific evidence and the approval of the Food and Drug Administration." *Id.* Every year between 1998 and 2009, Congress *blocked* implementation of a voter-approved initiative allowing for the medical use of marijuana in the District of Columbia. *See, e.g.,* Consolidated Appropriations Act, 2000, Pub. L. No. 106–113, § 167, 113 Stat. 1501, 1530 (1999). Between 2003 and 2007, the House annually, and by large margins, *rejected* legislation that would have prevented the Justice Department from using appropriated funds to interfere with implementation of medical marijuana laws in the states that approved such use. *See* Eddy, *supra,* at 4–5.

Under the plaintiffs' view, the ADA worked a substantial departure from this accepted federal policy by extending federal protections to federally prohibited, but state-authorized, medical use of marijuana. That would have been an extraordinary departure from policy, and one that we would have expected Congress to take *explicitly. Cf.* ***402** *CNA Fin. Corp. v. Donovan,* 830 F.2d 1132, 1148 (D.C.Cir.1987) (noting that the Supreme Court has "insisted on some clear evidence of congressional intent to work 'a substantial change in accepted practice' through [a statutory] revision"). It is unlikely that Congress would have wished to legitimize state-authorized, federally proscribed medical marijuana use without debate, in an ambiguously worded ADA provision.

Moreover, contrary to the dissent's suggestion, Congress did not need to include medical marijuana use under the ADA's supervised use exception to ensure that the federal medical marijuana program—the IND Compassionate Access Program—would be covered by § 12210(d)(1). The federal program was presumably authorized by the CSA's limited experimental research provisions, *see* 21 U.S.C. § 823(f), and was thus already covered by the portion of § 12210(d)(1) that excepts CSA-authorized uses. The same is true of the "experimental treatment" programs referenced in the Justice Department memorandum that the dissent cites. We do not quarrel with the dissent's observation that Congress intended the supervised medical use exception to apply to experimental use of controlled substances, including, perhaps, experimental use of marijuana. These experimental uses, however, are *authorized by federal law,* and subject to a comprehensive federal regulatory regime. We find nothing in the legislative history to suggest that Congress intended to extend ADA protection to state-authorized, but federally prohibited, uses of marijuana falling outside this regulatory framework. There is not one word in the statute or in the legislative history suggesting that Congress sought to exclude from the definition of illegal drug use the use of a controlled substance that was lawful under state law but unlawful and unauthorized under federal law.

The cities' interpretation not only makes the best sense of the statute's text and the historical context of its passage, but also is the only interpretation that fully harmonizes the ADA and the CSA. *See* *In re Transcon Lines,* 58 F.3d 1432, 1440 (9th Cir.1995) ("[W]e must, whenever possible, attempt to reconcile potential conflicts in statutory provisions."). To conclude that use of marijuana for medical purposes is *not* an illegal use of drugs under the ADA would undermine the CSA's clear statement that marijuana is an unlawful controlled substance that has "no currently accepted medical use in treatment in the United States." 21 U.S.C. § 812(b)(1)(B). As noted, Congress reaffirmed this principle in a 1998 appropriations act, *see* Pub. L. No. 105–277, div. F., 112 Stat. 2681, 2681–760 (1998) ("It is the sense of Congress that ... marijuana ... [has] not been approved ... to treat any disease or condition."), and the government has reiterated it in a number of decisions and advisory memoranda, as well as in

its amicus brief in this appeal. *See* Brief for the United States as *Amicus Curiae; see also* Memorandum from Deputy Att'y Gen. David W. Ogden to Selected U.S. Att'ys, at 1 (Oct. 19, 2009) [hereinafter Ogden Memo] ("Congress has determined that marijuana is a dangerous drug."); Memorandum from Deputy Att'y Gen. James M. Cole to U.S. Att'ys, at 1 (June 29, 2011) (same); Memorandum from Helen R. Kanovsky, Dep't of Hous. & Urban Dev., to John Trasviña, Assistant Sec'y for Fair Hous. & Equal Opportunity, et al., at 2 (Jan. 20, 2011) [hereinafter Kanovsky Memo] (stating that marijuana "may not be legally prescribed by a physician for any reason"). [9]

***403** Accordingly, in light of the text, the legislative history, including related congressional activity, and the relationship between the ADA and the CSA, we agree with both district courts that have considered the question, as well as the Department of Housing and Urban Development and the United States as amicus curiae, in concluding that doctor-supervised marijuana use is an illegal use of drugs not covered by the ADA's supervised use exception. *See James v. City of Costa Mesa,* No. SACV 10–0402 AG (MLGx), 2010 WL 1848157, at *4 (C.D.Cal. Apr. 30, 2010); *Barber v. Gonzales,* No. CV–05–0173–EFS, 2005 WL 1607189, at *1 (E.D.Wash. July 1, 2005); Kanovsky Memo at 5 ("Under ... the ADA, whether a given drug or usage is 'illegal' is determined exclusively by reference to the CSA.... While ... the ADA contain[s] language providing a physician-supervision exemption to the 'current illegal drug user' exclusionary provisions, this exemption does not apply to medical marijuana users."). [10]

A contrary interpretation of the exception for "use of a drug taken under supervision by a licensed health care professional" would allow a doctor to recommend the use of *any* controlled substance—including cocaine or heroin—and thereby enable the drug user to avoid the ADA's illegal drug exclusion. Congress could not have intended to create such a capacious loophole, especially through such an ambiguous provision. *Cf. Ross v. Ragingwire Telecomms., Inc.,* 42 Cal.4th 920, 70 Cal.Rptr.3d 382, 174 P.3d 200, 207 (2008) (observing, in interpreting California's employment discrimination law, that "given the controversy that would inevitably have attended a legislative proposal to require employers to accommodate marijuana use, we do not believe that [the relevant statute] can reasonably be understood as adopting such a requirement silently and without debate"). [11]

We recognize that the federal government's views on the wisdom of restricting medical marijuana use may be evolving. *See* Ogden Memo at 1–2 (advising against using federal resources to investigate and prosecute "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana"). But for now Congress has determined that, for purposes of federal law, marijuana is unacceptable for medical use. *See* 21 U.S.C. § 812(b)(1)(B). ***404** We decline to construe an ambiguous provision in the ADA as a tacit qualifier of the clear position expressed in the CSA. Accordingly, we hold that federally prohibited medical marijuana use does not fall within § 12210(d)(1)'s supervised use exception.

II.

[5] The plaintiffs contend that even if their marijuana use does not fall within the § 12210(d)(1) exception for "use of a drug taken under supervision by a licensed health care professional," it nonetheless comes within the separate exception for drug use "authorized by ... other provisions of Federal law," by virtue of recent congressional action allowing the implementation of a Washington, D.C. medical marijuana initiative. We reject this argument.

D.C.'s Initiative 59 suspended local criminal penalties for seriously ill individuals who use medical marijuana with a doctor's recommendation. *See* D.C. Act 13–138, §§ 2 & 3 (Sept. 20, 1999) (providing that such individuals do not violate the District of Columbia Uniform Controlled Substances Act). Although D.C. voters passed this initiative in 1998, Congress blocked its implementation through an appropriations provision known as the Barr Amendment, as noted earlier. *See* Consolidated Appropriations Act of 2000, Pub. L. No. 106–113, § 167(b), 113 Stat. 1501, 1530 (1999) ("Initiative 59 ... shall not take effect."); Comment, *Seeking a Second Opinion: How to Cure Maryland's Medical Marijuana Law,* 40 U. Balt. L. Rev. 139, 149 n.61 (2010) (describing the history of the Barr Amendment). Congress reenacted the Barr Amendment every year thereafter until 2009, when it passed an appropriations bill without the Barr Amendment language. *See* Consolidated Appropriations Act of 2010, Pub. L. No. 111–117, 123 Stat. 334 (2009). Soon afterward, the D.C. Council approved implementation of Initiative 59, *see* D.C. Act 18–210 (June 4, 2010), and Congress did not pass any joint resolution of disapproval, thus

allowing the initiative to take effect. *See* *Marijuana Policy Project v. United States,* 304 F.3d 82, 83 (D.C.Cir.2002) ("D.C. Council enactments become law only if Congress declines to pass a joint resolution of disapproval within thirty days.").

The plaintiffs argue that these congressional actions amount to "other provisions of Federal law" that authorize their medical marijuana use under § 12210(d)(1). We disagree. By allowing Initiative 59 to take effect, Congress merely declined to stand in the way of D.C.'s efforts to suspend *local* penalties on medical marijuana use. It did not affirmatively authorize medical marijuana use for purposes of *federal* law, which continues unambiguously to prohibit such use. [12] *See* Webster's Third New International Dictionary 147 ***405** (2002) ("*Authorize* indicates endowing formally with a power or right to act."). Moreover, even if Congress' actions somehow implicitly authorized medical marijuana use *in the District of Columbia,* Congress in no way authorized the plaintiffs' medical marijuana use in *California.* Congress' actions therefore did not bring the plaintiffs' marijuana use within the § 12210(d)(1) exception.

[6] We also do not agree with the plaintiffs that "[e]qual protection ... mandates" a different conclusion. Congress' decision not to block implementation of Initiative 59 did not result in the unequal treatment of District of Columbia and California residents. On the contrary, Congress' actions allow these jurisdictions to determine for themselves whether to suspend their *local* prohibitions on the use and distribution of marijuana for medical purposes. Local decriminalization notwithstanding, the unambiguous *federal* prohibitions on medical marijuana use set forth in the CSA continue to apply equally in both jurisdictions, as does the ADA's illegal drug exclusion. There is no unequal treatment, and thus no equal protection violation. *See* *Boos v. Barry,* 485 U.S. 312, 333, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (remarking that a statute could only run afoul of the Equal Protection Clause if construed to generate unequal treatment).

We therefore reject the plaintiffs' argument that their use of medical marijuana was authorized by Congress when it allowed implementation of D.C.'s Initiative 59.

CONCLUSION

We hold that doctor-recommended marijuana use permitted by state law, but prohibited by federal law, is an illegal use of drugs for purposes of the ADA, and that the plaintiffs' federally proscribed medical marijuana use therefore brings them within the ADA's illegal drug exclusion. This conclusion is not altered by recent congressional actions allowing the implementation of the District of Columbia's local medical marijuana initiative. The district court properly concluded that the plaintiffs' ADA challenge to the cities' efforts to close their medical marijuana collectives is unlikely to succeed on the merits. The district court therefore did not abuse its discretion by denying preliminary injunctive relief. *See* *Farris v. Seabrook,* 677 F.3d 858, 864 (9th Cir.2012) (describing the legal standard applicable to preliminary injunctive relief and the standard of review on appeal). [13]

The parties shall bear their own costs on appeal.

AFFIRMED.

BERZON, Circuit Judge, concurring in part and dissenting in part:

The statutory interpretation issue at the core of this case is an unusually tough one, as the majority opinion recognizes. Looking at the language of § 12210(d)(1) alone, I would come out where the majority does—concluding that the statute is ambiguous. But unlike the majority, I would not declare a near-draw. Instead, looking at the words alone, I would conclude that the plaintiffs have much the better reading, but not by enough to be comfortable ***406** that their interpretation is surely correct. Turning then to the legislative history, I would again declare the plaintiffs the winner, this time sufficiently, when combined with the language considerations, to adopt their interpretation, absent some very good reason otherwise. And I am decidedly not convinced that the majority's facile "trump" via the Controlled Substances Act ("CSA") works, because, among other reasons, the supposed tension relied upon does not exist.

I therefore would not decide the case on the broad ground that medical marijuana users are not protected by the ADA in any circumstance. And although, in the end, I might well be inclined to agree with the result the majority reaches on the narrower basis that the particular claim made here is not cognizable, it is not appropriate at this juncture to reach that question. I therefore respectfully dissent.

1. Statutory Text

At the heart of this case is § 12210(d)(1) of the ADA, which defines "illegal use of drugs" as

> the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

42 U.S.C. § 12210(d)(1). James and the other plaintiffs (collectively, "James") argue that the first clause of the second sentence carves out their marijuana use, which is under the supervision of a doctor and in compliance with California law. The Cities, on the other hand, read the statute as creating a single exception—for drug use authorized by the CSA—and argue that the first clause should be read as excepting drug use under supervision of a doctor only when that use complies with the CSA.

Although § 12210(d)(1) is not *entirely* clear, James has very much the better reading of the statutory language. In James's view, the phrases "use of a drug taken under supervision by a licensed health care professional" and "other uses authorized by the [CSA]" create *two different* exceptions, so that the ADA protects use of drugs under supervision of a doctor even when that use is not authorized by the CSA. If Congress intended to carve out only drug use authorized by the CSA, after all, the entire first clause—"the use of a drug under supervision by a licensed health care professional"—would have been unnecessary.

a. The use of "other"

The Cities argue, and the district court held, that James's reading renders the word "other" redundant, since Congress could have more clearly and concisely conveyed the meaning of two distinct exceptions by leaving it out. Under this view, "other" indicates that the exception contained in the first clause, for uses supervised by a doctor, is meant to be a subset of the exception in the second clause, and is included only for clarification and emphasis. This interpretation would, oddly, prefer a minor redundancy—the word "other"—over a major one—the entire first phrase of the second sentence.

Moreover, the word "other" is not necessarily redundant at all. It *could* be read to indicate that use under supervision of a doctor is meant to be a category of uses entirely subsumed by the larger category of uses authorized by the CSA, but this is not the only possible interpretation. Put another way, omitting the word "other" entirely would certainly have compelled the reading James advances, but its presence does not invalidate her interpretation. ***407** There is, after all, a middle ground between these two readings: The two exceptions could be entirely separate categories of uses, or, as the Cities see them, entirely overlapping, with the former a subset of the latter. But the two clauses could also be seen as *partially* overlapping, with the group of uses supervised by a doctor partially included within the set of uses authorized by the CSA but also partially independent, encompassing in addition a set of uses not authorized by the CSA. This reading strikes me as the most sensible.

Under this interpretation, "other" is not redundant. Instead, it accurately reflects the overlap. Were the "other" not there, the exception would have divided the relevant universe into two non-overlapping sets. Yet, in fact the CSA authorizes some (but not all) uses of "drugs taken under supervision of a licensed health care professional." The "other" serves to signal that there is no strict dichotomy between the two phrases, as the bulk of the CSA-authorized uses are within the broader set covered by the first phrase. [1]

b. The use of a comma

There is also a third clause, "or other provisions of Federal law." The CSA is clearly a provision of Federal law, meaning that this second "other" is being used to indicate that "uses authorized by the [CSA]" is a subset of "provisions of Federal law." The Cities argue that Congress used the first "other" in the same way, suggesting a kind of three-colored bull's eye, in which use supervised by a doctor is a subset of use authorized by the CSA, which in turn is a subset of use authorized by Federal law.

This argument runs aground of the last antecedent principle to which the majority refers, Maj. Op. at 399 n.7 (citing *Barnhart v. Thomas,* 540 U.S. 20, 26, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003)); *see also* *Jama v. ICE,* 543 U.S.

335, 343, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005); *Nw. Forest Res. Council v. Glickman,* 82 F.3d 825, 832–33 (9th Cir.1996). The rule states: "[A] limiting clause or phrase should ordinarily be read as modifying only the noun or phrase ... that it immediately follows." *Jama,* 543 U.S. at 343, 125 S.Ct. 694. Justice Scalia's illustration in *Barnhart* is instructive:

> Consider, for example, the case of parents who, before leaving their teenage son alone in the house for the weekend, warn him, "You will be punished if you throw a party or engage in any other activity that damages the house." If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged.

Barnhart, 540 U.S. at 27, 124 S.Ct. 376. Notably, Justice Scalia's example has the word "other" in a similar role to that I posit here, and does not condemn it as redundant.

It is true, as the majority notes, that "The rule of the last antecedent ... is not an absolute and can assuredly be overcome by other indicia of meaning." *United States v. Hayes,* 555 U.S. 415, 425, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009) (internal quotation marks omitted). But here, the comma that separates the first and second clauses, as well as the grammatical infelicity of the syntax the Cities' interpretation posits, reinforce the application of the last antecedent principle. The disjunctive "or" separating the first two clauses ***408** after the comma suggests categories at least partially distinct, in contrast to the second use of "or," which is not preceded by a comma. The Cities' reading requires jumping over the comma, so that the phrase "authorized by the [CSA] or other provisions of Federal law" modifies "a drug taken under supervision by a licensed health care professional." But in the English language, modifiers at the ends of phrases do not usually leapfrog over commas. *See The Chicago Manual of Style* § 6.31 (16th ed. 2010) ("A dependent clause that follows a main clause should *not* be preceded by a comma if it is restrictive, that is, essential to the meaning of the main clause."). And here, ignoring the comma and tacking the modifier onto the phrase before the comma yields an exceedingly awkward—indeed, incoherent—locution: "such term does not include the use of a drug taken under supervision by a licensed health care professional ... authorized by the [CSA]...."

More sensibly, the comma was added to reinforce the understanding that the first phrase is complete in itself, while "uses" other than those under medical supervision must be authorized by federal law. The comma therefore indicates that the set of uses described by the first clause is not entirely subsumed by the second clause, substituting for an implicit "if" in the second clause expressing this lack of total overlap. The sentence thus excepts (1) all supervised uses and (2) other uses as well, if authorized by the CSA or other federal law.

This reading of the statute is, on balance, considerably more persuasive as a matter of grammar and syntax than the reading advanced by the Cities. It minimizes the redundancy problem, accords with the last antecedent principle and the use of the word "other," avoids an awkward syntax, and accounts for the presence of the comma before "other uses."

2. Legislative History

James' reading of the statute also accords *much* better with the overall thrust of the legislative history. That history, while not *entirely* without ambiguity, strongly supports James's interpretation.

a. Evolution of the exception

As the majority observes, Congress replaced a draft of the exception that required that use of drugs be "pursuant to a valid prescription," S. 933, 101st Cong. § 512(b), with the broader language eventually enacted. The original language provided that "[t]he term 'illegal drugs' does not mean the use of a controlled substance *pursuant to a valid prescription* or other uses authorized by the Controlled Substances Act or other provisions of Federal law," S. 933, 101st Cong. § 512(b) (as passed by the Senate, Sept. 7, 1989) (emphasis added), while the currently in force revision, adopted by the House in May of 1990 and ultimately chosen over the Senate version in conference, H.R.Rep. No. 101–596, at 5 (1990)H.R.Rep. No. 101–596, at 5 (1990) (Conf. Rep.), *reprinted in* 1990 U.S.C.C.A.N. 565, 566, reads "[s]uch term does not include the use of a drug *taken under supervision by a licensed health care professional,* or other uses authorized by the Controlled Substances Act or other provisions of federal law." 42 U.S.C. § 12210(d)(1) (emphasis added).

Critically, the House Committee Report restates the exception, once amended, in precisely the cumulative manner I have suggested most accords with the statutory language:

"The term 'illegal use of drugs' does not include the use of controlled substances, including experimental drugs, taken under the supervision of a licensed health care professional. It also does not ***409** include uses authorized by the [CSA] or other provisions of Federal law." H.R.Rep. No. 101–485, pt. 3, at 75 (1990), 1990 U.S.C.C.A.N. 445, 498. This summary is in no way ambiguous, and indicates at least that members of the House familiar with the statutory language understood it in the manner that, for reasons I have explained, most accords with ordinary principles of grammar and syntax. [2]

b. Congressional awareness of medical marijuana

The majority discounts any significance in the way the current language is described in the relevant Committee report, observing that California voters did not pass Prop. 215 until 1996 and that there were no state laws in 1990 allowing for professionally supervised use of drugs in a manner inconsistent with the CSA. Congress would not have carefully drafted the exception to include non-CSA authorized medically supervised uses, the majority posits, as no such uses were legal under state law at the time.

That explanation for dismissing the best reading of the statute and the only coherent reading of the Committee's explanation of the statute won't wash, for several reasons. First, while California in 1996 became the first of the sixteen states that currently legalize medical marijuana, the history of medical marijuana goes back much further, so that use for medical purposes was not unthinkable in 1990. At one time, "almost all States ... had exceptions making lawful, under specified conditions, possession of marihuana by ... persons for whom the drug had been prescribed or to whom it had been given by an authorized medical person." *Leary v. United States,* 395 U.S. 6, 17, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969). What's more, the Federal government itself conducted an experimental medical marijuana program from 1978 to 1992, and it continues to provide marijuana to the surviving participants. *See* *Conant v. Walters,* 309 F.3d 629, 648 (9th Cir.2002). The existence of these programs indicates that medical marijuana was not a concept utterly foreign to Congress before 1996.

***410** Second, a deeper look at the legislative history reveals that James's interpretation may well reflect the particular problem Congress was addressing when it enacted § 12210. Originally, the provision that became § 12210 did not exclude users of illegal drugs from the definition of protected disabled individuals. During hearings before the Committee on Labor and Human Resources, Senator Harkin, the sponsor of the ADA, faced criticism that his bill would prevent employers from firing employees who were found to be under the influence of drugs while at work and was therefore inconsistent with the Drug–Free Workplace Act of 1988. [3] *Americans with Disabilities Act of 1989: Hearing on S. 933 Before the S. Comm. on Labor and Human Resources,* 101st Cong. 40 (1989).

In response, Senator Harkin pointed out that the provisions of the ADA were modeled after Section 504 of the Rehabilitation Act, and that his "intent was to incorporate the policies in Section 504 as interpreted by the Supreme Court and the Justice Department in a recent memo prepared by the Attorney General." *Id.* That memorandum, which was inserted into the record, explained that, in the view of the Justice Department, "[a]ny legislation must make clear that the definition of 'handicap' does not include those who use *illegal* drugs." *Id.* at 836. The memorandum went on to warn that

> [w]e ... do not wish to penalize those persons who, in limited cases, are using 'controlled substances' such as marijuana or morphine under the supervision of medical professionals as part of a course of treatment, including, for example, experimental treatment or to relieve the side-effects of chemotherapy. These persons would fall under the same category as those who are users of legal drugs.

Id. at 837–38. During the subsequent debates in the Senate, the amendment quoted above, which used the term "pursuant to a valid prescription" and lacked the crucial comma, was introduced by Senator Helms. 135 Cong. Rec. S10775 (Sept. 7, 1989). It was, as already explained, amended to include language closer to that used in the Justice Department Memorandum—"supervision of medical professionals."

A memorandum from the Justice Department certainly doesn't provide irrefutable proof of the correct interpretation of statutory text Congress had not yet adopted. But it does indicate that the issue of medical marijuana was at least on the federal government's, and Congress's, radar and not, as the

majority would largely have it, an unforeseen revolution six years in the future.

Further, as noted, the wording of the exception was altered in the House from the version that had earlier passed the Senate. The majority focuses on the substantive change from "pursuant to a valid prescription" to "taken under supervision by a licensed health care professional," noting that the CSA authorizes uses not pursuant to a prescription. But, for that very reason, there was no reason to change the wording of § 512(b) of the Senate bill; "other uses authorized by the [CSA]" were already, generically, covered. A more likely explanation, consistent with the House Committee Report, was the determination to define a set of uses covered by the exception *whether or not* "authorized by the [CSA]," a change carried out by the alteration in context, syntax, and ***411** punctuation—including the *addition* of the comma, otherwise inexplicable.

The upshot is that the statutory language and history, taken together, fit much better with James's version of what Congress meant than the Cities'.

3. Conflict with the CSA

The majority, however, instead declares a near-draw, and then breaks it by concluding that the Cities' "is the only interpretation that fully harmonizes the ADA and the CSA." Maj. Op. at 402. Not only do I disagree with the notion that both interpretations of the statutory language and history are equally or almost equally viable, I also cannot buy the notion that judges may invent the manner in which the ADA and the CSA should be harmonized. As to users of illegal drugs, the statute directly addresses that question. One way or another, we must find the answer to that harmonization by interpreting the statute, not by applying our own notion of how the two statutes ought to interact.

Moreover, I also cannot agree that James's reading of the exception creates a conflict between the ADA and the CSA so sharp as to provide useful guidance, from outside the terms of the ADA itself, as to the appropriate interaction of the two statutes. Nothing in the CSA addresses the civil rights of a disabled person using drugs for medical purposes, any more than anything in the CSA addresses whether such a person can recover in tort. Conversely, recognizing that individuals using CSA-covered drugs are not excluded from ADA coverage does not preclude prosecuting them under the CSA.

An analogous line of cases is instructive in this regard: In resolving conflicts between arbitrators' awards and notions of "public policy" gleaned from statutes, the Supreme Court has focused on direct and specific incompatibility, rather than on general notions concerning the underlying purpose of competing directives. *United Paperworkers International Union v. Misco,* 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987), and *Eastern Associated Coal Corporation v. United Mine Workers,* 531 U.S. 57, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000), reviewed arbitration awards reinstating employees who had been discharged for marijuana use. The appropriate inquiry as to the validity of the arbitration awards, the Court noted, must be into "explicit conflict with other 'laws and legal precedents' rather than an assessment of 'general considerations of supposed public interests.' " *Misco,* 484 U.S. at 43, 108 S.Ct. 364 (quoting *W.R. Grace & Co. v. Rubber Workers,* 461 U.S. 757, 766, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983)). Holding that no public policy against illegal drug use was sufficiently "explicit, well defined, and dominant," *United Mine Workers,* 531 U.S. at 62, 121 S.Ct. 462, to require that individuals who illegally use marijuana may not be employed, the Court stressed the idea that "the question to be answered is not whether [the employee's] drug use itself violates public policy, but whether the agreement to reinstate him does so." *Id.* at 62–63, 121 S.Ct. 462; *see also* *Misco,* 484 U.S. at 44, 108 S.Ct. 364; *Southern Cal. Gas Co. v. Util. Workers Union Local 132,* 265 F.3d 787, 794–97 (9th Cir.2001).

Similarly here, there could be no square conflict between the CSA and the ADA were the ADA interpreted, as I suggest, to specify that a medical marijuana user could be a qualified person with a disability and so not entirely excluded from the ADA's protection. The CSA does not make it illegal, for example, to employ a medical marijuana user or to provide such a user with schooling, unemployment benefits, or other non drug-related services. ***412** Interpreting the ADA to require, in some circumstances, such employment or schooling or benefits would not conflict with the CSA.

The California Supreme Court recently proceeded from a similar recognition as to the limits of the direct conflict concept, albeit to the opposite end. That Court held that the Compassionate Use Act did *not* dictate protection of medical marijuana users under the state's version of the ADA. The state disability statute, unlike the federal ADA, does not address, one way or the other, whether medical marijuana

users are entitled to the protections of the statute. *Ross v. RagingWire Telecommunications Inc.,* 42 Cal.4th 920, 70 Cal.Rptr.3d 382, 174 P.3d 200, 204 (2008), held that under those circumstances, the fact that use of medical marijuana is not a criminal offense in California does not necessarily speak to its status under an anti-discrimination law. For the same reason, I suggest, the opposite is also true: that use of medical marijuana is a criminal offense under the CSA does not speak to its pertinence as a disqualifying factor with regard to the civil protections otherwise accorded disabled individuals.

There is, in other words, no direct conflict between the ADA and the CSA if the ADA is interpreted as I propose. An imagined conflict or tension should not be dragged in, like a deus ex machina, to settle a difficult statutory interpretation problem.

It is worth observing, in addition, that if there were a direct conflict, it would be the ADA rather than the CSA that would prevail, as the ADA is the later-enacted statute. Repeals by implication are disfavored; every effort must therefore be made to make both statutes operative within their realm, rather than declaring a clash. *Watt v. Alaska,* 451 U.S. 259, 267, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981). Avoiding a clash by having the later statute bow to the earlier one, when the two address different problems and so can coexist without difficulty, is not harmonization, but hegemony through prior enactment.

Nor am I dissuaded by the assertion that my interpretation of the statutory exception "would allow a doctor to recommend the use of *any* controlled substance—including cocaine or heroin." Maj. Op. at 403. The ADA does not address the practice of medicine. Section 12210 only excepts use pursuant to supervision by a "licensed health care professional." Nothing in California law, or, so far as I am aware, the law of any other state, permits doctors to encourage the use of heroin; a doctor who does so is unlikely to remain "licensed" for very long, and so the scenario is unlikely to occur. In contrast, California, which generally licenses medical professionals, does not penalize those who recommend medical marijuana, nor may the federal government do so, in many instances. *See Conant,* 309 F.3d at 639.

At the same time, I am dubious that the exception upon which James relies can ultimately carry the day in this case. We are concerned here with the Cities' effort to exclude medical marijuana dispensaries, not with a policy that prevents disabled individuals who use medical marijuana from, for example, attending school or obtaining unemployment benefits. The ADA's definition of "individual with a disability," excluding those who illegally "use" drugs, and its attendant definition of "illegal use of drugs," are both phrased in terms of "use," and do not address those who distribute or sell drugs.

The definition of "illegal use of drugs" applies equally to the ADA's employment provisions. See 42 U.S.C. § 12111(6). That exception, if read as I suggest, would ***413** preclude employers from refusing to hire otherwise qualified disabled individuals who use medical marijuana, as long as doing so did not interfere with their ability to carry out their duties safely. The legislative history quoted above suggests that Congress was particularly concerned with that group of individuals, recognizing that disabled individuals who follow their doctors' advice for dealing with their disability should not be barred from the workplace simply for doing so. But there is no connection between having a disability and distributing or selling drugs, and no preclusion in the ADA of refusing to hire drug dealers of any stripe.

Moreover, in the absence of any statutory provision addressing ADA protection for drug dealers, the mode of analysis the majority inappropriately applies to interpreting § 12210 would have more force. That is, absent any statutory provision addressing the intersection of the two statutes, it would be proper to hold that employers may ban from employment, and public entities may refuse to harbor within their borders, drug dealers who violate the CSA, as Congress in no way indicated otherwise. That was the mode of analysis adopted by the California Supreme Court in *Ross,* and which I suggest would apply under the ADA to the question whether Title II requires the Cities to allow the *distribution*—as opposed to the use—of medical marijuana.

Deciding that question is, however, premature at this juncture. The only basis on which the preliminary injunction was denied was the district court's conclusion that James was not within the group of disabled individuals protected by Title II of the ADA. For now, I would simply decide that question, holding that § 12210 does not exclude James and the other plaintiffs from the class of individuals protected by the ADA, and remand for further proceedings.

4. Conclusion

While § 12210(d)(1) has a degree of ambiguity, it is most naturally read as carving out plaintiffs' medical marijuana use, which is "under supervision by a licensed health care professional," from the ADA's "illegal use of drugs" exception. The legislative history provides further support for this interpretation. At the same time, it seems most likely that Congress did not intend the ADA to require the Cities to permit marijuana dispensaries, which remain illegal under the CSA, within their borders, as the ADA provision at issue here is directed at personal use rather than distribution. I therefore dissent with regard to Part I of the majority opinion, and would remand for ultimate consideration on the merits of whether James has alleged a viable cause of action with regard to the *distribution* of drugs that are illegal under the CSA. I concur in the remainder of the majority opinion.

All Citations

700 F.3d 394, 27 A.D. Cases 5, 46 NDLR P 67, 12 Cal. Daily Op. Serv. 12,419, 2012 Daily Journal D.A.R. 15,154

Footnotes

1 We assume, as the parties do, that Costa Mesa's efforts to close medical marijuana "dispensaries" include the marijuana dispensing facilities that serve the plaintiffs, which the complaint terms "collectives." Compl. ¶¶ 6, 10–11.

2 The complaint alleged that "[e]ach of the plaintiffs is a qualified person with a disability as defined in the ADA." Compl. ¶ 4. It further alleged that each of the defendant cities is covered by Title II, under which public entities "must not intentionally or on a disparate impact basis discriminate against the disabled individual's meaningful access to public services." *Id.* ¶ 20. The complaint sought an order requiring the cities to "cease and desist any further action to remove existing marijuana collectives organized under the laws of California," as well as to establish regulations "that will accommodate the needs of qualified persons under the ADA so as to be able to legally access marijuana under California law." *Id.* at 5–6.

3 We do *not* hold, as the dissent states, that "medical marijuana users are not protected by the ADA in any circumstance." We hold instead that the ADA does not protect medical marijuana users who claim to face discrimination *on the basis of* their marijuana use. *See* 42 U.S.C. § 12210(a) (the illegal drug use exclusion applies only "when the covered entity acts on the basis of such use"). As the Equal Employment Opportunity Commission has explained,

> A person who alleges disability based on one of the excluded conditions [such as current use of illegal drugs or compulsive gambling, *see* 42 U.S.C. § 12211(b)(2),] is not an individual with a disability under the ADA. Note, however, that a person who has one of these conditions is an individual with a disability if (s)he has another condition that rises to the level of a disability. See House Education and Labor Report at 142. Thus, a compulsive gambler who has a heart impairment that substantially limits his/her major life activities is an individual with a disability. Although compulsive gambling is not a disability, the individual's heart impairment is a disability.

U.S. Equal Emp't Opportunity Comm'n, Section 902 Definition of the Term Disability, at § 902.6 (last modified No. 21, 2009), *available at* http:// www.eeoc.gov/policy/docs/902cm.html (last visited Apr. 27, 2012).

4 Under Title II of the ADA, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A "public entity" includes "any State or local government," *id.* § 12131(1)(A), and there is no dispute that the defendant cities are public entities for purposes of Title II.

5 The cities do not dispute that they have acted "on the basis of" the plaintiffs' marijuana use by restricting the operation of the medical marijuana collectives on which the plaintiffs rely.

6 Unlike our dissenting colleague, we do not place great significance on the use of a comma to separate supervised uses from other uses authorized by the CSA and other federal laws. We very much doubt

Congress would have relied on a single comma to acknowledge the legitimacy of a highly controversial medical practice. *Cf.* *Crandon v. United States,* 494 U.S. 152, 169, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990) (Scalia, J., concurring) (remarking, in discounting the significance of a misplaced comma, that "the evidence ... should be fairly clear before one concludes that Congress has slipped in an additional requirement in such an unusual fashion").

7 Although the parties did not raise it, we have considered the rule of the last antecedent, under which "a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas,* 540 U.S. 20, 26, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003). "The rule of the last antecedent, however, 'is not an absolute and can assuredly be overcome by other indicia of meaning.' " *United States v. Hayes,* 555 U.S. 415, 425, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009) (quoting *Barnhart,* 540 U.S. at 26, 124 S.Ct. 376); *see also* *Nw. Forest Resource Council v. Glickman,* 82 F.3d 825, 833 (9th Cir.1996) (holding that "the doctrine of last antecedent ... must yield to the most logical meaning of a statute that emerges from its plain language and legislative history"). In the context presented here, the rule of the last antecedent does not make the meaning of the statutory text plain and unambiguous. Nor, in resolving the ambiguous text, does whatever presumption the rule confers outweigh other indicia of meaning. As we explain, the language, the legislative history, including the historical congressional context, the relationship between the ADA and the CSA and the absurd results the plaintiffs' interpretation would produce all support the interpretation the cities urge and the United States has embraced as amicus curiae.

8 " 'If the statutory language is unambiguous and the statutory scheme is coherent and consistent,' judicial inquiry must cease." *Miranda v. Anchondo,* 684 F.3d 844, 849 (9th Cir.2012) (quoting *In re Ferrell,* 539 F.3d 1186, 1190 n. 10 (9th Cir.2008)). If the statute is ambiguous, however, "we may use canons of construction, legislative history, and the statute's overall purpose to illuminate Congress's intent." *Probert v. Family Centered Servs. of Alaska, Inc.,* 651 F.3d 1007, 1011 (9th Cir.2011) (quoting *Ileto v. Glock, Inc.,* 565 F.3d 1126, 1133 (9th Cir.2009)) (internal quotation marks omitted). "We may also look to other related statutes because' statutes dealing with similar subjects should be interpreted harmoniously.' " *Tides v. Boeing Co.,* 644 F.3d 809, 814 (9th Cir.2011) (quoting *United States v. Nader,* 542 F.3d 713, 717 (9th Cir.2008)); *see also* *Tidewater Oil Co. v. United States,* 409 U.S. 151, 157–58, 93 S.Ct. 408, 34 L.Ed.2d 375 (1972) (stating that "it is essential that we place the words of a statute in their proper context by resort to the legislative history," including related congressional activity addressing the same subject matter).

9 Before oral argument, we invited the view of the United States as amicus curiae. The government accepted our invitation and filed an amicus brief supporting the cities' interpretation:

> The proper interpretation of the term "illegal use of drugs," as defined in 42 U.S.C. [§] 12210(d), includes the use of marijuana taken under doctor supervision, unless that use is authorized by the CSA or another federal law, which is not the case here. Federal law makes clear that medical marijuana use does not receive special protection under the ADA.

Brief for the United States as *Amicus Curiae* at 10.

10 We do not, as the dissent suggests, resolve the statutory ambiguity based on an imagined inconsistency between the express terms of the ADA and "general considerations of supposed public interests" derived from the CSA. *United Paperworkers Int'l Union v. Misco,* 484 U.S. 29, 43, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987) (quoting *W.R. Grace & Co. v. Rubber Workers,* 461 U.S. 757, 766, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983)) (internal quotation marks omitted). The CSA directly addresses whether medical marijuana use constitutes illegal use of drugs, and clearly states that such use is unlawful.

11 The dissent dismisses this problem, arguing that state licensing requirements are sufficient to limit the reach of the supervised use exception. State licensing requirements do not eliminate the potential absurdity, however.

A doctor who recommends the use of an illegal drug might still succeed in preserving ADA protection for the drug user, even if the doctor's behavior might ultimately result in discipline before the state licensing authority.

12 It is true, of course, that, because the District of Columbia is not sovereign, the D.C. Council's legislative power is derived from that of Congress. *See* U.S. Const. art. 1, § 8, cl. 17 ("Congress shall have Power ... [t]o exercise exclusive Legislation in all Cases whatsoever, over ... the Seat of the Government of the United States."); D.C.Code Ann. §§ 1–203.02, 1–204.04 (delegating some of Congress' legislative power to the District and enumerating the powers of the D.C. Council). But "[u]nlike most congressional enactments, the [D.C.] Code is a comprehensive set of laws equivalent to those enacted by state and local governments." *Key v. Doyle,* 434 U.S. 59, 68 n. 13, 98 S.Ct. 280, 54 L.Ed.2d 238 (1977). D.C. Council enactments are therefore not "federal" laws in the usual sense. *See United States v. Weathers,* 493 F.3d 229, 236 (D.C.Cir.2007) (distinguishing between counts charged "under federal law" and "under the D.C. Code"); *Foretich v. United States,* 351 F.3d 1198, 1205 (D.C.Cir.2003) (referring to "criminal liability under both D.C. and federal law").

13 Because we conclude that the plaintiffs are not qualified individuals with a disability protected by the ADA, we do not reach Costa Mesa's alternative argument that the ADA does not require accommodation of a qualified individual's "misconduct." Likewise, because we conclude that the district court properly denied preliminary injunctive relief, we need not decide whether the Anti–Injunction Act would prohibit the court from enjoining Lake Forest from pursuing its state-court public nuisance action.

1 There is at least one CSA-authorized use that does not involve medical supervision. *See* 21 U.S.C. § 829(c).

2 This is not the place to enter into the contemporary debates about the usefulness of legislative history in general, and of committee reports in particular. *Compare* *Exxon Mobil Corp. v. Allapattah Services, Inc.,* 545 U.S. 546, 568, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005) (Kennedy, J.) ("[J]udicial reliance on legislative materials like committee reports ... may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history....") *with* *id.* at 575–76, 125 S.Ct. 2611 (Stevens, J., dissenting) ("[C]ommittee reports are normally considered the authoritative explication of a statute's text and purposes....") (citing *Garcia v. United States,* 469 U.S. 70, 76, 105 S.Ct. 479, 83 L.Ed.2d 472 (1984)). Current Supreme Court precedent does permit consideration of both where a statute is ambiguous, as it is here. *See* *BedRoc Ltd. v. United States,* 541 U.S. 176, 187 n. 8, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004). Moreover, statements made in the course of legislative consideration are most useful where, as here, they do not in terms declare any interpretive or application precept. Such self-conscious declarations are indeed subject to manipulation by interest groups and may represent a backdoor way to establish principles that would have failed if included directly in the statute. *See* *Exxon Mobil,* 545 U.S. at 568, 125 S.Ct. 2611. But statutory interpretation is aided rather than impeded by such clues as one can find in the legislative materials concerning how the legislators considering the bill were *speaking* about the statute at hand. Ambiguous language can take on a more definite meaning in a particular milieu. As a result, that sensitivity to the use of language while the bill is being considered can illuminate apparent imprecisions in the later-enacted statute. Pursuit of such a clarification is, to my mind, the appropriate use of the bill sequence, hearings, and Committee report on which I here rely.

3 The Drug–Free Workplace Act requires that government contractors ensure that their employees do not manufacture, distribute, dispense, possess, or use controlled substances at work. *See* 41 U.S.C. §§ 8101–8106.

273 F.Supp.3d 326
United States District Court, D. Connecticut.

Katelin NOFFSINGER, Plaintiff,
v.
SSC NIANTIC OPERATING COMPANY LLC, d/b/a Bride Brook Nursing & Rehabilitation Center, Defendant.

No. 3:16–cv–01938(JAM)
|
Signed 08/08/2017

Synopsis

Background: Prospective employee who was diagnosed with posttraumatic stress disorder (PTSD) and who was a qualifying patient under Connecticut's Palliative Use of Marijuana Act (PUMA) brought employment discrimination action in state court against prospective employer, alleging denial of employment based on positive cannabis result during pre-employment screening test in violation of PUMA. Prospective employer removed to federal court, and moved to dismiss for failure to state a claim.

Holdings: The District Court, Jeffrey Alker Meyer, J., held that:

[1] as a matter of first impression, CSA does not preempt PUMA provision that prohibits employers from discriminating against authorized persons who use medicinal marijuana;

[2] ADA does not preempt PUMA's anti-discrimination employment provision;

[3] Food, Drug, and Cosmetic Act (FDCA) does not preempt PUMA's anti-discrimination employment provision;

[4] as a matter of first impression, PUMA's anti-discrimination provision contains an implied private right of action;

[5] prospective employer was not exempt from PUMA's anti-discrimination employment provision;

[6] PUMA's anti-discrimination employment provision does not violate the Equal Protection Clause; and

[7] prospective employee stated claim of negligent infliction of emotional distress under Connecticut law.

Motion granted in part and denied in part.

Procedural Posture(s): Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

West Headnotes (27)

[1] **States** Conflicting or conforming laws or regulations

Congress may preempt state law where state law stands as an obstacle to the objectives of Congress, referred to as "obstacle preemption," or where simultaneous compliance with both federal and state law is impossible, referred to as "impossibility preemption."

1 Cases that cite this headnote

[2] **States** Congressional intent

A federal statute generally will not be found to preempt claims arising under state law unless Congress's intent to do so is clear and manifest.

[3] **States** Conflicting or conforming laws or regulations

Under "obstacle preemption," a state law is preempted where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

2 Cases that cite this headnote

[4] **States** Conflicting or conforming laws or regulations

The mere fact of tension between federal and state law is generally not enough to establish

an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power; rather, obstacle preemption precludes only those state laws that create an actual conflict with an overriding federal purpose and objective.

1 Cases that cite this headnote

[5] **States** Conflicting or conforming laws or regulations

What constitutes a sufficient obstacle to establish obstacle preemption is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects; but the conflict between state law and federal policy must be a sharp one.

[6] **States** Conflicting or conforming laws or regulations

There is no obstacle preemption unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.

[7] **Controlled Substances** Preemption

States Product safety; food and drug laws

Controlled Substances Act (CSA) does not preempt provision in Connecticut's Palliative Use of Marijuana Act (PUMA) that prohibits employers from discriminating against authorized persons who use medicinal marijuana; CSA nowhere prohibits employers from hiring applicants who may be engaged in illegal drug use, nor does any tension between the PUMA provision and CSA rise to the level of the sharp conflict required to establish obstacle preemption. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 101 et seq., 21 U.S.C.A. § 801 et seq.; Conn. Gen. Stat. Ann. §§ 21a-408, 21a-408p(b)(3).

1 Cases that cite this headnote

[8] **Controlled Substances** Substances regulated; definitions and schedules

The Controlled substances Act (CSA) makes it a federal crime to use, possess, or distribute marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 101 et seq., 21 U.S.C.A. § 801 et seq.

1 Cases that cite this headnote

[9] **States** Conflicting or conforming laws or regulations

In preemption cases, state law is displaced only to the extent that it actually conflicts with federal law, and a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it.

1 Cases that cite this headnote

[10] **Civil Rights** Federal preemption

Controlled Substances Preemption

States Product safety; food and drug laws

ADA does not preempt anti-discrimination employment provision in Connecticut's Palliative Use of Marijuana Act (PUMA) that prohibits employers from discriminating against authorized persons who use medicinal marijuana outside of the workplace; ADA does not preclude states from regulating employers who discriminate against employees who engage in the medicinal use of drugs in compliance with state law, and ADA was not meant to regulate non-workplace activity, much less to preclude states from doing so or to preclude states from prohibiting employers from taking adverse actions against employees who may use illegal drugs outside the workplace and whose drug use does not affect job performance. Americans with Disabilities Act of 1990 §§ 104, 501, 42 U.S.C.A. §§ 12114(c)(1), 12201(b); Conn. Gen. Stat. Ann. §§ 21a-408a(b)(2), 21a-408p(b)(3).

[11] **Civil Rights** Federal preemption
Controlled Substances Preemption
States Product safety; food and drug laws

FDCA does not preempt anti-discrimination employment provision in Connecticut's Palliative Use of Marijuana Act (PUMA) that prohibits employers from discriminating against authorized persons who use medicinal marijuana outside of the workplace; FDCA does not purport to regulate employment, and PUMA provision does not conflict with or pose obstacle to goals of FDCA. Federal Food, Drug, and Cosmetic Act § 1, 21 U.S.C.A. § 301; Conn. Gen. Stat. Ann. § 21a-408p(b)(3).

[12] **Action** Statutory rights of action

There is a presumption in Connecticut that private enforcement does not exist unless expressly provided in a statute.

[13] **Action** Statutory rights of action

Plaintiff bears the burden of overcoming the presumption in Connecticut that private enforcement does not exist unless expressly provided in a statute.

[14] **Action** Statutory rights of action

In determining whether a plaintiff has met her burden of overcoming the presumption in Connecticut that private enforcement does not exist unless expressly provided in a statute, district courts look to three factors: (1) whether plaintiff is one of the class for whose benefit the statute was enacted, (2) whether there is any indication of legislative intent, explicit or implicit, either to create a private right of action or to deny one, and (3) whether the recognition of a private right of action would be consistent with the underlying purposes of the legislative scheme.

3 Cases that cite this headnote

[15] **Action** Statutory rights of action

Under Connecticut law, once a plaintiff meets a threshold showing that none of the three factors weighs against recognizing a private cause of action, district courts consider all evidence that could bear on each factor.

[16] **Action** Statutory rights of action

In undertaking the analysis of whether a plaintiff has met her burden of overcoming the presumption in Connecticut that private enforcement does not exist unless expressly provided in a statute, district courts should look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter.

[17] **Action** Statutory rights of action

Under Connecticut law, the ultimate question in determining whether a plaintiff has met her burden of overcoming the presumption that private enforcement does not exist unless expressly provided in a statute is whether there is sufficient evidence that the legislature intended to provide a private cause of action.

[18] **Action** Statutory rights of action
Labor and Employment Nature and form

Anti-discrimination employment provision in Connecticut's Palliative Use of Marijuana Act (PUMA) that prohibits employers from discriminating against authorized persons who use medicinal marijuana outside the workplace contains an implied private right of action; there was no indication of legislative intent to deny a private cause of action, testimony from public hearings suggested that legislators expected that PUMA's employment provision would provide protections for employees that would be enforceable in the courts, private cause of action

effectuates the evident legislative purpose to prevent employers from discriminating against authorized medicinal users of marijuana, and provision does not provide for any other enforcement mechanism. Conn. Gen. Stat. Ann. § 21a-408p(b)(3).

5 Cases that cite this headnote

[19] **Action** Statutory rights of action

The absence of any enforcement mechanism militates in favor of authorizing a private right of action, thereby enabling those for whose benefit the statute was enacted to protect the rights conferred upon them by the legislature.

2 Cases that cite this headnote

[20] **Health** Adverse employment action; wrongful discharge

Act of merely hiring a medical marijuana user does not itself constitute a violation of the Controlled Substances Act (CSA) or any other federal, state, or local law, and thus prospective employer, a nursing facility subject to federal regulations that require compliance with federal, state, and local laws generally, was not exempt from anti-discrimination employment provision in Connecticut's Palliative Use of Marijuana Act (PUMA) that prohibits employers from discriminating against authorized persons who use medicinal marijuana outside the workplace. Conn. Gen. Stat. Ann. § 21a-408p(b).

2 Cases that cite this headnote

[21] **Constitutional Law** Labor, Employment, and Public Officials

Labor and Employment Validity

Anti-discrimination employment provision in Connecticut's Palliative Use of Marijuana Act (PUMA) that prohibits employers from discriminating against authorized persons who use medicinal marijuana outside the workplace does not violate the Equal Protection Clause; legislature could rationally distinguish between favoring people who use marijuana for medicinal purposes under the careful guidance of a physician and people who use marijuana at their whim to get high. U.S. Const. Amend. 14.

3 Cases that cite this headnote

[22] **Constitutional Law** Statutes and other written regulations and rules

A statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. U.S. Const. Amend. 14.

[23] **Labor and Employment** Public policy considerations in general

Under Connecticut law, if an employer's reason for dismissal is demonstrably improper because it violates some important public policy, an at-will employee may recover for wrongful termination.

[24] **Labor and Employment** Existence of other remedies; exclusivity

If a statute already provides a private right of action for an employee or a prospective employee intended to vindicate the relevant public policy, the public policy claim will fail.

1 Cases that cite this headnote

[25] **Damages** Handicap, disability, or illness

Prospective employee who was diagnosed with posttraumatic stress disorder (PTSD) stated claim of negligent infliction of emotional distress under Connecticut law resulting from rescission of job offer one day before she was scheduled to begin work and after she had already left her prior job, by alleging that withdrawal of offer was unreasonable and involved an unreasonable risk of causing severe emotional distress, that prospective employer knew prospective employee had PTSD, and that rescission of job offer did in fact cause such distress.

[26] **Damages** Labor and Employment
Damages Termination in general

A claim for negligent infliction of emotional distress cannot arise from conduct occurring in an ongoing employment relationship, as distinguished from conduct occurring in the termination of employment.

[27] **Federal Civil Procedure** Pleading, Defects In, in General

Under Connecticut law, at the motion to dismiss stage, plaintiffs need not prove that they are entitled to each form of relief sought, so long as they have adequately pled the underlying claim.

Attorneys and Law Firms

***330** Zachary L. Rubin, Henry F. Murray, Livingston, Adler, Pulda, Meiklejohn & Kelly, Hartford, CT, for Plaintiff.

Kelly M. Kirby, Thomas C. Blatchley, Shannon Marie Walsh, Gordon & Rees Scully Mansukhani, Glastonbury, CT, for Defendant.

RULING ON DEFENDANT'S MOTION TO DISMISS

Jeffrey Alker Meyer, United States District Judge

Connecticut is one of a growing number of States to allow the use of marijuana for medicinal purposes. Connecticut likewise bars employers from firing or refusing to hire an employee who uses medical marijuana in compliance with the requirements of Connecticut law. By contrast, federal law categorically prohibits the use of marijuana even for medical purposes.

This lawsuit calls upon me to decide if federal law preempts Connecticut law. In particular, I must decide if federal law precludes enforcement of a Connecticut law that prohibits employers from firing or refusing to hire someone who uses marijuana for medicinal purposes. I conclude that the answer to that question is "no" and that a plaintiff who uses marijuana for medicinal purposes in compliance with Connecticut law may maintain a cause of action against an employer who refuses to employ her for this reason. Accordingly, I will largely deny defendant's motion to dismiss this lawsuit.

BACKGROUND

For the last two decades, state legislatures across the United States have been passing laws to permit and regulate the use of marijuana for medicinal purposes. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE MEDICAL MARIJUANA LAWS (July 7, 2017). Connecticut is one of 29 States that have "comprehensive public medical marijuana and cannabis programs," and an additional 16 States have more limited programs allowing for the use of "low THC, high cannabidiol" products for particular medical reasons. *Ibid.*

The range of state statutes provide different rights and remedies to medical marijuana users. While all protect qualified users from state criminal prosecution, many also include broader protections "stating that medical marijuana patients are not to be subject to 'penalty,' 'sanction,' or may not be 'denied any right or privilege.' " Elizabeth Rodd, ***331** *Light, Smoke, and Fire: How State Law Can Provide Medical Marijuana Users Protection from Workplace Discrimination*, 55 B.C. L. REV. 1759, 1768 (2014). Several States—including Connecticut—provide explicit protection against employment discrimination on the basis of the medicinal use of marijuana in compliance with state law. *Ibid.* [1]

Notwithstanding the proliferation of state marijuana-use statutes, federal law stands to the contrary. The federal Controlled Substances Act classifies marijuana as a Schedule I substance, meaning that Congress has decided that "marijuana has no medicinal value." Kathleen Harvey, *Protecting Medical Marijuana Users in the Workplace*, 66 CASE W. RES. L. REV. 209, 211 (2015). Given the proliferation of state medical marijuana laws, courts around the country are now confronted with the question of how these permissive state laws may reconcile—if at all—with federal law.

In 2012, Connecticut enacted the Palliative Use of Marijuana Act (PUMA), Conn. Gen. Stat. § 21a–408 *et seq.* PUMA permits the use of medical marijuana for "qualifying patients"

with certain debilitating medical conditions. The law exempts such patients, their primary caregivers, and prescribing doctors from state criminal penalties that would otherwise apply to those who use or distribute marijuana. It also sets forth a framework for a system of licensed dispensaries and directs the Department of Consumer Protection to adopt implementing regulations. Most importantly for purposes of this case—and in contrast to medical marijuana laws in many other States—PUMA includes a provision that explicitly prohibits discrimination against qualifying patients and primary caregivers by schools, landlords, and employers. *See* Conn. Gen. Stat. § 21a–408p(b). [2]

Plaintiff's complaint alleges the following facts, which I accept as true for the purposes of this motion to dismiss. In 2012, plaintiff Katelin Noffsinger was diagnosed with posttraumatic stress disorder (PTSD). In 2015, her doctors recommended medical marijuana to treat her PTSD. She registered with the state Department of Consumer Protection as a qualifying patient under PUMA. After receiving her registration certificate, plaintiff began taking one capsule of Marinol, a synthetic form of cannabis, each night as prescribed.

When she started taking Marinol, plaintiff was employed as a recreation therapist at Touchpoints, a long-term care and rehabilitation provider. In July 2016, plaintiff was recruited for a position as a director of recreational therapy at Bride Brook, a nursing facility in Niantic, Connecticut. After a phone interview, plaintiff interviewed ***332** in person on July 18 with Lisa Mailloux, the administrator of Bride Brook. During the interview, Mailloux offered plaintiff the position, and plaintiff accepted the offer the following day. On July 20, Mailloux contacted plaintiff to set up a meeting for July 25 to complete paperwork and a routine pre-employment drug screen. Mailloux also instructed plaintiff to give notice to Touchpoints so that plaintiff could begin working at Bride Brook on August 3. Plaintiff informed Touchpoints that her last day would be August 2.

On July 25, plaintiff met with Mailloux as scheduled. At this meeting, plaintiff disclosed her disability of PTSD and explained that she was taking prescription marijuana as a "qualifying patient" under PUMA. Plaintiff showed Mailloux her registration certificate and explained that she took Marinol, but only in the evening before bed, and therefore she was never impaired during the workday. Plaintiff also offered to provide additional medical documentation, but Mailloux did not request it. Mailloux continued to process plaintiff's pre-employment documents and gave plaintiff a packet of documents to complete at home and bring back when she returned for orientation on August 3. At the same meeting, plaintiff provided defendant with a urine sample to be used as part of the pre-employment drug test.

On August 2, the day before plaintiff was scheduled to start work at Bride Brook, the drug testing company used by Bride Brook called plaintiff to inform her that she had tested positive for cannabis. Plaintiff immediately called Mailloux and left a voice message in which she informed Mailloux of her call with the drug testing company and asked a question about the upcoming orientation session. Later that day, Mailloux called plaintiff back to inform her that Bride Brook was rescinding plaintiff's job offer because she had tested positive for cannabis. In the meantime, plaintiff's former position at Touchpoints had already been filled, so she was not able to remain employed there.

On August 22, 2016, plaintiff filed a complaint in Connecticut Superior Court, alleging three causes of action: (1) a violation of PUMA's anti-discrimination provision, Conn. Gen. Stat. § 21a–408p(b)(3), (2) a common law claim for wrongful rescission of a job offer in violation of public policy, and (3) negligent infliction of emotional distress. Plaintiff brings these claims against a single defendant, SSC Niantic Operating Company, LLC d/b/a Bride Brook Nursing & Rehabilitation Center. Defendant removed the case to federal court on the basis of diversity jurisdiction, and has now moved to dismiss on several grounds discussed below.

DISCUSSION

The background principles governing a Rule 12(b)(6) motion to dismiss are well established. The Court must accept as true all factual matters alleged in a complaint, although a complaint may not survive unless its factual recitations state a claim to relief that is plausible on its face. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 177 (2d Cir. 2014). Moreover, " '[a]lthough a court must accept as true all of the allegations contained in a complaint, that tenet is inapplicable to legal conclusions, and threadbare recitals of the elements of a cause of action ... do not suffice' " to survive a motion to dismiss. *Ibid.* (quoting *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009)). In short, my role in

reviewing the motion to dismiss is to determine whether the complaint—apart from any of its conclusory allegations—sets forth sufficient facts to state a plausible claim for relief.

Preemption

Defendant's principal argument for dismissal is that PUMA is preempted by ***333** three different federal statutes: the Controlled Substances Act, the Americans with Disabilities Act, and the Food, Drug, and Cosmetic Act. Although defendant raises other challenges as well to each of plaintiff's claims, I will first address defendant's preemption arguments insofar as PUMA's validity under federal law impacts all of plaintiff's claims.

[1] **[2]** The U.S. Constitution's Supremacy Clause provides that "the Laws of the United States ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. It follows that Congress may preempt a state law by means of a federal statute. Congress may accomplish this in several ways. It may do so expressly ("express preemption"), or it may preempt state law implicitly in circumstances where it is clear that Congress intended to occupy an entire regulatory field ("field preemption"). Congress may also preempt state law where state law stands as an obstacle to the objectives of Congress ("obstacle preemption") or where simultaneous compliance with both federal and state law is impossible ("impossibility preemption"). *See* *Oneok, Inc. v. Learjet, Inc.*, —— U.S. ——, 135 S.Ct. 1591, 1595, 191 L.Ed.2d 511 (2015); *Madden v. Midland Funding, LLC*, 786 F.3d 246, 249–50 (2d Cir. 2015). In general, a federal statute will not be found to preempt claims arising under state law unless Congress's intent to do so is "clear and manifest." *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009).

[3] Defendant argues that the Controlled Substances Act, Americans with Disabilities Act, and Food, Drug, and Cosmetic Act each invalidate PUMA under a theory of obstacle preemption. Under obstacle preemption, a state law is preempted where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012).

[4] **[5]** **[6]** A defendant making an argument under obstacle preemption faces a heavy burden. "The mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power." *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 241 (2d Cir. 2006). Rather, obstacle preemption precludes only those state laws that create an "actual conflict" with an overriding federal purpose and objective. *See* *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 162 (2d Cir. 2013). What constitutes a "sufficient obstacle" is "a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Ibid.* (internal quotation marks omitted). But "the conflict between state law and federal policy must be a sharp one." *Marsh v. Rosenbloom*, 499 F.3d 165, 178 (2d Cir. 2007) (internal quotation marks omitted). Indeed, there is no preemption unless "the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together." *In re MTBE Prods. Liab. Litig.*, 725 F.3d 65, 102 (2d Cir. 2013).

1. Controlled Substances Act

[7] Defendant first argues that PUMA is preempted by the Controlled Substances Act, 21 U.S.C. § 801 *et seq.* ("CSA"). Specifically, defendant contends that by "affirmatively authoriz[ing] the medical use, possession, cultivation, sale, dispensing, and distribution of marijuana," PUMA "stands as an impermissible obstacle to the basic purpose of the CSA." Doc. # 18–1 at 12. In response, plaintiff argues that because ***334** the CSA does not regulate the employment relationship, the employment anti-discrimination provision of PUMA does not conflict with or stand as an obstacle to the CSA. Doc. # 27 at 11.1 agree with plaintiff.

[8] The CSA makes it a federal crime to use, possess, or distribute marijuana. "The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Gonzales v. Raich*, 545 U.S. 1, 12, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). To carry out these goals, "Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Id.* at 13,

125 S.Ct. 2195. The CSA classifies marijuana as a Schedule I substance, which indicates the drug's "high potential for abuse," and the CSA allows no exceptions for medical use. 21 U.S.C. § 812; *see also* *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001).

The CSA, however, does not make it illegal to employ a marijuana user. Nor does it purport to regulate employment practices in any manner. It also contains a provision that explicitly indicates that Congress did not intend for the CSA to preempt state law "unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together." 21 U.S.C. § 903.

[9] Defendant argues that PUMA stands as an obstacle to the CSA because it affirmatively authorizes the very conduct—marijuana use—that the CSA prohibits. But this argument is overbroad and overlooks the operative provision of PUMA that is at issue in this case: the specific provision of PUMA (Conn. Gen. Stat. § 21a–408p(b)(3)) that prohibits an employer from discriminating against authorized persons who use medicinal marijuana. Plaintiff contends that defendants have violated this particular provision, and plaintiff does not otherwise seek enforcement of PUMA *en toto* or of other provisions of PUMA. Accordingly, I must focus on PUMA's specific anti-employment discrimination provision rather than the statute as a whole, because in preemption cases, "state law is displaced only to the extent that it actually conflicts with federal law," and "a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476, 116 S.Ct. 1063, 134 L.Ed.2d 115 (1996) (*per curiam*).

No court has considered whether the CSA preempts § 21a–408p(b)(3) or any other provisions of PUMA. So far as I can tell, there have been no cases interpreting PUMA at all. Although state and federal courts around the country have evaluated other States' medical marijuana statutes—including in the employment context—many of those cases are of limited value here, because the statutory provisions at issue in those cases are not analogous to the anti-discrimination provision of § 21a–408p(b)(3).

For example, defendant relies heavily on *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 Or. 159, 230 P.3d 518 (2010), in which the Oregon Supreme Court determined that Oregon's medical marijuana statute was preempted by the CSA. Factually, the context in *Emerald Steel* is quite similar to this case: a plaintiff was fired by his employer one week after disclosing his status as a state-law-authorized user of medical marijuana. Legally, however, *Emerald Steel* is different, because Oregon's medical marijuana statute contains no provision explicitly barring ***335** employment discrimination.[3] The very different question presented in *Emerald Steel* was whether the CSA more generally preempted a provision of Oregon law that authorized the use of medical marijuana. Here, by contrast, the question is whether the CSA preempts a provision that prohibits an employer from taking adverse action against an employee on the basis of the employee's otherwise state-authorized medicinal use of marijuana.

So *Emerald Steel* is distinguishable, because it did not concern a statutory anti-discrimination-against-use-of-medical-marijuana provision. Other factually similar cases are even more distinguishable, because they have been decided on statutory interpretation grounds rather than on preemption grounds. *See, e.g.*, *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015) (plaintiff was not protected under statute that prohibited employer from terminating employee due to employee's participating in "lawful" activities off the premises of the employer during non-working hours, because court interpreted "lawful" to mean lawful under both state and federal law); *Casias v. Wal–Mart Stores, Inc.*, 695 F.3d 428, 435–36 (6th Cir. 2012) (Michigan's medical marijuana statute, which provides protection against disciplinary action by a "business," does not impose restrictions on private employers, as a matter of textual interpretation); *Stanley v. Cty. of Bernalillo Comm'rs*, 2015 WL 4997159, at *5 (D.N.M. 2015) (citing additional cases in which courts have "rejected the plaintiff's claims that state anti-discrimination laws prohibit private employers from terminating employees for state-authorized medical marijuana usage as a matter of statutory interpretation, and not on federal-preemption grounds").

Although most cases dealing with the CSA's preemption of state medical marijuana statutes have come out in favor of employers, these cases have not concerned statutes

with specific anti-discrimination provisions; courts and commentators alike have suggested that a statute that clearly and explicitly provided employment protections for medical marijuana users could lead to a different result.[4] Indeed, one court recently held that the CSA does not preempt the anti-discrimination-in-employment provision of Rhode Island's medical marijuana statute. *See Callaghan v. Darlington Fabrics Corp.*, 2017 WL 2321181, at *13–14 (R.I. Super. 2017).

***336** Like the provision at issue in *Callaghan*, § 21a–408p(b)(3) of PUMA regulates the employment relationship, an area in which States " 'possess broad authority under their policy powers to regulate.' " *Arizona*, 567 U.S. at 404, 132 S.Ct. 2492 (quoting *De Canas v. Bica*, 424 U.S. 351, 356, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976)). Given that the CSA nowhere prohibits employers from hiring applicants who may be engaged in illegal drug use, defendant has not established the sort of "positive conflict" between § 21a–408p(b)(3) and the CSA that is required for preemption under the very terms of the CSA. *See* 21 U.S.C. § 903. Nor does any tension between § 21a–408p(b)(3) and the CSA rise to the level of the "sharp" conflict required to establish obstacle preemption under the case law. The CSA does not preempt § 21a–408p(b)(3).

2. Americans with Disabilities Act

[10] Defendant next contends that PUMA's anti-discrimination employment provision is preempted by the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"). The ADA of course protects the rights of persons with disabilities to be free from discrimination, including discrimination in the employment context. Given the ADA's remedial purpose to protect employees from discrimination, it may seem odd to suppose that the ADA of all statutes should be understood to preclude the States from fighting employment discrimination of any kind.

Defendant nevertheless fashions its somewhat counterintuitive ADA preemption argument from a provision of the ADA—42 U.S.C. § 12114—that was crafted in order to make clear that the ADA does not extend its protections to persons who use illicit drugs or alcohol. This provision of the ADA contains numerous sub-provisions, several of which are important to consider here:

- Section 12114(a) states that "[f]or purposes of this subchapter, a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity [employer] acts on the basis of such use."
- Section 12114(b) provides in part that "it shall not be a violation" of the ADA for an employer to engage in "drug testing" in order to ensure that a person who has previously participated in a drug rehabilitation program "is no longer engaging in the illegal use of drugs."
- Section 12114(c)(1) provides that an employer "may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees."
- Section 12114(c)(4) provides that an employer "may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee."
- Section 12114(d)(2) provides that "[n]othing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results."

In essence, § 12114(a) creates an illicit-drug-use exception to the protections of the ADA, and then the rest of § 12114 outlines what steps that employers may take with respect to illicit drug use without violating the ADA.

***337** I draw the following conclusions from these various sub-provisions of § 12114. First and most importantly, the ADA explicitly provides that an employer "may prohibit the illegal use of drugs and the use of alcohol *at the workplace* by all employees." 42 U.S.C. § 12114(c)(1) (emphasis added). But the facts of this case do not involve any use of marijuana by plaintiff at the workplace, and PUMA explicitly declines to authorize such workplace use. *See* Conn. Gen. Stat. §§ 21a–408p(b)(3), 21a–408a(b)(2). And the fact that the ADA does not further provide that an employer may prohibit an employee from the illegal use of drugs *outside* of the workplace is a powerful indication that the

ADA was not meant to regulate non-workplace activity, much less to preclude the States from doing so or to preclude the States from prohibiting employers from taking adverse actions against employees who may use illegal drugs outside the workplace (and whose drug use does not affect job performance).

Second, although the ADA refers to and contemplates employers' use of drug testing, it does so for a limited purpose to make clear that such use of drug testing is not itself a violation of the ADA. *See* 42 U.S.C. § 12114(b). Other than making clear what conduct does not violate the ADA, the ADA is not an employer's *Magna Carta* to engage in drug testing of all employees. That is why § 12114(d)(2) provides that the ADA does not "encourage, prohibit, *or authorize*" drug testing of applicants or employees. The fact that the ADA allows an employer to use drug testing without fear of facing liability under the ADA does not additionally and exorbitantly mean that the ADA was intended to categorically preclude the States from preventing an employer from taking adverse action against someone who fails any kind of a drug test.

Defendant relies heavily on the wording of § 12114(c)(4), which as noted above provides that an employer "may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same *qualification standards* for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee." On the basis of this text, defendant argues that its drug testing of plaintiff was a "qualification standard" that it was free under the ADA to impose against plaintiff as it would any other employee. But viewed in context of the purpose of the ADA and the accompanying sub-provisions of § 12114 that I have just discussed, I cannot agree with defendant's understanding that a drug test is itself a "qualification standard" within the meaning of this sub-provision, because the wording of this sub-provision further states that the "qualification standard" must be job-performance/behavior-related. There is no suggestion in this case that plaintiff's medicinal use of marijuana adversely would affect her job performance. Moreover, defendant's interpretation is at odds with § 12114(d)(2), insofar as defendant reads § 12114(c)(4) to authorize drug testing of applicants.

My conclusion that the ADA does not preempt PUMA's anti-discrimination employment provision is reinforced by consideration of the ADA's preemption "savings clause":

> Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.

***338** 42 U.S.C. § 12201(b). The evident intent of Congress was to allow the States to enact greater protections for parties like plaintiff who may suffer from a disability such as plaintiff's post-traumatic stress disorder.

As the Supreme Court has acknowledged in a different context, the courts should not presume that Congress "hide[s] elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). But that is what defendant presumes that Congress has done here—that Congress has used an exemption from the coverage scope of the ADA to preempt the States from prohibiting other forms of employment discrimination. I cannot agree. The ADA is an anti-discrimination statute that exempts the use of illegal drugs from its scope of protection. Beyond doing so, the ADA does not preclude the States from regulating employers who discriminate against employees who engage in the medicinal use of drugs in compliance with state law.

At most, defendant presents a convincing case that plaintiff could not seek relief under the ADA for defendant's rescission of her job offer. *See, e.g.*, *James v. City of Costa Mesa*, 700 F.3d 394, 405 (9th Cir. 2012) ("We hold ... that the ADA does not protect medical marijuana users who claim to face discrimination on the basis of their marijuana use."). But the question here is not whether the ADA affords plaintiff relief. It is whether the ADA precludes Connecticut from granting plaintiff relief. I conclude that defendant has not shown a conflict between the ADA and PUMA that would justify preemption.

3. Federal Food, Drug, and Cosmetic Act

[11] Defendant further argues that PUMA is preempted by the Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 301 *et seq.*, because PUMA permits the use, dispensing, and licensing of medical marijuana, which has not been approved by the federal Food and Drug Administration. Doc. # 18–1 at 22. Like the CSA, however, the FDCA does not purport to regulate employment, and my focus here is limited to the validity of PUMA's anti-discrimination-in-employment provision, § 21a–408p(b)(3). Because § 21a–408p(b)(3) neither conflicts with nor poses an obstacle to the goals of the FDCA, I conclude that the FDCA does not preempt § 21a–408p(b)(3).

In short, therefore, PUMA is not preempted by any federal laws. Accordingly, I will now turn to consider defendant's specific arguments with respect to each of the three counts of the complaint.

Count One—Private Right of Action under PUMA

Defendant moves to dismiss plaintiff's PUMA claim under § 21a–408p(b)(3) on the ground that PUMA does not give rise to a private right of action. Both parties agree that PUMA lacks an explicit authorization for a private right of action but dispute whether there is an implied right of action.

[12] **[13]** **[14]** There is a "presumption in Connecticut that private enforcement does not exist unless expressly provided in a statute." *Gerardi v. City of Bridgeport*, 294 Conn. 461, 468, 985 A.2d 328 (2010). Plaintiff bears the burden of overcoming this presumption. In determining whether a plaintiff has met her burden, Connecticut courts look to three factors that are known as the "*Napoletano* factors." The first factor is whether plaintiff is one of the class for whose benefit the statute was enacted. The second factor is whether there is any indication of legislative intent, explicit or implicit, either to create a private right of action or to deny one. And the third factor is whether the recognition of a private right of action would be consistent with the underlying purposes of the legislative scheme. *See ibid.* (citing ***339** *Napoletano v. CIGNA Healthcare of Conn., Inc.*, 238 Conn. 216, 249, 680 A.2d 127 (1996)).

[15] **[16]** **[17]** Once a plaintiff meets a "threshold showing that none of the three factors weighs against recognizing a private cause of action," courts consider "all evidence that could bear on each factor." *Gerardi*, 294 Conn. at 469, 985 A.2d 328. In undertaking this analysis, courts should "look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." *Provencher v. Town of Enfield*, 284 Conn. 772, 778–79, 936 A.2d 625 (2007). "The ultimate question is whether there is sufficient evidence that the legislature intended" to provide a private cause of action. *Id.* at 779, 936 A.2d 625.

[18] Whether § 21a–408p(b)(3) provides a private cause of action is a question of first impression.[5] Applying the *Napoletano* test here, plaintiff meets the threshold showing that none of the three factors weighs against recognizing a private cause of action. With respect to the first factor, plaintiff is a qualifying patient and thus she certainly falls within the class for whose benefit the statute was enacted. With respect to the second factor, there is no indication of legislative intent to deny a private cause of action. To the contrary, testimony from public hearings suggests that legislators expected that the employment provision of PUMA would provide protections for employees that would be enforceable in the courts.[6] Lastly, with respect ***340** to the third factor, a private cause of action is not inconsistent with the underlying purposes of the legislative scheme but in fact effectuates the evident legislative purpose to prevent employers from discriminating against authorized medicinal users of marijuana.

[19] Considering all that bears on each factor, I conclude that the legislature intended that § 21a–408p(b)(3) provide a private cause of action. Most importantly, without a private cause of action, § 21a–408p(b)(3) would have no practical effect, because the law does not provide for any other enforcement mechanism. "The absence of any enforcement mechanism militates in favor of authorizing a private right of action, thereby enabling those for whose benefit the statute was enacted to protect the rights conferred upon them by the legislature." *Skakel v. Benedict*, 54 Conn.App. 663, 688, 738 A.2d 170 (1999) (implying private right of action for injunctive relief to enforce right to confidentiality under

Conn. Gen. Stat. § 17a–688(c) for lack of any alternative enforcement mechanism). By contrast, other recent decisions that have declined to imply a private right of action have relied heavily on the fact that the statute created an alternative enforcement mechanism. *See* *Perez–Dickson v. City of Bridgeport*, 304 Conn. 483, 507–08, 43 A.3d 69 (2012) (no private right of action against employer under Conn. Gen. Stat. § 17a–101e for retaliation against employee who reported child abuse where statute expressly provided for right of Attorney General to bring a court action if employer violated statute); *Gerardi*, 294 Conn. at 471–72, 985 A.2d 328 (no private right of action against employer under Conn. Gen. Stat. § 31–48d(b)(1) for failure to give notice of employee monitoring because statute provides for enforcement of statute by the Labor Commissioner); *J.P. Alexandre, LLC v. Egbuna*, 137 Conn.App. 340, 357, 49 A.3d 222 (2012) (no private right of action for "taxpayer bill of rights" under Conn. Gen. Stat. § 12–39n because "the legislature expressly provided that the rights granted in § 12–39n shall be enforced by other parts of the general statutes, or by rules or regulations of the department of revenue services").

Defendant counters that PUMA delegates administrative oversight and enforcement authority to the Connecticut Department of Consumer Protection. But plaintiff correctly notes that while other sections of PUMA assign administrative authority to the Department of Consumer ***341** Protection, the text of § 21a–408p is a clear exception. *See* Doc. # 27 at 27–28. In light of all these concerns, I conclude that § 21a–408p(b)(3) contains an implied private right of action.

Count One—Exemption under § 21a–408p(b)

[20] Defendant argues in the alternative that it is exempt from § 21a–408p(b) and therefore could not have violated the statute as a matter of law. *See* Doc. # 18–1 at 25–28. PUMA prohibits employers from refusing to hire qualifying patients, "unless required by federal law or required to obtain federal funding." § 21a–408p(b). As a nursing facility, defendant is subject to federal regulations that require compliance with federal, state, and local laws generally. Defendant argues that because the CSA prohibits marijuana use, defendant would be violating federal law (and thus violating the federal nursing home regulations that require compliance with federal law) by hiring plaintiff. This argument borders on the absurd. Because the act of merely hiring a medical marijuana user does not itself constitute a violation of the CSA or any other federal, state, or local law, defendant is not exempt from § 21a–408p(b).

Count One—Equal Protection Clause

[21] **[22]** Defendant next argues that § 21a–408p(b)(3) violates the Equal Protection Clause because it requires employers to treat one class of employees (medical marijuana users) differently than other similarly situated employees (recreational marijuana users). This argument is frivolous. "[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Keane v. Fischetti*, 300 Conn. 395, 406, 13 A.3d 1089 (2011); *Nordlinger v. Hahn*, 505 U.S. 1, 10–16, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) (same). Here the legislature could rationally distinguish between favoring people who use marijuana for medicinal purposes under the careful guidance of a physician and people who use marijuana at their whim to get high. PUMA does not violate the Equal Protection Clause.

Count Two—Public Policy Claim

[23] Count Two of the complaint alleges that defendant's refusal to hire plaintiff violated the public policy of the state of Connecticut. In her opposition brief, plaintiff clarifies that this is a common law claim based on *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980). In *Sheets*, the Connecticut Supreme Court "recognize[d] an exception to the traditional rules governing employment at will so as to permit a cause of action for wrongful discharge where the discharge contravenes a clear mandate of public policy." *Id.* at 474, 427 A.2d 385. In other words, under Connecticut law, "[i]f an employer's reason for dismissal is 'demonstrably improper' because it violates some important public policy, [an at-will] employee may recover for wrongful termination." *Groth v. Grove Hill Med. Or., P.C.*, 2015 WL 4393020, at *9 (D. Conn. 2015).

[24] Plaintiff seeks to extend *Sheets* to permit a cause of action for wrongful *rescission* of a job offer (as opposed to wrongful discharge) in violation of public policy. I need not

decide whether *Sheets* applies in this situation, however, because "if a statute already provides a private right of action intended to vindicate the relevant public policy, the [public policy] claim will fail." *Ibid.* Because I have found that § 21a–408p(b)(3) contains a private right of action, I will dismiss plaintiff's public policy claim under Count Two of the complaint.

342 *Count Three—Negligent Infliction of Emotional Distress

[25] Count Three of the complaint alleges a claim for negligent infliction of emotional distress. Plaintiff alleges that defendant—knowing that plaintiff suffered from PTSD—waited to rescind her job offer until one day before she was scheduled to begin work (and after she had already left her prior job), causing plaintiff to experience severe emotional distress, including anxiety, sleeplessness, and loss of appetite. The Connecticut Supreme Court has held that "[t]o prevail on a claim of negligent infliction of emotional distress, the plaintiff is required to prove that (1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress." *Hall v. Bergman*, 296 Conn. 169, 182 n.8, 994 A.2d 666 (2010) (internal quotation marks and citation omitted).

[26] A claim for negligent infliction of emotional distress cannot arise from conduct occurring in an ongoing employment relationship, as distinguished from conduct occurring in the termination of employment. *See* *Perodeau v. City of Hartford*, 259 Conn. 729, 749, 792 A.2d 752 (2002); *see also Spano v. Gengras Motor Cars, Inc.*, 663 F.Supp.2d 75, 83–84 (D. Conn. 2009). But *Perodeau* did not address employment-related conduct that qualifies as neither "occurring in an ongoing employment relationship" nor "occurring in the termination of employment," such as an employer's decision to rescind a job offer.

Since *Perodeau*, Connecticut courts have not squarely decided whether a rescinded job offer could serve as the basis for a negligent infliction of emotional distress claim. The practical, workplace-related reasons set forth in *Perodeau* for precluding a claim for negligent infliction of emotional distress on the basis of events occurring in an ongoing employment relationship do not apply in the context of an employer who rescinds a job offer before the prospective employee can begin work. *See* *Perodeau*, 259 Conn. at 758, 792 A.2d 752. Because the withdrawal of a job offer is more akin to termination than to conduct occurring in an ongoing employment relationship, it seems consistent with *Perodeau* that a claim for negligent infliction of emotional distress could arise from the withdrawal of a job offer.

Plaintiff has otherwise alleged the basic elements for a claim of negligent infliction of emotional distress. She alleges that defendant's conduct in withdrawing her offer was unreasonable, that defendant should have realized that its conduct involved an unreasonable risk of causing severe emotional distress (particularly because she alleges that defendant knew she had PTSD), and that defendant's conduct did in fact cause her such distress. I will therefore deny the motion to dismiss as to Count Three.

Plaintiff's Request for Attorney's Fees

[27] Defendant argues that plaintiff's request for attorney's fees and costs (*see* Doc. # 1–2 at 8) must be stricken as a matter of law, because plaintiff has failed to allege a statutory or contractual provision that provides such relief. Doc. # 18–1 at 33–34. Plaintiff responds that defendant's request is premature and that plaintiff could ultimately receive attorney's fees through a punitive damages award. "At the motion to dismiss stage, plaintiffs need not prove that they are entitled to each form of relief sought, so long as they have adequately plead the underlying claim." *SRSNE Site Grp. v. Advance Coatings Co.*, 2014 WL 671317, at *2 (D. Conn. 2014); *see also ibid.* (holding that "courts in this circuit have denied a defendant's ***343** motion to strike or to dismiss claims for attorney's fees ... because dismissal of such claims at the pleading stage would be premature"). Accordingly, I will deny defendant's motion to strike without prejudice to later renewal.

CONCLUSION

For the reasons explained above, defendant's motion to dismiss (Doc. # 18) is GRANTED in part and DENIED in part. The motion is granted as to Count Two (violation of public policy), and denied as to Count One (violation of Conn. Gen. Stat. § 281–408p(b)(3)) and Count Three (negligent infliction of emotional distress).

It is so ordered.

All Citations

273 F.Supp.3d 326, 33 A.D. Cases 997, 55 NDLR P 155

Footnotes

1 Eight other States besides Connecticut have passed medical marijuana laws that include explicit anti-discrimination protections from adverse employment actions. *See* ARIZ. REV. STAT. § 36–2813; DEL. CODE ANN. tit. 16, § 4905A; 410 ILL. COMP. STAT. 130/40; ME. REV. STAT. tit. 22, § 2423–E; NEV. REV. STAT. § 453A.800; N.Y. PUB. HEALTH LAW § 3369; MINN. STAT. § 152.32; R.I. GEN. LAWS § 21–28.6–4.

2 Conn. Gen. Stat. § 21a–408p(b)(3) provides as follows: "[U]nless required by federal law or required to obtain funding: ... (3) No employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient or primary caregiver under sections 21a–408 to 21a–408n, inclusive. Nothing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours." The Act elsewhere explicitly indicates that PUMA does not permit the ingestion of marijuana in the workplace. *See* Conn. Gen. Stat. § 21a–408a(b)(2).

3 The plaintiff in *Emerald Steel* brought his claim under ORS 659A. 112, a state law that protects employees against discrimination on the basis of disability. The defendant argued that it had no obligation to accommodate the plaintiff's medical marijuana use, because the law provided an exemption to the protection of ORS 659A.112, for cases in which the employer takes action based on an employee's illegal use of drugs. The decision in *Emerald Steel* turned on whether the plaintiff's use of medical marijuana constituted "the use of illegal drugs," and therefore it turned on whether the use of medical marijuana was "lawful." The Oregon Supreme Court held that it was not lawful, because the provision of Oregon's medical marijuana act that authorized the use of medical marijuana was preempted by the CSA.

4 *See, e.g.*, *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wash.2d 736, 748, 257 P.3d 586 (2011); *Ross v. RagingWire Telecomms., Inc.*, 42 Cal.4th 920, 927–28, 70 Cal.Rptr.3d 382, 174 P.3d 200 (2008); Kathleen Harvey, *Protecting Medical Marijuana Users in the Workplace*, 66 CASE W. RES. L. REV. 209, 222 (2015) (arguing that the CSA does not preempt provisions that provide explicit employment protections to medical marijuana patients); Taylor Oyaas, Note, *Reefer Madness: How Tennessee Can Provide Cannabis Oil Patients Protection from Workplace Discrimination*, 47 U. MEM. L. REV. 935, 967 (2017) (arguing that Tennessee can and should avoid the problems faced by the plaintiff *Emerald Steel* by adopting explicit employment protections for medical marijuana users).

5 This question is mostly unsettled in other States as well. The provisions in other States that are analogous to § 21a–408p(b)(3) similarly all lack express causes of action. The Rhode Island Superior Court recently determined that Rhode Island's medical marijuana statute contains an implied cause of action. *See Callaghan v. Darlington Fabrics Corp.*, 2017 WL 2321181, at *4–8 (R.I. Super. 2017). But for the most part, it appears to be an open question whether the other seven medical marijuana statutes that contain employment provisions imply a private cause of action. The Arizona Court of Appeals held that Arizona's provision did not provide a private cause of action for patients against their treating physicians; in doing so, the court contrasted

the physician provision with the provision prohibiting discrimination by landlords, schools, and employers and insinuated (but did not find) that a private cause of action might exist against landlords, schools, and employers. *See* *Gersten v. Sun Pain Mgmt., P.L.L.C.*, 242 Ariz. 301, 395 P.3d 310, 312–13 (Ariz. Ct. App. 2017).

The Massachusetts Supreme Court recently held that Massachusetts's medical marijuana statute, which does *not* explicitly protect employees against discrimination based on medical marijuana use, did not contain an implied cause of action to that effect either. But the Massachusetts Supreme Court, in that decision, also held that the aggrieved employee had a cause of action under a state disability discrimination statute, finding that "an exception to an employer's drug policy to permit its use is a facially reasonable accommodation" under the relevant state law. *See* *Barbuto v. Advantage Sales & Marketing LLC*, 477 Mass. 456, 78 N.E.3d 37, 45 (2017). The Massachusetts court emphasized that because "a comparable cause of action already exists under our law prohibiting handicap discrimination, a separate, implied right of action is not necessary to protect a patient using medical marijuana from being unjustly terminated for its use." *Id.* at 49.

6 *See* 55 H.R. Proc, Pt. 9, 2012 Sess., p. 177 (REP. NOUJAIM: "... All I am saying is this is one additional burden on employers, just one additional burden being placed on employers and—on their daily work and—and that, essentially, will hurt employers, and I do have some concerns about it."); *Id.* at p. 335–36 (REP. CALENDORA: "... we have language here that a qualifying patient shall not be denied any right or privilege, including but not limited to. So these individuals are going to be essentially, a protected class. I'm not sure what rights and privileges they're going to assert and that's denied from their use of medical marijuana.... [A]nd we see broad sweeping language in here, not just affording these individuals the right to use medical marijuana, but we're affording them the right to assert all sorts of claims that we don't even contemplate. And I'm not sure that was the original intent when this bill set out. When I first heard about it, it was about allowing individuals to be able to use medical marijuana in the treatment of some debilitating illness. But what we're doing here today is creating a whole other class that can assert lawsuits against landlords, against employers, against neighbors, against classmates, under the guise of using medical marijuana. Does it become a sword? I don't think so but it certainly is going to become a shield, and yet, again, it's going to be problematic in the workforce, in the residential facilities."); *Id.* at 440 (REP. CAFERO: "We have a situation is this bill that[ ] has been pointed out many times that says no employer can discriminate in any way ... against any employee who happens to be participating in this program. And yet when a very practical issue came up by Representative Noujaim, a manufacturer, who says if the qualifying patient is home before coming to work administers to him or herself the medical marijuana and by its very nature comes to work impaired. If he were to say, I got to send you home, you can't work on this. He is liable for lawsuit because he's not supposed to discriminate."); 55 S. Proc, Pt. 10, 2012 Sess., p. 210 (SEN. BOUCHER: "The other costs that we have to consider are ... [t]he cost to businesses; we have in this bill language that says businesses are prohibited from discriminating. We hopefully will talk about some protections for businesses should this program come in place, because they're really at risk").

2018 WL 3814278
NOT FOR PUBLICATION
United States District Court, D. New Jersey.

Daniel COTTO, Jr., Plaintiff,
v.
ARDAGH GLASS PACKING, INC., et al., Defendants.

Civil No. 18-1037 (RBK/AMD)
|
Signed 08/10/2018

Attorneys and Law Firms

Kevin M. Costello, Marisa Jean Hermanovich, Costello & Mains, LLC, Mount Laurel, NJ, for Plaintiff.

OPINION

ROBERT B. KUGLER, United States District Judge

***1** Plaintiff Daniel Cotto, Jr. hit his head on a forklift and was subsequently asked to take a drug test as a condition of continued employment. He told his employer, Defendant Ardagh Glass, that he could not pass a drug test because he takes several medically-prescribed drugs, including medical marijuana. Ardagh Glass told him they could not allow him to continue working there unless he tested negative for marijuana, and so he remained on indefinite suspension as a consequence of not satisfying this condition of employment. Plaintiff argues this constitutes disability discrimination. He claims that the decriminalization of medical marijuana under the New Jersey Compassionate Use Medical Marijuana Act ("CUMMA"), together with the New Jersey Law Against Discrimination ("LAD), compels his employer to provide an accommodation for him, which the Court infers can only mean a request that his employer waive the requirement that Plaintiff pass a drug test.

Now this matter comes before the Court on Ardagh Glass's Motion to Dismiss. (ECF No. 6.) As we find that neither the New Jersey Law Against Discrimination nor the New Jersey Compassionate Use Medical Marijuana Act require an employer to waive a drug test as a condition of employment for federally-prohibited substance, Defendant's Motion to Dismiss is **GRANTED**.

I. BACKGROUND

Daniel Cotto, Jr., a New Jersey resident, began working as a forklift operator at Ardagh Glass, a Delaware corporation whose principal place of business is in the State of Indiana, on February 8, 2011. Because of a neck and back injury in 2007, Plaintiff was prescribed drugs for pain management including Percocet, Gabapentin, and—as relevant to this litigation—marijuana. (Compl. at 2.), Plaintiff states that at the time of his hiring, he informed Ardagh Glass about his use of these medications and presented medical documentation showing that it was safe for him to take these medications. (*Id.* at ¶¶ 7–8.)

It came to pass that on November 1, 2016, Plaintiff injured himself by hitting his head on the roof of a forklift. (*Id.* at ¶ 9.) His supervisor told him to take a break in the breakroom, and Plaintiff was subsequently instructed to visit Premier Orthopedics in Vineland, New Jersey, for examination. (*Id.* at ¶ 11.) At Premier Orthopedics, a doctor placed Plaintiff on "light duty" work, with a follow-up appointment set for December 8, 2016. (*Id.* at ¶ 13.) But an Ardagh Glass safety employee also told him that "he was required to pass a breathalyzer and urine test in order to return to work." (*Id.*) Plaintiff explained that he was taking prescription medications, which the safety employee told him would not be a problem. (*Id.* at ¶ 15.) He was also told that there would be no work available to him given his "light duty" restrictions. (*Id.* at ¶ 16.) Other employees with similar restrictions were permitted to perform light-duty work. (*Id.* at ¶ 17.)

On December 1, 2016, Plaintiff received a phone call from an Ardagh Glass employee, "Bryan"—last name unpleaded—who told him that he could no longer work at Ardagh Glass because he could not operate machinery while on narcotics. (*Id.* at ¶ 18.) Plaintiff objected: he had told Ardagh Glass when he was hired about his prescription medications and his doctor had given him a note stating that he could operate machinery while on these drugs. (*Id.* at ¶¶ 19–20.) Bryan told Plaintiff that Ardagh Glass was not concerned about the Percocet—rather, it was concerned about Plaintiff's use of marijuana. But Ardagh Glass's representative stated that that he would discuss the matter with legal counsel and that he would get back to Plaintiff about it. (*Id.* at ¶ 21.)

***2** The next day Ardagh Glass held a meeting between Plaintiff, Bryan, and "a human resources representative named Jim." (*Id.* at ¶ 23.) Ardagh Glass's representatives asked Plaintiff whether he could work without taking his medications; Plaintiff responded that he could "wean off of

2018 WL 3814278
NOT FOR PUBLICATION
United States District Court, D. New Jersey.

Daniel COTTO, Jr., Plaintiff,
v.
ARDAGH GLASS PACKING, INC., et al., Defendants.

Civil No. 18-1037 (RBK/AMD)
|
Signed 08/10/2018

Attorneys and Law Firms

Kevin M. Costello, Marisa Jean Hermanovich, Costello & Mains, LLC, Mount Laurel, NJ, for Plaintiff.

OPINION

ROBERT B. KUGLER, United States District Judge

***1** Plaintiff Daniel Cotto, Jr. hit his head on a forklift and was subsequently asked to take a drug test as a condition of continued employment. He told his employer, Defendant Ardagh Glass, that he could not pass a drug test because he takes several medically-prescribed drugs, including medical marijuana. Ardagh Glass told him they could not allow him to continue working there unless he tested negative for marijuana, and so he remained on indefinite suspension as a consequence of not satisfying this condition of employment. Plaintiff argues this constitutes disability discrimination. He claims that the decriminalization of medical marijuana under the New Jersey Compassionate Use Medical Marijuana Act ("CUMMA"), together with the New Jersey Law Against Discrimination ("LAD), compels his employer to provide an accommodation for him, which the Court infers can only mean a request that his employer waive the requirement that Plaintiff pass a drug test.

Now this matter comes before the Court on Ardagh Glass's Motion to Dismiss. (ECF No. 6.) As we find that neither the New Jersey Law Against Discrimination nor the New Jersey Compassionate Use Medical Marijuana Act require an employer to waive a drug test as a condition of employment for federally-prohibited substance, Defendant's Motion to Dismiss is **GRANTED**.

I. BACKGROUND

Daniel Cotto, Jr., a New Jersey resident, began working as a forklift operator at Ardagh Glass, a Delaware corporation whose principal place of business is in the State of Indiana, on February 8, 2011. Because of a neck and back injury in 2007, Plaintiff was prescribed drugs for pain management including Percocet, Gabapentin, and—as relevant to this litigation—marijuana. (Compl. at 2.), Plaintiff states that at the time of his hiring, he informed Ardagh Glass about his use of these medications and presented medical documentation showing that it was safe for him to take these medications. (*Id.* at ¶¶ 7–8.)

It came to pass that on November 1, 2016, Plaintiff injured himself by hitting his head on the roof of a forklift. (*Id.* at ¶ 9.) His supervisor told him to take a break in the breakroom, and Plaintiff was subsequently instructed to visit Premier Orthopedics in Vineland, New Jersey, for examination. (*Id.* at ¶ 11.) At Premier Orthopedics, a doctor placed Plaintiff on "light duty" work, with a follow-up appointment set for December 8, 2016. (*Id.* at ¶ 13.) But an Ardagh Glass safety employee also told him that "he was required to pass a breathalyzer and urine test in order to return to work." (*Id.*) Plaintiff explained that he was taking prescription medications, which the safety employee told him would not be a problem. (*Id.* at ¶ 15.) He was also told that there would be no work available to him given his "light duty" restrictions. (*Id.* at ¶ 16.) Other employees with similar restrictions were permitted to perform light-duty work. (*Id.* at ¶ 17.)

On December 1, 2016, Plaintiff received a phone call from an Ardagh Glass employee, "Bryan"—last name unpleaded—who told him that he could no longer work at Ardagh Glass because he could not operate machinery while on narcotics. (*Id.* at ¶ 18.) Plaintiff objected: he had told Ardagh Glass when he was hired about his prescription medications and his doctor had given him a note stating that he could operate machinery while on these drugs. (*Id.* at ¶¶ 19–20.) Bryan told Plaintiff that Ardagh Glass was not concerned about the Percocet—rather, it was concerned about Plaintiff's use of marijuana. But Ardagh Glass's representative stated that that he would discuss the matter with legal counsel and that he would get back to Plaintiff about it. (*Id.* at ¶ 21.)

***2** The next day Ardagh Glass held a meeting between Plaintiff, Bryan, and "a human resources representative named Jim." (*Id.* at ¶ 23.) Ardagh Glass's representatives asked Plaintiff whether he could work without taking his medications; Plaintiff responded that he could "wean off of

the Percocet." (*Id.* at ¶ 24.) But even when told that the "problem" was the medical marijuana and that "corporate wants you fired," Plaintiff demurred, and presented his medical marijuana card and doctor's prescription. (*Id.* at ¶¶ 23–27.) As before, Ardagh Glass representatives told Plaintiff they would look into the matter to see what they could do. (*Id.* at ¶ 28.)

Plaintiff does not plead that he was fired: rather, he appears to be on "indefinite suspension" (*Id.* at ¶ 36) as a result of this episode. Whatever the precise nature of his employment status, Plaintiff maintains he has not been permitted to return to work until he passes a drug test. (*Id.* at ¶ 29.) He argues this constitutes discrimination. Plaintiff's doctor stated Plaintiff had some lifting restrictions because of his medical condition —the complaint does not specify if this medical condition is related to past injuries, the forklift injury, or both—and that he is therefore disabled within the meaning of the New Jersey Law Against Discrimination ("LAD"), N.J. Stat. Ann. § 0:5-12 *et seq.* (*Id.* at ¶¶ 1, 33.) Plaintiff avers he is still capable of performing all the essential functions of his job as a forklift operator despite his disability. (*Id.* at ¶ 32.) He simply seeks a "reasonable accommodation," which the Court infers to be a request that his employer waive the requirement that Plaintiff pass a drug test for marijuana, a substance prohibited by federal law. (*Id.* at ¶ 37.)

Plaintiff first filed this complaint in the Superior Court of New Jersey, Cumberland County, asserting claims of disability discrimination, the "perception of disability discrimination," a failure to accommodate, retaliation, and a request for equitable relief including costs and reinstatement. (Compl. at 6–10.) Ardagh Glass then removed this case by invoking this Court's diversity jurisdiction under 28 U.S.C. § 1332, and has now moved to dismiss the complaint in its entirety for failure to state a claim upon which relief can be granted.

II. THE 12(b)(6) STANDARD

When considering a motion to dismiss a complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the Court must accept all well-pleaded allegations in the complaint as true and view them in the light most favorable to the non-moving party. A motion to dismiss may be granted only if the plaintiff has failed to set forth fair notice of what the claim is and the grounds upon which it rests that make such a claim plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Although Rule 8 does not require "detailed factual allegations," it requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555).

In reviewing the sufficiency of a complaint, this Court must "tak[e] note of the elements [the] plaintiff must plead to state a claim. Second, it should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Finally, [w]hen there are well-pleaded factual allegations, [the] court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 787 (3d Cir. 2016) (alterations in original) (internal citations and quotation marks omitted).

III. JURISDICTION

***3** This case is properly before the Court under 28 U.S.C. § 1332. The parties are diverse—Plaintiff is a New Jersey citizen and Defendant is a Delaware corporation with a principal place of business in Indiana. The amount of controversy, inclusive of the potential for punitive damages and attorney's fees, could reasonably exceed $75,000. *See Bell v. Preferred Life Assur. Soc. Of Montgomery, Ala.*, 320 U.S. 238, 240 (1943) (punitive damages relevant to determining the amount of controversy); N.J. Stat. Ann. § 10:5-27.1 (The LAD awards attorney's fees to a prevailing party).

IV. DISCUSSION

New Jersey is an at-will employment state: an employer may fire an employee for good reason, bad reason, or no reason at all. *See Witkowski v. Thomas J. Lipton, Inc.*, 136 N.J. 385, 396 (1994). But this is subject to some exceptions, including, as relevant here, unlawful discrimination, which is prohibited by the New Jersey Law Against Discrimination ("LAD"). *See Greenwood v. State Police Training Ctr.*, 127 N.J. 500, 512 (1992).

The LAD forbids "any unlawful discrimination against any person because such person is or has been at any time disabled or any unlawful employment practice against such person, unless the nature and extent of the disability reasonably precludes the performance of the particular employment." N.J. Stat. Ann. § 10:5-4.1. In implementing this provision, New Jersey courts have adopted the framework

of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as the starting point in actions brought under the LAD. *See* *Andersen v. Exxon Co., U.S.A.*, 89 N.J. 483, 492 (1982). The "first step" of this burden-shifting framework requires "the plaintiff to bear the burden of proving the elements of a prima facie case." *Victor v. State*, 203 N.J. 383, 408, 4 A.3d 126, 140 (2010). The prima face case is a "rather modest" burden, *Zive v. Stanley Roberts, Inc.*, 182 N.J. 436, 447 (2005), "but it remains the plaintiff's burden nonetheless." *Victor*, 203 N.J. at 408. Once a plaintiff has established the prima facie case, the burden of proof shifts to the employer who may rebut the presumption of discrimination by providing a legitimate, non-discriminatory reason for the challenged action. *Andersen*, 89 N.J. at 491. After such a rebuttal, the plaintiff may "prove by a preponderance of the evidence that the legitimate nondiscriminatory reason articulated by the defendant was not the true reason for the employment decision but was merely a pretext for discrimination." *Id.* In addition to the pretext theory set forth by *McDonnell Douglas*, a plaintiff may also establish a claim of discrimination under a mixed-motive theory as set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See* *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 787 (3d Cir. 2016) (expounding on the two different modes of discrimination).

When deciding whether to grant a motion to dismiss, the Court must evaluate whether Plaintiff has alleged facts that could sustain a *prima facie* case in discovery. This is not a formalistic inquiry: "at least for purposes of pleading sufficiency, a complaint need not establish a *prima facie* case in order to survive a motion to dismiss." *Connelly*, 809 F.3d at 788. This is because a *prima facie* case is "an evidentiary standard, not a pleading requirement," *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 510 (2002). Rather, a plaintiff with a disability discrimination claim may survive a motion to dismiss if he pleads "sufficient factual allegations to raise a reasonable expectation that discovery will reveal evidence" of the elements of the *prima facie* case. *Connelly*, 809 F.3d at 789. [1]

***4** "There is no single prima facie case that applies to all employment discrimination claims." *Andersen*, 89 N.J. at 491. Instead, "the elements of the prima facie case vary depending upon the particular cause of action." *Id.* Plaintiff has identified four theories of discrimination, labeled as follows: "Discrimination Based on Disability Under the LAD" (Count I); "Perception of Disability Discrimination Under the LAD" (Count II); "Failure to Accommodate" (Count III); and "Retaliation under the LAD" (Count IV). Count I and II are properly considered together, as Count II merely provides an alternative definition for a motivation prohibited by the statute; it does not present a separate cause of action. *See* *Rogers v. Campbell Foundry Co.*, 185 N.J. Super. 109, 112 (App. Div. 1982) ("those perceived as suffering from a particular handicap are as much within the protected class as those who are actually handicapped."); *Poff v. Caro*, 228 N.J. Super. 370, 377 (Law Div. 1987) ("discrimination based on a perception of a handicap is within the protection of the Law Against Discrimination.").

Ardagh Glass has moved to dismiss the complaint in its entirety, focusing its arguments on Plaintiff's contention that his past employer was duty-bound to accommodate his use of medical marijuana. Specifically, Ardagh Glass argues that the New Jersey Compassionate Use Medical Marijuana Act ("CUMMA") does not mandate employer acceptance—or, more particularly, to waive a drug test—of an employee's use of a substance that is illegal under federal law. We take each claim in turn.

A. Discriminatory Discharge

To withstand a motion to dismiss, a complaint must contain "sufficient factual allegations to raise a reasonable expectation that discovery will reveal evidence" of the elements of a *prima facie* case of discriminatory discharge on the basis of disability. *See* *Connelly*, 809 F.3d at 789. When a plaintiff alleges he was discriminatorily fired because of a disability, he must prove by a preponderance of the evidence that: (1) he is disabled within the meaning of the LAD; (2) he was performing his job at a level that met his employer's legitimate expectations; (3) he was discharged; and (4) the employer sought someone else to perform the same work after he left. *Grande v. Saint Clare's Health Sys.*, 230 N.J. 1, 18 (2017).

Plaintiff has adequately pleaded that he is disabled under the LAD. The LAD "does not require proof that some major life activity was impaired," *Dicino v. Aetna U.S.*

Healthcare, Civ. No. 01-3206 (JBS), 2003 WL 21501818, at *12 (D.N.J. June 23, 2003) (citing N.J. Stat. Ann. § 10:5-5(q)), and "courts have found a broad array of medical conditions to be handicaps under the LAD." *Tynan v. Vicinage 13 of Superior Court*, 351 N.J. Super. 385, 398 (App. Div. 2002). *See* *Clowes*, 109 N.J. at 590 (finding that "alcoholism is a protected handicap"); *Viscik v. Fowler Equip. Co.*, 173 N.J. 1, 17 (2002) (obesity); *Jansen v. Food Circus Supermarkets, Inc.*, 110 N.J. 363, 374 (1988) (drug addiction). Plaintiff's back and neck pain, as alleged, readily satisfies the standard for physical disability under the LAD. *See, e.g.*, *Andersen*, 89 N.J. at 493 (finding that "a serious back and spinal ailment that warranted an operation requiring spinal fusion and removal of a lumbar disc" could sustain a finding of a "physical handicap" under the LAD).

We turn to the second element of the *prima facie* case: whether Plaintiff was qualified to perform the essential functions of the job. As the New Jersey Supreme Court has explained, "the import of the [LAD] is that the handicapped should enjoy equal access to employment, subject only to limits that they cannot overcome." *Jansen*, 110 N.J. at 374. "Because of the limits imposed by a handicap, the [LAD] must be applied sensibly with due consideration to the interests of the employer, employee, and the public." *Raspa v. Office of Sheriff of Cty. of Gloucester*, 191 N.J. 323, 336 (2007) (citing *Jansen*, 110 N.J. at 374). The LAD leaves employers "with the right to fire or not to hire employees who are unable to perform the job, whether because they are generally unqualified or because they have a handicap that in fact impedes job performance." *Raspa*, 191 N.J. at 336 (internal marks and citations omitted).

***5** As an initial matter, Plaintiff appears to be qualified to work as a forklift operator: he has done so for a period of five years, apparently without issue until the events giving rise to this litigation. But it bears repeating that Plaintiff's complaint does not claim that Ardagh Glass discriminated against him based on his disability as such (i.e., his neck and back pain). Rather, Plaintiff alleges that his employer discriminated against him by refusing to accommodate his use of medical marijuana by waiving a drug test.

Distinguishing a treatment from a disability can present some analytical difficulties. Undue prejudice toward a treatment for a disability—say, an employer's disapproval that an employee uses a wheelchair—can be discrimination against the disability itself. But not so here. Plaintiff has pleaded that Ardagh Glass was aware of Plaintiff's disability for years and never discriminated against him until he was asked to take a drug test. Nothing in the complaint indicates Ardagh Glass took issue with his disability as such, only with a consequence of his treatment. New Jersey courts interpreting the LAD have noted that "it is the almost universal view that the federal laws are intended to prevent discrimination premised upon a handicap or disability, not upon egregious or criminal conduct *even if such conduct results from the handicap or disability.*" *Barbera v. DiMartino*, 305 N.J. Super. 617, 636 (App. Div. 1997) (citing dozens of cases) (emphasis added). What occasioned this dispute is conduct resulting from a treatment, not the disability itself: Plaintiff alleges that Ardagh Glass discriminated against him by telling him "he was required to pass both a breathalyzer and a urine test in order to return to work." (Compl. at ¶ 13.)

In other words, Ardagh Glass had a condition of employment which Plaintiff was unable or unwilling to meet. Plaintiff had to test negative for illegal narcotics or else, according to the complaint, he would remain on "indefinite suspension." Part of this was a fear that Plaintiff "could not operate machinery while on narcotics" (Compl. at ¶ 18), a concern apparently animating the requirement that Plaintiff pass a breathalyzer and urine test before returning to work. (Compl. at ¶ 13.) Plaintiff's complaint, although less precise than it could be, sweats down to a request for an accommodation to waive the condition that he be required to pass a drug test. Ardagh Glass refused, citing marijuana—but not Plaintiff's concurrent use of Percocet, which, if prescribed, is *not* illegal under federal law. (Compl. at ¶ 26.) As pleaded, Ardagh Glass was unmoved by Plaintiff's possession of a medical marijuana card and a note from his doctor stating that he could operate machinery while taking his prescription drugs. (Compl. at ¶¶ 19, 27.)

The Court is thus presented with the question of whether Ardagh Glass may condition Plaintiff's employment on his passing a drug test, or, formulated in the language of a claim for discriminatory discharge, whether this is an "essential function" of Plaintiff's employment.

Our departure point is the current federal prohibition of marijuana. The Controlled Substances Act provides that "[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally ... to manufacture,

distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). Congress has classified marijuana as a Schedule I substance, § 812(c), which are scheduled as such "because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment." *Gonzales v. Raich*, 545 U.S. 1, 14 (2005) (citing 21 U.S.C. § 812(b)(1)). By contrast, Percocet, a tradename for the combination of oxycodone/paracetamol, is a Schedule II substance "with a high potential for abuse" that "may not be distributed without a prescription." *See United States v. McKinney*, Crim. No. 09-234, 2010 WL 3364204, at *1 (E.D. Pa. Aug. 24, 2010). Ardagh Glass's more permissive stance toward the latter instead of the former is thus understandable, as federal law allows Percocet to be used with a prescription but continues to regard marijuana as having no accepted medical use.

***6** New Jersey, along with at least 30 other states, has reached a different conclusion about the medical utility of marijuana. The New Jersey Compassionate Use Medical Marijuana Act ("CUMMA" or the "Act") was enacted in 2010 to decriminalize the use of medical marijuana. The New Jersey legislature found that "[m]odern medical research has discovered a beneficial use for marijuana in treating or alleviating the pain or other symptoms associated with certain debilitating medical conditions." N.J. Stat. Ann. § 24:6I-2(a). The legislature also stated that:

> the purpose of this act is to protect from arrest, prosecution, property forfeiture, and criminal and other penalties, those patients who use marijuana to alleviate suffering from debilitating medical conditions, as well as their physicians, primary caregivers, and those who are authorized to produce marijuana for medical purposes.

N.J. Stat. Ann. § 24:6I-2(e).

Consistent with these purposes, "CUMMA affords an affirmative defense to patients who are properly registered under the statute and are subsequently arrested and charged with possession of marijuana." *State v. Holley*, No. A-5547-15T3, 2017 WL 6492488, at *3 (N.J. Super. Ct. App. Div. Dec. 19, 2017) (citing N.J. Stat. Ann. § 2C:35-18). The Act also shields qualifying users of medical marijuana from civil penalties and other administrative actions. "A qualifying patient, primary caregiver, alternative treatment center, physician, or any other person ... shall not be subject to any civil or administrative penalty, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a professional licensing board, related to the medical use of marijuana." N.J. Stat. Ann. § 24:6I-6(a). But despite these provisions for immunity, "[n]othing in this act shall be construed to require ... an employer to accommodate the medical use of marijuana in any workplace." N.J. Stat. Ann. § 24:6I-14. [2]

By its own terms, the Act decriminalizes and removes the threat of civil sanctions from qualifying users, prescribers, or purveyors of medical marijuana. Nothing within it invalidates Plaintiff's claims or requires an employer to permit the use of medical marijuana in the workplace. Most significantly, it specifically excludes employers from its scope. We therefore agree with Plaintiff that the Act "does not render Plaintiff's claim invalid, nor does it waive the employer's obligations under the LAD." (Opp'n at 7.) We further agree that it "has no other relevance to the facts set forth in plaintiff's Amended Complaint." (Opp'n at 7.) CUMMA is essentially agnostic on Plaintiff's claims.

But just as nothing within CUMMA invalidates Plaintiff's claims, so too does nothing within the Act breathe life into them. Plaintiff cannot aver that CUMMA has no significance to his claims and at the same time aver that the Act's decriminalization of medical marijuana mandates Ardagh Glass to waive drug testing for Plaintiff. Nothing in the cited language supports a finding that CUMMA, working alongside LAD, somehow leads to an emergent, penumbral law. The statutes enact only what they expressly enact or what the New Jersey judiciary has held them to enact. And so far, the courts of New Jersey, or federal courts interpreting the law of New Jersey, have not yet addressed this question. *See, e.g., Cobb v. Ardagh Glass, Inc.*, Civ. No. 17-4399 (RMB/KMW), 2018 WL 585540, at *2 (D.N.J. Jan. 26, 2018) (declining to reach the question of whether "Defendants have no liability for failing to accommodate Plaintiff's marijuana usage" and remanding for lack of complete diversity); *Barrett v. Robert Half Corp.*, Civ. No 15-6245, 2017 WL 4475980, at *2 (D.N.J. Feb. 21, 2017) (dismissing without prejudice because

the plaintiff failed to plead that he had requested a reasonable accommodation for his disability).

***7** But even though no court has addressed CUMMA's effects on the LAD, this Court is by no means the first to address the question of whether a statute decriminalizing marijuana imposes obligations that previously were not imposed by a state's civil right statutes. Unless expressly provided for by statute, most courts have concluded that the decriminalization of medical marijuana does not shield employees from adverse employment actions. *See, e.g.,* *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wash. 2d 736, 748 (2011) (Washington's Medical Use of Marijuana Act "does not regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use"); *Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d 914, 921–22 (W.D. Mich. 2011) ("The fundamental problem with Plaintiff's case is that the [Michigan Medical Marijuana Act] does not regulate private employment. Rather, the Act provides a potential defense to criminal prosecution or other adverse action by the state."), aff'd, 695 F.3d 428 (6th Cir. 2012); *Curry v. MillerCoors, Inc.*, Civ. No. 12-2471 (JLK), 2013 WL 4494307, at *7 (D. Colo. Aug. 21, 2013) (granting motion to dismiss; "discharging an employee under these circumstances is lawful, regardless of whether the employee consumed marijuana on a medical recommendation, at home or off work."); *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225, 1229 (D.N.M. 2016) (finding New Mexico's medical marijuana law does not "combine" with New Mexico's civil rights statute to require an employer to accommodate medical marijuana).

Plaintiff relies on a dissent in *Ross v. Ragingwire Telecomm., Inc.*, 174 P.3d 200, 209–211 (Cal. 2008), a case that is nearly a carbon copy of this one. Judge Kennard, dissenting, observed that "California's voters ... when they enacted [California's] Compassionate Use Act, surely never intended that persons who availed themselves of its provisions would thereby disqualify themselves from employment...." *Id.* But this Court finds the majority in *Ross* to be much more persuasive. The plaintiff in *Ross*, like the plaintiff in this case, experienced lower back pain and used marijuana to treat that pain. That use, however, brought "plaintiff into conflict with defendant's employment policies" which "den[ied] employment to persons who test positive for illegal drugs." *Id.* at 204. Just as here, the plaintiff's complaint did not "identify the precise accommodation defendant would need to make in order to enable him to perform the essential duties of his job," but the Supreme Court inferred that he was asking "defendant to accommodate his use of marijuana at home by waiving its policy requiring a negative drug test of new employees." *Id.* The *Ross* plaintiff contended that terminating "an employee who uses a medicine deemed legal by the California electorate upon the recommendation of his physician" violated the California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12900 *et seq.*, which prohibits discrimination against the disabled in substantially the same manner as New Jersey's LAD. *See* *Ross*, 174 P.3d at 204.

The California Supreme Court disagreed with Plaintiff that his employer had to accommodate his drug use. It noted:

> Plaintiff's position might have merit if the Compassionate Use Act gave marijuana the same status as any legal prescription drug. But the act's effect is not so broad. No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law even for medical users ... Instead of attempting the impossible ... California's voters merely exempted medical users and their primary caregivers from criminal liability under two specifically designated state statutes. Nothing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and obligations of employers and employees.

Ross, 174 P.3d at 204 (citations omitted). The Court concluded that "FEHA does not require employers to accommodate the use of illegal drugs" and noted that the dearth of case law was because "the point is perhaps too obvious to have generated appellate litigation." *Id.*

This Court predicts that the New Jersey judiciary would reach a similarly obvious conclusion: the LAD does not

require an employer to accommodate an employee's use of medical marijuana with a drug test waiver. Although no court has expressly ruled on this question, New Jersey courts have generally found employment drug testing to be unobjectionable in the context of private employment. In *Vargo v. Nat'l Exch. Carriers Ass'n, Inc.*, 376 N.J. Super. 364, 383 (App. Div. 2005), the court noted that "where an employer was presented with a positive drug test result for a prospective employee, there was nothing improper or unlawful in the employer's perceiving the prospective employee as a user of illegal drugs." *See also Matter of Jackson*, 294 N.J. Super. 233, 236 (App. Div. 1996) (affirming decision removing firefighter from his job on the basis that an "employer is not required to assume—or hope—that the employee will limit alcohol and other drug consumption to off-duty hours, or that the effects of drugs will be dissipated by the time the work day begins"); *Small v. Rahway Bd. of Educ.*, Civ. No. 17-1963, 2018 WL 615677, at *4 (D.N.J. Jan. 26, 2018) (finding that applicant for custodial position who failed drug test "was not otherwise qualified to perform the essential functions of the custodial job" under the ADA). And as we have seen, nothing in CUMMA or LAD disturbs this regime.

***8** The Court notes that both parties cite past, pending, and future proposed legislation concerning the scope and status of legalized medical marijuana in New Jersey when arguing that the statute should be construed this way or that. This is completely irrelevant. Proposed amendments are just that: proposals. A legislature may refuse to enact a proposal just as swiftly as someone might turn down a wedding ring. "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 453 (1987) (Scalia, J., concurring). This is doubly true for laws that have not even been enacted.

The Court's decision today is a narrow one, as it must be for the narrow issue presented by Plaintiff's complaint. Plaintiff's discrimination claims turn entirely on the question of whether he can compel Ardagh Glass to waive its requirement that he pass a drug test. It is plain that CUMMA does not require Ardagh Glass to do so. We therefore find that Plaintiff has failed to show that he could perform the "essential functions" of the job he seeks to perform. Ardagh Glass is within its rights to refuse to waive a drug test for federally-prohibited narcotics.

The Court also notes that although Plaintiff has stated he "is aware of other employees with restrictions that were permitted to work light-duty positions" (Compl. at ¶ 17), he has not pleaded that other similarly-situated employees asked for the accommodation he requests—i.e., a drug test waiver—and were denied. This, too, provides a basis for dismissal of his complaint, and he must show that Ardagh Glass "sought someone else to perform the same work, or did fill the position with a similarly-qualified person." *Tourtellote*, 636 F. App'x at 848. There are broader formulations of this element as well. Some courts interpreting the LAD have construed it as requiring "a showing that the challenged employment decision ... took place under circumstances that give rise to an inference of unlawful discrimination." *Williams v. Pemberton Twp. Pub. Sch.*, 323 N.J. Super. 490, 502, 733 A.2d 571, 578 (App. Div. 1999). But even under this approach, Plaintiff has not pleaded that another similarly-situated coworker was subject to the same actions.

B. Failure to Accommodate and Retaliation Claims

Plaintiff's other claims fare no better. To present a prima facie case of a failure to accommodate claim under the LAD, Plaintiff must plead that (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for her disability; (3) the employer did not make a good faith effort to assist; and (4) the employee could have been reasonably accommodated. *Armstrong v. Burdette Tomlin Mem'l Hosp.*, 438 F.3d 240, 246 (3d Cir. 2006); *Vicinage 13 of Superior Court*, 351 N.J. Super. at 396. As we found above with respect to Plaintiff's discriminatory discharge claim, neither CUMMA nor the LAD require Ardagh Glass to waive its drug test as a condition for employment. Plaintiff cannot compel an employer to waive a drug test as an accommodation for an employee using marijuana, and so Plaintiff has failed to state a claim for a failure to accommodate.

Plaintiff's retaliation claim is even more attenuated. To sustain a prima facie case on a retaliation claim under the LAD, Plaintiff must demonstrate that (1) he engaged in a protected activity known by the employer; (2) he suffered an adverse employment action; and (3) his participation in the protected activity caused the retaliation. *Craig v. Suburban Cablevision, Inc.*, 140 N.J. 623 (1995). As refusing to take

a drug test is not a protected activity under New Jersey law, Plaintiff has failed to state a claim for retaliation.

V. CONCLUSION

***9** New Jersey law does not require private employers to waive drug tests for users of medical marijuana. We therefore find that Plaintiff has failed to state a claim. Defendant's motion is **GRANTED**. An order follows.

All Citations

Not Reported in Fed. Supp., 2018 WL 3814278, 2018 A.D. Cases 286,675

Footnotes

1 These precedents concern federal discrimination law, of course, but New Jersey courts "rely on the federal courts and their construction for guidance in those circumstances in which our LAD is unclear." *Victor*, 203 N.J. at 398.

2 New Jersey's language is much less expansive than several other states. Arizona, for example, explicitly provide protections for users of medical marijuana in the workplace. "Unless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon ... [a] registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment." Ariz. Rev. Stat. Ann. § 36-2813. *See also* 35 Pa. Stat. Ann. § 10231.2103; Del. Code Ann. tit. 16, § 4905A.

154 F.Supp.3d 1225
United States District Court, D. New Mexico.

Rojerio GARCIA, Plaintiff,
v.
TRACTOR SUPPLY COMPANY, Defendant.

No. CV 15–00735 WJ/WPL
|
Filed January 7, 2016

Synopsis

Background: Employee who suffered from HIV/AIDS, used medical marijuana, and failed employer's drug test brought action in state court against employer, alleging that employer's termination of his employment based on his serious medical condition and use of medical marijuana violated the New Mexico Human Rights Act. Following removal, employer moved to dismiss.

Holdings: The District Court, William P. Johnson, J., held that:

[1] as a matter of first impression, New Mexico's Compassionate Use Act (CUA), which authorized use of medical marijuana, did not mandate that employers accommodate medical marijuana use, and

[2] Controlled Substances Act (CSA) preempted interpretation CUA and New Mexico Human Rights Act as requiring employer to accommodate employee's use of medical marijuana.

Motion granted.

Procedural Posture(s): Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

West Headnotes (2)

[1] **Civil Rights** Alcohol or drug use
Civil Rights Human immuno-deficiency virus and acquired immune deficiency syndrome

New Mexico's Compassionate Use Act (CUA), which authorized use of medical marijuana, did not mandate that employers accommodate medical marijuana cardholders, and, thus, medical marijuana was not an accommodation that employer was required to provide to employee who suffered from HIV/AIDS and used medical marijuana, under the New Mexico Human Rights Act. N.M. Stat. Ann. §§ 26-2B-1, 28-1-1.

10 Cases that cite this headnote

[2] **Civil Rights** Alcohol or drug use
Civil Rights Federal preemption

Controlled Substances Act (CSA) preempted interpretation of New Mexico's Compassionate Use Act (CUA), which authorized use of medical marijuana, and the New Mexico Human Rights Act as requiring employer to accommodate employee's use of medical marijuana, where CUA provided only limited state law immunity from prosecution for individuals engaged in state law-compliant medical marijuana use, while CSA criminalized marijuana, and affirmatively requiring employer to accommodate employee's illegal drug use would mandate employer to permit very conduct CSA proscribed. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 101 et seq., 21 U.S.C.A. § 801 et seq.; N.M. Stat. Ann. §§ 26-2B-1, 28-1-1.

10 Cases that cite this headnote

Attorneys and Law Firms

***1226** E. Justin Pennington, E Justin Pennington Law Offices, Albuquerque, NM, for Plaintiff.

Jessica R. Terrazas, Rodey Dickason Sloan Akin & Robb PA, Santa Fe, NM, Michael W. Fox, Ogletree Deakins Nash Smoak & Stewart PC, Austin, TX, for Defendant.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

WILLIAM P. JOHNSON, UNITED STATES DISTRICT JUDGE

THIS MATTER comes before the Court upon Defendant Tractor Supply Company's Motion to Dismiss (**Doc. 3**). Having reviewed the parties' briefs and the applicable law, the Court finds that Defendant's Motion to Dismiss is well taken, and therefore **GRANTED**, as herein described.

BACKGROUND

This case concerns an issue of first impression in the District of New Mexico. Plaintiff Rojerio Garcia ("Mr.Garcia") suffers from HIV/AIDS, a serious medical condition as defined in the New Mexico Human Rights Act, N.M. STAT. ANN. § 28–1–1, *et seq*. (1978). Mr. Garcia's physicians recommended that treatment of his condition include the use of medical marijuana. Mr. Garcia subsequently applied for acceptance into the New Mexico Medical Cannabis Program, an agency of the New Mexico Department of Health. The New Mexico Medical Cannabis Program is authorized by the Lynn and Erin Compassionate Use Act ("CUA"), N.M. STAT. ANN. § 26–2B–1 (2007). The New Mexico Department of Health determined that Mr. Garcia met all the statutory and regulatory criteria for participation in the Medical Cannabis Program and issued him a Patient Identification Card.

***1227** Mr. Garcia thereafter applied for the job of Team Leader (Management) at Tractor Supply Company ("Tractor Supply"). During his initial employment interview, Mr. Garcia advised Tractor Supply's hiring manager of his diagnosis of HIV/AIDS and of his participation in the Medical Cannabis Program. Mr. Garcia was hired for the job, and on August 8, 2014, reported to a testing facility to undergo a drug test. The results of the drug test indicated that Mr. Garcia had tested positive for cannabis metabolites. On August 20, 2014, Tractor Supply's hiring manager discharged Mr. Garcia on the basis of the positive drug test. On October 2, 2014, Mr. Garcia filed a written complaint with the New Mexico Human Rights Division, alleging unlawful discrimination by Tractor Supply as defined by N.M. STAT. ANN. § 28–1–7 (2008). Mr. Garcia received a Determination of No Probable Cause from the New Mexico Labor Relations Division/Human Rights Bureau on April 15, 2015. Therefore, Mr. Garcia has properly exhausted his administrative remedies. Mr. Garcia subsequently filed suit on July 13, 2015 in the First Judicial District Court of Santa Fe County, New Mexico, alleging that Tractor Supply terminated him based on his serious medical condition and his physicians' recommendation to use medical marijuana. Tractor Supply timely removed the case to this Court on August 21, 2015.

Tractor Supply filed a Motion to Dismiss (**Doc. 3**) on August 28, 2015, arguing that Mr. Garcia failed to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). Mr. Garcia filed his Response (**Doc. 8**) on September 18, 2015, and Tractor Supply filed their Reply (**Doc. 12**) on October 13, 2015. The Court held a hearing on the Motion to Dismiss on December 4, 2015.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows a party to move for dismissal of a case for failure to state a claim upon which relief can be granted. Rule 8(a)(2), in turn, requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Although a court must accept all the complaint's factual allegations as true, the same is not true of legal conclusions. *See id.* Mere labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action" will not suffice. *Twombly,* 550 U.S. at 555, 127 S.Ct. 1955. "Thus, in ruling on a motion to dismiss, a court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Kan. Penn Gaming, LLC v. Collins,* 656 F.3d 1210, 1214 (10th Cir.2011).

DISCUSSION

This case turns on whether New Mexico's Compassionate Use Act (CUA") *combined* with the New Mexico Human Rights

Act provides a cause of action for Mr. Garcia. Ever-present in the background of this case is whether the Controlled Substances Act preempts New Mexico state law.

1. The Compassionate Use Act and New Mexico Human Rights Act

[1] While some states, such as Connecticut and Delaware, have included within their medical marijuana acts affirmative requirements mandating that employers accommodate medical marijuana cardholders, ***1228** New Mexico's medical marijuana act has no such affirmative language. Mr. Garcia does not dispute that the CUA by itself provides no cause of action. Thus, Mr. Garcia argues in essence that the CUA makes medical marijuana an accommodation promoted by the public policy of New Mexico, and therefore, medical marijuana is an accommodation that must be provided for by the employer under the New Mexico Human Rights Act.

Tractor Supply counters that the CUA only offers users of medical marijuana limited immunity against state criminal prosecution and imposes no duty on employers to accommodate the use of medical marijuana. While an issue of first impression in the District of New Mexico, several cases from states that have approved medical marijuana prove instructive. *Curry v. MillerCoors, Inc.,* No. 12–cv–02471–JLK, 2013 WL 4494307 (D.Colo. Aug. 21, 2013) concerned an employee with hepatitis C who used medical marijuana and failed his employer's drug test. The court held that [d]espite concern for Mr. Curry's medical condition, anti-discrimination law does not extend so far as to shield a disabled employee from the implementation of his employer's standard policies against employee misconduct. In other words, a termination for misconduct is not converted into a termination because of a disability just because the instigating misconduct somehow relates to a disability." *Id.* at *3 (internal citations omitted). A more recent District of Colorado case echoed the same reasoning: "Magistrate Judge Wang also correctly concluded that there was no basis for finding that Defendants terminated Plaintiff's employment **because of** his disability; the Complaint fails to allege a single fact to support the notion that Plaintiff's medical condition, or any accommodation for a medical condition, led to his termination." *Steele v. Stallion Rockies Ltd.,* 106 F.Supp.3d 1205 (D.Colo.2015) (emphasis in original).

Here, Mr. Garcia was not terminated because of or on the basis of his serious medical condition. Testing positive for marijuana was not because of Mr. Garcia's serious medical condition (HIV/AIDS), nor could testing positive for marijuana be seen as conduct that resulted from his serious medical condition. Using marijuana is not a manifestation of HIV/AIDS.

Tractor Supply cites two state cases and one federal case in support. However, two of the cases involved claims seeking an implied cause of action from the state medical marijuana statute itself, or relied on public policy grounds. Neither case was successful for the Plaintiff.[1] Here, however, Mr. Garcia does not dispute that the CUA itself provides no cause of action. The third case, from the California Supreme Court, more closely resembles the cause of action Mr. Garcia pleads. In *Ross v. Ragingwire Telecommunications, Inc.,* the Plaintiff suffered from back pain, used medical marijuana, failed a drug test, and was subsequently terminated. 42 Cal.4th 920, 70 Cal.Rptr.3d 382, 174 P.3d 200, 203 (2008). The Plaintiff sued under the California Fair Employment and Housing Act, which "requires employers in their hiring decisions to take into account ***1229** the feasibility of making reasonable accommodations." *Id.*, 70 Cal.Rptr.3d 382, 174 P.3d at 204. Plaintiff alleged that the employer failed to make reasonable accommodations for his disability. The California Supreme Court held that "[n]othing in the text or history of the Compassionate Use Act suggest the voters intended the measure to address the respective rights and obligations of employers and employees. The FEHA does not require employers to accommodate the use of illegal drugs." *Id.*

Mr. Garcia's strongest argument in response to the *Ross* case centers on several decisions by the New Mexico Court of Appeals holding that the Workers' Compensation Act authorizes reimbursement for medical marijuana. *See, e.g., Vialpando v. Ben's Auto. Servs.,* 331 P.3d 975, 979 (N.M.Ct.App.2014) (finding medical marijuana to be a reasonable and necessary medical treatment requiring reimbursement). These decisions point to "equivocal statements about state laws allowing marijuana use" made by the Department of Justice. *Id.* at 980. Thus, Mr. Garcia infers that it is plausible that New Mexico courts would also find medical marijuana to be a reasonable accommodation under the New Mexico Human Rights Act.

However, the Court finds Tractor Supply's rebuttal more persuasive. First, as Defendant argues, reliance on an

enforcement policy of the United States Attorney General is not law, and instead, is merely an ephemeral policy that may change under a different President or different Attorney General. Second, and more importantly, there is a fundamental difference between: (i) requiring an insurance carrier to reimburse medical treatments that have been approved by a physician in a regulated system, such as medical marijuana, and (ii) requiring that a national employer permit and accommodate an individual's marijuana use that is illegal under federal law. This second point opens an important public policy argument. Were the Court to agree with Mr. Garcia, and require Tractor Supply to modify their drug-free policy to accommodate Mr. Garcia's marijuana use, Tractor Supply, with stores in 49 states, would likely need to modify their drug-free policy for each state that has legalized marijuana, decriminalized marijuana, or created a medical marijuana program. Depending on the language of each state's statute, Tractor Supply would potentially have to tailor their drug-free policy differently for each state permitting marijuana use in some form.

In sum, the Court finds that the CUA combined with the New Mexico Human Rights Act does not provide a cause of action for Mr. Garcia as medical marijuana is not an accommodation that must be provided for by the employer. Tractor Supply did not terminate Mr. Garcia because of his serious medical condition, as marijuana use is not a manifestation of HIV/AIDS, nor is testing positive for marijuana conduct that resulted from Mr. Garcia's serious medical condition. While New Mexico state courts have found medical marijuana to be compensable under state workers' compensation laws, the Court finds a fundamental difference between requiring compensation for medical treatment and affirmatively requiring an employer to accommodate an employer's use of a drug that is still illegal under federal law.

2. The Controlled Substances Act and the CUA

Tractor Supply next argues that requiring accommodation of medical marijuana use conflicts with the Controlled Substances Act ("CSA") because it would mandate the very conduct the CSA proscribes. Several state courts have held that state ***1230** medical marijuana laws do not conflict with the CSA because the state laws merely provide limited state-law immunity from prosecution if individuals choose to engage in state-law compliant medical marijuana use. *See, e.g.,* *Ter Beek v. City of Wyoming,* 495 Mich. 1, 846 N.W.2d 531 (2014); *Qualified Patients Ass'n v. City of Anaheim,* 187 Cal.App.4th 734, 115 Cal.Rptr.3d 89 (Cal.Ct.App.2010). These courts have found that the state law does not present an obstacle to the accomplishment of the federal law and does not deny the federal government the ability to enforce the prohibition. Thus, "it is not impossible to comply with both the CSA's federal prohibition on marijuana and [the Act's] limited state-law immunity for certain medical marijuana use...." *Ter Beek,* 846 N.W.2d at 541.

[2] Yet these cases addressed only whether the CSA preempted the state-law immunity that state medical marijuana acts granted its citizens. Here, Tractor Supply's argument is more nuanced than asserting that New Mexico's CUA itself is preempted by the CSA. Rather, Tractor Supply argues that interpreting the CUA and the Human Rights Act to require the company to accommodate Mr. Garcia's marijuana use would be preempted by the CSA. Thus, a closer case is a Supreme Court of Oregon case that examined whether the plaintiff's medical marijuana use constituted an "illegal use of drugs" under the state statutory provision governing his claim for employment discrimination. *See* *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.,* 348 Or. 159, 230 P.3d 518 (2010) (en banc). The court found that under Oregon's discrimination laws, the employer was not required to accommodate the employee's use of medical marijuana under the state's disability-discrimination statute, as marijuana is an illegal drug under federal law. *See* *id.* at 536. Judge Kistler, the author of the *Emerald Steel* opinion, presented a similar argument in his concurrence in an earlier case: "[t]he fact that the state may exempt medical marijuana users from the reach of the state criminal law does not mean that the state can affirmatively require employers to accommodate what federal law specifically prohibits." *Washburn v. Columbia Forest Products, Inc.,* 340 Or. 469, 134 P.3d 161, 167–68 (2006).

The Court finds no conflict between these two lines of cases. State medical marijuana laws that provide limited state-law immunity may not conflict with the CSA. But here, Mr. Garcia does not merely seek state-law immunity for his marijuana use. Rather, he seeks the state to affirmatively require Tractor Supply to accommodate his marijuana use. Thus, the Court finds the Oregon cases closer to the fact of this case and more persuasive. To affirmatively require Tractor Supply to accommodate Mr. Garcia's illegal drug use would mandate Tractor Supply to permit the very conduct the CSA proscribes.

Accordingly, the Court finds that Defendant's Motion to Dismiss is well taken, and therefore **GRANTED**.

SO ORDERED.

All Citations

154 F.Supp.3d 1225, 32 A.D. Cases 824

Footnotes

1 *See* *Casias v. Wal–Mart Stores, Inc.,* 764 F.Supp.2d 914, 921 (W.D.Mich.2011) ("Plaintiff argues the MMMA provides him with an implied right of action. Even Mr. Casias acknowledges his chances on this theory are remote, given the strictness of the current test in Michigan case law."); *Roe v. Teletech Customer Care Management (Colorado) LCC,* 171 Wash.2d 736, 257 P.3d 586, 588 (2011) ("We hold that MUMA does not provide a private cause of action for discharge of an employee who uses medical marijuana, either expressly or impliedly, nor does MUMA create a clear public policy that would support a claim for wrongful discharge in violation of such a policy.").

359 F.Supp.3d 761
United States District Court, D. Arizona.

Carol M. WHITMIRE, Plaintiff,
v.
WAL-MART STORES INCORPORATED, Defendant.

No. CV-17-08108-PCT-JAT
|
Signed February 7, 2019

Synopsis

Background: Former employee, a customer service supervisor for retail corporation, who was terminated after a positive drug test, brought action against her former employer, alleging wrongful termination under the Arizona Medical Marijuana Act (AMMA), the Arizona Civil Rights Act (ACRA), and the Arizona Employment Protection Act (AEPA), discrimination under the AMMA, and retaliation under the AEPA. Employer moved for summary judgment and employee requested that the court's ruling be deferred.

Holdings: The District Court, James A. Teilborg, Senior District Judge, held that:

[1] as a matter of apparent first impression, the AMMA's anti-discrimination provision creates an implied private cause of action for its alleged violation;

[2] reopening of discovery to permit either party to obtain an expert's opinion on the issue of whether former employee's urine screen showed marijuana metabolites present in scientifically sufficient concentration to cause impairment, was not warranted;

[3] provisions of Arizona's Drug Testing of Employees Act (DTEA) prohibiting a cause of action against an employer who has established a policy and initiated a testing program based on the employer's good faith belief that an employee had an impairment while working on the employer's premises or during hours of employment, did not implicitly amend or repeal sections of the AMMA, in violation of the Voter Protection Act;

[4] employer failed to meet its burden under the DTEA and AMMA of showing that employee's drug screen sufficiently established the presence of metabolites or components of marijuana in a scientifically sufficient concentration to cause impairment;

[5] employee failed to show that smoking medical marijuana was required in the prudent judgment of the medical profession, and thus, the side effects from smoking medical marijuana could not constitute a "disability" under the ACRA;

[6] employee established a causal connection between her report of accident and injury to her employer and her termination, as required for a prima facie case of retaliation under the AEPA; and

[7] employee failed to produce sufficient evidence from which a reasonable factfinder could conclude that employer's proffered reason for terminating her, i.e., that it had a good faith basis to believe she was impaired by marijuana at work based on the results of her positive drug test, was pretext for retaliation, in violation of the AEPA.

Application for deferral denied; motion for summary judgment granted in part and denied in part.

Procedural Posture(s): Motion for Summary Judgment; Other; Motion to Exclude Evidence or Testimony.

West Headnotes (52)

[1] Controlled Substances Medical necessity or assistance

Under the Arizona Medical Marijuana Act (AMMA) a qualifying patient diagnosed with a debilitating medical condition may obtain a registry card from the Arizona Department of Health Services to buy and use medical marijuana. Ariz. Rev. Stat. Ann. § 36-2801(3), (13).

[2] Action Statutory rights of action

Controlled Substances Medical necessity or assistance

The Arizona Medical Marijuana Act's (AMMA) anti-discrimination provision creates an implied private cause of action for its alleged violation; although provision does not provide an express cause of action, it imposes on employers an affirmative obligation to abide by the anti-discrimination mandate of the statute, there is no independent enforcement mechanism against employers for violations of provision, there is no indication of legislative intent to deny a private cause of action, and a private cause of action is not inconsistent with the underlying purposes of the AMMA. Ariz. Rev. Stat. Ann. § 36-2813(B).

2 Cases that cite this headnote

[3] **Federal Courts** Anticipating or predicting state decision

When a federal court must determine a novel issue of state law, the court attempts to predict how the state's highest court would decide the issue.

[4] **Action** Statutory rights of action

When a statute does not expressly create a cause of action to enforce its terms, that statutory silence is not dispositive.

[5] **Action** Statutory rights of action

Determining whether a statute implicitly creates a private right of action requires considering the context of the statutes, the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law.

[6] **Controlled Substances** Medical necessity or assistance

The Arizona Medical Marijuana Act (AMMA) makes no exception to its anti-discrimination provision for employers who maintain drug-free workplace policies. Ariz. Rev. Stat. Ann. § 36-2801 et seq.

[7] **Federal Civil Procedure** Alternate, Hypothetical and Inconsistent Claims

Former employee's claim that her former employer terminated her in violation of the Arizona Employment Protection Act (AEPA), by firing her because of her positive drug screen in violation of the public policy set forth in the Arizona Medical Marijuana Act (AMMA), was duplicative of employee's AMMA discrimination claim, and thus, dismissal of AEPA claim was warranted.

Ariz. Rev. Stat. Ann. §§ 23-1501(A)(3)(b), 36-2813(B).

1 Cases that cite this headnote

[8] **Federal Civil Procedure** Time for consideration of motion

Rule permitting the court to defer considering a motion for summary judgment applies where the nonmoving party has not had the opportunity to discover information that is essential to its opposition. Fed. R. Civ. P. 56(d).

[9] **Federal Civil Procedure** Time for consideration of motion

Rule permitting the court to defer considering a motion for summary judgment is not meant to re-open discovery in general. Fed. R. Civ. P. 56(d).

[10] **Federal Civil Procedure** Time for consideration of motion

The party seeking a continuance under rule permitting the court to defer considering a motion for summary judgment bears the burden of proffering facts sufficient to satisfy the requirements of the rule. Fed. R. Civ. P. 56(d).

[11] **Federal Civil Procedure** Time for consideration of motion

In ruling on a motion to defer consideration of a summary judgment motion, the court

considers whether the movant diligently pursued its previous discovery opportunities, and whether the movant has shown how allowing additional discovery would preclude summary judgment. Fed. R. Civ. P. 56(d).

[12] **Federal Civil Procedure** Proceedings to obtain

Reopening of discovery to permit either party to obtain an expert's opinion on the issue of whether former employee's urine screen showed marijuana metabolites present in scientifically sufficient concentration to cause impairment, was not warranted, in employee's action asserting claims including discrimination under the Arizona Medical Marijuana Act (AMMA); although employer's counsel appeared to mislead employee's counsel about whether employer would argue about the level of metabolites in employee's urine, employee's counsel did not reduce any agreement on the issue to a formal stipulation, nor use a recognized discovery vehicle to elicit such admission, and both parties had ample opportunity to retain expert witnesses, and their failure to do so was at their own peril. Ariz. Rev. Stat. Ann. § 36-2813(B); Fed. R. Civ. P. 56(d).

[13] **Federal Civil Procedure** Failure to respond; sanctions

Last minute or eleventh hour discovery which results in insufficient time to undertake additional discovery and which requires an extension of the discovery deadline is disfavored, and may result in denial of an extension, exclusion of evidence, or the imposition of other sanctions.

[14] **Evidence** Matters involving scientific or other special knowledge in general

Evidence Necessity and sufficiency

District courts are charged with the duty to act as gatekeepers, as the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

[15] **Evidence** Bodily and mental condition

Evidence Necessity and sufficiency

Employer failed to provide the requisite foundation for portions of declaration of its personnel coordinator, stating that former employee's urinalysis showed the maximum reading the test could measure for marijuana, and that her positive drug screen indicated that she was impaired by marijuana during her shift that same day; employer did not provide personnel coordinator's curriculum vitae nor any indication that she had the requisite knowledge, skill, experience, training, or education to render opinions regarding the results of employee's drug test, and personnel coordinator cited to no sources upon which she relied, nor set forth any basis for her statements from which the court could determine whether or not her testimony was reliable. Fed. R. Evid. 702.

[16] **Federal Civil Procedure** Evidentiary matters

Portions of declaration given by personnel coordinator, that former employee's urinalysis showed the maximum reading the test could measure for marijuana, and that her positive drug screen indicated that she was impaired by marijuana during her shift that same day, fell within the purview of specialized, scientific knowledge, and thus, was required to be disclosed as expert testimony. Fed. R. Civ. P. 26(a)(2)(A); Fed. R. Evid. 702.

[17] **Evidence** Matters of opinion or facts

A party may not attempt to evade the requirements of rule governing expert testimony through the simple expedient of proffering an expert in lay witness clothing. Fed. R. Evid. 702.

[18] **Federal Civil Procedure** Failure to respond; sanctions

Exclusion of portions of declaration given by personnel coordinator for employer, that former employee's urinalysis showed the maximum reading the test could measure for marijuana, and that her positive drug screen indicated that she was impaired by marijuana during her shift that same day, was an appropriate remedy for failing to fulfill disclosure requirements, in employee's action alleging discrimination under the Arizona Medical Marijuana Act (AMMA); employer failed to show that its failure to comply was substantially justified and it prejudiced employee by depriving her of the opportunity to prepare for effective cross examination and arrange for expert testimony on the issue of whether the level of metabolites present in her drug screen indicated that she was impaired at work. Ariz. Rev. Stat. Ann. § 36-2813(B); Fed. R. Civ. P. 26(a), 37(c)(1).

[19] **Federal Civil Procedure** Failure to respond; sanctions

In determining whether evidence should be excluded, for failure to make a timely disclosure, the burden is on the party facing the sanction to demonstrate that the failure to comply with rule governing disclosures is substantially justified or harmless. Fed. R. Civ. P. 26(a), 37(c)(1).

[20] **Federal Civil Procedure** Failure to respond; sanctions

The court has wide latitude to issue sanctions for failure to make required disclosures. Fed. R. Civ. P. 26(a), 37(c)(1).

[21] **Federal Civil Procedure** Matters considered

District court would not consider evidence submitted by former employee in rebuttal to employer's contention that employee's positive screen for marijuana indicated that she was impaired by marijuana during her shift that same day, in ruling on employer's motion for summary judgment on employee's claims asserting, among other things, discrimination under the Arizona Medical Marijuana Act (AMMA), where court was excluding employer's contention. Ariz. Rev. Stat. Ann. § 36-2813(B).

[22] **Federal Civil Procedure** Matters considered

Former employee's arguments that the "safety-sensitive" exception of Arizona's Drug Testing of Employees Act (DTEA) was not supported by the law or the evidence on the grounds that employer already conceded that employee's position was not safety-sensitive, was irrelevant to employee's action alleging, among other things, discrimination in violation of the Arizona Medical Marijuana Act (AMMA) and, thus, would not be considered by district court in resolving employer's motion for summary judgment, where the court previously explicitly precluded any argument by employer that employee was in a safety sensitive position. Ariz. Rev. Stat. Ann. §§ 23-493.06(7), 36-2813(B).

[23] **Labor and Employment** Validity

Provisions of Arizona's Drug Testing of Employees Act (DTEA) prohibiting a cause of action against an employer who has established a policy and initiated a testing program based on the employer's good faith belief that an employee had an impairment while working on the employer's premises or during hours of employment, did not implicitly amend or repeal sections of the Arizona Medical Marijuana Act (AMMA), in violation of the Voter Protection Act; read together, an employer could not be sued for firing a registered qualifying patient based on the employer's good-faith belief that the employee was impaired by marijuana at work, where that belief was based on a drug test sufficiently establishing the presence of metabolites or components of marijuana sufficient to cause impairment. Ariz. Const. art. IV, § 1; Ariz. Rev. Stat. Ann. §§ 23-493(6), 23-493.06(A)(6), 36-2813(B)(2), 36-2814(A)(3), 36-2814(B).

[24] **Statutes** By inconsistent or repugnant statute

A statute can be implicitly repealed or amended by another through repugnancy or inconsistency.

[25] **Statutes** Other Statutes

Whenever possible, Arizona courts adopt a construction of a statute that reconciles it with other statutes, giving force to all statutes involved.

[26] **Statutes** Implied amendment

Statutes By inconsistent or repugnant statute

Although the finding of an implied repeal or amendment of a statute is generally disfavored, it is required when conflicting statutes cannot be harmonized to give each effect and meaning.

[27] **Labor and Employment** Other Particular Rights or Contexts

Under the Arizona's Drug Testing of Employees Act (DTEA) and the Arizona Medical Marijuana Act (AMMA), an employer cannot be sued for suspending or firing a registered qualifying patient based on the employer's good faith belief that the employee was impaired by marijuana at work, where that belief is based on a drug test which establishes the presence of metabolites or components of marijuana in sufficient concentration to cause impairment. Ariz. Rev. Stat. Ann. §§ 23-493(6), 23-493.06(A)(6), 36-2813(B)(2), 36-2814(A)(3), 36-2814(B).

[28] **Labor and Employment** Presumptions and burden of proof

In presenting an affirmative defense under Arizona's Drug Testing of Employees Act (DTEA), a defendant bears the burden of proving that it had a good faith belief that a plaintiff was impaired by marijuana at work. Ariz. Rev. Stat. Ann. §§ 23-493(6), 23-493.06(A)(6).

[29] **Labor and Employment** Exercise of rights or duties; retaliation

Employer failed to meet its burden under Arizona's Drug Testing of Employees Act (DTEA) and the Arizona Medical Marijuana Act (AMMA) of showing that former employee's drug screen sufficiently established the presence of metabolites or components of marijuana in a scientifically sufficient concentration to cause impairment; proving impairment based on the results of a drug screen was a scientific matter requiring expert testimony, and without expert testimony establishing that employee's drug screen showed marijuana metabolites or components in a sufficient concentration to cause impairment, employer was unable to prove that employee's drug screen gave it a good faith basis to believe that employee was impaired at work. Ariz. Rev. Stat. Ann. §§ 23-493(6), 23-493.06(A)(6), 36-2813(B)(2), 36-2814(A)(3), 36-2814(B).

[30] **Federal Civil Procedure** Motion

District courts possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence. Fed. R. Civ. P. 56(f).

[31] **Federal Civil Procedure** Motion

A district court may grant summary judgment without notice if the losing party has had a full and fair opportunity to ventilate the issues involved in the motion. Fed. R. Civ. P. 56(f).

[32] **Federal Civil Procedure** Motion

District court would sua sponte grant summary judgment in part to former employee on the question of liability on her claim of discrimination under the Arizona Medical Marijuana Act (AMMA); the court issued an order which asked the parties to provide supplemental briefing discussing, in part, why

employee should or should not be entitled to summary judgment on her claim under the AMMA, stating that there was no evidence indicating that employee was impaired at work or expert testimony establishing that the level of metabolites present in her positive drug screen demonstrated that marijuana was present in her system in a sufficient concentration to cause impairment, and despite such admonition, employer did not come forward with any evidence establishing that employee was impaired. Ariz. Rev. Stat. Ann. § 36-2813(B); Fed. R. Civ. P. 56(f).

[33] **Civil Rights** Practices prohibited or required in general; elements

The ADA standards for disability discrimination claims apply to similar claims brought under the Arizona Civil Rights Act (ACRA), as the ACRA is modeled after federal employment discrimination laws. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.; Ariz. Rev. Stat. Ann. § 41-1463.

[34] **Civil Rights** Practices prohibited or required in general; elements

In order to establish a prima facie case of disability discrimination under the Arizona Civil Rights Act (ACRA), a plaintiff must demonstrate: (1) that she is disabled, (2) that she is qualified to perform the essential functions of her job with or without a reasonable accommodation, and (3) that she was discharged because of her disability. Ariz. Rev. Stat. Ann. § 41-1463.

[35] **Civil Rights** Employment practices

Should a plaintiff establish a prima facie case of disability discrimination under the Arizona Civil Rights Act (ACRA), then the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its employment action. Ariz. Rev. Stat. Ann. § 41-1463.

1 Cases that cite this headnote

[36] **Civil Rights** Employment practices

If a defendant sets forth a legitimate non-discriminatory reason for taking an adverse employment action against a plaintiff alleging disability discrimination under the Arizona Civil Rights Act (ACRA), then the plaintiff must show that the defendant's proffered reason is merely pretext for unlawful disability discrimination. Ariz. Rev. Stat. Ann. § 41-1463.

[37] **Civil Rights** Employment practices

An employee alleging disability discrimination under the Arizona Civil Rights Act (ACRA) bears the ultimate burden of proving that she is disabled. Ariz. Rev. Stat. Ann. § 41-1463.

[38] **Federal Civil Procedure** Employees and Employment Discrimination, Actions Involving

For summary judgment to be appropriate on a claim of disability discrimination under the Arizona Civil Rights Act (ACRA), there must be no genuine issue of material fact regarding whether the plaintiff has an impairment that substantially limits a major life activity, has a record of such an impairment, or is regarded as having such an impairment. Ariz. Rev. Stat. Ann. § 41-1461(4).

1 Cases that cite this headnote

[39] **Civil Rights** Impairments in general; major life activities

Civil Rights Perceived disability; "regarded as" claims

Under the Americans with Disabilities Act (ADA), the relevant inquiry in determining whether an employee has a disability is whether the actual or perceived impairment is objectively transitory and minor, not whether the employer subjectively believed the impairment to be transitory and minor. 29 C.F.R. § 1630.2(l).

1 Cases that cite this headnote

[40] **Civil Rights** Alcohol or drug use

Former employee's alleged impairment, i.e., the effects of medical marijuana use, appeared to be "transitory and minor," as would bar her from meeting the Arizona Civil Rights Act's (ACRA) definition of "disabled"; employee alleged that she smoked medical marijuana in the evening just before bed in order to be able to sleep and strongly preferred medical marijuana over hydrocodone because she had no side effects when she woke up, while the hydrocodone made her groggy and feel "not there" in the mornings, she asserted that she did not come to work until 12 hours past her last use of medical marijuana on the day she was drug-tested, that she had never been impaired by marijuana during her hours of employment, and that there was no allegation that she was observed to be impaired at work. Ariz. Rev. Stat. Ann. § 41-1461(2)(b).

[41] **Civil Rights** Alcohol or drug use

Former employee failed to show that smoking medical marijuana was required in the prudent judgment of the medical profession, and thus, the side effects from smoking medical marijuana could not constitute a "disability" under the Arizona Civil Rights Act (ACRA); marijuana was classified as a Schedule 1 controlled substance under the Controlled Substances Act, although employee averred that she preferred medical marijuana to hydrocodone, she did not demonstrate that no other equally effective alternatives existed which lacked medical marijuana's side effects, but rather, she could likely use another pain medication which might not have the same impairing effects as medical marijuana or hydrocodone. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 202, 21 U.S.C.A. § 812(b)(1); Ariz. Rev. Stat. Ann. § 41-1461(4).

1 Cases that cite this headnote

[42] **Labor and Employment** Exercise of Rights or Duties; Retaliation

In order to establish a prima facie case of retaliation under the Arizona Employment Protection Act (AEPA), Plaintiff must show: (1) that she engaged in a protected activity, (2) that she suffered an adverse employment action, and (3) that there is a causal link between the two. Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii).

5 Cases that cite this headnote

[43] **Labor and Employment** Protected activities

Under the Arizona Employment Protection Act (AEPA), the filing of a workers' compensation claim is a protected activity. Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii).

1 Cases that cite this headnote

[44] **Labor and Employment** Protected activities

Former employee engaged in protected activity under the Arizona Employment Protection Act (AEPA) by reporting her accident and injury resulting from the accident to her employer; although employee did not personally file a workers' compensation claim, she did fill out an incident report on the date of her accident, which began employer's investigation into her accident, and which ultimately resulted in the generation of a workers' compensation claim by employer on employee's behalf, and employee also requested additional medical treatment for her injuries beyond her initial clinic visit. Ariz. Rev. Stat. Ann. §§ 23-908(E), 23-1501(A)(3)(c)(iii).

[45] **Labor and Employment** Exercise of rights or duties; retaliation

Former employee established a causal connection between her report of accident and injury to her employer and her termination,

as required for a prima facie case of retaliation under the Arizona Employment Protection Act (AEPA); employer's argument that it was not aware that employee submitted a workers' compensation claim when it terminated her employment was disingenuous, given that employer filed employee's workers' compensation claim on her behalf, an e-mail chain between employer's personnel coordinator and its market asset protection manager clearly demonstrated that employer knew of employee's workers' compensation claim, and temporal proximity between employee's injury, her request for additional medical treatment, and her termination supported an inference of causation.

Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii).

1 Cases that cite this headnote

[46] **Labor and Employment** Causation in general

To prove a causal link between an employee's purported protected activity and an adverse employment action, as required to make out a prima facie case of retaliation under the Arizona Employment Protection Act (AEPA), the employee must show that the employer's retaliatory motive played a part in the employment action. Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii).

4 Cases that cite this headnote

[47] **Labor and Employment** Causation in general

A plaintiff alleging retaliation under the Arizona Employment Protection Act (AEPA) must make some showing sufficient for a reasonable trier of fact to infer that the defendant was aware that the plaintiff had engaged in protected activity.

Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii).

1 Cases that cite this headnote

[48] **Courts** Operation and effect in general

Federal Courts Sources of authority; assumptions permissible

District court could cite unpublished decision of the Arizona Court of Appeals for persuasive value, on issue of what framework to apply to retaliatory discharge claim under the Arizona Employment Protection Act (AEPA), although it was a memorandum decision, and thus, not precedential, where it was issued on or after January 1, 2015, no opinion adequately addressed the issue before the court, and the citation was not to a depublished opinion or a depublished portion of an opinion. Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii); A.R.S. Sup.Ct.Rules, Rule 111.

[49] **Labor and Employment** Presumptions and burden of proof

If plaintiff provides sufficient evidence to make out a prima facie case of retaliation, under the Arizona Employment Protection Act (AEPA), then the burden shifts to the defendant to articulate some legitimate, non-retaliatory reason for its actions. Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii).

[50] **Labor and Employment** Presumptions and burden of proof

If a defendant sets forth a legitimate, non-retaliatory reason for taking an adverse action against a plaintiff alleging retaliation in violation of the Arizona Employment Protection Act (AEPA), then the plaintiff must show that the defendant's proffered reason is merely pretext for the underlying retaliatory motive. Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii).

[51] **Labor and Employment** Motive and intent; pretext

Employer met its burden of articulating a legitimate, non-retaliatory reason for terminating former employee, on employee's claim that she was terminated for engaging in protected activity under the workers' compensation statutes, in violation of the Arizona Employment Protection Act (AEPA); employer stated that employee was

terminated because employer had a good faith basis to believe that employee was impaired by marijuana at work, based on the results of a positive drug test. Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii).

1 Cases that cite this headnote

[52] Labor and Employment Motive and intent; pretext

Former employee failed to produce sufficient evidence from which a reasonable factfinder could conclude that employer's proffered reason for terminating her, i.e., that it had a good faith basis to believe she was impaired by marijuana at work based on the results of her positive drug test, was pretext for retaliation, in violation of the Arizona Employment Protection Act (AEPA); employee did not offer any evidence suggesting that employer did not honestly believe its proffered reason, and at most, there was a temporal proximity between employee's protected activity under Arizona's workers' compensation statutes and her termination, which was not enough to sustain a claim for retaliatory discharge. Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii).

Attorneys and Law Firms

***769** Joshua William Carden, Joshua Carden Law Firm PC, Scottsdale, AZ, for Plaintiff.

Steven Gregory Biddle, Stanley Ray Foreman, Jr., Littler Mendelson PC, Phoenix, AZ, for Defendant.

Oramel Horace Skinner, Office of the Attorney General, Phoenix, AZ, for Amicus State of Arizona.

ORDER

James A. Teilborg, Senior United States District Judge

Pending before the Court is Defendant Wal-Mart Stores, Inc.'s ("Defendant") Motion for Summary Judgment (Doc. 32) and Plaintiff Carol M. Whitmire's ("Plaintiff") Rule 56(d) Application (Doc. 35 at 11–13). For the reasons set forth below, Plaintiff's Rule 56(d) Application is denied, and Defendant's Motion for Summary Judgment is granted in part and denied in part.

I. BACKGROUND

On or about February 20, 2008, Defendant hired Plaintiff Carol M. Whitmire ("Plaintiff") as a Cashier in its Show Low, Arizona store. (Docs. 36 ¶ 1; 33-1 at 11–12, Whitmire Depo. at 35: 22-36:3, 38:1-13). During her new-hire orientation, Plaintiff received training on Defendant's Alcohol and Drug Abuse Policy, as well as its Discrimination and Harassment Prevention Policy. (Docs. 33 ¶ 2; 36 ¶ 2). Plaintiff also acknowledged and signed Walmart's Alcohol and Drug Abuse Policy, indicating her understanding that if "testing indicates the presence of illegal drugs ... in [her] body in any detectable amount, [she] w[ould] be terminated." (Docs. 33 ¶ 5; 33-3 at 9; 36 ¶ 5). Plaintiff further acknowledged the drug testing policies and procedures described in this Alcohol and Drug Abuse Policy, "and the use by Wal-Mart of results thereof in further determining [her] continued employment." (Doc. 33-3 at 9).

In December 2013, after working as a Cashier for approximately four years, Plaintiff was promoted to the position of Customer Service Supervisor. (Docs. 33 ¶ 8; 36 ¶ 8). On December 19, 2013, Plaintiff acknowledged that she had the ability to perform the essential functions of this Customer Service Supervisor position either with or without a reasonable accommodation. (Docs. 33 ¶ 9; 33-3 at 25–27; 36 ¶ 9). These essential functions include "maintaining a safe shopping environment," "ensuring a safe work environment," "[o]perat[ing] equipment, such as ***770** cash registers and related tools, to process Customer purchases," handling money, and "[s]upervis[ing] Associates." (Docs. 33 ¶ 10; 33-3 at 25; 36 ¶ 10).

In or about the end of 2013 or beginning of 2014, Plaintiff obtained an Arizona medical marijuana card, which she maintained during her employ at Walmart. (Docs. 33 ¶¶ 12–13; 36 ¶¶ 12–13). Plaintiff claims she smokes medical marijuana just before bed as a sleep aid and to help treat the chronic pain she suffers due to arthritis and a prior shoulder surgery. (Doc. 36 ¶¶ 34–36, 39–40). Plaintiff also asserts that she has never brought marijuana to work or used or been impaired by it during her hours of employment. (Doc. 36 ¶ 38).

In January 2016, Defendant modified its Alcohol and Drug Abuse Policy to expressly state that employees are prohibited from "[r]eporting to work under the influence of drugs or alcohol, including medical marijuana." (Docs. 33-3 at 12; 36 ¶ 2). Defendant's amended Alcohol and Drug Abuse Policy also requires employees to submit to a drug or alcohol test if they suffer a workplace injury "that requires medical treatment from an outside health care provider." (Doc. 33-3 at 14).

In March 2016, Plaintiff transferred to Defendant's Taylor, Arizona store. (Docs. 36 ¶ 1; 33-1 at 11–12, Whitmire Depo. at 35: 22-36:3, 38:1-13). While working on May 21, 2016 in the Taylor store, a bag of ice fell on Plaintiff's wrist as she was leveling the bags in the ice machine. (Docs. 33 ¶ 16; 36 ¶ 16). Plaintiff reported this incident to Management and filed an Associate Incident Report with Defendant that same day. (Docs. 33 ¶ 16; 36 ¶ 16; 36-1 at 12, 32). However, Plaintiff finished her shift and did not seek any medical attention on May 21, 2016 because she did not feel the incident was serious enough. (Docs. 33 ¶ 17; 36 ¶ 17; 36-1 ¶ 15). Defendant's Associate Accident Review Form indicates that Defendant did not find Plaintiff responsible for the incident. (Doc. 36-1 at 32 ("Not conclusive that the associate did not follow safe work practices[.] ... This could have just as easily happened to a customer.")).

On May 23, 2016, Plaintiff notified Human Resources of continued swelling and pain in her wrist. (Docs. 33 ¶ 18; 36 ¶ 18). Just before 2:00 a.m. on May 24, 2016, Plaintiff smoked medical marijuana prior to going to sleep. (Docs. 33 ¶ 19; 36 ¶ 19; 36-1 ¶ 18). Later that same day (May 24, 2016), Plaintiff clocked in to her scheduled shift at 2:00 p.m., and told Personnel Coordinator Debra Vaughn that her wrist still hurt. (Docs. 33 ¶¶ 20–21; 36 ¶¶ 20–21). Pursuant to Walmart policy, Ms. Vaughn directed Plaintiff to an urgent care clinic for a wrist examination and post-accident urine drug test. (Docs. 33 ¶ 21; 36 ¶ 21). Except for this visit to the urgent care clinic on May 24, 2016, Plaintiff never missed any time at work as a result of her wrist injury. (Docs. 33 ¶ 31; 36 ¶ 31).

At the urgent care clinic, Plaintiff's arm was x-rayed, and she submitted a urine sample for the drug test. (Docs. 33 ¶ 22; 36 ¶ 22). Following this drug screen, Plaintiff claims that she returned to work and informed Ms. Vaughn that the clinic had not taken a copy of her medical marijuana card, even after Plaintiff informed the clinic of her medical marijuana usage and cardholder status. (Doc. 36 ¶¶ 43–44). At this time, Plaintiff asserts that Ms. Vaughn took a copy of the medical marijuana card. (Doc. 36 ¶ 44). This was the first time that Plaintiff informed anyone at Walmart that she had a medical marijuana card. (Docs. 33 ¶ 14; 36 ¶¶ 14, 45). Plaintiff also never informed anyone at Walmart that she had a disability. (Docs. 33 ¶ 15; 36 ¶ 15).

Plaintiff's May 24, 2016 drug screen tested positive for marijuana metabolites at a quantitative value of greater than 1000 ***771** ng/ml. (Doc. 33-3 at 33).[1] In a signed declaration, Ms. Vaughn stated that, "upon reasonable belief, Plaintiff's May 24, 2016 positive test result for marijuana indicated that she was impaired by marijuana during her shift that same day." (Doc. 33-3 at 23, Vaughn Decl. ¶ 14).[2] On May 31, 2016 (prior to the test result being reported to Defendant), Plaintiff had a follow-up interview with a Medical Review Officer to discuss her positive drug screen, at which Plaintiff told the Medical Review Officer that she had an Arizona-issued medical marijuana card. (Docs. 36 ¶ 46; 36-1 at 26). The Medical Review Officer verified Plaintiff's medical marijuana card that same day. (Doc. 36-1 at 26).

In June, Plaintiff received a letter dated June 7, 2016 from the Industrial Commission of Arizona alerting Plaintiff that her employer's insurance carrier had been notified of her workers' compensation claim. (Doc. 36-1 at 10). That same month, Plaintiff received two Notices of Claim Status from the Industrial Commission of Arizona regarding her workers' compensation claim, both of which were dated June 22, 2016. (*Id.* at 14, 16). One of these letters indicated that Plaintiff's claim was accepted, but that no compensation would be paid. (*Id.* at 14). The other letter stated that Plaintiff's injury had not resulted in permanent disability, and indicated that temporary compensation and active medical treatment terminated on May 24, 2016 because "claimant was discharged." (*Id.* at 16).

Following the injury-causing incident on May 21, 2016, Plaintiff continued working full-time until she was suspended due to her positive drug test on July 4, 2016. (Doc. 36 ¶¶ 25, 49). On July 22, 2016 Defendant terminated Plaintiff, only citing her positive drug test as the reason for her termination. (Docs. 33 ¶ 26; 33-3 at 35; 36 ¶ 26). Plaintiff admits that she has no evidence that Defendant terminated her because of her status as a medical marijuana cardholder. (Docs. 33 ¶ 33; 36 ¶ 33). Aside from her termination, Plaintiff does not feel that Defendant discriminated against her in any way. (Docs. 33 ¶ 28; 36 ¶ 28).

On March 22, 2017, Plaintiff dual-filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Arizona Attorney General's

Office, Civil Rights Division. (Docs. 36 ¶ 73; 36-1 at 22). After receiving her Notice of Right to Sue from the Arizona Attorney General's Office on June 6, 2017, (Docs. 36 ¶ 74; 36-1 at 24), Plaintiff filed her Complaint on June 9, 2017, (Doc. 1). Plaintiff's Complaint alleges that she was wrongfully terminated and/or discriminated against in violation of the Arizona Medical Marijuana Act ("AMMA"), A.R.S. § 36-2813(B), the Arizona Civil Rights Act ("ACRA"), A.R.S. § 41-1463(B), the Arizona Employment Protection Act ("AEPA"), A.R.S. § 23-1501(A)(3)(b), and the Arizona workers' compensation statutes, A.R.S. §§ 23-901, *et seq*. (Doc. 1 at 1, 4–6).[3] Defendant filed an Answer on August ***772** 11, 2017 denying that it wrongfully terminated, discriminated against, or engaged in any conduct toward Plaintiff creating liability. (Doc. 6 at 1). In its Answer, Defendant also alleged as an affirmative defense that it "has established a policy and implemented a drug testing program in compliance with Arizona law, so its actions toward Plaintiff are protected from litigation under A.R.S. § 23-493.06," Arizona's Drug Testing of Employees Act ("DTEA"). (*Id.* at 9).

On February 5, 2018, Defendant responded to Plaintiff's First Set of Interrogatories, stating that "Defendant does not contend Plaintiff was employed in a safety-sensitive position as defined under Arizona law." (Docs. 15; 36-1 at 74–75). However, Defendant thereafter filed a Motion for Summary Judgment which argued, in part, that Plaintiff was in a safety sensitive position, (Doc. 20), and supplemented its interrogatory answer to say the same, (Doc. 28). As a result, the parties attended a Discovery Dispute Hearing on August 22, 2018, at which the Court ordered that Defendant's supplemental response to its interrogatory answer (Doc. 28) be struck as untimely, and precluded any argument by Defendant that Plaintiff was in a safety sensitive position. (Doc. 31). The Court also struck Defendant's Motion for Summary Judgment (Doc. 20), Plaintiff's Response (Doc. 24), and Defendant's Reply (Doc. 29). (Doc. 31).

On August 30, 2018, Defendant re-filed its Motion for Summary Judgment (Doc. 32), to which Plaintiff filed a Response and Rule 56(d) Application (Doc. 35) on October 1, 2018. On October 18, 2018, Defendant filed a Reply in support of its Motion for Summary Judgment. (Doc. 37).[4] After hearing oral argument on November 13, 2018, the Court issued an Order on November 21, 2018 declining to rule on Defendant's Motion for Summary Judgment (Doc. 32) until it received supplemental briefing on: (1) why the Court should or should not hold that sections 23-493(6) and 23-493.06(A)(6) of the DTEA unconstitutionally amend or implicitly repeal sections 36-2813(B)(2) and 36-2814(A)(3) of the AMMA; and (2) if the Court does find these sections of the DTEA unconstitutional under the Voter Protection Act, why Plaintiff should or should not be entitled to summary judgment on her claim under the AMMA pursuant to Fed. R. Civ. P. 56(f). (Doc. 44). The parties each filed briefs addressing these issues on December 7, 2018. (*See* Docs. 48; 49).

On November 21, 2018, Plaintiff filed a Notice of Constitutional Question (Doc. 45) pursuant to Fed. R. Civ. P. 5.1(a) and certified that she served a copy of this Notice on the Attorney General for the State of Arizona via certified mail, return receipt requested on that same date. The Court served its Certification of Constitutional Question (Doc. 46) in accordance with Fed. R. Civ. P. 5.1(b) and 28 U.S.C. § 2403(b) via certified mail on the Attorney General for the State of Arizona on November 27, 2018. The Attorney General did not intervene within sixty days from the date Plaintiff filed her Notice of Constitutional Question—the deadline set in the Court's Certification Order in accordance with Fed. R. Civ. P. 5.1(c). (Doc. 46 at 2). However, the State of Arizona did enter an appearance as a proposed *amicus* on January 22, 2019. (Docs. 53; 54). Finding that allowing the State of Arizona's ***773** proposed *amicus curiae* brief in support of no party would aid the Court in resolving the pending matters, the Court granted the State of Arizona's Motion for Leave to File Amicus Curiae Brief (Doc. 54) on January 23, 2019. (Doc. 55).[5] The Court now rules on Defendant's Motion for Summary Judgment (Doc. 32) and Plaintiff's Rule 56(d) Application (Doc. 35 at 11–13).

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A party asserting that a fact cannot be or is genuinely disputed must support that assertion by ... citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits, or declarations, stipulations ... admissions, interrogatory answers, or other materials," or by "showing that materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.* 56(c)(1)(A-B). Thus, summary judgment is mandated "against a

party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Initially, the movant bears the burden of demonstrating to the Court the basis for the motion and the elements of the cause of action upon which the non-movant will be unable to establish a genuine issue of material fact. *Id.* at 323, 106 S.Ct. 2548. The burden then shifts to the non-movant to establish the existence of material fact. *Id.* A material fact is any factual issue that may affect the outcome of the case under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts" by "com[ing] forward with 'specific facts showing that there is a genuine issue for trial.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (quoting Fed. R. Civ. P. 56(e)). A dispute about a fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Liberty Lobby, Inc.*, 477 U.S. at 248, 106 S.Ct. 2505. The non-movant's bare assertions, standing alone, are insufficient to create a material issue of fact and defeat a motion for summary judgment. *Id.* at 247–48, 106 S.Ct. 2505. However, in the summary judgment context, the Court construes all disputed facts in the light most favorable to the non-moving party. *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir. 2004).

At the summary judgment stage, the Court's role is to determine whether there is a genuine issue available for trial. There is no issue for trial unless there is sufficient evidence in favor of the non-moving party for a jury to return a verdict for the non-moving party. *Liberty Lobby, Inc.*, 477 U.S. at 249–50, 106 S.Ct. 2505. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* (citations omitted).

III. ANALYSIS

Defendant moves for complete summary judgment on Plaintiff's lawsuit, claiming ***774** there is no genuine issue of material fact on any of Plaintiff's claims. (Doc. 32 at 1, 16). In opposition, Plaintiff asks that the Court deny summary judgment on all counts and enter partial judgment for Plaintiff on liability on her AMMA and AEPA claims pursuant to Fed. R. Civ. P. 56(f). (Doc. 35 at 1). Alternatively, Plaintiff requests that the Court's ruling be deferred under Fed. R. Civ. P. 56(d). (*Id.* at 11–13, 17). The Court now addresses each of Plaintiff's claims, and all related arguments, in turn.

A. Discrimination under the AMMA, and Wrongful Termination under the AMMA and AEPA

Plaintiff alleges that Defendant discriminated against her in violation of the AMMA, A.R.S. § 36-2813(B), by suspending her without pay and then terminating her because of her positive drug screen. [6] (Doc. 1 at 3–5). Plaintiff also contends that Defendant wrongfully terminated her in violation of the AEPA, A.R.S. § 23-1501(A)(3)(b), by firing her because of her positive drug screen in violation of the public policy set forth in A.R.S. § 36-2813(B) of the AMMA. [7] (Doc. 1 at 4).

1. The AMMA

[1] In the November 2010 general election, Arizona voters enacted the AMMA, A.R.S. § 36-2801 *et seq.*, by ballot initiative. *State v. Gear*, 239 Ariz. 343, 372 P.3d 287, 288 (2016). Under the AMMA "a 'qualifying patient' diagnosed with a 'debilitating medical condition' may obtain a registry card from the Arizona Department of Health Services" to buy and use medical marijuana. [8] *Id.* (citing A.R.S. §§ 36-2801(3), (13); 36-2804.02). The AMMA includes an anti-discrimination provision, A.R.S. § 36-2813(B), which provides, in pertinent part, that:

> Unless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon ... [a] registered qualifying patient's positive drug test for marijuana components or metabolites,

> unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment.

A.R.S. § 36-2813(B).

The AMMA also provides that it does not require "[a]n employer to allow ... any employee to work while under the influence of marijuana," and does not "prohibit[ ] an employer from disciplining an employee for ... working while under the influence of marijuana." *Id.* § 36-2814(A)(3)–(B). However, "a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment." *Id.* § 36-2814(A)(3).

2. Whether the AMMA Provides a Private Cause of Action

[2] **[3]** In the second count of her Complaint, Plaintiff alleges that Defendant discriminated against her in violation of the ***775** AMMA, A.R.S. § 36-2813(B), by suspending her without pay and then terminating her because of her positive drug screen. (Doc. 1 at 4–5). Defendant contends that this discrimination claim under the AMMA fails as a matter of law because the AMMA does not provide a private cause of action. (Doc. 32 at 5). As there are no reported Arizona decisions discussing a private right of action for employment discrimination under the AMMA, this appears to be a question of first impression. "When a federal court must determine a novel issue of state law, the court attempts to predict how the state's highest court would decide the issue." *Picht v. Peoria Unified Sch. Dist. No. 11 of Maricopa Cty.*, 641 F.Supp.2d 888, 899 (D. Ariz. 2009) (citing *Ariz. Electric Power Coop. v. Berkeley*, 59 F.3d 988, 991 (9th Cir. 1995)).

[4] **[5]** "When, as here, a statute does not expressly create a cause of action to enforce its terms, that statutory 'silence' is not dispositive." *Gersten v. Sun Pain Mgmt., P.L.L.C.*, 242 Ariz. 301, 395 P.3d 310 (Ariz. Ct. App. 2017) (citing *Napier v. Bertram*, 191 Ariz. 238, 954 P.2d 1389, 1391 (1998)). Rather, "determining whether a statute implicitly creates a private right of action requires considering 'the context of the statutes, the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law.' " *Picht*, 641 F.Supp.2d at 899 (quoting *Transamerica Financial Corp. v. Superior Court*, 158 Ariz. 115, 761 P.2d 1019, 1020 (1988)); *see* *Napier*, 954 P.2d at 1391–92. "A private cause of action has been implied when no other remedy for violation of the statute was available." *Id.* (citing *Douglas v. Window Rock Consolidated Sch. Dist. No. 8*, 206 Ariz. 344, 78 P.3d 1065, 1069 (Ariz. Ct. App. 2003)). Applying these principles here, the Court holds that A.R.S. § 36-2813(B) creates a private cause of action for its alleged violation.

Section 36-2813(B) of the AMMA does not provide an express cause of action. However, the parties disagree on whether *Gersten v. Sun Pain Mgmt., P.L.L.C.*, 395 P.3d at 313, holds that there is no implied private cause of action under the AMMA. (*See* Docs. 32 at 5–6; 35 at 3–5). Specifically, Defendant cites *Gersten* for the proposition that "the AMMA has been held not to provide either an express or implied private cause of action," (Doc. 32 at 5), whereas Plaintiff claims that Defendant's reliance on this Arizona Court of Appeals decision is mistaken because "*Gersten* cannot be read for such a blanket statement," (Doc. 35 at 4). On this point, the Court agrees with Plaintiff.

In *Gersten*, a physician discharged a patient for obtaining a registry identification card to use medical marijuana. *Gersten*, 395 P.3d at 311–12. Suing his former physician for damages and equitable relief, the patient alleged that the physician's conduct constituted a violation of A.R.S. § 36-2813(C). [9] *Id.* at 312. The Superior Court granted the physician's motion to dismiss under Arizona Rule of Civil Procedure 12(b)(6) for failure to state a claim on the grounds "that A.R.S. § 36-2813(C) did not create a private cause of action for its alleged violation." *Gersten*, 395 P.3d at 312.

Upon the patient's appeal, the Arizona Court of Appeals noted that although § 36-2813(C) ensures "that qualifying patients ***776** will not 'otherwise' be disqualified from medical care solely because of their authorized use of medical marijuana," the appellate court stressed that § 36-2813(C) does not "obligate a physician to extend or continue medical care to a qualifying patient." *Id.* at 313. Consequently, the appellate court agreed with the court below that §

36-2813(C) does not create a private cause of action. *Id.* However, in reaching this decision, *Gersten* expressly distinguished the physician provision, § 36–2813(C), from the anti-discrimination provision, § 36–2813(B):

> The wording of A.R.S. § 36–2813(C) does not ... attempt to regulate the relationship between a physician and patient. *This distinction becomes clear when examining A.R.S. § 36–2813(C) in context and comparing it to other provisions of the Act that attempt to regulate the conduct of schools, landlords, and employers*. For example, A.R.S. § 36–2813(A) provides that "[n]o school or landlord may refuse to enroll or lease to and may not otherwise penalize a person solely for his status as a cardholder, unless failing to do so would cause the school or landlord to lose a monetary or licensing related benefit under federal law or regulations." In a similar vein, A.R.S. § 36–2813(B) provides that, with certain exceptions, an employer may not discriminate against a person in hiring, terminating, or imposing any term or condition of employment. *Unlike these provisions*, *A.R.S. § 36–2813(C) imposes no affirmative obligation* on a physician to treat or continue treating a qualifying patient. Given this, there is no basis for implying a private cause of action against a physician to enforce an affirmative obligation to treat or continue treating a qualifying patient that does not exist under A.R.S. § 36–2813(C).

Id. at 313–14 (emphasis added).

This distinction drawn by the appellate court in *Gersten* insinuated that, unlike § 36–2813(C), an implied private cause of action exists under § 36–2813(B) because this subsection imposes on employers an affirmative obligation to abide by the anti-discrimination mandate of the statute. Section 36–2813(C) is also distinguishable from the anti-discrimination provision, § 36–2813(B), because there is a pre-existing mechanism for wronged patients to enforce violations of § 36–2813(C) by submitting a complaint to the Arizona Medical Board to investigate and discipline a physician for unprofessional conduct, which includes the violation of any state law applicable to the practice of medicine, such as the AMMA. *Gersten*, 395 P.3d at 314. In contrast, "there is no such independent enforcement mechanism against employers" for violations of § 36–2813(B). (Doc. 35 at 5). This suggests that an implied private cause of action is needed to implement the directive of § 36–2813(B). *See Picht*, 641 F.Supp.2d at 899 ("A private cause of action has been implied when no other remedy for violation of the statute was available.").

In support of her argument that an implied private right of action exists in § 36–2813(B) of the AMMA, Plaintiff points to H.B. 2541, which the Arizona Legislature passed in April 2011 in response to the enactment of the AMMA. (Doc. 35 at 5). H.B. 2541 amended A.R.S. § 23-493.06(A)(6) of the DTEA to expand protections for employers who terminate an employee "based on the employer's good faith belief that [the] employee had an impairment while working while on the employer's premises or during hours of employment." *See* DRUGS, 2011 Ariz. Legis. Serv. Ch. 336 (H.B. 2541) (West). H.B. 2541 also added the "safety-sensitive" concept to § 23-493.06(A)(7) of the DTEA, which permits an employer to "exclude an employee from performing a safety-sensitive ***777** position" if the employer has a "good faith belief that the employee is engaged in the current use of any drug" which "could cause an impairment." *Id.* According to Plaintiff, H.B. 2541 creates "exceptions and modifications that directly impact Subsection B" of § 36–2813 of the AMMA, thus showing that "the Legislature believed that employers had new exposure to private lawsuits because of the AMMA." (Doc. 35 at 5). The Court agrees, as the Fact Sheet for H.B. 2541 explicitly mentions the AMMA before introducing the above modifications to the DTEA. *See* Arizona Senate Fact Sheet, 2011 Reg. Sess., H.B. 2541 (Mar. 25, 2011). That the Arizona Legislature made these modifications to the DTEA to protect employers from litigation suggests that the Legislature believed the AMMA supplied an implied private right of action for employees against employers allegedly violating § 36–2813(B) of the AMMA.

While Defendant claims that "[a]ll other courts considering this issue have held that similar medical marijuana laws were enacted to decriminalize medical marijuana use, not create an implied cause of action against employers," (Doc. 32 at 6), the Court is not so convinced. In support of this contention, Defendant cites *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012). In *Casias*, the plaintiff, a medical marijuana user, contended that Wal-Mart wrongfully discharged him in violation of Michigan's Medical Marihuana Act ("MMMA") after he tested positive for marijuana in violation of Wal-Mart's drug use policy. *Id.* at 431–32. Appealing the district court's dismissal of his case, the plaintiff argued that the MMMA, Mich. Comp. Laws § 333.26424(a), "protects patients against disciplinary action

in a private employment setting for using marijuana in accordance with Michigan law." *Id.* at 434. Section 333.26424(a) of the MMMA provides, in relevant part:

> 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[.]

Mich. Comp. Laws § 333.26424(a).

Agreeing with the district court that the "statute never expressly refers to employment, nor ... require[s] or impl[ies] the inclusion of private employment in its discussion of occupational or professional licensing boards[,]" the Sixth Circuit affirmed. *Casias*, 695 F.3d at 436. After determining that the MMMA's language did not support the plaintiff's interpretation that § 333.26424(a) provides protection against disciplinary actions by a business because "*the statute fails to regulate private employment actions* [,]" the Sixth Circuit concluded that § 333.26424(a), "does not impose restriction on private employers, such as Wal-Mart." *Id.* at 435–36 (emphasis added).

Whereas the MMMA statute in *Casias* "fails to regulate private employment actions," *Casias*, 695 F.3d at 436, section 36–2813(B) of the AMMA provides an affirmative obligation on employers to abide by the anti-discrimination mandate of the statute. *See* A.R.S. § 6–2813(B) ("... an employer *may not discriminate* against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person ....") (emphasis added). Based on the drastic dissimilarity of the medical marijuana statute at issue in *Casias* to § 36–2813(B) of the AMMA, the Court finds Defendant's extensive reliance on *Casias* futile.

***778** The other cases cited by Defendant fare no better, as none of these cases involve medical marijuana statutes with anti-discrimination provisions even remotely similar to § 36–2813(B). Rather, "[e]ach of these cases involves a statute or initiative that is either silent on employment, or expressly authorizes discrimination against medical marijuana users." (Doc. 35 at 6); *see* *Coles v. Harris Teeter, LLC*, 217 F.Supp.3d 185, 188 (D.D.C. 2016); *Steele v. Stallion Rockies Ltd*, 106 F.Supp.3d 1205, 1219 (D. Colo. 2015); *Swaw v. Safeway, Inc.*, No. C15-939 MJP, 2015 WL 7431106, at *1 (W.D. Wash. Nov. 20, 2015); *see also* *Roe v. TeleTech Customer Care Mgmt., LLC*, 152 Wash.App. 388, 216 P.3d 1055, 1059–60 (2009) (holding that Washington State Medical Use of Marijuana Act, RCW 69.51A.040(1), did not create an implied cause of action against employers who terminate, or fail to hire, an individual solely based on his or her use of medical marijuana where statute only created an affirmative defense to state criminal prosecution for possession of marijuana and did not "prohibit private employers from maintaining a drug-free workplace and terminating employees who use medical marijuana"); *Ross v. RagingWire Telecomms., Inc.*, 42 Cal.4th 920, 70 Cal.Rptr.3d 382, 174 P.3d 200, 205–07 (2008) (holding that disability discrimination provisions of California Fair Employment and Housing Act did not require employer to accommodate employee's use of medical marijuana where the operative provisions of California's medical marijuana statute, the Compassionate Use Act, Health & Saf. Code § 11362.5, "do not speak to employment law" but, rather, "speak exclusively to the criminal law"); *Johnson v. Columbia Falls Aluminum Co.*, 350 Mont. 562, 213 P.3d 789 (Table), 2009 WL 865308, at *2 (Mont. 2009) (holding that Montana's Medical Marijuana Act, MCA 50–46–205(2)(b), did not provide employee with an express or implied private right of action for negligence or negligence per se against employer following employee's termination for failing a drug test due to his medical marijuana use where state's medical marijuana act was essentially a "decriminalization" statute which specifically provided that it could not be construed to require employers "to accommodate medical use of marijuana in any workplace").

Defendant also cites *Coles v. Harris Teeter, LLC*, where a district court held that an employer's termination of an employee who failed a drug test due to his use of medical marijuana did not violate D.C.'s public policy of allowing

qualifying patients to use medical marijuana prescribed by their physicians. 217 F.Supp.3d at 188. In arriving at this conclusion, the court clarified that D.C.'s Medical Marijuana Treatment Act, D.C. Code § 7-1671.01, *et seq.*, "did not explicitly mandate" that employers had to accommodate such legal marijuana use, and, at most, "maintained a public policy that decriminalizes and allows the consumption of marijuana for private medical reasons"—a "far cry from prohibiting employers from terminating such users." *Id.* In contrast to D.C.'s Medical Marijuana Treatment Act, the AMMA goes one step beyond simply decriminalizing medical marijuana for qualifying patients by prohibiting employers from terminating such users unless the qualifying patient used, ingested, possessed, was impaired by or was under the influence of marijuana at work, or unless the employer's failure to discriminate against that qualifying patient would cause them to "lose a monetary or licensing related benefit under federal law or regulations." A.R.S. §§ 36–2813(B), 36-2814(A).

Similarly, *Steele v. Stallion Rockies Ltd* fails to provide support for Defendant's contention that there is no implied cause of action in the AMMA, as that case also ***779** involves a medical marijuana statute with little similarity to § 36–2813(B). 106 F.Supp.3d at 1219. In *Steele*, the district court dismissed the plaintiff's claims alleging breach of contract and discrimination in violation of the ADEA, ADA, and the Colorado Anti-Discrimination Act where the plaintiff was terminated for off-the-job use of medical marijuana because the court found that Colorado's medical marijuana act did not extend so far as to shield the plaintiff "from the implementation of his employer's standard policies against employee misconduct." *Id.* at 1214, 1219 n. 6. Rather, as noted by Plaintiff, Colorado's medical marijuana statute, Colo. Rev. Stat. Ann. § 18-18-406.3, fails to "mention employment at all." (Doc. 35 at 6). This is in stark contrast to the anti-discrimination provision of the AMMA. *See* A.R.S. § 36–2813(B). Moreover, Art. XVIII, sec. 14 of the Colorado Constitution—passed by voters in response to Colorado's medical marijuana statute—explicitly states: "Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place." Colo. Const. art. XVIII, § 14(10)(b).

[6] Further, the Washington medical marijuana statute at issue in *Swaw v. Safeway, Inc.*, RCW 69.51A.060, differs drastically from § 36–2813(B) of the AMMA as well. *Swaw*, 2015 WL 7431106, at *1. In *Swaw*, the plaintiff brought suit against his former employer, asserting that he was discriminated against on the basis of his disabilities when the employer fired him for testing positive for marijuana, which the plaintiff used after hours pursuant to a valid Washington state medical marijuana prescription. *Id.* In granting the employer's motion for judgment on the pleadings, the district court concluded that RCW 69.51A.060 of Washington's Medical Use of Marijuana Act "does not require employers to accommodate the use of medical marijuana where they have a drug-free workplace, even if medical marijuana is being used off site to treat an employee's disabilities." *Id.* (citing RCW 69.51A.060(6) [10] ("Employers may establish drug-free work policies. Nothing in [the Medical Use of Marijuana Act] requires an accommodation for the medical use of cannabis if an employer has a drug-free workplace.")). In contrast, the AMMA makes no such exception for employers who maintain drug-free workplace policies. *See* A.R.S. § 36-2801 *et seq.*

Contrary to the case law cited by Defendant, Plaintiff points to two cases, *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F.Supp.3d 326, 339–40 (D. Conn. 2017) and *Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680, 2017 WL 2321181, at *1 (R.I. Super. May 23, 2017), referring to medical marijuana statutes with anti-discrimination provisions analogous to § 36-2813(B) of the AMMA. [11] In *Noffsinger*, the district court considered whether a provision of Connecticut's Palliative Use of Marijuana Act ("PUMA"), ***780** which explicitly prohibits discrimination by employers against qualifying patients who use marijuana outside the workplace, provided an implied private right of action. *Noffsinger*, 273 F.Supp.3d at 331, 339–40 (citing Conn. Gen. Stat. § 21a-408p(b)(3)). There, a qualifying patient under PUMA brought suit against an employer who denied her a job position after she tested positive for marijuana during a pre-employment screening, contending that the employer's actions constituted a violation of PUMA's anti-discrimination provision, Conn. Gen. Stat.

§ 21a-408p(b)(3). *Id.* at 331–32. This anti-discrimination provision states:

> Unless required by federal law or required to obtain federal funding: ... (3) No employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient or primary caregiver under sections 21a-408 to 21a-408n, inclusive. Nothing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours.

Conn. Gen. Stat. § 21a-408p(b)(3).

Denying the employer's motion to dismiss the qualifying patient's claim under Conn. Gen. Stat. § 21a-408p(b)(3), the court concluded that PUMA's anti-discrimination provision provides a private cause of action. *Noffsinger*, 273 F.Supp.3d at 341, 343. In arriving at this conclusion, the court considered how the qualifying patient "certainly falls within the class for whose benefit the statute was enacted," and found "no indication of legislative intent to deny a private cause of action" nor indication that a private cause of action is inconsistent "with the underlying purposes of the legislative scheme." *Id.* at 339–40. The court further noted that, "without a private cause of action, § 21a-408p(b)(3) would have no practical effect, because the law does not provide for any other enforcement mechanism." *Id.* at 340.

Similar to Connecticut, Delaware also has an anti-discrimination provision in its Medical Marijuana Act which is almost identical to § 36–2813(B) of the AMMA:

> Unless a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulations, an employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon ... [a] registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment.

Del. Code Ann. tit. 16, § 4905A(a)(3). Notably, a Delaware Superior Court in and for Kent County recently determined that the language of § 4905A(a)(3) creates an implied private right of action. *See Chance v. Kraft Heinz Foods Co.*, No. CV-K18C-01-056 NEP, 2018 WL 6655670, at *6 (Del. Super. Ct. Dec. 17, 2018). In coming to this decision, the superior court noted that the plaintiff, a medical marijuana cardholder who was terminated for failing a drug test, clearly "falls within the class of persons for whose especial benefit the statute was enacted[.]" *Id.* at *5. Further, the court determined that recognizing an implied private right of action would advance the purpose of § 4905A(a)(3) by protecting medical marijuana patients from "discrimination based upon their status, and from being penalized based upon that discrimination, as with termination from employment." ***781** *Id.* Finally, the court found that the fact that the state's medical marijuana act included an anti-discrimination provision—but did not task any agency or commission with its enforcement—demonstrated legislative intent to remedy discrimination against registered cardholders through private rights of action. *Id.* at *6.

In light of the similarity between the anti-discrimination provisions at issue in *Noffsinger* and *Chance* to A.R.S. § 36-2813(B), the Court finds these cases highly persuasive. As in *Noffsinger* and *Chance*, Plaintiff is a qualifying patient who "falls within the class for whose benefit" the AMMA was enacted. *Noffsinger*, 273 F.Supp.3d at 339;

Chance, 2018 WL 6655670, at *5; *see also Picht*, 641 F.Supp.2d at 899 ("Whether the statute especially benefits the person seeking redress is a factor in the determination" of whether a statute implicitly creates a private right of action) (citing *Transamerica Financial Corp.*, 761 P.2d at 1021). In consideration of H.B. 2541's modifications to the DTEA intended to protect employers from litigation, it is clear that the Arizona Legislature believed employers had exposure to private lawsuits for violations of § 36–2813(B) of the AMMA. *See* Arizona Senate Fact Sheet, 2011 Reg. Sess., H.B. 2541 (Mar. 25, 2011). This suggests that "there is no indication of legislative intent to deny a private cause of action," as legislators expected the employment provision of the AMMA to "provide protections for employees that would be enforceable in courts." *Noffsinger*, 273 F.Supp.3d at 339.

Finally, like in *Noffsinger* and *Chance*, a private cause of action is not inconsistent with the underlying purposes of the AMMA, but rather "effectuates the evident legislative purpose" of preventing discrimination in employment against qualifying patients using medical marijuana outside of the workplace since the law lacks any explicit enforcement mechanism. *Id.* at 340; *Chance*, 2018 WL 6655670, at *5–6; *see also Callaghan*, 2017 WL 2321181, at *2, *5–8 (holding that the anti-discrimination provision of Rhode Island's medical marijuana act, R.I. Gen. Laws § 21-28.6-4(d), which provides 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," includes an implied private right of action because "[w]ithout one, § 21-28.6-4(d) would be meaningless"). Following *Noffsinger* and *Chance*, the Court concludes that there is an implied private cause of action for violations of § 36–2813(B) of the AMMA. [12]

[7] As the Court finds that there is an implied private cause of action in A.R.S. 36-2813(B) of the AMMA, the Court will not consider the parties' arguments as to whether or not the AMMA supplies the public policy for Plaintiff's AEPA claim. (*See* Docs. 32 at 10; 35 at 7–8; 37 at 4). Further, the first count in Plaintiff's Complaint (alleging that Defendant wrongfully terminated her in violation of the AEPA by firing her because of her positive drug screen in violation of the public policy set forth in the AMMA) relies on the same set of facts as Plaintiff's second count alleging discrimination under the AMMA. (*See* Doc. 1 at 4–5). Accordingly, since Plaintiff may proceed under her second count alleging discrimination under the AMMA, the Court dismisses Plaintiff's first count alleging wrongful termination under the ***782** AMMA and AEPA as duplicative of her second count.

3. Plaintiff's Request to Defer Ruling on Summary Judgment under Fed. R. Civ. P. 56(d)

Defendant argues in its Motion for Summary Judgment that the results of Plaintiff's May 24, 2016 drug test, which "was positive for marijuana metabolites at a level of greater than 1000 ng/ml, the highest level the test could record," gave Walmart "a good faith basis to believe Plaintiff was impaired by marijuana on May 24, 2016, on Defendant's premises during work hours." (Doc. 32 at 9). However, Plaintiff contends that Defendant previously agreed that impairment was not at issue and that Plaintiff was fired merely because her drug screen indicated the presence of marijuana metabolites —not because she was "impaired" from marijuana. (Doc. 35 at 11). According to Plaintiff, Defendant confirmed via email that it "would not discuss 'levels' of THC, and thus no additional expert testimony was needed" to determine whether or not the level of marijuana metabolites present in Plaintiff's drug screen indicated that she was impaired at work on May 24, 2016. (*Id.*). Because Defendant now presents evidence on impairment despite the alleged email agreement of the parties, Plaintiff requests that the Court defer ruling on summary judgment under Fed. R. Civ. P. 56(d) so that she may have the "opportunity to provide actual expert testimony ... that the presence or level of inactive marijuana metabolites in an individual's urine has no scientific correlation to that individual's impairment." (Doc. 36 at 2).

[8] **[9]** Fed. R. Civ. P. 56(d) permits the Court to "defer considering the motion or deny it," "allow time to obtain affidavits or declarations or to take discovery," or "issue any other appropriate order" where the "nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition[.]" Fed. R. Civ. P. 56(d). The rule applies "where the nonmoving party has not had the opportunity to discover information that is essential to its opposition." *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (emphasis added) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Notably, however, Rule 56(d) "is not meant to re-open discovery in general[.]"

Slama v. City of Madera, No. 1:08-CV-810 AWI GSA, 2012 WL 1067198, at *2 (E.D. Cal. Mar. 28, 2012); *see also Dumas v. Bangi*, No. 1:12-CV-01355-LJO, 2014 WL 3844775, at *2 (E.D. Cal. Jan. 23, 2014) ("Rule 56(d) does not reopen discovery; rather it forestalls ruling on a motion for summary judgment in cases where discovery is still open and provides the prospect of defeating summary judgment.").

[10] **[11]** "The party seeking a Rule 56(d) continuance bears the burden of proffering facts sufficient to satisfy the requirements of 56(d)." *Martinez v. Columbia Sportswear USA Corp.*, 553 F. App'x 760, 761 (9th Cir. 2014) (citing *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 921 (9th Cir. 1996)). In ruling on a 56(d) motion, the Court considers whether "the movant diligently pursued its *previous* discovery opportunities," and whether the movant has shown "how allowing *additional* discovery would [ ] preclude[ ] summary judgment." *Qualls By & Through Qualls v. Blue Cross of California, Inc.*, 22 F.3d 839, 844 (9th Cir. 1994) (emphasis in original) (citation omitted); *see also Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1005 (9th Cir. 2002) ("The failure to conduct discovery diligently is grounds ***783** for the denial of a Rule 56[(d)] motion."). [13]

[12] Here, Plaintiff produces a Declaration signed by her counsel, Joshua Carden, (Doc. 36-1 at 79–80), and a copy of an email chain with Defendant's counsel, (Doc. 36-1 at 69–71), in support of her position that Defendant previously agreed that the level of THC metabolites in Plaintiff's urine screen and its correlation (or lack thereof) with impairment was not going to be an issue in this suit. (*See id.* at 79).

On December 21, 2017, Plaintiff's counsel emailed counsel for Defendant, stating:

> In light of the recent communications from you that Wal-Mart now claims to have terminated Ms. Whitmire because of the level of THC in her bloodstream versus that she had any level of THC in her urine, I think we will need an expert to render an opinion on the correlation (or lack thereof) between THC and impairment. To that end, are you willing to extend the expert disclosure deadlines solely for that issue? ... I have located an expert and can probably get a report in 30-45 days or so. Let me know your position as soon as you can please.

(*Id.* at 70).

Defense counsel responded that same day, as follows:

> To make clear, Walmart terminated Ms. Whitmire for testing positive for THC on the drug test she performed. The level of THC the test recorded was not the reason for her termination. With that I do not believe the additional expert witness is necessary.

(*Id.* at 69). Following this response from defense counsel, Plaintiff's counsel asked if Defendant would be "willing to stipulate to limine out any commentary (by either side) on the level of THC itself" and "any testimony related to the THC level having an impact on [Defendant's] decision." (*Id.*). The email chain ends with defense counsel replying that they would talk with their client and then get back to Plaintiff's counsel. (*Id.*).

Despite the attestation of Plaintiff's counsel that he did not retain an expert on impairment "based on Wal-Mart's assurance that the 'level' of THC metabolites was not going to be an issue," (*id.* at 80), the Court will not preclude Defendant from arguing that Plaintiff was fired because the level of marijuana metabolites present in her drug screen led Defendant to believe she was impaired at work. While it does appear from the December 21, 2017 email chain that Defendant's counsel misled counsel for Plaintiff, Plaintiff's counsel did not reduce this agreement to a formal stipulation, nor use a recognized discovery vehicle to elicit this admission, such as an interrogatory. Therefore, the Court will not bind Defendant to its counsel's responses in the email chain.

[13] Further, as noted in the Rule 16 Scheduling Order, " 'last minute' or 'eleventh hour' discovery which results in insufficient time to undertake additional discovery and which requires an extension of the discovery deadline will be met with disfavor, and may result in denial of an extension, exclusion of evidence, or the imposition of other

sanctions." (Doc. 13 at 2 n. 2). Both parties here had ample opportunity to retain expert witnesses, depose them, and obtain expert reports within the deadlines set by the Rule 16 Scheduling Order. ***784** The parties' failure to disclose experts on the issue of whether Plaintiff's urine screen showed marijuana metabolites present in scientifically sufficient concentration to cause impairment is at their own peril. In light of each party's "failure to conduct discovery diligently," *Pfingston*, 284 F.3d at 1005, the Court denies Plaintiff's request under Fed. R. Civ. P. 56(d). *See* *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 921 (9th Cir. 1996) ("[T]he district court does not abuse its discretion by denying further discovery if the movant has failed diligently to pursue discovery in the past."). Accordingly, the Court will not re-open discovery nor permit Plaintiff (or Defendant) any additional opportunity to obtain further discovery in the form of an expert witness's opinion.

4. Evidentiary Objections

In support of its argument that Defendant fired Plaintiff because it had a good faith basis to believe Plaintiff was impaired by marijuana on May 24, 2016 based on the results of her positive drug test, (Docs. 32 at 9; 33 ¶ 23), Defendant produced a Declaration signed by Personnel Coordinator Debra Vaughn, (Doc. 33-3 at 21–23). This Declaration states, in relevant part:

> 13. On June 15, 2016, Plaintiff's urinalysis came back positive for marijuana at a level of "> 1000 ng/ml," which I understand to be the maximum reading the test can measure for marijuana.
>
> 14. I also understand, upon reasonable belief, that Plaintiff's May 24, 2016, positive test result for marijuana indicated that she was impaired by marijuana during her shift that same day.

(Doc. 33-3 ¶¶ 13–14).

Plaintiff objects to the admissibility of these portions of Ms. Vaughn's Declaration on the ground that paragraphs 13 and 14 of Ms. Vaughn's Declaration constitute improper and undisclosed expert testimony in violation of Federal Rules of Evidence 702 and 703. (Docs. 35 at 11; 36 at 1–2; *see also* Doc. 36 ¶ 23). Plaintiff contends that these portions of Ms. Vaughn's Declaration "were not disclosed to Plaintiff prior to use by Defendant, nor was Ms. Vaughn disclosed as an expert." (Doc. 36 at 1). Plaintiff also objects to Ms. Vaughn's Declaration testimony on the ground that there is "no supporting evidence or foundation" for her statement that the results of Plaintiff's drug test "showed the 'maximum reading the test can measure for marijuana,' " nor any disclosed basis for Ms. Vaughn's belief that Plaintiff's positive drug screen "indicated that she was impaired by marijuana during her shift that same day." (*Id.* at 1). Accordingly, Plaintiff moves for exclusion of these portions of Ms. Vaughn's Declaration testimony. (*Id.* at 2).

[14] Federal Rule of Evidence ("FRE") 702 permits a witness "who is qualified as an expert by knowledge, skill, experience, training, or education" to "testify in the form of an opinion or otherwise if ... the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. District courts are charged with the duty to act as gatekeepers, as "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *see also* *Hall v. Baxter Healthcare Corp.*, 947 F.Supp. 1387, 1396 (D. Or. 1996). A witness not testifying under FRE 702 may offer opinion testimony only if such testimony is "rationally based on the witness's perception," "helpful to clearly understanding the witness's testimony or to determining a fact in issue," and "not based on scientific, technical, or other specialized ***785** knowledge within the scope of Rule 702." Fed. R. Evid. 701.

[15] In this case, Defendant has not provided Ms. Vaughn's curriculum vitae nor any indication that Ms. Vaughn has the requisite "knowledge, skill, experience, training, or education" to render opinions regarding the results of Plaintiff's drug test. Fed. R. Evid. 702. Rather, Ms. Vaughn's Declaration indicates she is employed by Defendant as a Personnel Coordinator, which involves "promot[ing], support[ing], and ensur[ing] compliance with Company policies, procedures, mission, values, and standard of ethics and integrity for the Walmart store in Taylor, Arizona." (Doc. 33-3 ¶¶ 2–3). The Court is not satisfied that such a human resource professional is qualified as an expert capable of interpreting Plaintiff's drug test results or at all qualified to render an opinion as to whether the level of metabolites present in Plaintiff's urine screen indicate she was impaired at work on May 24, 2016. Moreover, Ms. Vaughn's opinions are entirely without foundation. She cites to no sources upon

which she relied, nor sets forth any basis for her statements from which the Court can determine whether or not her testimony is reliable.

[16] **[17]** Further, Ms. Vaughn's Declaration testimony that the results of Plaintiff's drug test "showed the 'maximum reading the test can measure for marijuana,' " and that Plaintiff's positive drug screen "indicated that she was impaired by marijuana during her shift that same day," (Doc. 33-3 ¶¶ 13–14), clearly falls within the purview of specialized, scientific knowledge. Defendant "may not attempt to evade FRE 702's requirements 'through the simple expedient of proffering an expert in lay witness clothing.' " *Montalvo v. Am. Family Mut. Ins. Co.*, No. CV-12-02297-PHX-JAT, 2014 WL 2986678, at *6 (D. Ariz. July 2, 2014) (citing Fed. R. Evid. 701 advisory committee's notes to 2000 amendments). As Ms. Vaughn's Declaration testimony (Doc. 33-3 ¶¶ 13–14) falls within the scope of Fed. R. Evid. 702, Defendant was required to identify Ms. Vaughn as an expert witness pursuant to Fed. R. Civ. P. 26(a)(2)(A), and disclose a written report pursuant to Fed. R. Civ. P. 26(a)(2)(B). [14] Defendant's failure to do so by the deadlines set forth in the Rule 16 Scheduling Order (Doc. 13) is a violation of that Order and of the discovery rules. [15]

[18] **[19]** **[20]** When a party fails to make a timely disclosure required by Federal Rule of Civil Procedure 26(a), "the party is not ***786** allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). "In determining whether this sanction should be imposed, the burden is on the party facing the sanction—i.e., Defendant[ ]—to demonstrate that the failure to comply with Rule 26(a) is substantially justified or harmless." *Torres v. City of Los Angeles*, 548 F.3d 1197, 1213 (9th Cir. 2008) (citation omitted). Not only has Defendant failed to show that either of these exceptions apply here, but Defendant's failure to disclose Ms. Vaughn as an expert substantially prejudiced Plaintiff by depriving her of the "reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses" on the issue of whether the level of metabolites present in Plaintiff's drug screen indicate that she was impaired at work on May 24, 2016. *Karl Storz Endoscopy-Am., Inc. v. Stryker Corp.*, No. 14-CV-00876-RS-JSC, 2018 WL 1569762, at *2 (N.D. Cal. Mar. 30, 2018) (citing *Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc.*, 725 F.3d 1377, 1381 (Fed. Cir. 2013)). Accordingly, the Court has "wide latitude" to "issue sanctions under Rule 37(c)(1)." *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001); *see also* Fed. R. Civ. P. 37 advisory committee's notes to 1993 amendments (noting that Fed. R. Civ. P. 37(c) "provides a self-executing," "automatic sanction" for failure to make a disclosure required by Rule 26(a) which "provides a strong inducement for disclosure of material").

The Court concludes that exclusion of Ms. Vaughn's expert testimony in paragraphs 13 and 14 of her Declaration (Doc. 33-3 ¶¶ 13–14) "is an appropriate remedy for failing to fulfill the required disclosure requirements of Rule 26(a)." *Yeti by Molly, Ltd.*, 259 F.3d at 1106. Accordingly, the Court will not consider this testimony in ruling on Defendant's Motion for Summary Judgment (Doc. 32).

[21] In response to Ms. Vaughn's contention that Plaintiff's positive screen for marijuana "indicated that she was impaired by marijuana during her shift that same day," (Doc. 33-3 ¶ 14), Plaintiff introduces rebuttal materials to demonstrate that she was not tested for "marijuana," but rather for "marijuana metabolites," which are "primarily the non-impairing components of THC ... that metabolize in urine," (Doc. 36 at 1). (*See* Docs. 36 at 1–2; 36-1 at 45–53, 55–58, 60–67). In its Reply, Defendant asks the Court to strike Plaintiff's evidence pertaining to the correlation between THC and impairment. (Doc. 37 at 4). Although Defendant does not state with specificity which particular evidence it wishes the Court to strike, the Court surmises that Defendant is referring to Exhibits H (Doc. 36-1 at 45–53, I (*id.* at 55–58), and J (*id.* at 60–67) to Plaintiff's Controverting Statements of Fact and Additional Statements of Fact (Doc. 36). [16] Because the Court is not considering paragraphs 13 and 14 of Ms. Vaughn's Declaration, the Court will also not consider Plaintiff's rebuttal materials—Exhibits H, I and J (Doc. 36-1 at 45–53, 55–58, 60–67)—pertaining to the correlation between THC and impairment in ruling on Defendant's ***787** Motion for Summary Judgment (Doc. 32).

5. The "Safety-Sensitive" Position Exception

[22] On pages 9–11 of her Response, Plaintiff argues that the "safety-sensitive" exception of A.R.S. § 23-493.06(7) of the DTEA is not supported by the law or the evidence on the grounds that Defendant already conceded that Plaintiff's position was not "safety-sensitive," and because the "safety-

sensitive" exception unconstitutionally amended the AMMA. (Doc. 35 at 9–11). However, in its Order dated August 22, 2018, the Court explicitly precluded any argument by Defendant that Plaintiff was in a safety sensitive position. (Doc. 31). Accordingly, whether or not Plaintiff was in a "safety-sensitive" position is not at issue in this case. Therefore, the Court will not consider Plaintiff's arguments on pages 9 through 11 of her Response as they are irrelevant.

6. Whether Sections 23-493(6) and 23-493.06(A)(6) of the DTEA Unconstitutionally Amended the AMMA

[23] A.R.S. § 36-2813(B)(2) provides that "an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon ... [a] registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment." While the AMMA does not "prohibit[ ] an employer from disciplining an employee for ... working while under the influence of marijuana," *id.* § 36-2814(B), "a registered qualifying patient shall not be considered to be under the influence of marijuana *solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment*," *id.* § 36-2814(A)(3) (emphasis added). Another Arizona statute, the Drug Testing of Employees Act ("DTEA") provides, in relevant part, that:

> No cause of action is or may be established for any person against an employer who has established a policy and initiated a testing program in accordance with this article for ... [a]ctions based on the employer's *good faith belief* that an employee had an *impairment* while working while on the employer's premises or during hours of employment.

Id. § 23-493.06(A)(6) (emphasis added). The DTEA further states that such a "good faith belief may be based on" any number of things, including the "[r]esults of a test for the use of alcohol or drugs." *Id.* § 23-493(6).

In its November 21, 2018 Order (Doc. 44), the Court asked the parties to provide supplemental briefing discussing whether sections 23-493(6) and 23-493.06(A)(6) of the DTEA implicitly amended or repealed sections 36-2813(B)(2) and 36-2814(A)(3) of the AMMA in violation of the Voter Protection Act, Ariz. Const. art. IV, Pt. 1 § 1. After reviewing the parties' briefs, (Doc. 48; Doc. 49), and the State of Arizona's *Amicus Curiae* Brief In Support of No Party (Doc. 54-1 at 1–5), the Court finds there is no conflict between the AMMA and DTEA provisions at issue.

[24] **[25]** **[26]** Arizona voters enacted the AMMA by ballot initiative in the November 2010 general election, *Gear*, 372 P.3d at 288, while sections 23-493(6) and 23-493.06(A)(6) of the DTEA were enacted by the Arizona Legislature in April 2011 via H.B. 2541. *See* Arizona Senate Fact Sheet, 2011 Reg. Sess., H.B. 2541 (Mar. 25, 2011). Under the Voter Protection Act, the legislature cannot repeal an initiative-enacted ***788** law, and may only modify it by a three-fourths vote when the change furthers the law's purpose. Ariz. Const. art. IV, Pt. 1 § 1(6)(B)–(C). "[A] statute can be implicitly repealed or amended by another through 'repugnancy' or 'inconsistency.' " *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 308 P.3d 1152, 1158 (2013) (citations omitted). However, "[w]henever possible[,]" Arizona courts "adopt a construction of a statute that reconciles it with other statutes, giving force to all statutes involved." *Lewis v. Arizona Dep't of Econ. Sec.*, 186 Ariz. 610, 925 P.2d 751, 755 (Ariz. Ct. App. 1996) (citation omitted). "Although the finding of an implied repeal or amendment is generally disfavored, it is required when conflicting statutes cannot be harmonized to give each effect and meaning." *Cave Creek Unified Sch. Dist.*, 308 P.3d at 1158 (citations omitted).

Here, however, sections 23-493(6) and 23-493.06(A)(6) of the DTEA and sections 36-2813(B)(2) and 36-2814(A)(3) of the AMMA can be harmonized. The Court finds the reasoning set forth by the State of Arizona in its *amicus* brief particularly compelling, and adopts it as its own:

> Here, the AMMA and DTEA provisions at issue work hand-in-hand. The AMMA provisions are framed in negative terms: an employer *may not* fire an employee based on a positive drug test for marijuana components or metabolites, unless she used, possessed, or was impaired by marijuana at work, A.R.S. § 36-2813(B)(1)–(2), and "a registered qualifying patient *shall not* be considered to be under the influence of marijuana solely because of the

presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment," *id.* § 36-2814(A)(3) (emphasis added). But the positive implications of these AMMA provisions are clear: an employee *may* be fired based on her positive drug test for "metabolites or components of marijuana" if she possessed, used, or was impaired by marijuana at work, *see id.* § 36-2813(B)(1)–(2), and a registered qualifying patient *may* be considered to be under the influence of marijuana based solely on the presence of "metabolites or components of marijuana" that appear in *sufficient* concentration to cause impairment, *see id.* § 36-2814(A)(3). The DTEA's implications are also clear: an employer is shielded from liability for firing an employee based on the employer's good-faith belief that the employee was impaired while working, *id.* § 23-493.06(6), and that good-faith belief may be based on the results of a drug test, *id.* § 23-493(6)(f).

As relevant here, the AMMA and DTEA provisions can and should be read together as follows: an employer cannot be sued for firing a registered qualifying patient based on the employer's good-faith belief that the employee was impaired by marijuana at work, where that belief is based on a drug test sufficiently establishing the presence of "metabolites or components of marijuana" sufficient to cause impairment.

(Doc. 54-1 at 4–5).

Accordingly, the Court finds that sections 23-493(6) and 23-493.06(A)(6) of the DTEA did not unconstitutionally amend the AMMA.

7. Whether a Genuine Dispute of Material Fact Exists

Plaintiff claims that Defendant discriminated against her in violation of the AMMA, A.R.S. § 36-2813(B), by suspending her without pay and then terminating her because of her positive drug test without a showing of impairment. (Doc. 1 at 4–5, 7). It is undisputed that Plaintiff, a qualified registered patient under the AMMA, smoked marijuana just before 2:00 ***789** a.m. on May 24, 2016 prior to going to sleep, and then clocked in to her scheduled shift at 2:00 p.m. later that same day. (Docs. 33 ¶¶ 12–13, 19–21; 36 ¶¶ 12–13, 19–21; 36-1 ¶ 18). It is also undisputed that the only reason given to Plaintiff for her suspension and termination was her positive drug test. (Docs. 33 ¶¶ 25–26; 36 ¶¶ 25–26; *see also* Doc. 33-3 at 35). Defendant claims that the results of this drug screen, which "was positive for marijuana metabolites at a level of greater than 1000 ng/ml, the highest level the test could record," gave Walmart "a good faith basis to believe Plaintiff was impaired by marijuana on May 24, 2016, on Defendant's premises during work hours, and Walmart terminated Plaintiff's employment *solely on that basis*." (Doc. 32 at 9) (emphasis added). Defendant argues as an affirmative defense that it is protected from litigation because "it has established a policy and implemented a drug testing program" in compliance with A.R.S. § 23-493.06 of the DTEA. (Docs. 6 at 9; 32 at 9, 15). Section 23-493.06 exempts an employer from liability for "actions based on the employer's good faith [17] belief that an employee had an impairment [18] while working while on the employer's premises or during hours of employment." A.R.S. § 23-493.06(A)(6). Under the DTEA, such a "good faith belief may be based on" the "[r]esults of a test for the use of alcohol or drugs." *Id.* § 23-493(6).

[27] The AMMA makes clear that while an employer may discipline an employee for working while under the influence of marijuana, *id.* § 36-2814(B), "a registered qualifying patient shall not be considered to be under the influence of marijuana *solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment*," *id.* § 36-2814(A)(3) (emphasis added). Reading the DTEA and AMMA in harmony, an employer cannot be sued for suspending or firing a registered qualifying patient based on the employer's good faith belief that the employee was impaired by marijuana at work, where that belief is based on a drug test which establishes the presence of metabolites or components of marijuana *in sufficient concentration to cause impairment*. *Id.* §§ 23-493(6), 23-493.06(A)(6), 36-2813(B)(2), 36-2814(A)(3). At issue in this case is whether Plaintiff's positive drug screen is alone sufficient to support Defendant's "good faith belief" that Plaintiff was impaired by marijuana at work on May 24, 2016 in the absence of any other evidence of impairment or any expert testimony establishing that the level of metabolites present in Plaintiff's drug screen demonstrates that marijuana was present in her ***790** system in a sufficient concentration to cause impairment. [19]

[28] In presenting its affirmative defense under the DTEA, Defendant bears the burden of proving that it had a good faith belief that Plaintiff was impaired by marijuana at work. *See id.* §§ 23-493(6), 23-493.06(A)(6). Thus, Defendant initially bears the burden of showing that Plaintiff's drug screen sufficiently establishes the presence of metabolites or components of marijuana in a scientifically sufficient

concentration to cause impairment. [20] Defendant is unable to meet that burden.

[29] Defendant claims that its "good faith belief cannot be supported or controverted by any expert witness testimony as it is a fact question solely based on the test result." (Doc. 37 at 5). According to Defendant, it "does not need to argue[ ] that any particular numerical reading indicates 'impairment,' " and "does not need expert witness testimony to correlate a specific numerical reading to 'impairment.' " (Doc. 48 at 8). Rather, Defendant believes Plaintiff's positive drug screen sufficiently supports its good faith belief that Plaintiff was impaired at work because "the positive reading was 'so positive' that it was above what the test could measure (that is, above 1000 ng/ml)." (*Id.*). In opposition, Plaintiff disputes Defendant's "good faith belief" on the ground that it is an unreasonable belief to hold in light of Arizona case law discussing the relationship between marijuana metabolites and impairment. (Doc. 35 at 12–13 ("the 'level' shown in a urine test cannot serve as a good faith basis for 'deeming' someone impaired") (citing *State v. Hammonds*, 192 Ariz. 528, 968 P.2d 601, 603 (Ariz. Ct. App. 1998) ("At the metabolite stage, the metabolic component detected in the urine is 'inactive,' in the sense that it is incapable of causing impairment. Many drugs will continue to appear in the urine in metabolite form for days or even weeks after use. A urine test, while indicative of what has been in the bloodstream in the past, says nothing conclusive about what is presently in the bloodstream.")). [21]

While the Court draws no conclusion as to whether a drug screen is itself capable of demonstrating whether someone was impaired based on this case law cited by Plaintiff, it is clear to the Court that proving impairment based on the results of a drug screen is a scientific matter which requires expert testimony. Without expert testimony establishing that Plaintiff's drug screen shows marijuana metabolites or components in a sufficient concentration to cause impairment, Defendant is unable to prove that Plaintiff's drug screen gave it a ***791** "good faith basis" to believe Plaintiff was impaired at work on May 24, 2016. Accordingly, Defendant's affirmative defense under § 23-493.06(A)(6) of the DTEA fails. Therefore, the Court denies Defendant's Motion for Summary Judgment as to the second count in Plaintiff's Complaint alleging discrimination under the AMMA.

It is undisputed that Plaintiff, a registered qualifying patient, was suspended and ultimately terminated because of her positive urine screen showing the presence of marijuana metabolites. Defendant claims: "[u]nder Walmart policy, Plaintiff was terminated for testing positive for marijuana, which is a legitimate reason for termination, even under the AMMA." (Doc. 32 at 14). According to Defendant, "Walmart has a policy of terminating Associates if they test positive for marijuana while on Walmart's premises or during working hours *regardless of whether the employee possesses a medical marijuana card and regardless of the level of marijuana detected*." (Doc. 33-3 at 22, Decl. of Debra Vaughn ¶ 6) (emphasis added). However, as Plaintiff points out, terminating a registered qualifying patient who tests positive for marijuana "regardless of whether the employee possesses a medical marijuana card and regardless of the level of marijuana detected" constitutes a "complete and 'bright line' disregard for the Arizona Medical Marijuana Act's antidiscrimination provisions[.]" (Doc. 35 at 1). Indeed, section 36-2813(B)(2) of the AMMA protects qualifying registered patients, like Plaintiff, who merely test positive for marijuana metabolites. Without any evidence that Plaintiff "used, possessed or was impaired by marijuana" at work on May 24, 2016, it is clear that Defendant discriminated against Plaintiff in violation of A.R.S. § 36-2813(B)(2) of the AMMA by suspending and then terminating Plaintiff solely based on her positive drug screen. [22] *See* A.R.S. § 36-2813(B)(2) ("[A]n employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon ... [a] registered qualifying patient's positive drug test for marijuana components or metabolites, *unless the patient used, possessed or was impaired by marijuana* on the premises of the place of employment or during the hours of employment.") (emphasis added). Accordingly, no genuine dispute of material fact remains for trial.

[30] **[31]** Fed. R. Civ. P. 56(f) provides that the court may "grant summary judgment for a nonmovant[,]" grant a summary judgment motion "on grounds not raised by a party[,]" or "consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute[ ]" so long as the court gives "notice and a reasonable time to respond" prior to doing so. "[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp.*, 477 U.S. at 326, 106 S.Ct. 2548; *see also* *Norse v. City of Santa Cruz*, 629 F.3d 966, 971 (9th Cir. 2010) ("District courts unquestionably possess the power

to enter summary judgment *sua sponte*, even on the eve of trial."). "Reasonable notice implies adequate time to develop the facts on which the litigant will depend to oppose summary judgment." *Norse*, 629 F.3d at 972 (quoting ***792** *Portsmouth Square, Inc. v. S'holders Protective Comm.*, 770 F.2d 866, 869 (9th Cir. 1985)). However, it is well settled that "[a] district court may grant summary judgment without notice if the losing party has had a full and fair opportunity to ventilate the issues involved in the motion." *In re Harris Pine Mills*, 44 F.3d 1431, 1439 (9th Cir. 1995) (quoting *United States v. Grayson*, 879 F.2d 620, 625 (9th Cir. 1989)).

[32] Here, the parties had notice and a reasonable opportunity to present their respective evidence on the question of liability under the AMMA's anti-discrimination provision. In November, the Court issued an Order which asked the parties to provide supplemental briefing discussing, in part, why Plaintiff should or should not be entitled to summary judgment on her claim under the AMMA pursuant to Rule 56(f). (Doc. 44 at 4). In this Order, the Court stated that "there is no evidence indicating that Plaintiff was impaired at work or expert testimony establishing that the level of metabolites present in Plaintiff's positive drug screen demonstrates that marijuana was present in her system in a sufficient concentration to cause impairment." (*Id.* at 3). Despite this admonition, Defendant still did not come forward with any evidence establishing that Plaintiff was impaired in its Supplemental Brief. (*See* Doc. 48). Sections 36-2813(B)(2) and 36-2814(A)(3) of the AMMA grant Plaintiff protection against suspension and termination for merely testing positive for marijuana metabolites. In the absence of any expert testimony or evidence demonstrating impairment, the Court will, pursuant to Rule 56(f), *sua sponte* grant summary judgment in part to Plaintiff solely on the question of liability on the Second Count of her Complaint alleging discrimination under the AMMA.

B. Wrongful Termination under the ACRA

[33] The third count in Plaintiff's Complaint alleges that she was wrongfully terminated on the basis of disability in violation of the ACRA, A.R.S. § 41-1463(B). (Doc. 1 at 5). This portion of the ACRA provides that it "is an unlawful employment practice for an employer" to "discharge any individual [23] or otherwise to discriminate against any individual with respect to the individual's compensation, terms, conditions or privileges of employment ... on the basis of disability." A.R.S. § 41-1463(B)(1). Notably, the "ADA standards for disability discrimination claims apply to similar claims brought under the Arizona Civil Rights Act ("ACRA"), A.R.S. § 41–1463, as the ACRA is modeled after federal employment discrimination laws." *Larson v. United Nat. Foods W., Inc.*, No. CV-10-185-PHX-DGC, 2011 WL 3267316, at *3 (D. Ariz. July 29, 2011) (citing *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 762 (9th Cir. 1997); *April v. U.S. Airways, Inc.*, No. CV-09-1707-PHX-LOA, 2011 WL 488893, at *10 (D.Ariz. Feb.7, 2011)); *see also* *Ransom v. State of Arizona Bd. of Regents*, 983 F.Supp. 895, 904 (D. Ariz. 1997) ("This Court finds federal case law to be persuasive in interpreting the ACRA because of the similarities between it and the federal antidiscrimination laws."); *Francini v. Phoenix Newspapers, Inc.*, 188 Ariz. 576, 937 P.2d 1382, 1388 (Ariz. Ct. App. 1996) ("Because the ACRA is modeled after federal employment discrimination laws ... federal case law is persuasive in applying the ACRA.").

[34] **[35]** **[36]** In order to establish a *prima facie* case of disability discrimination under the ACRA, Plaintiff must demonstrate: (1) that she is disabled, (2) that she is ***793** qualified to perform the essential functions of her job with or without a reasonable accommodation, and (3) that she was discharged because of her disability. *Fallar v. Compuware Corp.*, 202 F.Supp.2d 1067, 1082 (D. Ariz. 2002); *Ransom*, 983 F.Supp. at 904. Should Plaintiff establish a *prima facie* case, then the burden shifts to Defendant to articulate a legitimate, non-discriminatory reason for its employment action. *Fallar*, 202 F.Supp.2d at 1082. If Defendant sets forth such a reason, then Plaintiff must show that Defendant's proffered reason is merely pretext for unlawful disability discrimination. *Id.*; *see also* *Burris v. City of Phoenix*, 179 Ariz. 35, 875 P.2d 1340, 1346 (Ariz. Ct. App. 1993) (applying the *McDonnell Douglas* burden-shifting framework to a discriminatory termination claim under A.R.S. § 41-1463 of the ACRA).

1. Whether Plaintiff is "Disabled"

Defendant contends that Plaintiff cannot establish the first element of her *prima facie* case because she is not disabled. (Doc. 32 at 11). The ACRA requires that the term "disability"

be defined and construed "in favor of broad coverage of individuals." A.R.S. § 41-1468(A). Under the ACRA:

> Disability means, with respect to an individual, *except any impairment caused by current use of illegal drugs*, any of the following:
>
> (a) A physical or mental impairment that substantially limits one or more of the major life activities of the individual.
>
> (b) A record of such a physical or mental impairment.
>
> (c) Being regarded as having such a physical or mental impairment.

Id. § 41-1461(4) (emphasis added).

[37] **[38]** The employee "bears the ultimate burden of proving" that she is disabled. *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 988 (9th Cir. 2007) (citing *Nunes v. Wal–Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th Cir. 1999)). "Therefore, for summary judgment to be appropriate, there must be no genuine issue of material fact regarding whether [the plaintiff] has an impairment that substantially limits a major life activity, has a record of such an impairment, or is regarded as having such an impairment." *Coons v. Sec'y of U.S. Dep't of Treasury*, 383 F.3d 879, 884 (9th Cir. 2004).

According to Defendant, "Plaintiff does not identify or describe her purported disability anywhere in her Complaint," nor "provide[ ] any information about any purported disability." (Doc. 32 at 11). Rather, Defendant states that Plaintiff "seems to imply that she is 'disabled' because she qualifies for a medical marijuana card." (*Id.*). To the extent that Plaintiff may be attempting to imply that her "disability" is "her status as a medical marijuana cardholder," as Defendant suggests, (*id.*), Plaintiff's argument fails because Plaintiff admitted that "she has no evidence that Walmart terminated her because of her status as a medical marijuana cardholder." (Doc. 36 ¶ 33).

In both her Complaint and Response, Plaintiff does not aver any facts suggesting that any of her major life activities have been limited or that she has a record of an impairment. (*See* Doc. 1, 35). Rather, Plaintiff alleges that she is disabled under the ACRA "because she was 'regarded as' being impaired by Wal-Mart." (Doc. 35 at 13). In her Response, Plaintiff nowhere specifies whether Defendant viewed her as impaired because of her marijuana use, because of her on-the-job wrist injury, or because of the underlying medical conditions ***794** [24] that she treats with medical marijuana. (*See* Doc. 35). Although the Court agrees with Defendant that it is "far from clear" (Doc. 37 at 8) from Plaintiff's Response, Plaintiff clarified at oral argument that she is alleging that Defendant regarded her as having an impairment because of the effects of her medical marijuana use.

[39] The ACRA defines "[b]eing regarded as having such a physical or mental impairment" as an individual who establishes that he or she "has been subjected to an action prohibited under this article because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." A.R.S. § 41-1461(2). Notably, however, the impairment must not be "transitory" or "minor." A.R.S. § 41-1461(2)(b). [25] A "transitory impairment" is "an impairment with an actual or expected duration of six months or less." *Id.*

[40] Here, Plaintiff's alleged impairment—the effects of medical marijuana use— appears to be objectively "transitory and minor," and thus bars Plaintiff from meeting the ACRA's definition of disabled. *Id.* In Plaintiff's Controverting Statements of Fact and Additional Statements of Fact, she states that she "smokes the medical marijuana in the evening just before bed in order to be able to sleep," and "strongly prefers the medical marijuana over the hydrocodone because she has zero side effects when she wakes up, while the hydrocodone makes her groggy and feel 'not there' in the mornings." (Doc. 36 ¶¶ 36–37). Further, she asserts that she "did not come to work until 12 hours past her last use of medical marijuana" on the day she was drug-tested, and states that she has "never ... been impaired by [marijuana] during her hours of employment." (*Id.* ¶¶ 38, 68). Moreover, Plaintiff points out that there "is no allegation or evidence in this case that Ms. Whitmire was observed to be impaired at work." (*Id.* ¶ 69). In light of these facts averred by Plaintiff which demonstrate that she believes the impairing effects of marijuana subside in a period of hours, the Court suspects that a reasonable jury would not be convinced that smoking medical marijuana gave Plaintiff a physical or mental impairment with an actual or expected duration of more than six months, as required to meet the definition of "disabled" under A.R.S. § 41-1461(2)(b).

Putting aside the issue of whether the reference to "impairment caused by current use of illegal drugs" in

A.R.S. § 41-1461(4) includes impairment caused by medical marijuana use, case law from the Third and Seventh Circuits suggests that "if one can alter or remove the 'impairment' through an equally efficacious course of treatment, it should not be considered 'disabling.' " *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 187 (3d Cir. 2010). In *Sulima*, the Court stated that the "side effects from medical treatments may themselves constitute an impairment under the ADA," where the potentially disabling medication or course of treatment is "required in the 'prudent judgment of the medical profession,' " and where there are no "available alternative[s] that [are] equally efficacious [but] lack[ ] similarly disabling side effects." *Id.* at 187 (holding that employee's claimed impairment based on side effects from prescribed medication ***795** for his gastrointestinal problems did not constitute a "disability" within the meaning of the ADA, regardless of whether his underlying health problems were disabling, because employee did not demonstrate that the prescribed medication was required in the prudent judgment of the medical profession) (citing *Christian v. St. Anthony Med. Ctr., Inc.*, 117 F.3d 1051, 1052 (7th Cir. 1997) (stating that "the disabling treatment [must] be truly necessary, and not merely an attractive option"); *Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999) (finding no evidence in the record that the plaintiff's "physical condition *compelled* her to take a combination of medications [that caused the side effects]" (emphasis in original))).

[41] Applying this standard here, Plaintiff clearly has not shown that smoking medical marijuana, the "potentially disabling medication" at issue, is "required in the prudent judgment of the medical profession." *Sulima*, 602 F.3d at 187. Rather, marijuana is still classified as a Schedule 1 controlled substance under the Controlled Substances Act, meaning it "has a high potential for abuse," and "has no currently accepted medical use in treatment in the United States." 21 U.S.C. § 812(b)(1). Although Plaintiff avers that she prefers medical marijuana to hydrocodone because the "hydrocodone makes her groggy and feel 'not there' in the mornings," (Doc. 36 ¶ 37), Plaintiff has also not demonstrated that no other equally effective alternatives exist which lack the side-effects that medical marijuana has, *Sulima*, 602 F.3d at 187. Rather, Plaintiff could likely use another pain medication which might not have the same "impairing" effects as medical marijuana or hydrocodone. [26]

Following the precedents set by the Third Circuit in *Sulima* and by the Seventh Circuit in *Christian*, the Court cannot find that the side effects from smoking medical marijuana constitute a disability under the ACRA. As Plaintiff has failed to demonstrate that she has a disability, she is unable to meet the first element of her *prima facie* case. This, alone, is sufficient to grant summary judgment to Defendant on Plaintiff's wrongful termination claim under the ACRA.

Because Plaintiff failed to prove that she is disabled under the ACRA and is therefore unable to meet her *prima facie* case, the Court need not address the parties' arguments as to whether Plaintiff is a "qualified individual" or whether she was discharged "because of" her disability. *See* *Ransom*, 983 F.Supp. at 905 ("Plaintiff bears the burden of proof for establishing *each* of the[ ] elements" of her prima facie case.) (emphasis added). Further, Plaintiff's failure to meet her *prima facie* burden renders moot the remainder of the ***796** burden-shifting analysis. [27] In sum, the Court finds that Plaintiff has not introduced evidence sufficient to raise a genuine dispute of material fact that Defendant discriminated against her because of a disability. Accordingly, the Court grants Defendant's Motion with respect to Plaintiff's third cause of action alleging disability discrimination under the ACRA.

C. Retaliatory Termination under the AEPA and Arizona Workers' Compensation Statutes

The fourth and final count in Plaintiff's Complaint alleges that Defendant retaliated against her for pursuing her rights under Arizona's workers' compensation statutes in violation of the AEPA, A.R.S. § 23-1501(A)(3)(c)(iii). (Doc. 1 at 5–6). This section of the AEPA provides that it is the "public policy of this state" that an "employee has a claim against an employer for termination of employment" if the "employer has terminated the employment relationship of an employee in retaliation" for the "exercise of rights under the workers' compensation statutes[.]" A.R.S. § 23-1501(A)(3)(c)(iii); *see also Thompson v. Better-Bilt Aluminum Prod. Co.*, 187 Ariz. 121, 927 P.2d 781, 787 (Ariz. Ct. App. 1996) ("Termination in retaliation for filing a workers' compensation claim can serve as the basis for a cause of action for wrongful discharge.").

[42] **[43]** In order to establish a *prima facie* case of retaliation under the AEPA, Plaintiff must show: "(1) that [s]he engaged in a protected activity, (2) that [s]he suffered an

adverse employment action, and (3) that there is a causal link between the two." *Levine v. TERROS, Inc.*, No. CV08-1458-PHX-MHM, 2010 WL 864498, at *8–10 (D. Ariz. Mar. 9, 2010) (citing *Hernandez v. Spacelabs Med., Inc.*, 343 F.3d 1107, 1113 (9th Cir. 2003)); *see also Burroughs v. City of Tucson*, No. CV-16-00724-TUC-BGM, 2018 WL 5044653, at *13 (D. Ariz. Oct. 17, 2018); *Love v. Phelps Dodge Bagdad, Inc.*, No. CV-03-01399-PCT-MHM, 2005 WL 2416363, at *10 (D. Ariz. Sept. 26, 2005). "Under the AEPA the filing of a workers' compensation claim is a protected activity." *Levine*, 2010 WL 864498, at *14 (citing A.R.S. § 23–1501(A)(3)(c)(iii)).

The parties here do not dispute that Plaintiff suffered an adverse employment action, (*see* Docs. 32 at 11 n. 2, 13–14; 35 at 14–17), as she was terminated, (Doc. 1 at 6). Accordingly, the second element of Plaintiff's *prima facie* case is met. Rather, the contention lays in the first and third elements, as Defendant claims that Plaintiff cannot establish a *prima facie* case of retaliation because Plaintiff cannot show that she engaged in a protected activity nor demonstrate a causal connection between any purported protected activity and the adverse employment action she suffered. (Doc. 32 at 13).

1. Whether Plaintiff Engaged in a Protected Activity

[44] As to the first element, Defendant claims that "Plaintiff admits that she never exercised any rights under Arizona's workers' compensation statutes because she did not miss any work as a result of her wrist injury, ... and never filled out any workers' compensation paperwork or otherwise sought benefits." (*Id.* at 13–14 (citing Doc. 33 ¶¶ 31–32)). Defendant also asserts that "Plaintiff admits she has no basis or evidence ***797** to support a claim of retaliation based on her alleged exercise of any right under the workers' compensation statutes." (*Id.* at 14). In support of these contentions, Defendant only cites its own Statement of Facts (Doc. 33 ¶¶ 31–32), which purports that the following portion of Plaintiff's deposition corroborates these statements:

> Q: Did you fill out any workers' comp paperwork, like making a claim?
>
> A: I don't think so.
>
> Q: Yeah, I didn't see anything. That's why I was asking. Why do you think Walmart retaliated against you in some way for this workers' comp thing? Where does that claim come from?
>
> A: I don't know.
>
> Q: Okay. And you didn't miss any time as a result of your wrist injury, right?
>
> A: No.

(Doc. 33-2 at 5, Plaintiff Depo. at 98: 8–99:10).

As a preliminary matter, the Court notes that *nowhere* in Plaintiff's deposition testimony—or in any other portion of the record—does Plaintiff admit that "she has no basis or evidence to support a claim of retaliation," as Defendant claims, (Doc. 32 at 14). Rather, Plaintiff merely answered "I don't know" in response to questioning by counsel for Defendant. (Doc. 33-2 at 5, Plaintiff Depo. at 99:7). Moreover, while Plaintiff stated in her deposition that she did not miss any time as a result of her wrist injury, (Doc. 33-2 at 5, Plaintiff Depo. at 99:8–10), Plaintiff left her scheduled shift on May 24, 2016 to get x-rays and submit a post-accident drug screen in accordance with Defendant's company policy, (Docs. 33-3 ¶ 12; 36 ¶ 31).

Although Defendant asserts that "Plaintiff's reporting of her wrist injury[ ] is not tantamount to 'exercising a right under the workers' compensation statute,' for purposes of establishing that she engaged in a protected activity," (Doc. 32 at 13 (citing *Quinones v. Potter*, 661 F.Supp.2d 1105, 1126–27 (D. Ariz. 2009)), the Court disagrees. However, Defendant's reliance on *Quinones v. Potter* is misplaced, as that case nowhere indicates that reporting of an on the job injury is not equivalent to engaging in protected activity under the workers' compensation statutes of Arizona.[28] Rather, the AEPA states that a wrongful termination claim can be brought against an employer "in retaliation for" the "exercise of rights under the workers' compensation statutes prescribed in chapter 6 of this title." A.R.S. § 23-1501(A)(3)(c)(iii); *see id.* at § 23-901 *et seq*. In particular, the workers' compensation statutes provide that injured employees shall be compensated "for loss sustained on account of the injury," including "medical, nurse and hospital services and medicines." A.R.S. § 23-1021.

Here, Plaintiff exercised her right to receive compensation under the workers' compensation statutes by reporting her

"accident and the injury resulting from the accident" to her employer on May 21, 2016 in accordance with A.R.S. § 23-908(E). (Docs. 33 ¶ 16; 36 ¶ 16). Although Plaintiff ***798** did not personally "file" a workers' compensation claim, she did fill out an Associate Incident Report on the date of her accident, (Doc. 36-1 at 12), which began Defendant's investigation into her accident, (*id.* at 32, 34–35, 42–43), and which ultimately resulted in the generation of a workers' compensation claim by Defendant on Plaintiff's behalf, (*id.* at 10, 14, 16). (*See* Doc. 36 ¶¶ 31–32). Plaintiff also requested additional medical treatment for her injuries from Ms. Vaughn beyond her initial visit to the clinic on May 24, 2016. (Docs. 36 ¶¶ 55–57; 36-1 at 30 (email from Ms. Vaughn on June 28, 2016 stating that Plaintiff requested medical care for her work injury on May 21, 2016)). As Plaintiff exercised her rights under § 23-1021 of the workers' compensation statutes, the Court finds that Plaintiff engaged in protected activity. Therefore, Plaintiff has met the first element of her *prima facie* case.

2. Whether There is a Causal Link Between the Purported Protected Activity and Plaintiff's Termination

[45] **[46]** **[47]** Although Defendant claims that Plaintiff cannot show a causal connection between any purported protected activity and the adverse employment action she suffered, (Doc. 32 at 13), the Court finds that Plaintiff has established this third element of her *prima facie* case for retaliation. "To prove this 'causal link,' the employee must show that the employer's 'retaliatory motive played a part in the employment action.' " *Knox v. United Rentals Highway Techs., Inc.*, No. CIV07-0297-PHX-DKD, 2009 WL 806625, at *5 (D. Ariz. Mar. 26, 2009) (quoting *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 798 (9th Cir. 1982)). "[T]he plaintiff must make some showing sufficient for a reasonable trier of fact to infer that the defendant was aware that the plaintiff had engaged in protected activity." *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003); *see also Stephens v. Nike, Inc.*, 611 F. App'x 896, 897 (9th Cir. 2015) (affirming summary judgment in favor of the employer on the plaintiff's Title VII retaliation claim where plaintiff "failed to raise a genuine dispute of material fact as to whether the relevant decision maker was aware of his protected activity").

Despite producing workers' compensation related paperwork in this litigation, (Doc. 36 ¶ 53), Defendant argues that there is no evidence "whatsoever" that Defendant "had any knowledge regarding [Plaintiff's] purported workers' compensation claim." (Doc. 37 at 9). Frankly, the Court finds it disingenuous for Defendant to argue that it was "not aware that Plaintiff submitted a workers' compensation claim when it terminated her employment," when Defendant filed Plaintiff's workers' compensation claim on her behalf. (*Id.*; *see* Docs. 36-1 at 10 (letter from the Industrial Commission of Arizona's Claims Division to Plaintiff on June 7, 2016, alerting Plaintiff that her "employer's insurance carrier has been notified of [her] claim"); 36-1 at 35 (noting that Manager Investigation Report completed by Mr. Deese was mailed to Claims Management, Inc. by Debra Vaughn on May 26, 2016 via USPS)). Furthermore, an email chain in the record between Debra Vaughn, Defendant's Personnel Coordinator, and Jason Krongaard, Defendant's Market Asset Protection Manager, clearly demonstrates that Defendant knew of Plaintiff's workers' compensation claim prior to Plaintiff's termination on July 22, 2016. (Doc. 36-1 at 29–30). Specifically, Ms. Vaughn emailed Mr. Krongaard on June 28, 2016—almost an entire month before Plaintiff's termination—stating: "I need direction in regards to Carol Whitmire. She is requesting medical care for her work injury on 5/21/2016 [for] Claim # C6477157." (*Id.* at 30). In addition to proving that Defendant had actual knowledge of Plaintiff's workers' ***799** compensation claim, this email also demonstrates that Defendant was aware of Plaintiff's requests for additional medical treatment for her work-related injury. (*See* Doc. 36 ¶¶ 55–57).

Moreover, the Ninth Circuit has held that "causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (citations omitted); *see also Ray v. Henderson*, 217 F.3d 1234, 1244 (9th Cir. 2000) ("That an employer's actions were caused by an employee's engagement in protected activities may be inferred from proximity in time between the protected action and the allegedly retaliatory employment decision.") (citation and internal quotations omitted). Here, Plaintiff asserts that her "retaliation claim is premised on the fact that she was terminated practically in the midst of Wal-Mart's 'handling' of her workers' compensation claim and her asking for additional medical treatment." (Doc. 35 at 15). A period of 62 days elapsed from the time Plaintiff first filled out an incident report on the date of her injury (May 21, 2016) to the date of her termination (July 22, 2016). (Doc. 35 at 15–16); (*see also* Docs. 33 ¶ 26; 36-1 at 12). Moreover,

from the date Plaintiff first obtained treatment for her wrist injury on May 24, 2016, 59 days passed to the date of her termination. (Doc. 35 at 15–16). Finally, from June 7, 2016 —the date on which Plaintiff requested additional medical treatment for her work injury from Ms. Vaughn—just 45 days elapsed to the date of Plaintiff's termination. (*Id.*; *see also* Docs. 36 ¶¶ 55–57; 36-1, Decl. of Plaintiff ¶¶ 26–27).

The Ninth Circuit has held that adverse employment actions occurring within similar intervals of time after protected activity support an inference of causation. *See* *Thomas v. City of Beaverton*, 379 F.3d 802, 812 (9th Cir. 2004) (concluding that seven week lapse between protected activity and adverse employment action was sufficient evidence of causation); *Miller v. Fairchild Indus.*, 885 F.2d 498, 505 (9th Cir. 1989) (holding that a *prima facie* case of causation was established when discharges occurred forty-two and fifty-nine days after protected activity); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (holding that sufficient evidence of causation existed where adverse employment actions occurred less than three months after complaint filed, two weeks after charge first investigated, and less than two months after investigation ended); *see also* *Coszalter v. City of Salem*, 320 F.3d 968, 977 (9th Cir. 2003) ("Depending on the circumstances, three to eight months is easily within a time range that can support an inference of retaliation."). Accordingly, the Court finds that sufficient evidence of a causal link exists between Plaintiff's protected activity and her termination from Defendant's employ. Therefore, Plaintiff has provided sufficient evidence to make out a *prima facie* case of retaliatory discharge in violation of A.R.S. § 23-1501(A)(3)(c)(iii).

3. Legitimate, Non-Retaliatory Reason and Pretext

[48] **[49]** **[50]** "If Plaintiff provides sufficient evidence to make out a *prima facie* case of retaliation, then the burden shifts to Defendant to articulate some legitimate, non-retaliatory reason for its actions." *Levine*, 2010 WL 864498, at *8 (citing *Porter v. California Dep't of Corrections*, 419 F.3d 885, 894 (9th Cir. 2005)). "If Defendant sets forth such a reason, then Plaintiff must show that Defendant's proffered reason is merely pretext for the underlying ***800** retaliatory motive."[29] *Id.*

[51] Here, Defendant has met its burden of articulating a legitimate, non-retaliatory reason for terminating Plaintiff. Specifically, Defendant stated that Plaintiff was fired because Walmart had a good faith basis to believe Plaintiff was impaired by marijuana at work on May 24, 2016 based on the results of her positive drug test. (Doc. 32 at 14 ("Plaintiff was terminated because she tested positive for marijuana, and Walmart has a bright-line policy of terminating employees who test positive for a Schedule I controlled substance like marijuana, including medical marijuana cardholders who are deemed to be impaired at work."). Therefore, the deciding question is whether Plaintiff has produced enough evidence from which a reasonable factfinder could conclude that Defendant's proffered reason was pretext for retaliation.

[52] In this case, Plaintiff has not offered any evidence suggesting that Defendant did not honestly believe its legitimate, non-retaliatory reason for terminating her, nor argued that the reasons provided by Defendant were pretext for retaliation. (*See* Doc. 35). At most, there is temporal proximity between Plaintiff's protected activity under Arizona's workers' compensation statutes and her termination, which is not enough to sustain a claim for retaliatory discharge. As Plaintiff has failed to point to evidence of pretext, the Court is unable to determine that there is a genuine dispute of material fact on this claim. Accordingly, the Court grants summary judgment for Defendant on Plaintiff's Fourth Cause of Action alleging retaliatory discharge under the AEPA.

IV. CONCLUSION

IT IS ORDERED that Plaintiff's Rule 56(d) Application (Doc. 35 at 11–13) is **DENIED**.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment (Doc. 32) is **GRANTED IN PART** and **DENIED IN PART**. The motion is **GRANTED** as to Plaintiff's Third Count alleging wrongful termination under the ACRA, and as to Plaintiff's Fourth Count alleging retaliatory discharge for the exercise of rights under the workers' compensation statutes in violation of the AEPA. Defendant's Motion for Summary Judgment is **DENIED** as to Plaintiff's Second Count alleging discrimination under the AMMA.

IT IS FURTHER ORDERED that, pursuant to Rule 56(f), the Court is *sua* ***801** *sponte* granting summary judgment in part for Plaintiff on a non-filed cross-motion for summary

judgment solely on the question of liability on Plaintiff's Second Count alleging discrimination under the AMMA.

IT IS FURTHER ORDERED that Plaintiff's First Count alleging wrongful termination under the AMMA and AEPA is **DISMISSED** as duplicative of Plaintiff's Second Count.

IT IS FINALLY ORDERED affirming all trial dates solely for the issue of damages on Plaintiff's Second Count alleging discrimination under the AMMA. When filing a proposed Final Pretrial Order, the parties shall specifically address whether the AMMA provides a right to a trial by jury, whether the AMMA provides for a claim for reinstatement, and what specific damages Plaintiff seeks.

All Citations

359 F.Supp.3d 761, 169 Lab.Cas. P 61,933, 102 Fed.R.Serv.3d 1397, 2019 A.D. Cases 41,374

Footnotes

1 Plaintiff does not challenge the testing method of her drug screen and admits that the results indicate that a marijuana metabolite was present in her urine. (Docs. 33 ¶ 24; 36 ¶ 24).

2 Ms. Vaughn also states in her Declaration that it is her understanding that the quantitative value of marijuana reflected in Plaintiff's urine screen ("> 1000 ng/ml") is "the maximum reading the test can measure for marijuana." (Doc. 33-3 at 22–23, Vaughn Decl. ¶ 13).

3 Specifically, the four counts in Plaintiff's Complaint are as follows: Count One alleges wrongful termination under the AMMA and the AEPA; Count Two alleges discrimination under the AMMA; Count Three alleges wrongful termination under the ACRA; and Count 4 alleges retaliation under the AEPA for exercising rights under the Arizona workers' compensation statutes. (Doc. 1 at 4–6).

4 After receiving the parties' Joint Motion requesting that the Court extend the deadline for Defendant to file its Reply, (Doc. 38), the Court ordered that Defendant's Reply filed on October 18, 2018 was deemed to be timely, (Doc 39).

5 The Court deems the State of Arizona's Proposed Amicus Curiae Brief in Support of No Party at Doc. 54-1 at 1–5 to be filed as of January 23, 2019, the date of the Order granting leave.

6 Plaintiff's discrimination claim under the AMMA is the second count in her Complaint. (Doc. 1 at 4–5).

7 Plaintiff's wrongful termination claim under the AMMA and AEPA is the first count in her Complaint. (Doc. 1 at 4).

8 Defendant does not dispute that Plaintiff is a qualifying patient under the AMMA. (*See* Docs. 2; 32).

9 This portion of the AMMA states:

> For the purposes of medical care, including organ transplants, a registered qualifying patient's authorized use of marijuana must be considered the equivalent of the use of any other medication under the direction of a physician and does not constitute the use of an illicit substance or otherwise disqualify a registered qualifying patient from medical care.

A.R.S. § 36-2813(C).

10 Due to amendments of RCW 69.51A.060 effective July 1, 2016, former subsection 6 is now subsection 7. *See* Cannabis Patient Protection Act—Establishment, 2015 Wash. Legis. Serv. Ch. 70 (S.S.S.B. 5052) (West).

11 In *Noffsinger*, the court noted that Arizona is one of nine states which have passed medical marijuana laws with explicit anti-discrimination protections from adverse employment actions. *Noffsinger*, 273 F.Supp.3d at 331 n. 1; *see* A.R.S. § 36-2813; Conn. Gen. Stat. § 21a-408p(b); Del. Code Ann. tit. 16, § 4905A; 410 Ill. Comp. Stat. 130/40; Me. Rev. Stat. tit. 22, § 2423-E; Minn. Stat. § 152.32; Nev. Rev. Stat. §

453A.800; 35 Pa. Stat. Ann. § 10231.2103; R.I. Gen. Laws § 21-28.6-4. The *Noffsinger* decision also emphasized that in *Gersten v. Sun Pain Mgmt., P.L.L.C.*, 395 P.3d at 312– 13, the Arizona Court of Appeals "insinuated (but did not find) that a private cause of action might exist against ... employers" in the AMMA. *Id.* at 339 n. 5.

12 The Court is not convinced by Defendant's argument that *Noffsinger* is distinguishable because it is a "failure-to-hire" case. (Doc. 37 at 3). The anti-discrimination provision analyzed in *Noffsinger*, like A.R.S. § 36-2813(B), does not differentiate between refusing to hire or discharging an individual. *See* Conn. Gen. Stat. § 21a-408p(b)(3).

13 In *Pfingston v. Ronan Eng'g Co.*, a case from 2002, the Court refers to the plaintiff's motion for a continuance of the summary judgment motions pending additional discovery as a Rule 56(f) motion. In 2010, Fed. R. Civ. P. 56 was amended, so now "subdivision (d) carries forward without substantial change the provisions of former subdivision (f)." Fed. R. Civ. P. 56 advisory committee's notes to 2000 amendments.

14 Under Fed. R. Civ. P. 26(a)(2)(A), "a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." This expert disclosure "must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case ...." Fed. R. Civ. P. 26(a)(2)(B). "A party must make these disclosures at the times and in the sequence that the court orders." Fed. R. Civ. P. 26(a)(2)(D).

15 Regardless of which party has the burden of proof on the issue of impairment, Defendant failed to timely disclose Ms. Vaughn as an expert. The Court's Rule 16 Scheduling Order required that the party with the burden of proof on the issue make all expert disclosures "no later than November 17, 2017." (Doc. 13 at 2). Thereafter, the Order required the responding party without the burden of proof on that issue to make any expert disclosures "no later than December 15, 2017." (*Id.*). Then, the party with the burden of proof was required to "make its rebuttal expert disclosure, if any, no later than January 12, 2018." (*Id.*). Further, the Court ordered that all discovery be completed by March 30, 2018, (*id.*) and stressed that it would "not entertain discovery disputes after the close of discovery barring extraordinary circumstances," (*id.* at 2 n. 2).

16 Exhibit H (Doc. 36-1 at 45–53) includes pages from an article entitled "An Evaluation of Data from Drivers Arrested for Driving Under the Influence in Relation to Per se Limits for Cannabis." Exhibit I (*id.* at 55–58) is the Drug Screen Test Cup (Urine) Package Insert from Alere. Exhibit J (*id.* at 60–67) includes pages from an article entitled "Marijuana and the Cannabinoids."

17 Under the DTEA, "good faith" is defined as "reasonable reliance on fact, or that which is held out to be factual, without the intent to deceive or be deceived and without reckless or malicious disregard for the truth." A.R.S. § 23-493(6).

18 The DTEA defines "impairment" as:

> ... symptoms that a prospective employee or employee while working may be under the influence of drugs or alcohol that may decrease or lessen the employee's performance of the duties or tasks of the employee's job position, including symptoms of the employee's speech, walking, standing, physical dexterity, agility, coordination, actions, movement, demeanor, appearance, clothing, odor, irrational or unusual behavior, negligence or carelessness in operating equipment, machinery or production or manufacturing processes, disregard for the safety of the employee or others, involvement in an accident that results in serious damage to equipment, machinery or property, disruption of a production or manufacturing process, any injury to the employee or others or other symptoms causing a reasonable suspicion of the use of drugs or alcohol.

Id. at § 23-493(7).

19 The Court has not overlooked the fact that impairment can be proven in any number of ways. *See* A.R.S. § 23-493(7). However, as Defendant itself admitted, Walmart terminated Plaintiff solely based on the results of her drug screen. (*See* Doc. 32 at 9 ("The results of this test gave Defendant a good faith basis to believe

Plaintiff was impaired by marijuana on May 24, 2016, on Defendant's premises during work hours, and Walmart terminated Plaintiff's employment *solely on that basis*.") (emphasis added)).

20 In its Supplemental Brief, Defendant agrees that the burden of showing a "good faith belief" is placed on the employer, and then shifts to the employee. (*See* Doc. 48 at 4 ("... Walmart must show it had a good faith belief that Plaintiff was 'impaired by' or 'under the influence of' marijuana while at work and, if it d[oes], it is Plaintiff's burden to show the lack of such a good faith belief.")).

21 The Arizona Supreme Court has also recognized the distinction between active and inactive marijuana metabolites. *See* *State ex rel. Montgomery v. Harris*, 234 Ariz. 343, 322 P.3d 160, 164 (2014) ("Because the legislature intended to prevent impaired driving, we hold that the 'metabolite' reference in § 28–1381(A)(3) is limited to any of a proscribed substance's metabolites that are capable of causing impairment.").

22 Defendant nowhere contends that Plaintiff "used" or "possessed" marijuana while at work. Rather, Defendant's defense rests on its claim that Plaintiff was "impaired" by marijuana at work, of which there is no evidence.

23 The ACRA clarifies that "with respect to employers or employment practices involving a disability, 'individual,' means a qualified individual." A.R.S. § 41-1463(O).

24 (*See* Doc. 36 ¶¶ 34–36, 39–40).

25 Under the ADA, the "relevant inquiry is whether the actual or perceived impairment is objectively 'transitory and minor,' not whether the employer subjectively believed the impairment to be transitory and minor." *Saley v. Caney Fork, LLC*, 886 F.Supp.2d 837, 851 (M.D. Tenn. 2012) (citing 29 C.F.R. § 1630.2(l)).

26 *See* *McDonald v. Pennsylvania State Police*, No. 02:09-CV-00442, 2012 WL 5381403, at *11 (W.D. Pa. Oct. 31, 2012) (holding that the side effects of the plaintiff's prescribed pain medication did not constitute an actual disability nor lead plaintiff to be "regarded as" disabled where the plaintiff could have switched to a non-narcotic pain reliever or stopped taking the pain medication altogether, and where the plaintiff failed to meet his burden of demonstrating that his prescribed pain medication was the "only efficacious medication" and medically necessary); *Tavarez v. United Blood Servs.*, No. 11-CV-673 WJ/ACT, 2012 WL 13080075, at *6 (D.N.M. July 12, 2012) (holding that the side effects of the plaintiff's pain medication did not qualify as a disability under the ADA where the plaintiff did not claim that such side effects were a permanent condition, did not make any showing that she discussed the possibility of an alternative pain medication with her doctor, and where plaintiff discontinued use of the medication, showing "that it was not required").

27 Despite recognizing that "the *McDonnell Douglas* burden-shifting framework applies to her ACRA claim," (Doc. 35 at 13), Plaintiff failed to make any argument contending that Defendant's proffered reasons for her termination were pretext for disability discrimination. (*See* Doc. 35). Accordingly, even if Plaintiff had met her *prima facie* burden, Plaintiff's wrongful termination claim under the ACRA still would not survive summary judgment.

28 *Quinones v. Potter* involved an employee who alleged, in part, that her former employer retaliated against her in violation of Title VII. *Quinones*, 661 F.Supp.2d at 1117. There, the district court granted summary judgment for the employer on the employee's retaliation claim because the employee failed to demonstrate that she engaged in any protected activity. *Id.* at 1126–27. Specifically, the district court determined that the employee's submission of medical documentation, requests for continued temporary light duty assignments, and requests for "time on the clock" to work on her EEOC complaint did not constitute "protected activities," nor reasonably put her former employer on notice that she was opposing discrimination. *Id.* at 1127.

29 Although the district court has previously applied this *McDonnell Douglas* burden-shifting framework in the context of a retaliatory discharge claim under A.R.S. § 23-1501(A)(3)(c)(iii), the Court could find not find any opinions from the Arizona Court of Appeals or Arizona Supreme Court applying this framework to a claim under A.R.S. § 23-1501(A)(3)(c)(iii). Nevertheless, the Arizona Court of Appeals recently noted in

an unpublished decision that the Arizona Court of Appeals "has applied the *McDonnell Douglas* burden-shifting framework to wrongful discharge claims under A.R.S. § 41–1464 (alleged retaliation for asserting employment discrimination violations), *see Najar v. State*, 198 Ariz. 345, 347–48, ¶ 8, 9 P.3d 1084 (App. 2000), and *we agree ... that the framework likewise applies to claims under § 23–1501*." *Czarny v. Hyatt Residential Mktg. Corp.*, No. 1 CA-CV 16-0577, 2018 WL 1190051, at *2 (Ariz. Ct. App. Mar. 8, 2018) (emphasis added). Pursuant to Rule 111 of the Supreme Court of Arizona, the Court recognizes that *Czarny v. Hyatt Residential Mktg. Corp.* is a memorandum decision and, thus, is not precedential. AZ ST S CT Rule 111(c). However, this memorandum decision may be cited for persuasive value, as it is here, since "it was issued on or after January 1, 2015; no opinion adequately addresses the issue before the court; and the citation is not to a depublished opinion or a depublished portion of an opinion." *Id.*

the Percocet." (*Id.* at ¶ 24.) But even when told that the "problem" was the medical marijuana and that "corporate wants you fired," Plaintiff demurred, and presented his medical marijuana card and doctor's prescription. (*Id.* at ¶¶ 23–27.) As before, Ardagh Glass representatives told Plaintiff they would look into the matter to see what they could do. (*Id.* at ¶ 28.)

Plaintiff does not plead that he was fired: rather, he appears to be on "indefinite suspension" (*Id.* at ¶ 36) as a result of this episode. Whatever the precise nature of his employment status, Plaintiff maintains he has not been permitted to return to work until he passes a drug test. (*Id.* at ¶ 29.) He argues this constitutes discrimination. Plaintiff's doctor stated Plaintiff had some lifting restrictions because of his medical condition —the complaint does not specify if this medical condition is related to past injuries, the forklift injury, or both—and that he is therefore disabled within the meaning of the New Jersey Law Against Discrimination ("LAD"), N.J. Stat. Ann. § 0:5-12 *et seq.* (*Id.* at ¶¶ 1, 33.) Plaintiff avers he is still capable of performing all the essential functions of his job as a forklift operator despite his disability. (*Id.* at ¶ 32.) He simply seeks a "reasonable accommodation," which the Court infers to be a request that his employer waive the requirement that Plaintiff pass a drug test for marijuana, a substance prohibited by federal law. (*Id.* at ¶ 37.)

Plaintiff first filed this complaint in the Superior Court of New Jersey, Cumberland County, asserting claims of disability discrimination, the "perception of disability discrimination," a failure to accommodate, retaliation, and a request for equitable relief including costs and reinstatement. (Compl. at 6–10.) Ardagh Glass then removed this case by invoking this Court's diversity jurisdiction under 28 U.S.C. § 1332, and has now moved to dismiss the complaint in its entirety for failure to state a claim upon which relief can be granted.

II. THE 12(b)(6) STANDARD

When considering a motion to dismiss a complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the Court must accept all well-pleaded allegations in the complaint as true and view them in the light most favorable to the non-moving party. A motion to dismiss may be granted only if the plaintiff has failed to set forth fair notice of what the claim is and the grounds upon which it rests that make such a claim plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Although Rule 8 does not require "detailed factual allegations," it requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555).

In reviewing the sufficiency of a complaint, this Court must "tak[e] note of the elements [the] plaintiff must plead to state a claim. Second, it should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Finally, [w]hen there are well-pleaded factual allegations, [the] court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 787 (3d Cir. 2016) (alterations in original) (internal citations and quotation marks omitted).

III. JURISDICTION

***3** This case is properly before the Court under 28 U.S.C. § 1332. The parties are diverse—Plaintiff is a New Jersey citizen and Defendant is a Delaware corporation with a principal place of business in Indiana. The amount of controversy, inclusive of the potential for punitive damages and attorney's fees, could reasonably exceed $75,000. *See Bell v. Preferred Life Assur. Soc. Of Montgomery, Ala.*, 320 U.S. 238, 240 (1943) (punitive damages relevant to determining the amount of controversy); N.J. Stat. Ann. § 10:5-27.1 (The LAD awards attorney's fees to a prevailing party).

IV. DISCUSSION

New Jersey is an at-will employment state: an employer may fire an employee for good reason, bad reason, or no reason at all. *See Witkowski v. Thomas J. Lipton, Inc.*, 136 N.J. 385, 396 (1994). But this is subject to some exceptions, including, as relevant here, unlawful discrimination, which is prohibited by the New Jersey Law Against Discrimination ("LAD"). *See Greenwood v. State Police Training Ctr.*, 127 N.J. 500, 512 (1992).

The LAD forbids "any unlawful discrimination against any person because such person is or has been at any time disabled or any unlawful employment practice against such person, unless the nature and extent of the disability reasonably precludes the performance of the particular employment." N.J. Stat. Ann. § 10:5-4.1. In implementing this provision, New Jersey courts have adopted the framework

of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as the starting point in actions brought under the LAD. *See* *Andersen v. Exxon Co., U.S.A.*, 89 N.J. 483, 492 (1982). The "first step" of this burden-shifting framework requires "the plaintiff to bear the burden of proving the elements of a prima facie case." *Victor v. State*, 203 N.J. 383, 408, 4 A.3d 126, 140 (2010). The prima face case is a "rather modest" burden, *Zive v. Stanley Roberts, Inc.*, 182 N.J. 436, 447 (2005), "but it remains the plaintiff's burden nonetheless." *Victor*, 203 N.J. at 408. Once a plaintiff has established the prima facie case, the burden of proof shifts to the employer who may rebut the presumption of discrimination by providing a legitimate, non-discriminatory reason for the challenged action. *Andersen*, 89 N.J. at 491. After such a rebuttal, the plaintiff may "prove by a preponderance of the evidence that the legitimate nondiscriminatory reason articulated by the defendant was not the true reason for the employment decision but was merely a pretext for discrimination." *Id.* In addition to the pretext theory set forth by *McDonnell Douglas*, a plaintiff may also establish a claim of discrimination under a mixed-motive theory as set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See* *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 787 (3d Cir. 2016) (expounding on the two different modes of discrimination).

When deciding whether to grant a motion to dismiss, the Court must evaluate whether Plaintiff has alleged facts that could sustain a *prima facie* case in discovery. This is not a formalistic inquiry: "at least for purposes of pleading sufficiency, a complaint need not establish a *prima facie* case in order to survive a motion to dismiss." *Connelly*, 809 F.3d at 788. This is because a *prima facie* case is "an evidentiary standard, not a pleading requirement," *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 510 (2002). Rather, a plaintiff with a disability discrimination claim may survive a motion to dismiss if he pleads "sufficient factual allegations to raise a reasonable expectation that discovery will reveal evidence" of the elements of the *prima facie* case. *Connelly*, 809 F.3d at 789. [1]

***4** "There is no single prima facie case that applies to all employment discrimination claims." *Andersen*, 89 N.J. at 491. Instead, "the elements of the prima facie case vary depending upon the particular cause of action." *Id.* Plaintiff has identified four theories of discrimination, labeled as follows: "Discrimination Based on Disability Under the LAD" (Count I); "Perception of Disability Discrimination Under the LAD" (Count II); "Failure to Accommodate" (Count III); and "Retaliation under the LAD" (Count IV). Count I and II are properly considered together, as Count II merely provides an alternative definition for a motivation prohibited by the statute; it does not present a separate cause of action. *See* *Rogers v. Campbell Foundry Co.*, 185 N.J. Super. 109, 112 (App. Div. 1982) ("those perceived as suffering from a particular handicap are as much within the protected class as those who are actually handicapped."); *Poff v. Caro*, 228 N.J. Super. 370, 377 (Law Div. 1987) ("discrimination based on a perception of a handicap is within the protection of the Law Against Discrimination.").

Ardagh Glass has moved to dismiss the complaint in its entirety, focusing its arguments on Plaintiff's contention that his past employer was duty-bound to accommodate his use of medical marijuana. Specifically, Ardagh Glass argues that the New Jersey Compassionate Use Medical Marijuana Act ("CUMMA") does not mandate employer acceptance—or, more particularly, to waive a drug test—of an employee's use of a substance that is illegal under federal law. We take each claim in turn.

A. Discriminatory Discharge

To withstand a motion to dismiss, a complaint must contain "sufficient factual allegations to raise a reasonable expectation that discovery will reveal evidence" of the elements of a *prima facie* case of discriminatory discharge on the basis of disability. *See* *Connelly*, 809 F.3d at 789. When a plaintiff alleges he was discriminatorily fired because of a disability, he must prove by a preponderance of the evidence that: (1) he is disabled within the meaning of the LAD; (2) he was performing his job at a level that met his employer's legitimate expectations; (3) he was discharged; and (4) the employer sought someone else to perform the same work after he left. *Grande v. Saint Clare's Health Sys.*, 230 N.J. 1, 18 (2017).

Plaintiff has adequately pleaded that he is disabled under the LAD. The LAD "does not require proof that some major life activity was impaired," *Dicino v. Aetna U.S.*

Healthcare, Civ. No. 01-3206 (JBS), 2003 WL 21501818, at *12 (D.N.J. June 23, 2003) (citing N.J. Stat. Ann. § 10:5-5(q)), and "courts have found a broad array of medical conditions to be handicaps under the LAD." *Tynan v. Vicinage 13 of Superior Court*, 351 N.J. Super. 385, 398 (App. Div. 2002). *See* *Clowes*, 109 N.J. at 590 (finding that "alcoholism is a protected handicap"); *Viscik v. Fowler Equip. Co.*, 173 N.J. 1, 17 (2002) (obesity); *Jansen v. Food Circus Supermarkets, Inc.*, 110 N.J. 363, 374 (1988) (drug addiction). Plaintiff's back and neck pain, as alleged, readily satisfies the standard for physical disability under the LAD. *See, e.g.*, *Andersen*, 89 N.J. at 493 (finding that "a serious back and spinal ailment that warranted an operation requiring spinal fusion and removal of a lumbar disc" could sustain a finding of a "physical handicap" under the LAD).

We turn to the second element of the *prima facie* case: whether Plaintiff was qualified to perform the essential functions of the job. As the New Jersey Supreme Court has explained, "the import of the [LAD] is that the handicapped should enjoy equal access to employment, subject only to limits that they cannot overcome." *Jansen*, 110 N.J. at 374. "Because of the limits imposed by a handicap, the [LAD] must be applied sensibly with due consideration to the interests of the employer, employee, and the public." *Raspa v. Office of Sheriff of Cty. of Gloucester*, 191 N.J. 323, 336 (2007) (citing *Jansen*, 110 N.J. at 374). The LAD leaves employers "with the right to fire or not to hire employees who are unable to perform the job, whether because they are generally unqualified or because they have a handicap that in fact impedes job performance." *Raspa*, 191 N.J. at 336 (internal marks and citations omitted).

***5** As an initial matter, Plaintiff appears to be qualified to work as a forklift operator: he has done so for a period of five years, apparently without issue until the events giving rise to this litigation. But it bears repeating that Plaintiff's complaint does not claim that Ardagh Glass discriminated against him based on his disability as such (i.e., his neck and back pain). Rather, Plaintiff alleges that his employer discriminated against him by refusing to accommodate his use of medical marijuana by waiving a drug test.

Distinguishing a treatment from a disability can present some analytical difficulties. Undue prejudice toward a treatment for a disability—say, an employer's disapproval that an employee uses a wheelchair—can be discrimination against the disability itself. But not so here. Plaintiff has pleaded that Ardagh Glass was aware of Plaintiff's disability for years and never discriminated against him until he was asked to take a drug test. Nothing in the complaint indicates Ardagh Glass took issue with his disability as such, only with a consequence of his treatment. New Jersey courts interpreting the LAD have noted that "it is the almost universal view that the federal laws are intended to prevent discrimination premised upon a handicap or disability, not upon egregious or criminal conduct *even if such conduct results from the handicap or disability.*" *Barbera v. DiMartino*, 305 N.J. Super. 617, 636 (App. Div. 1997) (citing dozens of cases) (emphasis added). What occasioned this dispute is conduct resulting from a treatment, not the disability itself: Plaintiff alleges that Ardagh Glass discriminated against him by telling him "he was required to pass both a breathalyzer and a urine test in order to return to work." (Compl. at ¶ 13.)

In other words, Ardagh Glass had a condition of employment which Plaintiff was unable or unwilling to meet. Plaintiff had to test negative for illegal narcotics or else, according to the complaint, he would remain on "indefinite suspension." Part of this was a fear that Plaintiff "could not operate machinery while on narcotics" (Compl. at ¶ 18), a concern apparently animating the requirement that Plaintiff pass a breathalyzer and urine test before returning to work. (Compl. at ¶ 13.) Plaintiff's complaint, although less precise than it could be, sweats down to a request for an accommodation to waive the condition that he be required to pass a drug test. Ardagh Glass refused, citing marijuana—but not Plaintiff's concurrent use of Percocet, which, if prescribed, is *not* illegal under federal law. (Compl. at ¶ 26.) As pleaded, Ardagh Glass was unmoved by Plaintiff's possession of a medical marijuana card and a note from his doctor stating that he could operate machinery while taking his prescription drugs. (Compl. at ¶¶ 19, 27.)

The Court is thus presented with the question of whether Ardagh Glass may condition Plaintiff's employment on his passing a drug test, or, formulated in the language of a claim for discriminatory discharge, whether this is an "essential function" of Plaintiff's employment.

Our departure point is the current federal prohibition of marijuana. The Controlled Substances Act provides that "[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally ... to manufacture,

distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). Congress has classified marijuana as a Schedule I substance, § 812(c), which are scheduled as such "because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment." *Gonzales v. Raich*, 545 U.S. 1, 14 (2005) (citing 21 U.S.C. § 812(b)(1)). By contrast, Percocet, a tradename for the combination of oxycodone/paracetamol, is a Schedule II substance "with a high potential for abuse" that "may not be distributed without a prescription." *See United States v. McKinney*, Crim. No. 09-234, 2010 WL 3364204, at *1 (E.D. Pa. Aug. 24, 2010). Ardagh Glass's more permissive stance toward the latter instead of the former is thus understandable, as federal law allows Percocet to be used with a prescription but continues to regard marijuana as having no accepted medical use.

***6** New Jersey, along with at least 30 other states, has reached a different conclusion about the medical utility of marijuana. The New Jersey Compassionate Use Medical Marijuana Act ("CUMMA" or the "Act") was enacted in 2010 to decriminalize the use of medical marijuana. The New Jersey legislature found that "[m]odern medical research has discovered a beneficial use for marijuana in treating or alleviating the pain or other symptoms associated with certain debilitating medical conditions." N.J. Stat. Ann. § 24:6I-2(a). The legislature also stated that:

> the purpose of this act is to protect from arrest, prosecution, property forfeiture, and criminal and other penalties, those patients who use marijuana to alleviate suffering from debilitating medical conditions, as well as their physicians, primary caregivers, and those who are authorized to produce marijuana for medical purposes.

N.J. Stat. Ann. § 24:6I-2(e).

Consistent with these purposes, "CUMMA affords an affirmative defense to patients who are properly registered under the statute and are subsequently arrested and charged with possession of marijuana." *State v. Holley*, No. A-5547-15T3, 2017 WL 6492488, at *3 (N.J. Super. Ct. App. Div. Dec. 19, 2017) (citing N.J. Stat. Ann. § 2C:35-18). The Act also shields qualifying users of medical marijuana from civil penalties and other administrative actions. "A qualifying patient, primary caregiver, alternative treatment center, physician, or any other person ... shall not be subject to any civil or administrative penalty, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a professional licensing board, related to the medical use of marijuana." N.J. Stat. Ann. § 24:6I-6(a). But despite these provisions for immunity, "[n]othing in this act shall be construed to require ... an employer to accommodate the medical use of marijuana in any workplace." N.J. Stat. Ann. § 24:6I-14. [2]

By its own terms, the Act decriminalizes and removes the threat of civil sanctions from qualifying users, prescribers, or purveyors of medical marijuana. Nothing within it invalidates Plaintiff's claims or requires an employer to permit the use of medical marijuana in the workplace. Most significantly, it specifically excludes employers from its scope. We therefore agree with Plaintiff that the Act "does not render Plaintiff's claim invalid, nor does it waive the employer's obligations under the LAD." (Opp'n at 7.) We further agree that it "has no other relevance to the facts set forth in plaintiff's Amended Complaint." (Opp'n at 7.) CUMMA is essentially agnostic on Plaintiff's claims.

But just as nothing within CUMMA invalidates Plaintiff's claims, so too does nothing within the Act breathe life into them. Plaintiff cannot aver that CUMMA has no significance to his claims and at the same time aver that the Act's decriminalization of medical marijuana mandates Ardagh Glass to waive drug testing for Plaintiff. Nothing in the cited language supports a finding that CUMMA, working alongside LAD, somehow leads to an emergent, penumbral law. The statutes enact only what they expressly enact or what the New Jersey judiciary has held them to enact. And so far, the courts of New Jersey, or federal courts interpreting the law of New Jersey, have not yet addressed this question. *See, e.g., Cobb v. Ardagh Glass, Inc.*, Civ. No. 17-4399 (RMB/KMW), 2018 WL 585540, at *2 (D.N.J. Jan. 26, 2018) (declining to reach the question of whether "Defendants have no liability for failing to accommodate Plaintiff's marijuana usage" and remanding for lack of complete diversity); *Barrett v. Robert Half Corp.*, Civ. No 15-6245, 2017 WL 4475980, at *2 (D.N.J. Feb. 21, 2017) (dismissing without prejudice because

the plaintiff failed to plead that he had requested a reasonable accommodation for his disability).

***7** But even though no court has addressed CUMMA's effects on the LAD, this Court is by no means the first to address the question of whether a statute decriminalizing marijuana imposes obligations that previously were not imposed by a state's civil right statutes. Unless expressly provided for by statute, most courts have concluded that the decriminalization of medical marijuana does not shield employees from adverse employment actions. *See, e.g.,* *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wash. 2d 736, 748 (2011) (Washington's Medical Use of Marijuana Act "does not regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use"); *Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d 914, 921–22 (W.D. Mich. 2011) ("The fundamental problem with Plaintiff's case is that the [Michigan Medical Marijuana Act] does not regulate private employment. Rather, the Act provides a potential defense to criminal prosecution or other adverse action by the state."), aff'd, 695 F.3d 428 (6th Cir. 2012); *Curry v. MillerCoors, Inc.*, Civ. No. 12-2471 (JLK), 2013 WL 4494307, at *7 (D. Colo. Aug. 21, 2013) (granting motion to dismiss; "discharging an employee under these circumstances is lawful, regardless of whether the employee consumed marijuana on a medical recommendation, at home or off work."); *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225, 1229 (D.N.M. 2016) (finding New Mexico's medical marijuana law does not "combine" with New Mexico's civil rights statute to require an employer to accommodate medical marijuana).

Plaintiff relies on a dissent in *Ross v. Ragingwire Telecomm., Inc.*, 174 P.3d 200, 209–211 (Cal. 2008), a case that is nearly a carbon copy of this one. Judge Kennard, dissenting, observed that "California's voters ... when they enacted [California's] Compassionate Use Act, surely never intended that persons who availed themselves of its provisions would thereby disqualify themselves from employment...." *Id.* But this Court finds the majority in *Ross* to be much more persuasive. The plaintiff in *Ross*, like the plaintiff in this case, experienced lower back pain and used marijuana to treat that pain. That use, however, brought "plaintiff into conflict with defendant's employment policies" which "den[ied] employment to persons who test positive for illegal drugs." *Id.* at 204. Just as here, the plaintiff's complaint did not "identify the precise accommodation defendant would need to make in order to enable him to perform the essential duties of his job," but the Supreme Court inferred that he was asking "defendant to accommodate his use of marijuana at home by waiving its policy requiring a negative drug test of new employees." *Id.* The *Ross* plaintiff contended that terminating "an employee who uses a medicine deemed legal by the California electorate upon the recommendation of his physician" violated the California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12900 *et seq.*, which prohibits discrimination against the disabled in substantially the same manner as New Jersey's LAD. *See* *Ross*, 174 P.3d at 204.

The California Supreme Court disagreed with Plaintiff that his employer had to accommodate his drug use. It noted:

> Plaintiff's position might have merit if the Compassionate Use Act gave marijuana the same status as any legal prescription drug. But the act's effect is not so broad. No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law even for medical users ... Instead of attempting the impossible ... California's voters merely exempted medical users and their primary caregivers from criminal liability under two specifically designated state statutes. Nothing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and obligations of employers and employees.

Ross, 174 P.3d at 204 (citations omitted). The Court concluded that "FEHA does not require employers to accommodate the use of illegal drugs" and noted that the dearth of case law was because "the point is perhaps too obvious to have generated appellate litigation." *Id.*

This Court predicts that the New Jersey judiciary would reach a similarly obvious conclusion: the LAD does not

require an employer to accommodate an employee's use of medical marijuana with a drug test waiver. Although no court has expressly ruled on this question, New Jersey courts have generally found employment drug testing to be unobjectionable in the context of private employment. In *Vargo v. Nat'l Exch. Carriers Ass'n, Inc.*, 376 N.J. Super. 364, 383 (App. Div. 2005), the court noted that "where an employer was presented with a positive drug test result for a prospective employee, there was nothing improper or unlawful in the employer's perceiving the prospective employee as a user of illegal drugs." *See also Matter of Jackson*, 294 N.J. Super. 233, 236 (App. Div. 1996) (affirming decision removing firefighter from his job on the basis that an "employer is not required to assume—or hope—that the employee will limit alcohol and other drug consumption to off-duty hours, or that the effects of drugs will be dissipated by the time the work day begins"); *Small v. Rahway Bd. of Educ.*, Civ. No. 17-1963, 2018 WL 615677, at *4 (D.N.J. Jan. 26, 2018) (finding that applicant for custodial position who failed drug test "was not otherwise qualified to perform the essential functions of the custodial job" under the ADA). And as we have seen, nothing in CUMMA or LAD disturbs this regime.

***8** The Court notes that both parties cite past, pending, and future proposed legislation concerning the scope and status of legalized medical marijuana in New Jersey when arguing that the statute should be construed this way or that. This is completely irrelevant. Proposed amendments are just that: proposals. A legislature may refuse to enact a proposal just as swiftly as someone might turn down a wedding ring. "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 453 (1987) (Scalia, J., concurring). This is doubly true for laws that have not even been enacted.

The Court's decision today is a narrow one, as it must be for the narrow issue presented by Plaintiff's complaint. Plaintiff's discrimination claims turn entirely on the question of whether he can compel Ardagh Glass to waive its requirement that he pass a drug test. It is plain that CUMMA does not require Ardagh Glass to do so. We therefore find that Plaintiff has failed to show that he could perform the "essential functions" of the job he seeks to perform. Ardagh Glass is within its rights to refuse to waive a drug test for federally-prohibited narcotics.

The Court also notes that although Plaintiff has stated he "is aware of other employees with restrictions that were permitted to work light-duty positions" (Compl. at ¶ 17), he has not pleaded that other similarly-situated employees asked for the accommodation he requests—i.e., a drug test waiver—and were denied. This, too, provides a basis for dismissal of his complaint, and he must show that Ardagh Glass "sought someone else to perform the same work, or did fill the position with a similarly-qualified person." *Tourtellote*, 636 F. App'x at 848. There are broader formulations of this element as well. Some courts interpreting the LAD have construed it as requiring "a showing that the challenged employment decision ... took place under circumstances that give rise to an inference of unlawful discrimination." *Williams v. Pemberton Twp. Pub. Sch.*, 323 N.J. Super. 490, 502, 733 A.2d 571, 578 (App. Div. 1999). But even under this approach, Plaintiff has not pleaded that another similarly-situated coworker was subject to the same actions.

B. Failure to Accommodate and Retaliation Claims

Plaintiff's other claims fare no better. To present a prima facie case of a failure to accommodate claim under the LAD, Plaintiff must plead that (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for her disability; (3) the employer did not make a good faith effort to assist; and (4) the employee could have been reasonably accommodated. *Armstrong v. Burdette Tomlin Mem'l Hosp.*, 438 F.3d 240, 246 (3d Cir. 2006); *Vicinage 13 of Superior Court*, 351 N.J. Super. at 396. As we found above with respect to Plaintiff's discriminatory discharge claim, neither CUMMA nor the LAD require Ardagh Glass to waive its drug test as a condition for employment. Plaintiff cannot compel an employer to waive a drug test as an accommodation for an employee using marijuana, and so Plaintiff has failed to state a claim for a failure to accommodate.

Plaintiff's retaliation claim is even more attenuated. To sustain a prima facie case on a retaliation claim under the LAD, Plaintiff must demonstrate that (1) he engaged in a protected activity known by the employer; (2) he suffered an adverse employment action; and (3) his participation in the protected activity caused the retaliation. *Craig v. Suburban Cablevision, Inc.*, 140 N.J. 623 (1995). As refusing to take

a drug test is not a protected activity under New Jersey law, Plaintiff has failed to state a claim for retaliation.

V. CONCLUSION

***9** New Jersey law does not require private employers to waive drug tests for users of medical marijuana. We therefore find that Plaintiff has failed to state a claim. Defendant's motion is **GRANTED**. An order follows.

All Citations

Not Reported in Fed. Supp., 2018 WL 3814278, 2018 A.D. Cases 286,675

Footnotes

1 These precedents concern federal discrimination law, of course, but New Jersey courts "rely on the federal courts and their construction for guidance in those circumstances in which our LAD is unclear." *Victor*, 203 N.J. at 398.

2 New Jersey's language is much less expansive than several other states. Arizona, for example, explicitly provide protections for users of medical marijuana in the workplace. "Unless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon ... [a] registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment." Ariz. Rev. Stat. Ann. § 36-2813. *See also* 35 Pa. Stat. Ann. § 10231.2103; Del. Code Ann. tit. 16, § 4905A.

154 F.Supp.3d 1225
United States District Court, D. New Mexico.

Rojerio GARCIA, Plaintiff,
v.
TRACTOR SUPPLY COMPANY, Defendant.

No. CV 15–00735 WJ/WPL
|
Filed January 7, 2016

Synopsis

Background: Employee who suffered from HIV/AIDS, used medical marijuana, and failed employer's drug test brought action in state court against employer, alleging that employer's termination of his employment based on his serious medical condition and use of medical marijuana violated the New Mexico Human Rights Act. Following removal, employer moved to dismiss.

Holdings: The District Court, William P. Johnson, J., held that:

[1] as a matter of first impression, New Mexico's Compassionate Use Act (CUA), which authorized use of medical marijuana, did not mandate that employers accommodate medical marijuana use, and

[2] Controlled Substances Act (CSA) preempted interpretation CUA and New Mexico Human Rights Act as requiring employer to accommodate employee's use of medical marijuana.

Motion granted.

Procedural Posture(s): Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

West Headnotes (2)

[1] **Civil Rights** Alcohol or drug use
Civil Rights Human immuno-deficiency virus and acquired immune deficiency syndrome

New Mexico's Compassionate Use Act (CUA), which authorized use of medical marijuana, did not mandate that employers accommodate medical marijuana cardholders, and, thus, medical marijuana was not an accommodation that employer was required to provide to employee who suffered from HIV/AIDS and used medical marijuana, under the New Mexico Human Rights Act. N.M. Stat. Ann. §§ 26-2B-1, 28-1-1.

10 Cases that cite this headnote

[2] **Civil Rights** Alcohol or drug use
Civil Rights Federal preemption

Controlled Substances Act (CSA) preempted interpretation of New Mexico's Compassionate Use Act (CUA), which authorized use of medical marijuana, and the New Mexico Human Rights Act as requiring employer to accommodate employee's use of medical marijuana, where CUA provided only limited state law immunity from prosecution for individuals engaged in state law-compliant medical marijuana use, while CSA criminalized marijuana, and affirmatively requiring employer to accommodate employee's illegal drug use would mandate employer to permit very conduct CSA proscribed. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 101 et seq., 21 U.S.C.A. § 801 et seq.; N.M. Stat. Ann. §§ 26-2B-1, 28-1-1.

10 Cases that cite this headnote

Attorneys and Law Firms

***1226** E. Justin Pennington, E Justin Pennington Law Offices, Albuquerque, NM, for Plaintiff.

Jessica R. Terrazas, Rodey Dickason Sloan Akin & Robb PA, Santa Fe, NM, Michael W. Fox, Ogletree Deakins Nash Smoak & Stewart PC, Austin, TX, for Defendant.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

WILLIAM P. JOHNSON, UNITED STATES DISTRICT JUDGE

THIS MATTER comes before the Court upon Defendant Tractor Supply Company's Motion to Dismiss (**Doc. 3**). Having reviewed the parties' briefs and the applicable law, the Court finds that Defendant's Motion to Dismiss is well taken, and therefore **GRANTED**, as herein described.

BACKGROUND

This case concerns an issue of first impression in the District of New Mexico. Plaintiff Rojerio Garcia ("Mr.Garcia") suffers from HIV/AIDS, a serious medical condition as defined in the New Mexico Human Rights Act, N.M. STAT. ANN. § 28–1–1, *et seq*. (1978). Mr. Garcia's physicians recommended that treatment of his condition include the use of medical marijuana. Mr. Garcia subsequently applied for acceptance into the New Mexico Medical Cannabis Program, an agency of the New Mexico Department of Health. The New Mexico Medical Cannabis Program is authorized by the Lynn and Erin Compassionate Use Act ("CUA"), N.M. STAT. ANN. § 26–2B–1 (2007). The New Mexico Department of Health determined that Mr. Garcia met all the statutory and regulatory criteria for participation in the Medical Cannabis Program and issued him a Patient Identification Card.

***1227** Mr. Garcia thereafter applied for the job of Team Leader (Management) at Tractor Supply Company ("Tractor Supply"). During his initial employment interview, Mr. Garcia advised Tractor Supply's hiring manager of his diagnosis of HIV/AIDS and of his participation in the Medical Cannabis Program. Mr. Garcia was hired for the job, and on August 8, 2014, reported to a testing facility to undergo a drug test. The results of the drug test indicated that Mr. Garcia had tested positive for cannabis metabolites. On August 20, 2014, Tractor Supply's hiring manager discharged Mr. Garcia on the basis of the positive drug test. On October 2, 2014, Mr. Garcia filed a written complaint with the New Mexico Human Rights Division, alleging unlawful discrimination by Tractor Supply as defined by N.M. STAT. ANN. § 28–1–7 (2008). Mr. Garcia received a Determination of No Probable Cause from the New Mexico Labor Relations Division/Human Rights Bureau on April 15, 2015. Therefore, Mr. Garcia has properly exhausted his administrative remedies. Mr. Garcia subsequently filed suit on July 13, 2015 in the First Judicial District Court of Santa Fe County, New Mexico, alleging that Tractor Supply terminated him based on his serious medical condition and his physicians' recommendation to use medical marijuana. Tractor Supply timely removed the case to this Court on August 21, 2015.

Tractor Supply filed a Motion to Dismiss (**Doc. 3**) on August 28, 2015, arguing that Mr. Garcia failed to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). Mr. Garcia filed his Response (**Doc. 8**) on September 18, 2015, and Tractor Supply filed their Reply (**Doc. 12**) on October 13, 2015. The Court held a hearing on the Motion to Dismiss on December 4, 2015.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows a party to move for dismissal of a case for failure to state a claim upon which relief can be granted. Rule 8(a)(2), in turn, requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Although a court must accept all the complaint's factual allegations as true, the same is not true of legal conclusions. *See id.* Mere labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action" will not suffice. *Twombly,* 550 U.S. at 555, 127 S.Ct. 1955. "Thus, in ruling on a motion to dismiss, a court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Kan. Penn Gaming, LLC v. Collins,* 656 F.3d 1210, 1214 (10th Cir.2011).

DISCUSSION

This case turns on whether New Mexico's Compassionate Use Act (CUA") *combined* with the New Mexico Human Rights

Act provides a cause of action for Mr. Garcia. Ever-present in the background of this case is whether the Controlled Substances Act preempts New Mexico state law.

1. The Compassionate Use Act and New Mexico Human Rights Act

[1] While some states, such as Connecticut and Delaware, have included within their medical marijuana acts affirmative requirements mandating that employers accommodate medical marijuana cardholders, ***1228** New Mexico's medical marijuana act has no such affirmative language. Mr. Garcia does not dispute that the CUA by itself provides no cause of action. Thus, Mr. Garcia argues in essence that the CUA makes medical marijuana an accommodation promoted by the public policy of New Mexico, and therefore, medical marijuana is an accommodation that must be provided for by the employer under the New Mexico Human Rights Act.

Tractor Supply counters that the CUA only offers users of medical marijuana limited immunity against state criminal prosecution and imposes no duty on employers to accommodate the use of medical marijuana. While an issue of first impression in the District of New Mexico, several cases from states that have approved medical marijuana prove instructive. *Curry v. MillerCoors, Inc.,* No. 12–cv–02471–JLK, 2013 WL 4494307 (D.Colo. Aug. 21, 2013) concerned an employee with hepatitis C who used medical marijuana and failed his employer's drug test. The court held that [d]espite concern for Mr. Curry's medical condition, anti-discrimination law does not extend so far as to shield a disabled employee from the implementation of his employer's standard policies against employee misconduct. In other words, a termination for misconduct is not converted into a termination because of a disability just because the instigating misconduct somehow relates to a disability." *Id.* at *3 (internal citations omitted). A more recent District of Colorado case echoed the same reasoning: "Magistrate Judge Wang also correctly concluded that there was no basis for finding that Defendants terminated Plaintiff's employment **because of** his disability; the Complaint fails to allege a single fact to support the notion that Plaintiff's medical condition, or any accommodation for a medical condition, led to his termination." *Steele v. Stallion Rockies Ltd.,* 106 F.Supp.3d 1205 (D.Colo.2015) (emphasis in original).

Here, Mr. Garcia was not terminated because of or on the basis of his serious medical condition. Testing positive for marijuana was not because of Mr. Garcia's serious medical condition (HIV/AIDS), nor could testing positive for marijuana be seen as conduct that resulted from his serious medical condition. Using marijuana is not a manifestation of HIV/AIDS.

Tractor Supply cites two state cases and one federal case in support. However, two of the cases involved claims seeking an implied cause of action from the state medical marijuana statute itself, or relied on public policy grounds. Neither case was successful for the Plaintiff.[1] Here, however, Mr. Garcia does not dispute that the CUA itself provides no cause of action. The third case, from the California Supreme Court, more closely resembles the cause of action Mr. Garcia pleads. In *Ross v. Ragingwire Telecommunications, Inc.,* the Plaintiff suffered from back pain, used medical marijuana, failed a drug test, and was subsequently terminated. 42 Cal.4th 920, 70 Cal.Rptr.3d 382, 174 P.3d 200, 203 (2008). The Plaintiff sued under the California Fair Employment and Housing Act, which "requires employers in their hiring decisions to take into account ***1229** the feasibility of making reasonable accommodations." *Id.*, 70 Cal.Rptr.3d 382, 174 P.3d at 204. Plaintiff alleged that the employer failed to make reasonable accommodations for his disability. The California Supreme Court held that "[n]othing in the text or history of the Compassionate Use Act suggest the voters intended the measure to address the respective rights and obligations of employers and employees. The FEHA does not require employers to accommodate the use of illegal drugs." *Id.*

Mr. Garcia's strongest argument in response to the *Ross* case centers on several decisions by the New Mexico Court of Appeals holding that the Workers' Compensation Act authorizes reimbursement for medical marijuana. *See, e.g., Vialpando v. Ben's Auto. Servs.,* 331 P.3d 975, 979 (N.M.Ct.App.2014) (finding medical marijuana to be a reasonable and necessary medical treatment requiring reimbursement). These decisions point to "equivocal statements about state laws allowing marijuana use" made by the Department of Justice. *Id.* at 980. Thus, Mr. Garcia infers that it is plausible that New Mexico courts would also find medical marijuana to be a reasonable accommodation under the New Mexico Human Rights Act.

However, the Court finds Tractor Supply's rebuttal more persuasive. First, as Defendant argues, reliance on an

enforcement policy of the United States Attorney General is not law, and instead, is merely an ephemeral policy that may change under a different President or different Attorney General. Second, and more importantly, there is a fundamental difference between: (i) requiring an insurance carrier to reimburse medical treatments that have been approved by a physician in a regulated system, such as medical marijuana, and (ii) requiring that a national employer permit and accommodate an individual's marijuana use that is illegal under federal law. This second point opens an important public policy argument. Were the Court to agree with Mr. Garcia, and require Tractor Supply to modify their drug-free policy to accommodate Mr. Garcia's marijuana use, Tractor Supply, with stores in 49 states, would likely need to modify their drug-free policy for each state that has legalized marijuana, decriminalized marijuana, or created a medical marijuana program. Depending on the language of each state's statute, Tractor Supply would potentially have to tailor their drug-free policy differently for each state permitting marijuana use in some form.

In sum, the Court finds that the CUA combined with the New Mexico Human Rights Act does not provide a cause of action for Mr. Garcia as medical marijuana is not an accommodation that must be provided for by the employer. Tractor Supply did not terminate Mr. Garcia because of his serious medical condition, as marijuana use is not a manifestation of HIV/AIDS, nor is testing positive for marijuana conduct that resulted from Mr. Garcia's serious medical condition. While New Mexico state courts have found medical marijuana to be compensable under state workers' compensation laws, the Court finds a fundamental difference between requiring compensation for medical treatment and affirmatively requiring an employer to accommodate an employer's use of a drug that is still illegal under federal law.

2. The Controlled Substances Act and the CUA

Tractor Supply next argues that requiring accommodation of medical marijuana use conflicts with the Controlled Substances Act ("CSA") because it would mandate the very conduct the CSA proscribes. Several state courts have held that state ***1230** medical marijuana laws do not conflict with the CSA because the state laws merely provide limited state-law immunity from prosecution if individuals choose to engage in state-law compliant medical marijuana use. *See, e.g.,* *Ter Beek v. City of Wyoming,* 495 Mich. 1, 846 N.W.2d 531 (2014); *Qualified Patients Ass'n v. City of Anaheim,* 187 Cal.App.4th 734, 115 Cal.Rptr.3d 89 (Cal.Ct.App.2010). These courts have found that the state law does not present an obstacle to the accomplishment of the federal law and does not deny the federal government the ability to enforce the prohibition. Thus, "it is not impossible to comply with both the CSA's federal prohibition on marijuana and [the Act's] limited state-law immunity for certain medical marijuana use...." *Ter Beek,* 846 N.W.2d at 541.

[2] Yet these cases addressed only whether the CSA preempted the state-law immunity that state medical marijuana acts granted its citizens. Here, Tractor Supply's argument is more nuanced than asserting that New Mexico's CUA itself is preempted by the CSA. Rather, Tractor Supply argues that interpreting the CUA and the Human Rights Act to require the company to accommodate Mr. Garcia's marijuana use would be preempted by the CSA. Thus, a closer case is a Supreme Court of Oregon case that examined whether the plaintiff's medical marijuana use constituted an "illegal use of drugs" under the state statutory provision governing his claim for employment discrimination. *See* *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.,* 348 Or. 159, 230 P.3d 518 (2010) (en banc). The court found that under Oregon's discrimination laws, the employer was not required to accommodate the employee's use of medical marijuana under the state's disability-discrimination statute, as marijuana is an illegal drug under federal law. *See* *id.* at 536. Judge Kistler, the author of the *Emerald Steel* opinion, presented a similar argument in his concurrence in an earlier case: "[t]he fact that the state may exempt medical marijuana users from the reach of the state criminal law does not mean that the state can affirmatively require employers to accommodate what federal law specifically prohibits." *Washburn v. Columbia Forest Products, Inc.,* 340 Or. 469, 134 P.3d 161, 167–68 (2006).

The Court finds no conflict between these two lines of cases. State medical marijuana laws that provide limited state-law immunity may not conflict with the CSA. But here, Mr. Garcia does not merely seek state-law immunity for his marijuana use. Rather, he seeks the state to affirmatively require Tractor Supply to accommodate his marijuana use. Thus, the Court finds the Oregon cases closer to the fact of this case and more persuasive. To affirmatively require Tractor Supply to accommodate Mr. Garcia's illegal drug use would mandate Tractor Supply to permit the very conduct the CSA proscribes.

Accordingly, the Court finds that Defendant's Motion to Dismiss is well taken, and therefore **GRANTED**.

SO ORDERED.

All Citations

154 F.Supp.3d 1225, 32 A.D. Cases 824

Footnotes

1 *See* *Casias v. Wal–Mart Stores, Inc.,* 764 F.Supp.2d 914, 921 (W.D.Mich.2011) ("Plaintiff argues the MMMA provides him with an implied right of action. Even Mr. Casias acknowledges his chances on this theory are remote, given the strictness of the current test in Michigan case law."); *Roe v. Teletech Customer Care Management (Colorado) LCC,* 171 Wash.2d 736, 257 P.3d 586, 588 (2011) ("We hold that MUMA does not provide a private cause of action for discharge of an employee who uses medical marijuana, either expressly or impliedly, nor does MUMA create a clear public policy that would support a claim for wrongful discharge in violation of such a policy.").

359 F.Supp.3d 761
United States District Court, D. Arizona.

Carol M. WHITMIRE, Plaintiff,
v.
WAL-MART STORES INCORPORATED, Defendant.

No. CV-17-08108-PCT-JAT
|
Signed February 7, 2019

Synopsis

Background: Former employee, a customer service supervisor for retail corporation, who was terminated after a positive drug test, brought action against her former employer, alleging wrongful termination under the Arizona Medical Marijuana Act (AMMA), the Arizona Civil Rights Act (ACRA), and the Arizona Employment Protection Act (AEPA), discrimination under the AMMA, and retaliation under the AEPA. Employer moved for summary judgment and employee requested that the court's ruling be deferred.

Holdings: The District Court, James A. Teilborg, Senior District Judge, held that:

[1] as a matter of apparent first impression, the AMMA's anti-discrimination provision creates an implied private cause of action for its alleged violation;

[2] reopening of discovery to permit either party to obtain an expert's opinion on the issue of whether former employee's urine screen showed marijuana metabolites present in scientifically sufficient concentration to cause impairment, was not warranted;

[3] provisions of Arizona's Drug Testing of Employees Act (DTEA) prohibiting a cause of action against an employer who has established a policy and initiated a testing program based on the employer's good faith belief that an employee had an impairment while working on the employer's premises or during hours of employment, did not implicitly amend or repeal sections of the AMMA, in violation of the Voter Protection Act;

[4] employer failed to meet its burden under the DTEA and AMMA of showing that employee's drug screen sufficiently established the presence of metabolites or components of marijuana in a scientifically sufficient concentration to cause impairment;

[5] employee failed to show that smoking medical marijuana was required in the prudent judgment of the medical profession, and thus, the side effects from smoking medical marijuana could not constitute a "disability" under the ACRA;

[6] employee established a causal connection between her report of accident and injury to her employer and her termination, as required for a prima facie case of retaliation under the AEPA; and

[7] employee failed to produce sufficient evidence from which a reasonable factfinder could conclude that employer's proffered reason for terminating her, i.e., that it had a good faith basis to believe she was impaired by marijuana at work based on the results of her positive drug test, was pretext for retaliation, in violation of the AEPA.

Application for deferral denied; motion for summary judgment granted in part and denied in part.

Procedural Posture(s): Motion for Summary Judgment; Other; Motion to Exclude Evidence or Testimony.

West Headnotes (52)

[1] Controlled Substances Medical necessity or assistance

Under the Arizona Medical Marijuana Act (AMMA) a qualifying patient diagnosed with a debilitating medical condition may obtain a registry card from the Arizona Department of Health Services to buy and use medical marijuana. Ariz. Rev. Stat. Ann. § 36-2801(3), (13).

[2] Action Statutory rights of action

Controlled Substances Medical necessity or assistance

The Arizona Medical Marijuana Act's (AMMA) anti-discrimination provision creates an implied private cause of action for its alleged violation; although provision does not provide an express cause of action, it imposes on employers an affirmative obligation to abide by the anti-discrimination mandate of the statute, there is no independent enforcement mechanism against employers for violations of provision, there is no indication of legislative intent to deny a private cause of action, and a private cause of action is not inconsistent with the underlying purposes of the AMMA. Ariz. Rev. Stat. Ann. § 36-2813(B).

2 Cases that cite this headnote

[3] **Federal Courts** Anticipating or predicting state decision

When a federal court must determine a novel issue of state law, the court attempts to predict how the state's highest court would decide the issue.

[4] **Action** Statutory rights of action

When a statute does not expressly create a cause of action to enforce its terms, that statutory silence is not dispositive.

[5] **Action** Statutory rights of action

Determining whether a statute implicitly creates a private right of action requires considering the context of the statutes, the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law.

[6] **Controlled Substances** Medical necessity or assistance

The Arizona Medical Marijuana Act (AMMA) makes no exception to its anti-discrimination provision for employers who maintain drug-free workplace policies. Ariz. Rev. Stat. Ann. § 36-2801 et seq.

[7] **Federal Civil Procedure** Alternate, Hypothetical and Inconsistent Claims

Former employee's claim that her former employer terminated her in violation of the Arizona Employment Protection Act (AEPA), by firing her because of her positive drug screen in violation of the public policy set forth in the Arizona Medical Marijuana Act (AMMA), was duplicative of employee's AMMA discrimination claim, and thus, dismissal of AEPA claim was warranted.

Ariz. Rev. Stat. Ann. §§ 23-1501(A)(3)(b), 36-2813(B).

1 Cases that cite this headnote

[8] **Federal Civil Procedure** Time for consideration of motion

Rule permitting the court to defer considering a motion for summary judgment applies where the nonmoving party has not had the opportunity to discover information that is essential to its opposition. Fed. R. Civ. P. 56(d).

[9] **Federal Civil Procedure** Time for consideration of motion

Rule permitting the court to defer considering a motion for summary judgment is not meant to re-open discovery in general. Fed. R. Civ. P. 56(d).

[10] **Federal Civil Procedure** Time for consideration of motion

The party seeking a continuance under rule permitting the court to defer considering a motion for summary judgment bears the burden of proffering facts sufficient to satisfy the requirements of the rule. Fed. R. Civ. P. 56(d).

[11] **Federal Civil Procedure** Time for consideration of motion

In ruling on a motion to defer consideration of a summary judgment motion, the court

considers whether the movant diligently pursued its previous discovery opportunities, and whether the movant has shown how allowing additional discovery would preclude summary judgment. Fed. R. Civ. P. 56(d).

[12] **Federal Civil Procedure** Proceedings to obtain

Reopening of discovery to permit either party to obtain an expert's opinion on the issue of whether former employee's urine screen showed marijuana metabolites present in scientifically sufficient concentration to cause impairment, was not warranted, in employee's action asserting claims including discrimination under the Arizona Medical Marijuana Act (AMMA); although employer's counsel appeared to mislead employee's counsel about whether employer would argue about the level of metabolites in employee's urine, employee's counsel did not reduce any agreement on the issue to a formal stipulation, nor use a recognized discovery vehicle to elicit such admission, and both parties had ample opportunity to retain expert witnesses, and their failure to do so was at their own peril. Ariz. Rev. Stat. Ann. § 36-2813(B); Fed. R. Civ. P. 56(d).

[13] **Federal Civil Procedure** Failure to respond; sanctions

Last minute or eleventh hour discovery which results in insufficient time to undertake additional discovery and which requires an extension of the discovery deadline is disfavored, and may result in denial of an extension, exclusion of evidence, or the imposition of other sanctions.

[14] **Evidence** Matters involving scientific or other special knowledge in general

Evidence Necessity and sufficiency

District courts are charged with the duty to act as gatekeepers, as the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

[15] **Evidence** Bodily and mental condition

Evidence Necessity and sufficiency

Employer failed to provide the requisite foundation for portions of declaration of its personnel coordinator, stating that former employee's urinalysis showed the maximum reading the test could measure for marijuana, and that her positive drug screen indicated that she was impaired by marijuana during her shift that same day; employer did not provide personnel coordinator's curriculum vitae nor any indication that she had the requisite knowledge, skill, experience, training, or education to render opinions regarding the results of employee's drug test, and personnel coordinator cited to no sources upon which she relied, nor set forth any basis for her statements from which the court could determine whether or not her testimony was reliable. Fed. R. Evid. 702.

[16] **Federal Civil Procedure** Evidentiary matters

Portions of declaration given by personnel coordinator, that former employee's urinalysis showed the maximum reading the test could measure for marijuana, and that her positive drug screen indicated that she was impaired by marijuana during her shift that same day, fell within the purview of specialized, scientific knowledge, and thus, was required to be disclosed as expert testimony. Fed. R. Civ. P. 26(a)(2)(A); Fed. R. Evid. 702.

[17] **Evidence** Matters of opinion or facts

A party may not attempt to evade the requirements of rule governing expert testimony through the simple expedient of proffering an expert in lay witness clothing. Fed. R. Evid. 702.

[18] **Federal Civil Procedure** Failure to respond; sanctions

Exclusion of portions of declaration given by personnel coordinator for employer, that former employee's urinalysis showed the maximum reading the test could measure for marijuana, and that her positive drug screen indicated that she was impaired by marijuana during her shift that same day, was an appropriate remedy for failing to fulfill disclosure requirements, in employee's action alleging discrimination under the Arizona Medical Marijuana Act (AMMA); employer failed to show that its failure to comply was substantially justified and it prejudiced employee by depriving her of the opportunity to prepare for effective cross examination and arrange for expert testimony on the issue of whether the level of metabolites present in her drug screen indicated that she was impaired at work. Ariz. Rev. Stat. Ann. § 36-2813(B); Fed. R. Civ. P. 26(a), 37(c)(1).

[19] **Federal Civil Procedure** Failure to respond; sanctions

In determining whether evidence should be excluded, for failure to make a timely disclosure, the burden is on the party facing the sanction to demonstrate that the failure to comply with rule governing disclosures is substantially justified or harmless. Fed. R. Civ. P. 26(a), 37(c)(1).

[20] **Federal Civil Procedure** Failure to respond; sanctions

The court has wide latitude to issue sanctions for failure to make required disclosures. Fed. R. Civ. P. 26(a), 37(c)(1).

[21] **Federal Civil Procedure** Matters considered

District court would not consider evidence submitted by former employee in rebuttal to employer's contention that employee's positive screen for marijuana indicated that she was impaired by marijuana during her shift that same day, in ruling on employer's motion for summary judgment on employee's claims asserting, among other things, discrimination under the Arizona Medical Marijuana Act (AMMA), where court was excluding employer's contention. Ariz. Rev. Stat. Ann. § 36-2813(B).

[22] **Federal Civil Procedure** Matters considered

Former employee's arguments that the "safety-sensitive" exception of Arizona's Drug Testing of Employees Act (DTEA) was not supported by the law or the evidence on the grounds that employer already conceded that employee's position was not safety-sensitive, was irrelevant to employee's action alleging, among other things, discrimination in violation of the Arizona Medical Marijuana Act (AMMA) and, thus, would not be considered by district court in resolving employer's motion for summary judgment, where the court previously explicitly precluded any argument by employer that employee was in a safety sensitive position. Ariz. Rev. Stat. Ann. §§ 23-493.06(7), 36-2813(B).

[23] **Labor and Employment** Validity

Provisions of Arizona's Drug Testing of Employees Act (DTEA) prohibiting a cause of action against an employer who has established a policy and initiated a testing program based on the employer's good faith belief that an employee had an impairment while working on the employer's premises or during hours of employment, did not implicitly amend or repeal sections of the Arizona Medical Marijuana Act (AMMA), in violation of the Voter Protection Act; read together, an employer could not be sued for firing a registered qualifying patient based on the employer's good-faith belief that the employee was impaired by marijuana at work, where that belief was based on a drug test sufficiently establishing the presence of metabolites or components of marijuana sufficient to cause impairment. Ariz. Const. art. IV, § 1; Ariz. Rev. Stat. Ann. §§ 23-493(6), 23-493.06(A)(6), 36-2813(B)(2), 36-2814(A)(3), 36-2814(B).

[24] **Statutes** By inconsistent or repugnant statute

A statute can be implicitly repealed or amended by another through repugnancy or inconsistency.

[25] **Statutes** Other Statutes

Whenever possible, Arizona courts adopt a construction of a statute that reconciles it with other statutes, giving force to all statutes involved.

[26] **Statutes** Implied amendment

Statutes By inconsistent or repugnant statute

Although the finding of an implied repeal or amendment of a statute is generally disfavored, it is required when conflicting statutes cannot be harmonized to give each effect and meaning.

[27] **Labor and Employment** Other Particular Rights or Contexts

Under the Arizona's Drug Testing of Employees Act (DTEA) and the Arizona Medical Marijuana Act (AMMA), an employer cannot be sued for suspending or firing a registered qualifying patient based on the employer's good faith belief that the employee was impaired by marijuana at work, where that belief is based on a drug test which establishes the presence of metabolites or components of marijuana in sufficient concentration to cause impairment. Ariz. Rev. Stat. Ann. §§ 23-493(6), 23-493.06(A)(6), 36-2813(B)(2), 36-2814(A)(3), 36-2814(B).

[28] **Labor and Employment** Presumptions and burden of proof

In presenting an affirmative defense under Arizona's Drug Testing of Employees Act (DTEA), a defendant bears the burden of proving that it had a good faith belief that a plaintiff was impaired by marijuana at work. Ariz. Rev. Stat. Ann. §§ 23-493(6), 23-493.06(A)(6).

[29] **Labor and Employment** Exercise of rights or duties; retaliation

Employer failed to meet its burden under Arizona's Drug Testing of Employees Act (DTEA) and the Arizona Medical Marijuana Act (AMMA) of showing that former employee's drug screen sufficiently established the presence of metabolites or components of marijuana in a scientifically sufficient concentration to cause impairment; proving impairment based on the results of a drug screen was a scientific matter requiring expert testimony, and without expert testimony establishing that employee's drug screen showed marijuana metabolites or components in a sufficient concentration to cause impairment, employer was unable to prove that employee's drug screen gave it a good faith basis to believe that employee was impaired at work. Ariz. Rev. Stat. Ann. §§ 23-493(6), 23-493.06(A)(6), 36-2813(B)(2), 36-2814(A)(3), 36-2814(B).

[30] **Federal Civil Procedure** Motion

District courts possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence. Fed. R. Civ. P. 56(f).

[31] **Federal Civil Procedure** Motion

A district court may grant summary judgment without notice if the losing party has had a full and fair opportunity to ventilate the issues involved in the motion. Fed. R. Civ. P. 56(f).

[32] **Federal Civil Procedure** Motion

District court would sua sponte grant summary judgment in part to former employee on the question of liability on her claim of discrimination under the Arizona Medical Marijuana Act (AMMA); the court issued an order which asked the parties to provide supplemental briefing discussing, in part, why

employee should or should not be entitled to summary judgment on her claim under the AMMA, stating that there was no evidence indicating that employee was impaired at work or expert testimony establishing that the level of metabolites present in her positive drug screen demonstrated that marijuana was present in her system in a sufficient concentration to cause impairment, and despite such admonition, employer did not come forward with any evidence establishing that employee was impaired. Ariz. Rev. Stat. Ann. § 36-2813(B); Fed. R. Civ. P. 56(f).

[33] **Civil Rights** Practices prohibited or required in general; elements

The ADA standards for disability discrimination claims apply to similar claims brought under the Arizona Civil Rights Act (ACRA), as the ACRA is modeled after federal employment discrimination laws. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.; Ariz. Rev. Stat. Ann. § 41-1463.

[34] **Civil Rights** Practices prohibited or required in general; elements

In order to establish a prima facie case of disability discrimination under the Arizona Civil Rights Act (ACRA), a plaintiff must demonstrate: (1) that she is disabled, (2) that she is qualified to perform the essential functions of her job with or without a reasonable accommodation, and (3) that she was discharged because of her disability. Ariz. Rev. Stat. Ann. § 41-1463.

[35] **Civil Rights** Employment practices

Should a plaintiff establish a prima facie case of disability discrimination under the Arizona Civil Rights Act (ACRA), then the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its employment action. Ariz. Rev. Stat. Ann. § 41-1463.

1 Cases that cite this headnote

[36] **Civil Rights** Employment practices

If a defendant sets forth a legitimate non-discriminatory reason for taking an adverse employment action against a plaintiff alleging disability discrimination under the Arizona Civil Rights Act (ACRA), then the plaintiff must show that the defendant's proffered reason is merely pretext for unlawful disability discrimination. Ariz. Rev. Stat. Ann. § 41-1463.

[37] **Civil Rights** Employment practices

An employee alleging disability discrimination under the Arizona Civil Rights Act (ACRA) bears the ultimate burden of proving that she is disabled. Ariz. Rev. Stat. Ann. § 41-1463.

[38] **Federal Civil Procedure** Employees and Employment Discrimination, Actions Involving

For summary judgment to be appropriate on a claim of disability discrimination under the Arizona Civil Rights Act (ACRA), there must be no genuine issue of material fact regarding whether the plaintiff has an impairment that substantially limits a major life activity, has a record of such an impairment, or is regarded as having such an impairment. Ariz. Rev. Stat. Ann. § 41-1461(4).

1 Cases that cite this headnote

[39] **Civil Rights** Impairments in general; major life activities

Civil Rights Perceived disability; "regarded as" claims

Under the Americans with Disabilities Act (ADA), the relevant inquiry in determining whether an employee has a disability is whether the actual or perceived impairment is objectively transitory and minor, not whether the employer subjectively believed the impairment to be transitory and minor. 29 C.F.R. § 1630.2(l).

1 Cases that cite this headnote

[40] **Civil Rights** Alcohol or drug use

Former employee's alleged impairment, i.e., the effects of medical marijuana use, appeared to be "transitory and minor," as would bar her from meeting the Arizona Civil Rights Act's (ACRA) definition of "disabled"; employee alleged that she smoked medical marijuana in the evening just before bed in order to be able to sleep and strongly preferred medical marijuana over hydrocodone because she had no side effects when she woke up, while the hydrocodone made her groggy and feel "not there" in the mornings, she asserted that she did not come to work until 12 hours past her last use of medical marijuana on the day she was drug-tested, that she had never been impaired by marijuana during her hours of employment, and that there was no allegation that she was observed to be impaired at work. Ariz. Rev. Stat. Ann. § 41-1461(2)(b).

[41] **Civil Rights** Alcohol or drug use

Former employee failed to show that smoking medical marijuana was required in the prudent judgment of the medical profession, and thus, the side effects from smoking medical marijuana could not constitute a "disability" under the Arizona Civil Rights Act (ACRA); marijuana was classified as a Schedule 1 controlled substance under the Controlled Substances Act, although employee averred that she preferred medical marijuana to hydrocodone, she did not demonstrate that no other equally effective alternatives existed which lacked medical marijuana's side effects, but rather, she could likely use another pain medication which might not have the same impairing effects as medical marijuana or hydrocodone. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 202, 21 U.S.C.A. § 812(b)(1); Ariz. Rev. Stat. Ann. § 41-1461(4).

1 Cases that cite this headnote

[42] **Labor and Employment** Exercise of Rights or Duties; Retaliation

In order to establish a prima facie case of retaliation under the Arizona Employment Protection Act (AEPA), Plaintiff must show: (1) that she engaged in a protected activity, (2) that she suffered an adverse employment action, and (3) that there is a causal link between the two. Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii).

5 Cases that cite this headnote

[43] **Labor and Employment** Protected activities

Under the Arizona Employment Protection Act (AEPA), the filing of a workers' compensation claim is a protected activity. Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii).

1 Cases that cite this headnote

[44] **Labor and Employment** Protected activities

Former employee engaged in protected activity under the Arizona Employment Protection Act (AEPA) by reporting her accident and injury resulting from the accident to her employer; although employee did not personally file a workers' compensation claim, she did fill out an incident report on the date of her accident, which began employer's investigation into her accident, and which ultimately resulted in the generation of a workers' compensation claim by employer on employee's behalf, and employee also requested additional medical treatment for her injuries beyond her initial clinic visit. Ariz. Rev. Stat. Ann. §§ 23-908(E), 23-1501(A)(3)(c)(iii).

[45] **Labor and Employment** Exercise of rights or duties; retaliation

Former employee established a causal connection between her report of accident and injury to her employer and her termination,

as required for a prima facie case of retaliation under the Arizona Employment Protection Act (AEPA); employer's argument that it was not aware that employee submitted a workers' compensation claim when it terminated her employment was disingenuous, given that employer filed employee's workers' compensation claim on her behalf, an e-mail chain between employer's personnel coordinator and its market asset protection manager clearly demonstrated that employer knew of employee's workers' compensation claim, and temporal proximity between employee's injury, her request for additional medical treatment, and her termination supported an inference of causation.

Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii).

1 Cases that cite this headnote

[46] **Labor and Employment** Causation in general

To prove a causal link between an employee's purported protected activity and an adverse employment action, as required to make out a prima facie case of retaliation under the Arizona Employment Protection Act (AEPA), the employee must show that the employer's retaliatory motive played a part in the employment action. Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii).

4 Cases that cite this headnote

[47] **Labor and Employment** Causation in general

A plaintiff alleging retaliation under the Arizona Employment Protection Act (AEPA) must make some showing sufficient for a reasonable trier of fact to infer that the defendant was aware that the plaintiff had engaged in protected activity.

Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii).

1 Cases that cite this headnote

[48] **Courts** Operation and effect in general

Federal Courts Sources of authority; assumptions permissible

District court could cite unpublished decision of the Arizona Court of Appeals for persuasive value, on issue of what framework to apply to retaliatory discharge claim under the Arizona Employment Protection Act (AEPA), although it was a memorandum decision, and thus, not precedential, where it was issued on or after January 1, 2015, no opinion adequately addressed the issue before the court, and the citation was not to a depublished opinion or a depublished portion of an opinion. Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii); A.R.S. Sup.Ct.Rules, Rule 111.

[49] **Labor and Employment** Presumptions and burden of proof

If plaintiff provides sufficient evidence to make out a prima facie case of retaliation, under the Arizona Employment Protection Act (AEPA), then the burden shifts to the defendant to articulate some legitimate, non-retaliatory reason for its actions. Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii).

[50] **Labor and Employment** Presumptions and burden of proof

If a defendant sets forth a legitimate, non-retaliatory reason for taking an adverse action against a plaintiff alleging retaliation in violation of the Arizona Employment Protection Act (AEPA), then the plaintiff must show that the defendant's proffered reason is merely pretext for the underlying retaliatory motive. Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii).

[51] **Labor and Employment** Motive and intent; pretext

Employer met its burden of articulating a legitimate, non-retaliatory reason for terminating former employee, on employee's claim that she was terminated for engaging in protected activity under the workers' compensation statutes, in violation of the Arizona Employment Protection Act (AEPA); employer stated that employee was

terminated because employer had a good faith basis to believe that employee was impaired by marijuana at work, based on the results of a positive drug test. Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii).

1 Cases that cite this headnote

[52] Labor and Employment Motive and intent; pretext

Former employee failed to produce sufficient evidence from which a reasonable factfinder could conclude that employer's proffered reason for terminating her, i.e., that it had a good faith basis to believe she was impaired by marijuana at work based on the results of her positive drug test, was pretext for retaliation, in violation of the Arizona Employment Protection Act (AEPA); employee did not offer any evidence suggesting that employer did not honestly believe its proffered reason, and at most, there was a temporal proximity between employee's protected activity under Arizona's workers' compensation statutes and her termination, which was not enough to sustain a claim for retaliatory discharge. Ariz. Rev. Stat. Ann. § 23-1501(A)(3)(c)(iii).

Attorneys and Law Firms

***769** Joshua William Carden, Joshua Carden Law Firm PC, Scottsdale, AZ, for Plaintiff.

Steven Gregory Biddle, Stanley Ray Foreman, Jr., Littler Mendelson PC, Phoenix, AZ, for Defendant.

Oramel Horace Skinner, Office of the Attorney General, Phoenix, AZ, for Amicus State of Arizona.

ORDER

James A. Teilborg, Senior United States District Judge

Pending before the Court is Defendant Wal-Mart Stores, Inc.'s ("Defendant") Motion for Summary Judgment (Doc. 32) and Plaintiff Carol M. Whitmire's ("Plaintiff") Rule 56(d) Application (Doc. 35 at 11–13). For the reasons set forth below, Plaintiff's Rule 56(d) Application is denied, and Defendant's Motion for Summary Judgment is granted in part and denied in part.

I. BACKGROUND

On or about February 20, 2008, Defendant hired Plaintiff Carol M. Whitmire ("Plaintiff") as a Cashier in its Show Low, Arizona store. (Docs. 36 ¶ 1; 33-1 at 11–12, Whitmire Depo. at 35: 22-36:3, 38:1-13). During her new-hire orientation, Plaintiff received training on Defendant's Alcohol and Drug Abuse Policy, as well as its Discrimination and Harassment Prevention Policy. (Docs. 33 ¶ 2; 36 ¶ 2). Plaintiff also acknowledged and signed Walmart's Alcohol and Drug Abuse Policy, indicating her understanding that if "testing indicates the presence of illegal drugs ... in [her] body in any detectable amount, [she] w[ould] be terminated." (Docs. 33 ¶ 5; 33-3 at 9; 36 ¶ 5). Plaintiff further acknowledged the drug testing policies and procedures described in this Alcohol and Drug Abuse Policy, "and the use by Wal-Mart of results thereof in further determining [her] continued employment." (Doc. 33-3 at 9).

In December 2013, after working as a Cashier for approximately four years, Plaintiff was promoted to the position of Customer Service Supervisor. (Docs. 33 ¶ 8; 36 ¶ 8). On December 19, 2013, Plaintiff acknowledged that she had the ability to perform the essential functions of this Customer Service Supervisor position either with or without a reasonable accommodation. (Docs. 33 ¶ 9; 33-3 at 25–27; 36 ¶ 9). These essential functions include "maintaining a safe shopping environment," "ensuring a safe work environment," "[o]perat[ing] equipment, such as ***770** cash registers and related tools, to process Customer purchases," handling money, and "[s]upervis[ing] Associates." (Docs. 33 ¶ 10; 33-3 at 25; 36 ¶ 10).

In or about the end of 2013 or beginning of 2014, Plaintiff obtained an Arizona medical marijuana card, which she maintained during her employ at Walmart. (Docs. 33 ¶¶ 12–13; 36 ¶¶ 12–13). Plaintiff claims she smokes medical marijuana just before bed as a sleep aid and to help treat the chronic pain she suffers due to arthritis and a prior shoulder surgery. (Doc. 36 ¶¶ 34–36, 39–40). Plaintiff also asserts that she has never brought marijuana to work or used or been impaired by it during her hours of employment. (Doc. 36 ¶ 38).

In January 2016, Defendant modified its Alcohol and Drug Abuse Policy to expressly state that employees are prohibited from "[r]eporting to work under the influence of drugs or alcohol, including medical marijuana." (Docs. 33-3 at 12; 36 ¶ 2). Defendant's amended Alcohol and Drug Abuse Policy also requires employees to submit to a drug or alcohol test if they suffer a workplace injury "that requires medical treatment from an outside health care provider." (Doc. 33-3 at 14).

In March 2016, Plaintiff transferred to Defendant's Taylor, Arizona store. (Docs. 36 ¶ 1; 33-1 at 11–12, Whitmire Depo. at 35: 22-36:3, 38:1-13). While working on May 21, 2016 in the Taylor store, a bag of ice fell on Plaintiff's wrist as she was leveling the bags in the ice machine. (Docs. 33 ¶ 16; 36 ¶ 16). Plaintiff reported this incident to Management and filed an Associate Incident Report with Defendant that same day. (Docs. 33 ¶ 16; 36 ¶ 16; 36-1 at 12, 32). However, Plaintiff finished her shift and did not seek any medical attention on May 21, 2016 because she did not feel the incident was serious enough. (Docs. 33 ¶ 17; 36 ¶ 17; 36-1 ¶ 15). Defendant's Associate Accident Review Form indicates that Defendant did not find Plaintiff responsible for the incident. (Doc. 36-1 at 32 ("Not conclusive that the associate did not follow safe work practices[.] ... This could have just as easily happened to a customer.")).

On May 23, 2016, Plaintiff notified Human Resources of continued swelling and pain in her wrist. (Docs. 33 ¶ 18; 36 ¶ 18). Just before 2:00 a.m. on May 24, 2016, Plaintiff smoked medical marijuana prior to going to sleep. (Docs. 33 ¶ 19; 36 ¶ 19; 36-1 ¶ 18). Later that same day (May 24, 2016), Plaintiff clocked in to her scheduled shift at 2:00 p.m., and told Personnel Coordinator Debra Vaughn that her wrist still hurt. (Docs. 33 ¶¶ 20–21; 36 ¶¶ 20–21). Pursuant to Walmart policy, Ms. Vaughn directed Plaintiff to an urgent care clinic for a wrist examination and post-accident urine drug test. (Docs. 33 ¶ 21; 36 ¶ 21). Except for this visit to the urgent care clinic on May 24, 2016, Plaintiff never missed any time at work as a result of her wrist injury. (Docs. 33 ¶ 31; 36 ¶ 31).

At the urgent care clinic, Plaintiff's arm was x-rayed, and she submitted a urine sample for the drug test. (Docs. 33 ¶ 22; 36 ¶ 22). Following this drug screen, Plaintiff claims that she returned to work and informed Ms. Vaughn that the clinic had not taken a copy of her medical marijuana card, even after Plaintiff informed the clinic of her medical marijuana usage and cardholder status. (Doc. 36 ¶¶ 43–44). At this time, Plaintiff asserts that Ms. Vaughn took a copy of the medical marijuana card. (Doc. 36 ¶ 44). This was the first time that Plaintiff informed anyone at Walmart that she had a medical marijuana card. (Docs. 33 ¶ 14; 36 ¶¶ 14, 45). Plaintiff also never informed anyone at Walmart that she had a disability. (Docs. 33 ¶ 15; 36 ¶ 15).

Plaintiff's May 24, 2016 drug screen tested positive for marijuana metabolites at a quantitative value of greater than 1000 ***771** ng/ml. (Doc. 33-3 at 33).[1] In a signed declaration, Ms. Vaughn stated that, "upon reasonable belief, Plaintiff's May 24, 2016 positive test result for marijuana indicated that she was impaired by marijuana during her shift that same day." (Doc. 33-3 at 23, Vaughn Decl. ¶ 14).[2] On May 31, 2016 (prior to the test result being reported to Defendant), Plaintiff had a follow-up interview with a Medical Review Officer to discuss her positive drug screen, at which Plaintiff told the Medical Review Officer that she had an Arizona-issued medical marijuana card. (Docs. 36 ¶ 46; 36-1 at 26). The Medical Review Officer verified Plaintiff's medical marijuana card that same day. (Doc. 36-1 at 26).

In June, Plaintiff received a letter dated June 7, 2016 from the Industrial Commission of Arizona alerting Plaintiff that her employer's insurance carrier had been notified of her workers' compensation claim. (Doc. 36-1 at 10). That same month, Plaintiff received two Notices of Claim Status from the Industrial Commission of Arizona regarding her workers' compensation claim, both of which were dated June 22, 2016. (*Id.* at 14, 16). One of these letters indicated that Plaintiff's claim was accepted, but that no compensation would be paid. (*Id.* at 14). The other letter stated that Plaintiff's injury had not resulted in permanent disability, and indicated that temporary compensation and active medical treatment terminated on May 24, 2016 because "claimant was discharged." (*Id.* at 16).

Following the injury-causing incident on May 21, 2016, Plaintiff continued working full-time until she was suspended due to her positive drug test on July 4, 2016. (Doc. 36 ¶¶ 25, 49). On July 22, 2016 Defendant terminated Plaintiff, only citing her positive drug test as the reason for her termination. (Docs. 33 ¶ 26; 33-3 at 35; 36 ¶ 26). Plaintiff admits that she has no evidence that Defendant terminated her because of her status as a medical marijuana cardholder. (Docs. 33 ¶ 33; 36 ¶ 33). Aside from her termination, Plaintiff does not feel that Defendant discriminated against her in any way. (Docs. 33 ¶ 28; 36 ¶ 28).

On March 22, 2017, Plaintiff dual-filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Arizona Attorney General's

Office, Civil Rights Division. (Docs. 36 ¶ 73; 36-1 at 22). After receiving her Notice of Right to Sue from the Arizona Attorney General's Office on June 6, 2017, (Docs. 36 ¶ 74; 36-1 at 24), Plaintiff filed her Complaint on June 9, 2017, (Doc. 1). Plaintiff's Complaint alleges that she was wrongfully terminated and/or discriminated against in violation of the Arizona Medical Marijuana Act ("AMMA"), A.R.S. § 36-2813(B), the Arizona Civil Rights Act ("ACRA"), A.R.S. § 41-1463(B), the Arizona Employment Protection Act ("AEPA"), A.R.S. § 23-1501(A)(3)(b), and the Arizona workers' compensation statutes, A.R.S. §§ 23-901, *et seq*. (Doc. 1 at 1, 4–6).[3] Defendant filed an Answer on August ***772** 11, 2017 denying that it wrongfully terminated, discriminated against, or engaged in any conduct toward Plaintiff creating liability. (Doc. 6 at 1). In its Answer, Defendant also alleged as an affirmative defense that it "has established a policy and implemented a drug testing program in compliance with Arizona law, so its actions toward Plaintiff are protected from litigation under A.R.S. § 23-493.06," Arizona's Drug Testing of Employees Act ("DTEA"). (*Id.* at 9).

On February 5, 2018, Defendant responded to Plaintiff's First Set of Interrogatories, stating that "Defendant does not contend Plaintiff was employed in a safety-sensitive position as defined under Arizona law." (Docs. 15; 36-1 at 74–75). However, Defendant thereafter filed a Motion for Summary Judgment which argued, in part, that Plaintiff was in a safety sensitive position, (Doc. 20), and supplemented its interrogatory answer to say the same, (Doc. 28). As a result, the parties attended a Discovery Dispute Hearing on August 22, 2018, at which the Court ordered that Defendant's supplemental response to its interrogatory answer (Doc. 28) be struck as untimely, and precluded any argument by Defendant that Plaintiff was in a safety sensitive position. (Doc. 31). The Court also struck Defendant's Motion for Summary Judgment (Doc. 20), Plaintiff's Response (Doc. 24), and Defendant's Reply (Doc. 29). (Doc. 31).

On August 30, 2018, Defendant re-filed its Motion for Summary Judgment (Doc. 32), to which Plaintiff filed a Response and Rule 56(d) Application (Doc. 35) on October 1, 2018. On October 18, 2018, Defendant filed a Reply in support of its Motion for Summary Judgment. (Doc. 37).[4] After hearing oral argument on November 13, 2018, the Court issued an Order on November 21, 2018 declining to rule on Defendant's Motion for Summary Judgment (Doc. 32) until it received supplemental briefing on: (1) why the Court should or should not hold that sections 23-493(6) and 23-493.06(A)(6) of the DTEA unconstitutionally amend or implicitly repeal sections 36-2813(B)(2) and 36-2814(A)(3) of the AMMA; and (2) if the Court does find these sections of the DTEA unconstitutional under the Voter Protection Act, why Plaintiff should or should not be entitled to summary judgment on her claim under the AMMA pursuant to Fed. R. Civ. P. 56(f). (Doc. 44). The parties each filed briefs addressing these issues on December 7, 2018. (*See* Docs. 48; 49).

On November 21, 2018, Plaintiff filed a Notice of Constitutional Question (Doc. 45) pursuant to Fed. R. Civ. P. 5.1(a) and certified that she served a copy of this Notice on the Attorney General for the State of Arizona via certified mail, return receipt requested on that same date. The Court served its Certification of Constitutional Question (Doc. 46) in accordance with Fed. R. Civ. P. 5.1(b) and 28 U.S.C. § 2403(b) via certified mail on the Attorney General for the State of Arizona on November 27, 2018. The Attorney General did not intervene within sixty days from the date Plaintiff filed her Notice of Constitutional Question—the deadline set in the Court's Certification Order in accordance with Fed. R. Civ. P. 5.1(c). (Doc. 46 at 2). However, the State of Arizona did enter an appearance as a proposed *amicus* on January 22, 2019. (Docs. 53; 54). Finding that allowing the State of Arizona's ***773** proposed *amicus curiae* brief in support of no party would aid the Court in resolving the pending matters, the Court granted the State of Arizona's Motion for Leave to File Amicus Curiae Brief (Doc. 54) on January 23, 2019. (Doc. 55).[5] The Court now rules on Defendant's Motion for Summary Judgment (Doc. 32) and Plaintiff's Rule 56(d) Application (Doc. 35 at 11–13).

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A party asserting that a fact cannot be or is genuinely disputed must support that assertion by ... citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits, or declarations, stipulations ... admissions, interrogatory answers, or other materials," or by "showing that materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.* 56(c)(1)(A-B). Thus, summary judgment is mandated "against a

party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Initially, the movant bears the burden of demonstrating to the Court the basis for the motion and the elements of the cause of action upon which the non-movant will be unable to establish a genuine issue of material fact. *Id.* at 323, 106 S.Ct. 2548. The burden then shifts to the non-movant to establish the existence of material fact. *Id.* A material fact is any factual issue that may affect the outcome of the case under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts" by "com[ing] forward with 'specific facts showing that there is a genuine issue for trial.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (quoting Fed. R. Civ. P. 56(e)). A dispute about a fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Liberty Lobby, Inc.*, 477 U.S. at 248, 106 S.Ct. 2505. The non-movant's bare assertions, standing alone, are insufficient to create a material issue of fact and defeat a motion for summary judgment. *Id.* at 247–48, 106 S.Ct. 2505. However, in the summary judgment context, the Court construes all disputed facts in the light most favorable to the non-moving party. *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir. 2004).

At the summary judgment stage, the Court's role is to determine whether there is a genuine issue available for trial. There is no issue for trial unless there is sufficient evidence in favor of the non-moving party for a jury to return a verdict for the non-moving party. *Liberty Lobby, Inc.*, 477 U.S. at 249–50, 106 S.Ct. 2505. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* (citations omitted).

III. ANALYSIS

Defendant moves for complete summary judgment on Plaintiff's lawsuit, claiming ***774** there is no genuine issue of material fact on any of Plaintiff's claims. (Doc. 32 at 1, 16). In opposition, Plaintiff asks that the Court deny summary judgment on all counts and enter partial judgment for Plaintiff on liability on her AMMA and AEPA claims pursuant to Fed. R. Civ. P. 56(f). (Doc. 35 at 1). Alternatively, Plaintiff requests that the Court's ruling be deferred under Fed. R. Civ. P. 56(d). (*Id.* at 11–13, 17). The Court now addresses each of Plaintiff's claims, and all related arguments, in turn.

A. Discrimination under the AMMA, and Wrongful Termination under the AMMA and AEPA

Plaintiff alleges that Defendant discriminated against her in violation of the AMMA, A.R.S. § 36-2813(B), by suspending her without pay and then terminating her because of her positive drug screen. [6] (Doc. 1 at 3–5). Plaintiff also contends that Defendant wrongfully terminated her in violation of the AEPA, A.R.S. § 23-1501(A)(3)(b), by firing her because of her positive drug screen in violation of the public policy set forth in A.R.S. § 36-2813(B) of the AMMA. [7] (Doc. 1 at 4).

1. The AMMA

[1] In the November 2010 general election, Arizona voters enacted the AMMA, A.R.S. § 36-2801 *et seq.*, by ballot initiative. *State v. Gear*, 239 Ariz. 343, 372 P.3d 287, 288 (2016). Under the AMMA "a 'qualifying patient' diagnosed with a 'debilitating medical condition' may obtain a registry card from the Arizona Department of Health Services" to buy and use medical marijuana. [8] *Id.* (citing A.R.S. §§ 36-2801(3), (13); 36-2804.02). The AMMA includes an anti-discrimination provision, A.R.S. § 36-2813(B), which provides, in pertinent part, that:

> Unless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon ... [a] registered qualifying patient's positive drug test for marijuana components or metabolites,

> unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment.

A.R.S. § 36-2813(B).

The AMMA also provides that it does not require "[a]n employer to allow ... any employee to work while under the influence of marijuana," and does not "prohibit[ ] an employer from disciplining an employee for ... working while under the influence of marijuana." *Id.* § 36-2814(A)(3)–(B). However, "a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment." *Id.* § 36-2814(A)(3).

2. Whether the AMMA Provides a Private Cause of Action

[2] **[3]** In the second count of her Complaint, Plaintiff alleges that Defendant discriminated against her in violation of the ***775** AMMA, A.R.S. § 36-2813(B), by suspending her without pay and then terminating her because of her positive drug screen. (Doc. 1 at 4–5). Defendant contends that this discrimination claim under the AMMA fails as a matter of law because the AMMA does not provide a private cause of action. (Doc. 32 at 5). As there are no reported Arizona decisions discussing a private right of action for employment discrimination under the AMMA, this appears to be a question of first impression. "When a federal court must determine a novel issue of state law, the court attempts to predict how the state's highest court would decide the issue." *Picht v. Peoria Unified Sch. Dist. No. 11 of Maricopa Cty.*, 641 F.Supp.2d 888, 899 (D. Ariz. 2009) (citing *Ariz. Electric Power Coop. v. Berkeley*, 59 F.3d 988, 991 (9th Cir. 1995)).

[4] **[5]** "When, as here, a statute does not expressly create a cause of action to enforce its terms, that statutory 'silence' is not dispositive." *Gersten v. Sun Pain Mgmt., P.L.L.C.*, 242 Ariz. 301, 395 P.3d 310 (Ariz. Ct. App. 2017) (citing *Napier v. Bertram*, 191 Ariz. 238, 954 P.2d 1389, 1391 (1998)). Rather, "determining whether a statute implicitly creates a private right of action requires considering 'the context of the statutes, the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law.' " *Picht*, 641 F.Supp.2d at 899 (quoting *Transamerica Financial Corp. v. Superior Court*, 158 Ariz. 115, 761 P.2d 1019, 1020 (1988)); *see* *Napier*, 954 P.2d at 1391–92. "A private cause of action has been implied when no other remedy for violation of the statute was available." *Id.* (citing *Douglas v. Window Rock Consolidated Sch. Dist. No. 8*, 206 Ariz. 344, 78 P.3d 1065, 1069 (Ariz. Ct. App. 2003)). Applying these principles here, the Court holds that A.R.S. § 36-2813(B) creates a private cause of action for its alleged violation.

Section 36-2813(B) of the AMMA does not provide an express cause of action. However, the parties disagree on whether *Gersten v. Sun Pain Mgmt., P.L.L.C.*, 395 P.3d at 313, holds that there is no implied private cause of action under the AMMA. (*See* Docs. 32 at 5–6; 35 at 3–5). Specifically, Defendant cites *Gersten* for the proposition that "the AMMA has been held not to provide either an express or implied private cause of action," (Doc. 32 at 5), whereas Plaintiff claims that Defendant's reliance on this Arizona Court of Appeals decision is mistaken because "*Gersten* cannot be read for such a blanket statement," (Doc. 35 at 4). On this point, the Court agrees with Plaintiff.

In *Gersten*, a physician discharged a patient for obtaining a registry identification card to use medical marijuana. *Gersten*, 395 P.3d at 311–12. Suing his former physician for damages and equitable relief, the patient alleged that the physician's conduct constituted a violation of A.R.S. § 36-2813(C). [9] *Id.* at 312. The Superior Court granted the physician's motion to dismiss under Arizona Rule of Civil Procedure 12(b)(6) for failure to state a claim on the grounds "that A.R.S. § 36-2813(C) did not create a private cause of action for its alleged violation." *Gersten*, 395 P.3d at 312.

Upon the patient's appeal, the Arizona Court of Appeals noted that although § 36-2813(C) ensures "that qualifying patients ***776** will not 'otherwise' be disqualified from medical care solely because of their authorized use of medical marijuana," the appellate court stressed that § 36-2813(C) does not "obligate a physician to extend or continue medical care to a qualifying patient." *Id.* at 313. Consequently, the appellate court agreed with the court below that §

36-2813(C) does not create a private cause of action. *Id.* However, in reaching this decision, *Gersten* expressly distinguished the physician provision, § 36–2813(C), from the anti-discrimination provision, § 36–2813(B):

> The wording of A.R.S. § 36–2813(C) does not ... attempt to regulate the relationship between a physician and patient. *This distinction becomes clear when examining A.R.S. § 36–2813(C) in context and comparing it to other provisions of the Act that attempt to regulate the conduct of schools, landlords, and employers*. For example, A.R.S. § 36–2813(A) provides that "[n]o school or landlord may refuse to enroll or lease to and may not otherwise penalize a person solely for his status as a cardholder, unless failing to do so would cause the school or landlord to lose a monetary or licensing related benefit under federal law or regulations." In a similar vein, A.R.S. § 36–2813(B) provides that, with certain exceptions, an employer may not discriminate against a person in hiring, terminating, or imposing any term or condition of employment. *Unlike these provisions*, *A.R.S. § 36–2813(C) imposes no affirmative obligation* on a physician to treat or continue treating a qualifying patient. Given this, there is no basis for implying a private cause of action against a physician to enforce an affirmative obligation to treat or continue treating a qualifying patient that does not exist under A.R.S. § 36–2813(C).

Id. at 313–14 (emphasis added).

This distinction drawn by the appellate court in *Gersten* insinuated that, unlike § 36–2813(C), an implied private cause of action exists under § 36–2813(B) because this subsection imposes on employers an affirmative obligation to abide by the anti-discrimination mandate of the statute. Section 36–2813(C) is also distinguishable from the anti-discrimination provision, § 36–2813(B), because there is a pre-existing mechanism for wronged patients to enforce violations of § 36–2813(C) by submitting a complaint to the Arizona Medical Board to investigate and discipline a physician for unprofessional conduct, which includes the violation of any state law applicable to the practice of medicine, such as the AMMA. *Gersten*, 395 P.3d at 314. In contrast, "there is no such independent enforcement mechanism against employers" for violations of § 36–2813(B). (Doc. 35 at 5). This suggests that an implied private cause of action is needed to implement the directive of § 36–2813(B). *See Picht*, 641 F.Supp.2d at 899 ("A private cause of action has been implied when no other remedy for violation of the statute was available.").

In support of her argument that an implied private right of action exists in § 36–2813(B) of the AMMA, Plaintiff points to H.B. 2541, which the Arizona Legislature passed in April 2011 in response to the enactment of the AMMA. (Doc. 35 at 5). H.B. 2541 amended A.R.S. § 23-493.06(A)(6) of the DTEA to expand protections for employers who terminate an employee "based on the employer's good faith belief that [the] employee had an impairment while working while on the employer's premises or during hours of employment." *See* DRUGS, 2011 Ariz. Legis. Serv. Ch. 336 (H.B. 2541) (West). H.B. 2541 also added the "safety-sensitive" concept to § 23-493.06(A)(7) of the DTEA, which permits an employer to "exclude an employee from performing a safety-sensitive ***777** position" if the employer has a "good faith belief that the employee is engaged in the current use of any drug" which "could cause an impairment." *Id.* According to Plaintiff, H.B. 2541 creates "exceptions and modifications that directly impact Subsection B" of § 36–2813 of the AMMA, thus showing that "the Legislature believed that employers had new exposure to private lawsuits because of the AMMA." (Doc. 35 at 5). The Court agrees, as the Fact Sheet for H.B. 2541 explicitly mentions the AMMA before introducing the above modifications to the DTEA. *See* Arizona Senate Fact Sheet, 2011 Reg. Sess., H.B. 2541 (Mar. 25, 2011). That the Arizona Legislature made these modifications to the DTEA to protect employers from litigation suggests that the Legislature believed the AMMA supplied an implied private right of action for employees against employers allegedly violating § 36–2813(B) of the AMMA.

While Defendant claims that "[a]ll other courts considering this issue have held that similar medical marijuana laws were enacted to decriminalize medical marijuana use, not create an implied cause of action against employers," (Doc. 32 at 6), the Court is not so convinced. In support of this contention, Defendant cites *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012). In *Casias*, the plaintiff, a medical marijuana user, contended that Wal-Mart wrongfully discharged him in violation of Michigan's Medical Marihuana Act ("MMMA") after he tested positive for marijuana in violation of Wal-Mart's drug use policy. *Id.* at 431–32. Appealing the district court's dismissal of his case, the plaintiff argued that the MMMA, Mich. Comp. Laws § 333.26424(a), "protects patients against disciplinary action

in a private employment setting for using marijuana in accordance with Michigan law." *Id.* at 434. Section 333.26424(a) of the MMMA provides, in relevant part:

> 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[.]

Mich. Comp. Laws § 333.26424(a).

Agreeing with the district court that the "statute never expressly refers to employment, nor ... require[s] or impl[ies] the inclusion of private employment in its discussion of occupational or professional licensing boards[,]" the Sixth Circuit affirmed. *Casias*, 695 F.3d at 436. After determining that the MMMA's language did not support the plaintiff's interpretation that § 333.26424(a) provides protection against disciplinary actions by a business because "*the statute fails to regulate private employment actions* [,]" the Sixth Circuit concluded that § 333.26424(a), "does not impose restriction on private employers, such as Wal-Mart." *Id.* at 435–36 (emphasis added).

Whereas the MMMA statute in *Casias* "fails to regulate private employment actions," *Casias*, 695 F.3d at 436, section 36–2813(B) of the AMMA provides an affirmative obligation on employers to abide by the anti-discrimination mandate of the statute. *See* A.R.S. § 6–2813(B) ("... an employer *may not discriminate* against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person ....") (emphasis added). Based on the drastic dissimilarity of the medical marijuana statute at issue in *Casias* to § 36–2813(B) of the AMMA, the Court finds Defendant's extensive reliance on *Casias* futile.

***778** The other cases cited by Defendant fare no better, as none of these cases involve medical marijuana statutes with anti-discrimination provisions even remotely similar to § 36–2813(B). Rather, "[e]ach of these cases involves a statute or initiative that is either silent on employment, or expressly authorizes discrimination against medical marijuana users." (Doc. 35 at 6); *see* *Coles v. Harris Teeter, LLC*, 217 F.Supp.3d 185, 188 (D.D.C. 2016); *Steele v. Stallion Rockies Ltd*, 106 F.Supp.3d 1205, 1219 (D. Colo. 2015); *Swaw v. Safeway, Inc.*, No. C15-939 MJP, 2015 WL 7431106, at *1 (W.D. Wash. Nov. 20, 2015); *see also* *Roe v. TeleTech Customer Care Mgmt., LLC*, 152 Wash.App. 388, 216 P.3d 1055, 1059–60 (2009) (holding that Washington State Medical Use of Marijuana Act, RCW 69.51A.040(1), did not create an implied cause of action against employers who terminate, or fail to hire, an individual solely based on his or her use of medical marijuana where statute only created an affirmative defense to state criminal prosecution for possession of marijuana and did not "prohibit private employers from maintaining a drug-free workplace and terminating employees who use medical marijuana"); *Ross v. RagingWire Telecomms., Inc.*, 42 Cal.4th 920, 70 Cal.Rptr.3d 382, 174 P.3d 200, 205–07 (2008) (holding that disability discrimination provisions of California Fair Employment and Housing Act did not require employer to accommodate employee's use of medical marijuana where the operative provisions of California's medical marijuana statute, the Compassionate Use Act, Health & Saf. Code § 11362.5, "do not speak to employment law" but, rather, "speak exclusively to the criminal law"); *Johnson v. Columbia Falls Aluminum Co.*, 350 Mont. 562, 213 P.3d 789 (Table), 2009 WL 865308, at *2 (Mont. 2009) (holding that Montana's Medical Marijuana Act, MCA 50–46–205(2)(b), did not provide employee with an express or implied private right of action for negligence or negligence per se against employer following employee's termination for failing a drug test due to his medical marijuana use where state's medical marijuana act was essentially a "decriminalization" statute which specifically provided that it could not be construed to require employers "to accommodate medical use of marijuana in any workplace").

Defendant also cites *Coles v. Harris Teeter, LLC*, where a district court held that an employer's termination of an employee who failed a drug test due to his use of medical marijuana did not violate D.C.'s public policy of allowing

qualifying patients to use medical marijuana prescribed by their physicians. 217 F.Supp.3d at 188. In arriving at this conclusion, the court clarified that D.C.'s Medical Marijuana Treatment Act, D.C. Code § 7-1671.01, *et seq.*, "did not explicitly mandate" that employers had to accommodate such legal marijuana use, and, at most, "maintained a public policy that decriminalizes and allows the consumption of marijuana for private medical reasons"—a "far cry from prohibiting employers from terminating such users." *Id.* In contrast to D.C.'s Medical Marijuana Treatment Act, the AMMA goes one step beyond simply decriminalizing medical marijuana for qualifying patients by prohibiting employers from terminating such users unless the qualifying patient used, ingested, possessed, was impaired by or was under the influence of marijuana at work, or unless the employer's failure to discriminate against that qualifying patient would cause them to "lose a monetary or licensing related benefit under federal law or regulations." A.R.S. §§ 36–2813(B), 36-2814(A).

Similarly, *Steele v. Stallion Rockies Ltd* fails to provide support for Defendant's contention that there is no implied cause of action in the AMMA, as that case also ***779** involves a medical marijuana statute with little similarity to § 36–2813(B). 106 F.Supp.3d at 1219. In *Steele*, the district court dismissed the plaintiff's claims alleging breach of contract and discrimination in violation of the ADEA, ADA, and the Colorado Anti-Discrimination Act where the plaintiff was terminated for off-the-job use of medical marijuana because the court found that Colorado's medical marijuana act did not extend so far as to shield the plaintiff "from the implementation of his employer's standard policies against employee misconduct." *Id.* at 1214, 1219 n. 6. Rather, as noted by Plaintiff, Colorado's medical marijuana statute, Colo. Rev. Stat. Ann. § 18-18-406.3, fails to "mention employment at all." (Doc. 35 at 6). This is in stark contrast to the anti-discrimination provision of the AMMA. *See* A.R.S. § 36–2813(B). Moreover, Art. XVIII, sec. 14 of the Colorado Constitution—passed by voters in response to Colorado's medical marijuana statute—explicitly states: "Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place." Colo. Const. art. XVIII, § 14(10)(b).

[6] Further, the Washington medical marijuana statute at issue in *Swaw v. Safeway, Inc.*, RCW 69.51A.060, differs drastically from § 36–2813(B) of the AMMA as well. *Swaw*, 2015 WL 7431106, at *1. In *Swaw*, the plaintiff brought suit against his former employer, asserting that he was discriminated against on the basis of his disabilities when the employer fired him for testing positive for marijuana, which the plaintiff used after hours pursuant to a valid Washington state medical marijuana prescription. *Id.* In granting the employer's motion for judgment on the pleadings, the district court concluded that RCW 69.51A.060 of Washington's Medical Use of Marijuana Act "does not require employers to accommodate the use of medical marijuana where they have a drug-free workplace, even if medical marijuana is being used off site to treat an employee's disabilities." *Id.* (citing RCW 69.51A.060(6) [10] ("Employers may establish drug-free work policies. Nothing in [the Medical Use of Marijuana Act] requires an accommodation for the medical use of cannabis if an employer has a drug-free workplace.")). In contrast, the AMMA makes no such exception for employers who maintain drug-free workplace policies. *See* A.R.S. § 36-2801 *et seq.*

Contrary to the case law cited by Defendant, Plaintiff points to two cases, *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F.Supp.3d 326, 339–40 (D. Conn. 2017) and *Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680, 2017 WL 2321181, at *1 (R.I. Super. May 23, 2017), referring to medical marijuana statutes with anti-discrimination provisions analogous to § 36-2813(B) of the AMMA. [11] In *Noffsinger*, the district court considered whether a provision of Connecticut's Palliative Use of Marijuana Act ("PUMA"), ***780** which explicitly prohibits discrimination by employers against qualifying patients who use marijuana outside the workplace, provided an implied private right of action. *Noffsinger*, 273 F.Supp.3d at 331, 339–40 (citing Conn. Gen. Stat. § 21a-408p(b)(3)). There, a qualifying patient under PUMA brought suit against an employer who denied her a job position after she tested positive for marijuana during a pre-employment screening, contending that the employer's actions constituted a violation of PUMA's anti-discrimination provision, Conn. Gen. Stat.

§ 21a-408p(b)(3). *Id.* at 331–32. This anti-discrimination provision states:

> Unless required by federal law or required to obtain federal funding: ... (3) No employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient or primary caregiver under sections 21a-408 to 21a-408n, inclusive. Nothing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours.

Conn. Gen. Stat. § 21a-408p(b)(3).

Denying the employer's motion to dismiss the qualifying patient's claim under Conn. Gen. Stat. § 21a-408p(b)(3), the court concluded that PUMA's anti-discrimination provision provides a private cause of action. *Noffsinger*, 273 F.Supp.3d at 341, 343. In arriving at this conclusion, the court considered how the qualifying patient "certainly falls within the class for whose benefit the statute was enacted," and found "no indication of legislative intent to deny a private cause of action" nor indication that a private cause of action is inconsistent "with the underlying purposes of the legislative scheme." *Id.* at 339–40. The court further noted that, "without a private cause of action, § 21a-408p(b)(3) would have no practical effect, because the law does not provide for any other enforcement mechanism." *Id.* at 340.

Similar to Connecticut, Delaware also has an anti-discrimination provision in its Medical Marijuana Act which is almost identical to § 36–2813(B) of the AMMA:

> Unless a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulations, an employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon ... [a] registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment.

Del. Code Ann. tit. 16, § 4905A(a)(3). Notably, a Delaware Superior Court in and for Kent County recently determined that the language of § 4905A(a)(3) creates an implied private right of action. *See Chance v. Kraft Heinz Foods Co.*, No. CV-K18C-01-056 NEP, 2018 WL 6655670, at *6 (Del. Super. Ct. Dec. 17, 2018). In coming to this decision, the superior court noted that the plaintiff, a medical marijuana cardholder who was terminated for failing a drug test, clearly "falls within the class of persons for whose especial benefit the statute was enacted[.]" *Id.* at *5. Further, the court determined that recognizing an implied private right of action would advance the purpose of § 4905A(a)(3) by protecting medical marijuana patients from "discrimination based upon their status, and from being penalized based upon that discrimination, as with termination from employment." ***781** *Id.* Finally, the court found that the fact that the state's medical marijuana act included an anti-discrimination provision—but did not task any agency or commission with its enforcement—demonstrated legislative intent to remedy discrimination against registered cardholders through private rights of action. *Id.* at *6.

In light of the similarity between the anti-discrimination provisions at issue in *Noffsinger* and *Chance* to A.R.S. § 36-2813(B), the Court finds these cases highly persuasive. As in *Noffsinger* and *Chance*, Plaintiff is a qualifying patient who "falls within the class for whose benefit" the AMMA was enacted. *Noffsinger*, 273 F.Supp.3d at 339;

Chance, 2018 WL 6655670, at *5; *see also Picht*, 641 F.Supp.2d at 899 ("Whether the statute especially benefits the person seeking redress is a factor in the determination" of whether a statute implicitly creates a private right of action) (citing *Transamerica Financial Corp.*, 761 P.2d at 1021). In consideration of H.B. 2541's modifications to the DTEA intended to protect employers from litigation, it is clear that the Arizona Legislature believed employers had exposure to private lawsuits for violations of § 36–2813(B) of the AMMA. *See* Arizona Senate Fact Sheet, 2011 Reg. Sess., H.B. 2541 (Mar. 25, 2011). This suggests that "there is no indication of legislative intent to deny a private cause of action," as legislators expected the employment provision of the AMMA to "provide protections for employees that would be enforceable in courts." *Noffsinger*, 273 F.Supp.3d at 339.

Finally, like in *Noffsinger* and *Chance*, a private cause of action is not inconsistent with the underlying purposes of the AMMA, but rather "effectuates the evident legislative purpose" of preventing discrimination in employment against qualifying patients using medical marijuana outside of the workplace since the law lacks any explicit enforcement mechanism. *Id.* at 340; *Chance*, 2018 WL 6655670, at *5–6; *see also Callaghan*, 2017 WL 2321181, at *2, *5–8 (holding that the anti-discrimination provision of Rhode Island's medical marijuana act, R.I. Gen. Laws § 21-28.6-4(d), which provides 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," includes an implied private right of action because "[w]ithout one, § 21-28.6-4(d) would be meaningless"). Following *Noffsinger* and *Chance*, the Court concludes that there is an implied private cause of action for violations of § 36–2813(B) of the AMMA. [12]

[7] As the Court finds that there is an implied private cause of action in A.R.S. 36-2813(B) of the AMMA, the Court will not consider the parties' arguments as to whether or not the AMMA supplies the public policy for Plaintiff's AEPA claim. (*See* Docs. 32 at 10; 35 at 7–8; 37 at 4). Further, the first count in Plaintiff's Complaint (alleging that Defendant wrongfully terminated her in violation of the AEPA by firing her because of her positive drug screen in violation of the public policy set forth in the AMMA) relies on the same set of facts as Plaintiff's second count alleging discrimination under the AMMA. (*See* Doc. 1 at 4–5). Accordingly, since Plaintiff may proceed under her second count alleging discrimination under the AMMA, the Court dismisses Plaintiff's first count alleging wrongful termination under the ***782** AMMA and AEPA as duplicative of her second count.

3. Plaintiff's Request to Defer Ruling on Summary Judgment under Fed. R. Civ. P. 56(d)

Defendant argues in its Motion for Summary Judgment that the results of Plaintiff's May 24, 2016 drug test, which "was positive for marijuana metabolites at a level of greater than 1000 ng/ml, the highest level the test could record," gave Walmart "a good faith basis to believe Plaintiff was impaired by marijuana on May 24, 2016, on Defendant's premises during work hours." (Doc. 32 at 9). However, Plaintiff contends that Defendant previously agreed that impairment was not at issue and that Plaintiff was fired merely because her drug screen indicated the presence of marijuana metabolites —not because she was "impaired" from marijuana. (Doc. 35 at 11). According to Plaintiff, Defendant confirmed via email that it "would not discuss 'levels' of THC, and thus no additional expert testimony was needed" to determine whether or not the level of marijuana metabolites present in Plaintiff's drug screen indicated that she was impaired at work on May 24, 2016. (*Id.*). Because Defendant now presents evidence on impairment despite the alleged email agreement of the parties, Plaintiff requests that the Court defer ruling on summary judgment under Fed. R. Civ. P. 56(d) so that she may have the "opportunity to provide actual expert testimony ... that the presence or level of inactive marijuana metabolites in an individual's urine has no scientific correlation to that individual's impairment." (Doc. 36 at 2).

[8] **[9]** Fed. R. Civ. P. 56(d) permits the Court to "defer considering the motion or deny it," "allow time to obtain affidavits or declarations or to take discovery," or "issue any other appropriate order" where the "nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition[.]" Fed. R. Civ. P. 56(d). The rule applies "where the nonmoving party has not had the opportunity to discover information that is essential to its opposition." *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (emphasis added) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Notably, however, Rule 56(d) "is not meant to re-open discovery in general[.]"

Slama v. City of Madera, No. 1:08-CV-810 AWI GSA, 2012 WL 1067198, at *2 (E.D. Cal. Mar. 28, 2012); *see also Dumas v. Bangi*, No. 1:12-CV-01355-LJO, 2014 WL 3844775, at *2 (E.D. Cal. Jan. 23, 2014) ("Rule 56(d) does not reopen discovery; rather it forestalls ruling on a motion for summary judgment in cases where discovery is still open and provides the prospect of defeating summary judgment.").

[10] **[11]** "The party seeking a Rule 56(d) continuance bears the burden of proffering facts sufficient to satisfy the requirements of 56(d)." *Martinez v. Columbia Sportswear USA Corp.*, 553 F. App'x 760, 761 (9th Cir. 2014) (citing *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 921 (9th Cir. 1996)). In ruling on a 56(d) motion, the Court considers whether "the movant diligently pursued its *previous* discovery opportunities," and whether the movant has shown "how allowing *additional* discovery would [ ] preclude[ ] summary judgment." *Qualls By & Through Qualls v. Blue Cross of California, Inc.*, 22 F.3d 839, 844 (9th Cir. 1994) (emphasis in original) (citation omitted); *see also Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1005 (9th Cir. 2002) ("The failure to conduct discovery diligently is grounds ***783** for the denial of a Rule 56[(d)] motion."). [13]

[12] Here, Plaintiff produces a Declaration signed by her counsel, Joshua Carden, (Doc. 36-1 at 79–80), and a copy of an email chain with Defendant's counsel, (Doc. 36-1 at 69–71), in support of her position that Defendant previously agreed that the level of THC metabolites in Plaintiff's urine screen and its correlation (or lack thereof) with impairment was not going to be an issue in this suit. (*See id.* at 79).

On December 21, 2017, Plaintiff's counsel emailed counsel for Defendant, stating:

> In light of the recent communications from you that Wal-Mart now claims to have terminated Ms. Whitmire because of the level of THC in her bloodstream versus that she had any level of THC in her urine, I think we will need an expert to render an opinion on the correlation (or lack thereof) between THC and impairment. To that end, are you willing to extend the expert disclosure deadlines solely for that issue? ... I have located an expert and can probably get a report in 30-45 days or so. Let me know your position as soon as you can please.

(*Id.* at 70).

Defense counsel responded that same day, as follows:

> To make clear, Walmart terminated Ms. Whitmire for testing positive for THC on the drug test she performed. The level of THC the test recorded was not the reason for her termination. With that I do not believe the additional expert witness is necessary.

(*Id.* at 69). Following this response from defense counsel, Plaintiff's counsel asked if Defendant would be "willing to stipulate to limine out any commentary (by either side) on the level of THC itself" and "any testimony related to the THC level having an impact on [Defendant's] decision." (*Id.*). The email chain ends with defense counsel replying that they would talk with their client and then get back to Plaintiff's counsel. (*Id.*).

Despite the attestation of Plaintiff's counsel that he did not retain an expert on impairment "based on Wal-Mart's assurance that the 'level' of THC metabolites was not going to be an issue," (*id.* at 80), the Court will not preclude Defendant from arguing that Plaintiff was fired because the level of marijuana metabolites present in her drug screen led Defendant to believe she was impaired at work. While it does appear from the December 21, 2017 email chain that Defendant's counsel misled counsel for Plaintiff, Plaintiff's counsel did not reduce this agreement to a formal stipulation, nor use a recognized discovery vehicle to elicit this admission, such as an interrogatory. Therefore, the Court will not bind Defendant to its counsel's responses in the email chain.

[13] Further, as noted in the Rule 16 Scheduling Order, " 'last minute' or 'eleventh hour' discovery which results in insufficient time to undertake additional discovery and which requires an extension of the discovery deadline will be met with disfavor, and may result in denial of an extension, exclusion of evidence, or the imposition of other

sanctions." (Doc. 13 at 2 n. 2). Both parties here had ample opportunity to retain expert witnesses, depose them, and obtain expert reports within the deadlines set by the Rule 16 Scheduling Order. ***784** The parties' failure to disclose experts on the issue of whether Plaintiff's urine screen showed marijuana metabolites present in scientifically sufficient concentration to cause impairment is at their own peril. In light of each party's "failure to conduct discovery diligently," *Pfingston*, 284 F.3d at 1005, the Court denies Plaintiff's request under Fed. R. Civ. P. 56(d). *See* *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 921 (9th Cir. 1996) ("[T]he district court does not abuse its discretion by denying further discovery if the movant has failed diligently to pursue discovery in the past."). Accordingly, the Court will not re-open discovery nor permit Plaintiff (or Defendant) any additional opportunity to obtain further discovery in the form of an expert witness's opinion.

4. Evidentiary Objections

In support of its argument that Defendant fired Plaintiff because it had a good faith basis to believe Plaintiff was impaired by marijuana on May 24, 2016 based on the results of her positive drug test, (Docs. 32 at 9; 33 ¶ 23), Defendant produced a Declaration signed by Personnel Coordinator Debra Vaughn, (Doc. 33-3 at 21–23). This Declaration states, in relevant part:

> 13. On June 15, 2016, Plaintiff's urinalysis came back positive for marijuana at a level of "> 1000 ng/ml," which I understand to be the maximum reading the test can measure for marijuana.
>
> 14. I also understand, upon reasonable belief, that Plaintiff's May 24, 2016, positive test result for marijuana indicated that she was impaired by marijuana during her shift that same day.

(Doc. 33-3 ¶¶ 13–14).

Plaintiff objects to the admissibility of these portions of Ms. Vaughn's Declaration on the ground that paragraphs 13 and 14 of Ms. Vaughn's Declaration constitute improper and undisclosed expert testimony in violation of Federal Rules of Evidence 702 and 703. (Docs. 35 at 11; 36 at 1–2; *see also* Doc. 36 ¶ 23). Plaintiff contends that these portions of Ms. Vaughn's Declaration "were not disclosed to Plaintiff prior to use by Defendant, nor was Ms. Vaughn disclosed as an expert." (Doc. 36 at 1). Plaintiff also objects to Ms. Vaughn's Declaration testimony on the ground that there is "no supporting evidence or foundation" for her statement that the results of Plaintiff's drug test "showed the 'maximum reading the test can measure for marijuana,' " nor any disclosed basis for Ms. Vaughn's belief that Plaintiff's positive drug screen "indicated that she was impaired by marijuana during her shift that same day." (*Id.* at 1). Accordingly, Plaintiff moves for exclusion of these portions of Ms. Vaughn's Declaration testimony. (*Id.* at 2).

[14] Federal Rule of Evidence ("FRE") 702 permits a witness "who is qualified as an expert by knowledge, skill, experience, training, or education" to "testify in the form of an opinion or otherwise if ... the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. District courts are charged with the duty to act as gatekeepers, as "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *see also* *Hall v. Baxter Healthcare Corp.*, 947 F.Supp. 1387, 1396 (D. Or. 1996). A witness not testifying under FRE 702 may offer opinion testimony only if such testimony is "rationally based on the witness's perception," "helpful to clearly understanding the witness's testimony or to determining a fact in issue," and "not based on scientific, technical, or other specialized ***785** knowledge within the scope of Rule 702." Fed. R. Evid. 701.

[15] In this case, Defendant has not provided Ms. Vaughn's curriculum vitae nor any indication that Ms. Vaughn has the requisite "knowledge, skill, experience, training, or education" to render opinions regarding the results of Plaintiff's drug test. Fed. R. Evid. 702. Rather, Ms. Vaughn's Declaration indicates she is employed by Defendant as a Personnel Coordinator, which involves "promot[ing], support[ing], and ensur[ing] compliance with Company policies, procedures, mission, values, and standard of ethics and integrity for the Walmart store in Taylor, Arizona." (Doc. 33-3 ¶¶ 2–3). The Court is not satisfied that such a human resource professional is qualified as an expert capable of interpreting Plaintiff's drug test results or at all qualified to render an opinion as to whether the level of metabolites present in Plaintiff's urine screen indicate she was impaired at work on May 24, 2016. Moreover, Ms. Vaughn's opinions are entirely without foundation. She cites to no sources upon

which she relied, nor sets forth any basis for her statements from which the Court can determine whether or not her testimony is reliable.

[16] **[17]** Further, Ms. Vaughn's Declaration testimony that the results of Plaintiff's drug test "showed the 'maximum reading the test can measure for marijuana,' " and that Plaintiff's positive drug screen "indicated that she was impaired by marijuana during her shift that same day," (Doc. 33-3 ¶¶ 13–14), clearly falls within the purview of specialized, scientific knowledge. Defendant "may not attempt to evade FRE 702's requirements 'through the simple expedient of proffering an expert in lay witness clothing.' " *Montalvo v. Am. Family Mut. Ins. Co.*, No. CV-12-02297-PHX-JAT, 2014 WL 2986678, at *6 (D. Ariz. July 2, 2014) (citing Fed. R. Evid. 701 advisory committee's notes to 2000 amendments). As Ms. Vaughn's Declaration testimony (Doc. 33-3 ¶¶ 13–14) falls within the scope of Fed. R. Evid. 702, Defendant was required to identify Ms. Vaughn as an expert witness pursuant to Fed. R. Civ. P. 26(a)(2)(A), and disclose a written report pursuant to Fed. R. Civ. P. 26(a)(2)(B). [14] Defendant's failure to do so by the deadlines set forth in the Rule 16 Scheduling Order (Doc. 13) is a violation of that Order and of the discovery rules. [15]

[18] **[19]** **[20]** When a party fails to make a timely disclosure required by Federal Rule of Civil Procedure 26(a), "the party is not ***786** allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). "In determining whether this sanction should be imposed, the burden is on the party facing the sanction—i.e., Defendant[ ]—to demonstrate that the failure to comply with Rule 26(a) is substantially justified or harmless." *Torres v. City of Los Angeles*, 548 F.3d 1197, 1213 (9th Cir. 2008) (citation omitted). Not only has Defendant failed to show that either of these exceptions apply here, but Defendant's failure to disclose Ms. Vaughn as an expert substantially prejudiced Plaintiff by depriving her of the "reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses" on the issue of whether the level of metabolites present in Plaintiff's drug screen indicate that she was impaired at work on May 24, 2016. *Karl Storz Endoscopy-Am., Inc. v. Stryker Corp.*, No. 14-CV-00876-RS-JSC, 2018 WL 1569762, at *2 (N.D. Cal. Mar. 30, 2018) (citing *Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc.*, 725 F.3d 1377, 1381 (Fed. Cir. 2013)). Accordingly, the Court has "wide latitude" to "issue sanctions under Rule 37(c)(1)." *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001); *see also* Fed. R. Civ. P. 37 advisory committee's notes to 1993 amendments (noting that Fed. R. Civ. P. 37(c) "provides a self-executing," "automatic sanction" for failure to make a disclosure required by Rule 26(a) which "provides a strong inducement for disclosure of material").

The Court concludes that exclusion of Ms. Vaughn's expert testimony in paragraphs 13 and 14 of her Declaration (Doc. 33-3 ¶¶ 13–14) "is an appropriate remedy for failing to fulfill the required disclosure requirements of Rule 26(a)." *Yeti by Molly, Ltd.*, 259 F.3d at 1106. Accordingly, the Court will not consider this testimony in ruling on Defendant's Motion for Summary Judgment (Doc. 32).

[21] In response to Ms. Vaughn's contention that Plaintiff's positive screen for marijuana "indicated that she was impaired by marijuana during her shift that same day," (Doc. 33-3 ¶ 14), Plaintiff introduces rebuttal materials to demonstrate that she was not tested for "marijuana," but rather for "marijuana metabolites," which are "primarily the non-impairing components of THC ... that metabolize in urine," (Doc. 36 at 1). (*See* Docs. 36 at 1–2; 36-1 at 45–53, 55–58, 60–67). In its Reply, Defendant asks the Court to strike Plaintiff's evidence pertaining to the correlation between THC and impairment. (Doc. 37 at 4). Although Defendant does not state with specificity which particular evidence it wishes the Court to strike, the Court surmises that Defendant is referring to Exhibits H (Doc. 36-1 at 45–53, I (*id.* at 55–58), and J (*id.* at 60–67) to Plaintiff's Controverting Statements of Fact and Additional Statements of Fact (Doc. 36). [16] Because the Court is not considering paragraphs 13 and 14 of Ms. Vaughn's Declaration, the Court will also not consider Plaintiff's rebuttal materials—Exhibits H, I and J (Doc. 36-1 at 45–53, 55–58, 60–67)—pertaining to the correlation between THC and impairment in ruling on Defendant's ***787** Motion for Summary Judgment (Doc. 32).

5. The "Safety-Sensitive" Position Exception

[22] On pages 9–11 of her Response, Plaintiff argues that the "safety-sensitive" exception of A.R.S. § 23-493.06(7) of the DTEA is not supported by the law or the evidence on the grounds that Defendant already conceded that Plaintiff's position was not "safety-sensitive," and because the "safety-

sensitive" exception unconstitutionally amended the AMMA. (Doc. 35 at 9–11). However, in its Order dated August 22, 2018, the Court explicitly precluded any argument by Defendant that Plaintiff was in a safety sensitive position. (Doc. 31). Accordingly, whether or not Plaintiff was in a "safety-sensitive" position is not at issue in this case. Therefore, the Court will not consider Plaintiff's arguments on pages 9 through 11 of her Response as they are irrelevant.

6. Whether Sections 23-493(6) and 23-493.06(A)(6) of the DTEA Unconstitutionally Amended the AMMA

[23] A.R.S. § 36-2813(B)(2) provides that "an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon ... [a] registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment." While the AMMA does not "prohibit[ ] an employer from disciplining an employee for ... working while under the influence of marijuana," *id.* § 36-2814(B), "a registered qualifying patient shall not be considered to be under the influence of marijuana *solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment*," *id.* § 36-2814(A)(3) (emphasis added). Another Arizona statute, the Drug Testing of Employees Act ("DTEA") provides, in relevant part, that:

> No cause of action is or may be established for any person against an employer who has established a policy and initiated a testing program in accordance with this article for ... [a]ctions based on the employer's *good faith belief* that an employee had an *impairment* while working while on the employer's premises or during hours of employment.

Id. § 23-493.06(A)(6) (emphasis added). The DTEA further states that such a "good faith belief may be based on" any number of things, including the "[r]esults of a test for the use of alcohol or drugs." *Id.* § 23-493(6).

In its November 21, 2018 Order (Doc. 44), the Court asked the parties to provide supplemental briefing discussing whether sections 23-493(6) and 23-493.06(A)(6) of the DTEA implicitly amended or repealed sections 36-2813(B)(2) and 36-2814(A)(3) of the AMMA in violation of the Voter Protection Act, Ariz. Const. art. IV, Pt. 1 § 1. After reviewing the parties' briefs, (Doc. 48; Doc. 49), and the State of Arizona's *Amicus Curiae* Brief In Support of No Party (Doc. 54-1 at 1–5), the Court finds there is no conflict between the AMMA and DTEA provisions at issue.

[24] **[25]** **[26]** Arizona voters enacted the AMMA by ballot initiative in the November 2010 general election, *Gear*, 372 P.3d at 288, while sections 23-493(6) and 23-493.06(A)(6) of the DTEA were enacted by the Arizona Legislature in April 2011 via H.B. 2541. *See* Arizona Senate Fact Sheet, 2011 Reg. Sess., H.B. 2541 (Mar. 25, 2011). Under the Voter Protection Act, the legislature cannot repeal an initiative-enacted ***788** law, and may only modify it by a three-fourths vote when the change furthers the law's purpose. Ariz. Const. art. IV, Pt. 1 § 1(6)(B)–(C). "[A] statute can be implicitly repealed or amended by another through 'repugnancy' or 'inconsistency.' " *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 308 P.3d 1152, 1158 (2013) (citations omitted). However, "[w]henever possible[,]" Arizona courts "adopt a construction of a statute that reconciles it with other statutes, giving force to all statutes involved." *Lewis v. Arizona Dep't of Econ. Sec.*, 186 Ariz. 610, 925 P.2d 751, 755 (Ariz. Ct. App. 1996) (citation omitted). "Although the finding of an implied repeal or amendment is generally disfavored, it is required when conflicting statutes cannot be harmonized to give each effect and meaning." *Cave Creek Unified Sch. Dist.*, 308 P.3d at 1158 (citations omitted).

Here, however, sections 23-493(6) and 23-493.06(A)(6) of the DTEA and sections 36-2813(B)(2) and 36-2814(A)(3) of the AMMA can be harmonized. The Court finds the reasoning set forth by the State of Arizona in its *amicus* brief particularly compelling, and adopts it as its own:

> Here, the AMMA and DTEA provisions at issue work hand-in-hand. The AMMA provisions are framed in negative terms: an employer *may not* fire an employee based on a positive drug test for marijuana components or metabolites, unless she used, possessed, or was impaired by marijuana at work, A.R.S. § 36-2813(B)(1)–(2), and "a registered qualifying patient *shall not* be considered to be under the influence of marijuana solely because of the

presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment," *id.* § 36-2814(A)(3) (emphasis added). But the positive implications of these AMMA provisions are clear: an employee *may* be fired based on her positive drug test for "metabolites or components of marijuana" if she possessed, used, or was impaired by marijuana at work, *see id.* § 36-2813(B)(1)–(2), and a registered qualifying patient *may* be considered to be under the influence of marijuana based solely on the presence of "metabolites or components of marijuana" that appear in *sufficient* concentration to cause impairment, *see id.* § 36-2814(A)(3). The DTEA's implications are also clear: an employer is shielded from liability for firing an employee based on the employer's good-faith belief that the employee was impaired while working, *id.* § 23-493.06(6), and that good-faith belief may be based on the results of a drug test, *id.* § 23-493(6)(f).

As relevant here, the AMMA and DTEA provisions can and should be read together as follows: an employer cannot be sued for firing a registered qualifying patient based on the employer's good-faith belief that the employee was impaired by marijuana at work, where that belief is based on a drug test sufficiently establishing the presence of "metabolites or components of marijuana" sufficient to cause impairment.

(Doc. 54-1 at 4–5).

Accordingly, the Court finds that sections 23-493(6) and 23-493.06(A)(6) of the DTEA did not unconstitutionally amend the AMMA.

7. Whether a Genuine Dispute of Material Fact Exists

Plaintiff claims that Defendant discriminated against her in violation of the AMMA, A.R.S. § 36-2813(B), by suspending her without pay and then terminating her because of her positive drug test without a showing of impairment. (Doc. 1 at 4–5, 7). It is undisputed that Plaintiff, a qualified registered patient under the AMMA, smoked marijuana just before 2:00 ***789** a.m. on May 24, 2016 prior to going to sleep, and then clocked in to her scheduled shift at 2:00 p.m. later that same day. (Docs. 33 ¶¶ 12–13, 19–21; 36 ¶¶ 12–13, 19–21; 36-1 ¶ 18). It is also undisputed that the only reason given to Plaintiff for her suspension and termination was her positive drug test. (Docs. 33 ¶¶ 25–26; 36 ¶¶ 25–26; *see also* Doc. 33-3 at 35). Defendant claims that the results of this drug screen, which "was positive for marijuana metabolites at a level of greater than 1000 ng/ml, the highest level the test could record," gave Walmart "a good faith basis to believe Plaintiff was impaired by marijuana on May 24, 2016, on Defendant's premises during work hours, and Walmart terminated Plaintiff's employment *solely on that basis*." (Doc. 32 at 9) (emphasis added). Defendant argues as an affirmative defense that it is protected from litigation because "it has established a policy and implemented a drug testing program" in compliance with A.R.S. § 23-493.06 of the DTEA. (Docs. 6 at 9; 32 at 9, 15). Section 23-493.06 exempts an employer from liability for "actions based on the employer's good faith [17] belief that an employee had an impairment [18] while working while on the employer's premises or during hours of employment." A.R.S. § 23-493.06(A)(6). Under the DTEA, such a "good faith belief may be based on" the "[r]esults of a test for the use of alcohol or drugs." *Id.* § 23-493(6).

[27] The AMMA makes clear that while an employer may discipline an employee for working while under the influence of marijuana, *id.* § 36-2814(B), "a registered qualifying patient shall not be considered to be under the influence of marijuana *solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment*," *id.* § 36-2814(A)(3) (emphasis added). Reading the DTEA and AMMA in harmony, an employer cannot be sued for suspending or firing a registered qualifying patient based on the employer's good faith belief that the employee was impaired by marijuana at work, where that belief is based on a drug test which establishes the presence of metabolites or components of marijuana *in sufficient concentration to cause impairment*. *Id.* §§ 23-493(6), 23-493.06(A)(6), 36-2813(B)(2), 36-2814(A)(3). At issue in this case is whether Plaintiff's positive drug screen is alone sufficient to support Defendant's "good faith belief" that Plaintiff was impaired by marijuana at work on May 24, 2016 in the absence of any other evidence of impairment or any expert testimony establishing that the level of metabolites present in Plaintiff's drug screen demonstrates that marijuana was present in her ***790** system in a sufficient concentration to cause impairment. [19]

[28] In presenting its affirmative defense under the DTEA, Defendant bears the burden of proving that it had a good faith belief that Plaintiff was impaired by marijuana at work. *See id.* §§ 23-493(6), 23-493.06(A)(6). Thus, Defendant initially bears the burden of showing that Plaintiff's drug screen sufficiently establishes the presence of metabolites or components of marijuana in a scientifically sufficient

concentration to cause impairment. [20] Defendant is unable to meet that burden.

[29] Defendant claims that its "good faith belief cannot be supported or controverted by any expert witness testimony as it is a fact question solely based on the test result." (Doc. 37 at 5). According to Defendant, it "does not need to argue[ ] that any particular numerical reading indicates 'impairment,' " and "does not need expert witness testimony to correlate a specific numerical reading to 'impairment.' " (Doc. 48 at 8). Rather, Defendant believes Plaintiff's positive drug screen sufficiently supports its good faith belief that Plaintiff was impaired at work because "the positive reading was 'so positive' that it was above what the test could measure (that is, above 1000 ng/ml)." (*Id.*). In opposition, Plaintiff disputes Defendant's "good faith belief" on the ground that it is an unreasonable belief to hold in light of Arizona case law discussing the relationship between marijuana metabolites and impairment. (Doc. 35 at 12–13 ("the 'level' shown in a urine test cannot serve as a good faith basis for 'deeming' someone impaired") (citing *State v. Hammonds*, 192 Ariz. 528, 968 P.2d 601, 603 (Ariz. Ct. App. 1998) ("At the metabolite stage, the metabolic component detected in the urine is 'inactive,' in the sense that it is incapable of causing impairment. Many drugs will continue to appear in the urine in metabolite form for days or even weeks after use. A urine test, while indicative of what has been in the bloodstream in the past, says nothing conclusive about what is presently in the bloodstream.")). [21]

While the Court draws no conclusion as to whether a drug screen is itself capable of demonstrating whether someone was impaired based on this case law cited by Plaintiff, it is clear to the Court that proving impairment based on the results of a drug screen is a scientific matter which requires expert testimony. Without expert testimony establishing that Plaintiff's drug screen shows marijuana metabolites or components in a sufficient concentration to cause impairment, Defendant is unable to prove that Plaintiff's drug screen gave it a ***791** "good faith basis" to believe Plaintiff was impaired at work on May 24, 2016. Accordingly, Defendant's affirmative defense under § 23-493.06(A)(6) of the DTEA fails. Therefore, the Court denies Defendant's Motion for Summary Judgment as to the second count in Plaintiff's Complaint alleging discrimination under the AMMA.

It is undisputed that Plaintiff, a registered qualifying patient, was suspended and ultimately terminated because of her positive urine screen showing the presence of marijuana metabolites. Defendant claims: "[u]nder Walmart policy, Plaintiff was terminated for testing positive for marijuana, which is a legitimate reason for termination, even under the AMMA." (Doc. 32 at 14). According to Defendant, "Walmart has a policy of terminating Associates if they test positive for marijuana while on Walmart's premises or during working hours *regardless of whether the employee possesses a medical marijuana card and regardless of the level of marijuana detected*." (Doc. 33-3 at 22, Decl. of Debra Vaughn ¶ 6) (emphasis added). However, as Plaintiff points out, terminating a registered qualifying patient who tests positive for marijuana "regardless of whether the employee possesses a medical marijuana card and regardless of the level of marijuana detected" constitutes a "complete and 'bright line' disregard for the Arizona Medical Marijuana Act's antidiscrimination provisions[.]" (Doc. 35 at 1). Indeed, section 36-2813(B)(2) of the AMMA protects qualifying registered patients, like Plaintiff, who merely test positive for marijuana metabolites. Without any evidence that Plaintiff "used, possessed or was impaired by marijuana" at work on May 24, 2016, it is clear that Defendant discriminated against Plaintiff in violation of A.R.S. § 36-2813(B)(2) of the AMMA by suspending and then terminating Plaintiff solely based on her positive drug screen. [22] *See* A.R.S. § 36-2813(B)(2) ("[A]n employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon ... [a] registered qualifying patient's positive drug test for marijuana components or metabolites, *unless the patient used, possessed or was impaired by marijuana* on the premises of the place of employment or during the hours of employment.") (emphasis added). Accordingly, no genuine dispute of material fact remains for trial.

[30] **[31]** Fed. R. Civ. P. 56(f) provides that the court may "grant summary judgment for a nonmovant[,]" grant a summary judgment motion "on grounds not raised by a party[,]" or "consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute[ ]" so long as the court gives "notice and a reasonable time to respond" prior to doing so. "[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp.*, 477 U.S. at 326, 106 S.Ct. 2548; *see also* *Norse v. City of Santa Cruz*, 629 F.3d 966, 971 (9th Cir. 2010) ("District courts unquestionably possess the power

to enter summary judgment *sua sponte*, even on the eve of trial."). "Reasonable notice implies adequate time to develop the facts on which the litigant will depend to oppose summary judgment." *Norse*, 629 F.3d at 972 (quoting ***792** *Portsmouth Square, Inc. v. S'holders Protective Comm.*, 770 F.2d 866, 869 (9th Cir. 1985)). However, it is well settled that "[a] district court may grant summary judgment without notice if the losing party has had a full and fair opportunity to ventilate the issues involved in the motion." *In re Harris Pine Mills*, 44 F.3d 1431, 1439 (9th Cir. 1995) (quoting *United States v. Grayson*, 879 F.2d 620, 625 (9th Cir. 1989)).

[32] Here, the parties had notice and a reasonable opportunity to present their respective evidence on the question of liability under the AMMA's anti-discrimination provision. In November, the Court issued an Order which asked the parties to provide supplemental briefing discussing, in part, why Plaintiff should or should not be entitled to summary judgment on her claim under the AMMA pursuant to Rule 56(f). (Doc. 44 at 4). In this Order, the Court stated that "there is no evidence indicating that Plaintiff was impaired at work or expert testimony establishing that the level of metabolites present in Plaintiff's positive drug screen demonstrates that marijuana was present in her system in a sufficient concentration to cause impairment." (*Id.* at 3). Despite this admonition, Defendant still did not come forward with any evidence establishing that Plaintiff was impaired in its Supplemental Brief. (*See* Doc. 48). Sections 36-2813(B)(2) and 36-2814(A)(3) of the AMMA grant Plaintiff protection against suspension and termination for merely testing positive for marijuana metabolites. In the absence of any expert testimony or evidence demonstrating impairment, the Court will, pursuant to Rule 56(f), *sua sponte* grant summary judgment in part to Plaintiff solely on the question of liability on the Second Count of her Complaint alleging discrimination under the AMMA.

B. Wrongful Termination under the ACRA

[33] The third count in Plaintiff's Complaint alleges that she was wrongfully terminated on the basis of disability in violation of the ACRA, A.R.S. § 41-1463(B). (Doc. 1 at 5). This portion of the ACRA provides that it "is an unlawful employment practice for an employer" to "discharge any individual [23] or otherwise to discriminate against any individual with respect to the individual's compensation, terms, conditions or privileges of employment ... on the basis of disability." A.R.S. § 41-1463(B)(1). Notably, the "ADA standards for disability discrimination claims apply to similar claims brought under the Arizona Civil Rights Act ("ACRA"), A.R.S. § 41–1463, as the ACRA is modeled after federal employment discrimination laws." *Larson v. United Nat. Foods W., Inc.*, No. CV-10-185-PHX-DGC, 2011 WL 3267316, at *3 (D. Ariz. July 29, 2011) (citing *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 762 (9th Cir. 1997); *April v. U.S. Airways, Inc.*, No. CV-09-1707-PHX-LOA, 2011 WL 488893, at *10 (D.Ariz. Feb.7, 2011)); *see also* *Ransom v. State of Arizona Bd. of Regents*, 983 F.Supp. 895, 904 (D. Ariz. 1997) ("This Court finds federal case law to be persuasive in interpreting the ACRA because of the similarities between it and the federal antidiscrimination laws."); *Francini v. Phoenix Newspapers, Inc.*, 188 Ariz. 576, 937 P.2d 1382, 1388 (Ariz. Ct. App. 1996) ("Because the ACRA is modeled after federal employment discrimination laws ... federal case law is persuasive in applying the ACRA.").

[34] **[35]** **[36]** In order to establish a *prima facie* case of disability discrimination under the ACRA, Plaintiff must demonstrate: (1) that she is disabled, (2) that she is ***793** qualified to perform the essential functions of her job with or without a reasonable accommodation, and (3) that she was discharged because of her disability. *Fallar v. Compuware Corp.*, 202 F.Supp.2d 1067, 1082 (D. Ariz. 2002); *Ransom*, 983 F.Supp. at 904. Should Plaintiff establish a *prima facie* case, then the burden shifts to Defendant to articulate a legitimate, non-discriminatory reason for its employment action. *Fallar*, 202 F.Supp.2d at 1082. If Defendant sets forth such a reason, then Plaintiff must show that Defendant's proffered reason is merely pretext for unlawful disability discrimination. *Id.*; *see also* *Burris v. City of Phoenix*, 179 Ariz. 35, 875 P.2d 1340, 1346 (Ariz. Ct. App. 1993) (applying the *McDonnell Douglas* burden-shifting framework to a discriminatory termination claim under A.R.S. § 41-1463 of the ACRA).

1. Whether Plaintiff is "Disabled"

Defendant contends that Plaintiff cannot establish the first element of her *prima facie* case because she is not disabled. (Doc. 32 at 11). The ACRA requires that the term "disability"

be defined and construed "in favor of broad coverage of individuals." A.R.S. § 41-1468(A). Under the ACRA:

> Disability means, with respect to an individual, *except any impairment caused by current use of illegal drugs*, any of the following:
>
> (a) A physical or mental impairment that substantially limits one or more of the major life activities of the individual.
>
> (b) A record of such a physical or mental impairment.
>
> (c) Being regarded as having such a physical or mental impairment.

Id. § 41-1461(4) (emphasis added).

[37] **[38]** The employee "bears the ultimate burden of proving" that she is disabled. *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 988 (9th Cir. 2007) (citing *Nunes v. Wal–Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th Cir. 1999)). "Therefore, for summary judgment to be appropriate, there must be no genuine issue of material fact regarding whether [the plaintiff] has an impairment that substantially limits a major life activity, has a record of such an impairment, or is regarded as having such an impairment." *Coons v. Sec'y of U.S. Dep't of Treasury*, 383 F.3d 879, 884 (9th Cir. 2004).

According to Defendant, "Plaintiff does not identify or describe her purported disability anywhere in her Complaint," nor "provide[ ] any information about any purported disability." (Doc. 32 at 11). Rather, Defendant states that Plaintiff "seems to imply that she is 'disabled' because she qualifies for a medical marijuana card." (*Id.*). To the extent that Plaintiff may be attempting to imply that her "disability" is "her status as a medical marijuana cardholder," as Defendant suggests, (*id.*), Plaintiff's argument fails because Plaintiff admitted that "she has no evidence that Walmart terminated her because of her status as a medical marijuana cardholder." (Doc. 36 ¶ 33).

In both her Complaint and Response, Plaintiff does not aver any facts suggesting that any of her major life activities have been limited or that she has a record of an impairment. (*See* Doc. 1, 35). Rather, Plaintiff alleges that she is disabled under the ACRA "because she was 'regarded as' being impaired by Wal-Mart." (Doc. 35 at 13). In her Response, Plaintiff nowhere specifies whether Defendant viewed her as impaired because of her marijuana use, because of her on-the-job wrist injury, or because of the underlying medical conditions ***794** [24] that she treats with medical marijuana. (*See* Doc. 35). Although the Court agrees with Defendant that it is "far from clear" (Doc. 37 at 8) from Plaintiff's Response, Plaintiff clarified at oral argument that she is alleging that Defendant regarded her as having an impairment because of the effects of her medical marijuana use.

[39] The ACRA defines "[b]eing regarded as having such a physical or mental impairment" as an individual who establishes that he or she "has been subjected to an action prohibited under this article because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." A.R.S. § 41-1461(2). Notably, however, the impairment must not be "transitory" or "minor." A.R.S. § 41-1461(2)(b). [25] A "transitory impairment" is "an impairment with an actual or expected duration of six months or less." *Id.*

[40] Here, Plaintiff's alleged impairment—the effects of medical marijuana use— appears to be objectively "transitory and minor," and thus bars Plaintiff from meeting the ACRA's definition of disabled. *Id.* In Plaintiff's Controverting Statements of Fact and Additional Statements of Fact, she states that she "smokes the medical marijuana in the evening just before bed in order to be able to sleep," and "strongly prefers the medical marijuana over the hydrocodone because she has zero side effects when she wakes up, while the hydrocodone makes her groggy and feel 'not there' in the mornings." (Doc. 36 ¶¶ 36–37). Further, she asserts that she "did not come to work until 12 hours past her last use of medical marijuana" on the day she was drug-tested, and states that she has "never ... been impaired by [marijuana] during her hours of employment." (*Id.* ¶¶ 38, 68). Moreover, Plaintiff points out that there "is no allegation or evidence in this case that Ms. Whitmire was observed to be impaired at work." (*Id.* ¶ 69). In light of these facts averred by Plaintiff which demonstrate that she believes the impairing effects of marijuana subside in a period of hours, the Court suspects that a reasonable jury would not be convinced that smoking medical marijuana gave Plaintiff a physical or mental impairment with an actual or expected duration of more than six months, as required to meet the definition of "disabled" under A.R.S. § 41-1461(2)(b).

Putting aside the issue of whether the reference to "impairment caused by current use of illegal drugs" in

A.R.S. § 41-1461(4) includes impairment caused by medical marijuana use, case law from the Third and Seventh Circuits suggests that "if one can alter or remove the 'impairment' through an equally efficacious course of treatment, it should not be considered 'disabling.' " *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 187 (3d Cir. 2010). In *Sulima*, the Court stated that the "side effects from medical treatments may themselves constitute an impairment under the ADA," where the potentially disabling medication or course of treatment is "required in the 'prudent judgment of the medical profession,' " and where there are no "available alternative[s] that [are] equally efficacious [but] lack[ ] similarly disabling side effects." *Id.* at 187 (holding that employee's claimed impairment based on side effects from prescribed medication ***795** for his gastrointestinal problems did not constitute a "disability" within the meaning of the ADA, regardless of whether his underlying health problems were disabling, because employee did not demonstrate that the prescribed medication was required in the prudent judgment of the medical profession) (citing *Christian v. St. Anthony Med. Ctr., Inc.*, 117 F.3d 1051, 1052 (7th Cir. 1997) (stating that "the disabling treatment [must] be truly necessary, and not merely an attractive option"); *Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999) (finding no evidence in the record that the plaintiff's "physical condition *compelled* her to take a combination of medications [that caused the side effects]" (emphasis in original))).

[41] Applying this standard here, Plaintiff clearly has not shown that smoking medical marijuana, the "potentially disabling medication" at issue, is "required in the prudent judgment of the medical profession." *Sulima*, 602 F.3d at 187. Rather, marijuana is still classified as a Schedule 1 controlled substance under the Controlled Substances Act, meaning it "has a high potential for abuse," and "has no currently accepted medical use in treatment in the United States." 21 U.S.C. § 812(b)(1). Although Plaintiff avers that she prefers medical marijuana to hydrocodone because the "hydrocodone makes her groggy and feel 'not there' in the mornings," (Doc. 36 ¶ 37), Plaintiff has also not demonstrated that no other equally effective alternatives exist which lack the side-effects that medical marijuana has, *Sulima*, 602 F.3d at 187. Rather, Plaintiff could likely use another pain medication which might not have the same "impairing" effects as medical marijuana or hydrocodone. [26]

Following the precedents set by the Third Circuit in *Sulima* and by the Seventh Circuit in *Christian*, the Court cannot find that the side effects from smoking medical marijuana constitute a disability under the ACRA. As Plaintiff has failed to demonstrate that she has a disability, she is unable to meet the first element of her *prima facie* case. This, alone, is sufficient to grant summary judgment to Defendant on Plaintiff's wrongful termination claim under the ACRA.

Because Plaintiff failed to prove that she is disabled under the ACRA and is therefore unable to meet her *prima facie* case, the Court need not address the parties' arguments as to whether Plaintiff is a "qualified individual" or whether she was discharged "because of" her disability. *See* *Ransom*, 983 F.Supp. at 905 ("Plaintiff bears the burden of proof for establishing *each* of the[ ] elements" of her prima facie case.) (emphasis added). Further, Plaintiff's failure to meet her *prima facie* burden renders moot the remainder of the ***796** burden-shifting analysis. [27] In sum, the Court finds that Plaintiff has not introduced evidence sufficient to raise a genuine dispute of material fact that Defendant discriminated against her because of a disability. Accordingly, the Court grants Defendant's Motion with respect to Plaintiff's third cause of action alleging disability discrimination under the ACRA.

C. Retaliatory Termination under the AEPA and Arizona Workers' Compensation Statutes

The fourth and final count in Plaintiff's Complaint alleges that Defendant retaliated against her for pursuing her rights under Arizona's workers' compensation statutes in violation of the AEPA, A.R.S. § 23-1501(A)(3)(c)(iii). (Doc. 1 at 5–6). This section of the AEPA provides that it is the "public policy of this state" that an "employee has a claim against an employer for termination of employment" if the "employer has terminated the employment relationship of an employee in retaliation" for the "exercise of rights under the workers' compensation statutes[.]" A.R.S. § 23-1501(A)(3)(c)(iii); *see also Thompson v. Better-Bilt Aluminum Prod. Co.*, 187 Ariz. 121, 927 P.2d 781, 787 (Ariz. Ct. App. 1996) ("Termination in retaliation for filing a workers' compensation claim can serve as the basis for a cause of action for wrongful discharge.").

[42] **[43]** In order to establish a *prima facie* case of retaliation under the AEPA, Plaintiff must show: "(1) that [s]he engaged in a protected activity, (2) that [s]he suffered an

judgment solely on the question of liability on Plaintiff's Second Count alleging discrimination under the AMMA.

IT IS FURTHER ORDERED that Plaintiff's First Count alleging wrongful termination under the AMMA and AEPA is **DISMISSED** as duplicative of Plaintiff's Second Count.

IT IS FINALLY ORDERED affirming all trial dates solely for the issue of damages on Plaintiff's Second Count alleging discrimination under the AMMA. When filing a proposed Final Pretrial Order, the parties shall specifically address whether the AMMA provides a right to a trial by jury, whether the AMMA provides for a claim for reinstatement, and what specific damages Plaintiff seeks.

All Citations

359 F.Supp.3d 761, 169 Lab.Cas. P 61,933, 102 Fed.R.Serv.3d 1397, 2019 A.D. Cases 41,374

Footnotes

1 Plaintiff does not challenge the testing method of her drug screen and admits that the results indicate that a marijuana metabolite was present in her urine. (Docs. 33 ¶ 24; 36 ¶ 24).

2 Ms. Vaughn also states in her Declaration that it is her understanding that the quantitative value of marijuana reflected in Plaintiff's urine screen ("> 1000 ng/ml") is "the maximum reading the test can measure for marijuana." (Doc. 33-3 at 22–23, Vaughn Decl. ¶ 13).

3 Specifically, the four counts in Plaintiff's Complaint are as follows: Count One alleges wrongful termination under the AMMA and the AEPA; Count Two alleges discrimination under the AMMA; Count Three alleges wrongful termination under the ACRA; and Count 4 alleges retaliation under the AEPA for exercising rights under the Arizona workers' compensation statutes. (Doc. 1 at 4–6).

4 After receiving the parties' Joint Motion requesting that the Court extend the deadline for Defendant to file its Reply, (Doc. 38), the Court ordered that Defendant's Reply filed on October 18, 2018 was deemed to be timely, (Doc 39).

5 The Court deems the State of Arizona's Proposed Amicus Curiae Brief in Support of No Party at Doc. 54-1 at 1–5 to be filed as of January 23, 2019, the date of the Order granting leave.

6 Plaintiff's discrimination claim under the AMMA is the second count in her Complaint. (Doc. 1 at 4–5).

7 Plaintiff's wrongful termination claim under the AMMA and AEPA is the first count in her Complaint. (Doc. 1 at 4).

8 Defendant does not dispute that Plaintiff is a qualifying patient under the AMMA. (*See* Docs. 2; 32).

9 This portion of the AMMA states:

> For the purposes of medical care, including organ transplants, a registered qualifying patient's authorized use of marijuana must be considered the equivalent of the use of any other medication under the direction of a physician and does not constitute the use of an illicit substance or otherwise disqualify a registered qualifying patient from medical care.

A.R.S. § 36-2813(C).

10 Due to amendments of RCW 69.51A.060 effective July 1, 2016, former subsection 6 is now subsection 7. *See* Cannabis Patient Protection Act—Establishment, 2015 Wash. Legis. Serv. Ch. 70 (S.S.S.B. 5052) (West).

11 In *Noffsinger*, the court noted that Arizona is one of nine states which have passed medical marijuana laws with explicit anti-discrimination protections from adverse employment actions. *Noffsinger*, 273 F.Supp.3d at 331 n. 1; *see* A.R.S. § 36-2813; Conn. Gen. Stat. § 21a-408p(b); Del. Code Ann. tit. 16, § 4905A; 410 Ill. Comp. Stat. 130/40; Me. Rev. Stat. tit. 22, § 2423-E; Minn. Stat. § 152.32; Nev. Rev. Stat. §

adverse employment action, and (3) that there is a causal link between the two." *Levine v. TERROS, Inc.*, No. CV08-1458-PHX-MHM, 2010 WL 864498, at *8–10 (D. Ariz. Mar. 9, 2010) (citing *Hernandez v. Spacelabs Med., Inc.*, 343 F.3d 1107, 1113 (9th Cir. 2003)); *see also Burroughs v. City of Tucson*, No. CV-16-00724-TUC-BGM, 2018 WL 5044653, at *13 (D. Ariz. Oct. 17, 2018); *Love v. Phelps Dodge Bagdad, Inc.*, No. CV-03-01399-PCT-MHM, 2005 WL 2416363, at *10 (D. Ariz. Sept. 26, 2005). "Under the AEPA the filing of a workers' compensation claim is a protected activity." *Levine*, 2010 WL 864498, at *14 (citing A.R.S. § 23–1501(A)(3)(c)(iii)).

The parties here do not dispute that Plaintiff suffered an adverse employment action, (*see* Docs. 32 at 11 n. 2, 13–14; 35 at 14–17), as she was terminated, (Doc. 1 at 6). Accordingly, the second element of Plaintiff's *prima facie* case is met. Rather, the contention lays in the first and third elements, as Defendant claims that Plaintiff cannot establish a *prima facie* case of retaliation because Plaintiff cannot show that she engaged in a protected activity nor demonstrate a causal connection between any purported protected activity and the adverse employment action she suffered. (Doc. 32 at 13).

1. Whether Plaintiff Engaged in a Protected Activity

[44] As to the first element, Defendant claims that "Plaintiff admits that she never exercised any rights under Arizona's workers' compensation statutes because she did not miss any work as a result of her wrist injury, ... and never filled out any workers' compensation paperwork or otherwise sought benefits." (*Id.* at 13–14 (citing Doc. 33 ¶¶ 31–32)). Defendant also asserts that "Plaintiff admits she has no basis or evidence ***797** to support a claim of retaliation based on her alleged exercise of any right under the workers' compensation statutes." (*Id.* at 14). In support of these contentions, Defendant only cites its own Statement of Facts (Doc. 33 ¶¶ 31–32), which purports that the following portion of Plaintiff's deposition corroborates these statements:

> Q: Did you fill out any workers' comp paperwork, like making a claim?
>
> A: I don't think so.
>
> Q: Yeah, I didn't see anything. That's why I was asking. Why do you think Walmart retaliated against you in some way for this workers' comp thing? Where does that claim come from?
>
> A: I don't know.
>
> Q: Okay. And you didn't miss any time as a result of your wrist injury, right?
>
> A: No.

(Doc. 33-2 at 5, Plaintiff Depo. at 98: 8–99:10).

As a preliminary matter, the Court notes that *nowhere* in Plaintiff's deposition testimony—or in any other portion of the record—does Plaintiff admit that "she has no basis or evidence to support a claim of retaliation," as Defendant claims, (Doc. 32 at 14). Rather, Plaintiff merely answered "I don't know" in response to questioning by counsel for Defendant. (Doc. 33-2 at 5, Plaintiff Depo. at 99:7). Moreover, while Plaintiff stated in her deposition that she did not miss any time as a result of her wrist injury, (Doc. 33-2 at 5, Plaintiff Depo. at 99:8–10), Plaintiff left her scheduled shift on May 24, 2016 to get x-rays and submit a post-accident drug screen in accordance with Defendant's company policy, (Docs. 33-3 ¶ 12; 36 ¶ 31).

Although Defendant asserts that "Plaintiff's reporting of her wrist injury[ ] is not tantamount to 'exercising a right under the workers' compensation statute,' for purposes of establishing that she engaged in a protected activity," (Doc. 32 at 13 (citing *Quinones v. Potter*, 661 F.Supp.2d 1105, 1126–27 (D. Ariz. 2009)), the Court disagrees. However, Defendant's reliance on *Quinones v. Potter* is misplaced, as that case nowhere indicates that reporting of an on the job injury is not equivalent to engaging in protected activity under the workers' compensation statutes of Arizona.[28] Rather, the AEPA states that a wrongful termination claim can be brought against an employer "in retaliation for" the "exercise of rights under the workers' compensation statutes prescribed in chapter 6 of this title." A.R.S. § 23-1501(A)(3)(c)(iii); *see id.* at § 23-901 *et seq*. In particular, the workers' compensation statutes provide that injured employees shall be compensated "for loss sustained on account of the injury," including "medical, nurse and hospital services and medicines." A.R.S. § 23-1021.

Here, Plaintiff exercised her right to receive compensation under the workers' compensation statutes by reporting her

"accident and the injury resulting from the accident" to her employer on May 21, 2016 in accordance with A.R.S. § 23-908(E). (Docs. 33 ¶ 16; 36 ¶ 16). Although Plaintiff ***798** did not personally "file" a workers' compensation claim, she did fill out an Associate Incident Report on the date of her accident, (Doc. 36-1 at 12), which began Defendant's investigation into her accident, (*id.* at 32, 34–35, 42–43), and which ultimately resulted in the generation of a workers' compensation claim by Defendant on Plaintiff's behalf, (*id.* at 10, 14, 16). (*See* Doc. 36 ¶¶ 31–32). Plaintiff also requested additional medical treatment for her injuries from Ms. Vaughn beyond her initial visit to the clinic on May 24, 2016. (Docs. 36 ¶¶ 55–57; 36-1 at 30 (email from Ms. Vaughn on June 28, 2016 stating that Plaintiff requested medical care for her work injury on May 21, 2016)). As Plaintiff exercised her rights under § 23-1021 of the workers' compensation statutes, the Court finds that Plaintiff engaged in protected activity. Therefore, Plaintiff has met the first element of her *prima facie* case.

2. Whether There is a Causal Link Between the Purported Protected Activity and Plaintiff's Termination

[45] **[46]** **[47]** Although Defendant claims that Plaintiff cannot show a causal connection between any purported protected activity and the adverse employment action she suffered, (Doc. 32 at 13), the Court finds that Plaintiff has established this third element of her *prima facie* case for retaliation. "To prove this 'causal link,' the employee must show that the employer's 'retaliatory motive played a part in the employment action.' " *Knox v. United Rentals Highway Techs., Inc.*, No. CIV07-0297-PHX-DKD, 2009 WL 806625, at *5 (D. Ariz. Mar. 26, 2009) (quoting *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 798 (9th Cir. 1982)). "[T]he plaintiff must make some showing sufficient for a reasonable trier of fact to infer that the defendant was aware that the plaintiff had engaged in protected activity." *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003); *see also Stephens v. Nike, Inc.*, 611 F. App'x 896, 897 (9th Cir. 2015) (affirming summary judgment in favor of the employer on the plaintiff's Title VII retaliation claim where plaintiff "failed to raise a genuine dispute of material fact as to whether the relevant decision maker was aware of his protected activity").

Despite producing workers' compensation related paperwork in this litigation, (Doc. 36 ¶ 53), Defendant argues that there is no evidence "whatsoever" that Defendant "had any knowledge regarding [Plaintiff's] purported workers' compensation claim." (Doc. 37 at 9). Frankly, the Court finds it disingenuous for Defendant to argue that it was "not aware that Plaintiff submitted a workers' compensation claim when it terminated her employment," when Defendant filed Plaintiff's workers' compensation claim on her behalf. (*Id.*; *see* Docs. 36-1 at 10 (letter from the Industrial Commission of Arizona's Claims Division to Plaintiff on June 7, 2016, alerting Plaintiff that her "employer's insurance carrier has been notified of [her] claim"); 36-1 at 35 (noting that Manager Investigation Report completed by Mr. Deese was mailed to Claims Management, Inc. by Debra Vaughn on May 26, 2016 via USPS)). Furthermore, an email chain in the record between Debra Vaughn, Defendant's Personnel Coordinator, and Jason Krongaard, Defendant's Market Asset Protection Manager, clearly demonstrates that Defendant knew of Plaintiff's workers' compensation claim prior to Plaintiff's termination on July 22, 2016. (Doc. 36-1 at 29–30). Specifically, Ms. Vaughn emailed Mr. Krongaard on June 28, 2016—almost an entire month before Plaintiff's termination—stating: "I need direction in regards to Carol Whitmire. She is requesting medical care for her work injury on 5/21/2016 [for] Claim # C6477157." (*Id.* at 30). In addition to proving that Defendant had actual knowledge of Plaintiff's workers' ***799** compensation claim, this email also demonstrates that Defendant was aware of Plaintiff's requests for additional medical treatment for her work-related injury. (*See* Doc. 36 ¶¶ 55–57).

Moreover, the Ninth Circuit has held that "causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (citations omitted); *see also Ray v. Henderson*, 217 F.3d 1234, 1244 (9th Cir. 2000) ("That an employer's actions were caused by an employee's engagement in protected activities may be inferred from proximity in time between the protected action and the allegedly retaliatory employment decision.") (citation and internal quotations omitted). Here, Plaintiff asserts that her "retaliation claim is premised on the fact that she was terminated practically in the midst of Wal-Mart's 'handling' of her workers' compensation claim and her asking for additional medical treatment." (Doc. 35 at 15). A period of 62 days elapsed from the time Plaintiff first filled out an incident report on the date of her injury (May 21, 2016) to the date of her termination (July 22, 2016). (Doc. 35 at 15–16); (*see also* Docs. 33 ¶ 26; 36-1 at 12). Moreover,

from the date Plaintiff first obtained treatment for her wrist injury on May 24, 2016, 59 days passed to the date of her termination. (Doc. 35 at 15–16). Finally, from June 7, 2016 —the date on which Plaintiff requested additional medical treatment for her work injury from Ms. Vaughn—just 45 days elapsed to the date of Plaintiff's termination. (*Id.*; *see also* Docs. 36 ¶¶ 55–57; 36-1, Decl. of Plaintiff ¶¶ 26–27).

The Ninth Circuit has held that adverse employment actions occurring within similar intervals of time after protected activity support an inference of causation. *See* *Thomas v. City of Beaverton*, 379 F.3d 802, 812 (9th Cir. 2004) (concluding that seven week lapse between protected activity and adverse employment action was sufficient evidence of causation); *Miller v. Fairchild Indus.*, 885 F.2d 498, 505 (9th Cir. 1989) (holding that a *prima facie* case of causation was established when discharges occurred forty-two and fifty-nine days after protected activity); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (holding that sufficient evidence of causation existed where adverse employment actions occurred less than three months after complaint filed, two weeks after charge first investigated, and less than two months after investigation ended); *see also* *Coszalter v. City of Salem*, 320 F.3d 968, 977 (9th Cir. 2003) ("Depending on the circumstances, three to eight months is easily within a time range that can support an inference of retaliation."). Accordingly, the Court finds that sufficient evidence of a causal link exists between Plaintiff's protected activity and her termination from Defendant's employ. Therefore, Plaintiff has provided sufficient evidence to make out a *prima facie* case of retaliatory discharge in violation of A.R.S. § 23-1501(A)(3)(c)(iii).

3. Legitimate, Non-Retaliatory Reason and Pretext

[48] **[49]** **[50]** "If Plaintiff provides sufficient evidence to make out a *prima facie* case of retaliation, then the burden shifts to Defendant to articulate some legitimate, non-retaliatory reason for its actions." *Levine*, 2010 WL 864498, at *8 (citing *Porter v. California Dep't of Corrections*, 419 F.3d 885, 894 (9th Cir. 2005)). "If Defendant sets forth such a reason, then Plaintiff must show that Defendant's proffered reason is merely pretext for the underlying ***800** retaliatory motive."[29] *Id.*

[51] Here, Defendant has met its burden of articulating a legitimate, non-retaliatory reason for terminating Plaintiff. Specifically, Defendant stated that Plaintiff was fired because Walmart had a good faith basis to believe Plaintiff was impaired by marijuana at work on May 24, 2016 based on the results of her positive drug test. (Doc. 32 at 14 ("Plaintiff was terminated because she tested positive for marijuana, and Walmart has a bright-line policy of terminating employees who test positive for a Schedule I controlled substance like marijuana, including medical marijuana cardholders who are deemed to be impaired at work."). Therefore, the deciding question is whether Plaintiff has produced enough evidence from which a reasonable factfinder could conclude that Defendant's proffered reason was pretext for retaliation.

[52] In this case, Plaintiff has not offered any evidence suggesting that Defendant did not honestly believe its legitimate, non-retaliatory reason for terminating her, nor argued that the reasons provided by Defendant were pretext for retaliation. (*See* Doc. 35). At most, there is temporal proximity between Plaintiff's protected activity under Arizona's workers' compensation statutes and her termination, which is not enough to sustain a claim for retaliatory discharge. As Plaintiff has failed to point to evidence of pretext, the Court is unable to determine that there is a genuine dispute of material fact on this claim. Accordingly, the Court grants summary judgment for Defendant on Plaintiff's Fourth Cause of Action alleging retaliatory discharge under the AEPA.

IV. CONCLUSION

IT IS ORDERED that Plaintiff's Rule 56(d) Application (Doc. 35 at 11–13) is **DENIED**.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment (Doc. 32) is **GRANTED IN PART** and **DENIED IN PART**. The motion is **GRANTED** as to Plaintiff's Third Count alleging wrongful termination under the ACRA, and as to Plaintiff's Fourth Count alleging retaliatory discharge for the exercise of rights under the workers' compensation statutes in violation of the AEPA. Defendant's Motion for Summary Judgment is **DENIED** as to Plaintiff's Second Count alleging discrimination under the AMMA.

IT IS FURTHER ORDERED that, pursuant to Rule 56(f), the Court is *sua* ***801** *sponte* granting summary judgment in part for Plaintiff on a non-filed cross-motion for summary

453A.800; 35 Pa. Stat. Ann. § 10231.2103; R.I. Gen. Laws § 21-28.6-4. The *Noffsinger* decision also emphasized that in *Gersten v. Sun Pain Mgmt., P.L.L.C.*, 395 P.3d at 312– 13, the Arizona Court of Appeals "insinuated (but did not find) that a private cause of action might exist against ... employers" in the AMMA. *Id.* at 339 n. 5.

12 The Court is not convinced by Defendant's argument that *Noffsinger* is distinguishable because it is a "failure-to-hire" case. (Doc. 37 at 3). The anti-discrimination provision analyzed in *Noffsinger*, like A.R.S. § 36-2813(B), does not differentiate between refusing to hire or discharging an individual. *See* Conn. Gen. Stat. § 21a-408p(b)(3).

13 In *Pfingston v. Ronan Eng'g Co.*, a case from 2002, the Court refers to the plaintiff's motion for a continuance of the summary judgment motions pending additional discovery as a Rule 56(f) motion. In 2010, Fed. R. Civ. P. 56 was amended, so now "subdivision (d) carries forward without substantial change the provisions of former subdivision (f)." Fed. R. Civ. P. 56 advisory committee's notes to 2000 amendments.

14 Under Fed. R. Civ. P. 26(a)(2)(A), "a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." This expert disclosure "must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case ...." Fed. R. Civ. P. 26(a)(2)(B). "A party must make these disclosures at the times and in the sequence that the court orders." Fed. R. Civ. P. 26(a)(2)(D).

15 Regardless of which party has the burden of proof on the issue of impairment, Defendant failed to timely disclose Ms. Vaughn as an expert. The Court's Rule 16 Scheduling Order required that the party with the burden of proof on the issue make all expert disclosures "no later than November 17, 2017." (Doc. 13 at 2). Thereafter, the Order required the responding party without the burden of proof on that issue to make any expert disclosures "no later than December 15, 2017." (*Id.*). Then, the party with the burden of proof was required to "make its rebuttal expert disclosure, if any, no later than January 12, 2018." (*Id.*). Further, the Court ordered that all discovery be completed by March 30, 2018, (*id.*) and stressed that it would "not entertain discovery disputes after the close of discovery barring extraordinary circumstances," (*id.* at 2 n. 2).

16 Exhibit H (Doc. 36-1 at 45–53) includes pages from an article entitled "An Evaluation of Data from Drivers Arrested for Driving Under the Influence in Relation to Per se Limits for Cannabis." Exhibit I (*id.* at 55–58) is the Drug Screen Test Cup (Urine) Package Insert from Alere. Exhibit J (*id.* at 60–67) includes pages from an article entitled "Marijuana and the Cannabinoids."

17 Under the DTEA, "good faith" is defined as "reasonable reliance on fact, or that which is held out to be factual, without the intent to deceive or be deceived and without reckless or malicious disregard for the truth." A.R.S. § 23-493(6).

18 The DTEA defines "impairment" as:

> ... symptoms that a prospective employee or employee while working may be under the influence of drugs or alcohol that may decrease or lessen the employee's performance of the duties or tasks of the employee's job position, including symptoms of the employee's speech, walking, standing, physical dexterity, agility, coordination, actions, movement, demeanor, appearance, clothing, odor, irrational or unusual behavior, negligence or carelessness in operating equipment, machinery or production or manufacturing processes, disregard for the safety of the employee or others, involvement in an accident that results in serious damage to equipment, machinery or property, disruption of a production or manufacturing process, any injury to the employee or others or other symptoms causing a reasonable suspicion of the use of drugs or alcohol.

Id. at § 23-493(7).

19 The Court has not overlooked the fact that impairment can be proven in any number of ways. *See* A.R.S. § 23-493(7). However, as Defendant itself admitted, Walmart terminated Plaintiff solely based on the results of her drug screen. (*See* Doc. 32 at 9 ("The results of this test gave Defendant a good faith basis to believe

Plaintiff was impaired by marijuana on May 24, 2016, on Defendant's premises during work hours, and Walmart terminated Plaintiff's employment *solely on that basis*.") (emphasis added)).

20 In its Supplemental Brief, Defendant agrees that the burden of showing a "good faith belief" is placed on the employer, and then shifts to the employee. (*See* Doc. 48 at 4 ("... Walmart must show it had a good faith belief that Plaintiff was 'impaired by' or 'under the influence of' marijuana while at work and, if it d[oes], it is Plaintiff's burden to show the lack of such a good faith belief.")).

21 The Arizona Supreme Court has also recognized the distinction between active and inactive marijuana metabolites. *See* *State ex rel. Montgomery v. Harris*, 234 Ariz. 343, 322 P.3d 160, 164 (2014) ("Because the legislature intended to prevent impaired driving, we hold that the 'metabolite' reference in § 28–1381(A)(3) is limited to any of a proscribed substance's metabolites that are capable of causing impairment.").

22 Defendant nowhere contends that Plaintiff "used" or "possessed" marijuana while at work. Rather, Defendant's defense rests on its claim that Plaintiff was "impaired" by marijuana at work, of which there is no evidence.

23 The ACRA clarifies that "with respect to employers or employment practices involving a disability, 'individual,' means a qualified individual." A.R.S. § 41-1463(O).

24 (*See* Doc. 36 ¶¶ 34–36, 39–40).

25 Under the ADA, the "relevant inquiry is whether the actual or perceived impairment is objectively 'transitory and minor,' not whether the employer subjectively believed the impairment to be transitory and minor." *Saley v. Caney Fork, LLC*, 886 F.Supp.2d 837, 851 (M.D. Tenn. 2012) (citing 29 C.F.R. § 1630.2(l)).

26 *See* *McDonald v. Pennsylvania State Police*, No. 02:09-CV-00442, 2012 WL 5381403, at *11 (W.D. Pa. Oct. 31, 2012) (holding that the side effects of the plaintiff's prescribed pain medication did not constitute an actual disability nor lead plaintiff to be "regarded as" disabled where the plaintiff could have switched to a non-narcotic pain reliever or stopped taking the pain medication altogether, and where the plaintiff failed to meet his burden of demonstrating that his prescribed pain medication was the "only efficacious medication" and medically necessary); *Tavarez v. United Blood Servs.*, No. 11-CV-673 WJ/ACT, 2012 WL 13080075, at *6 (D.N.M. July 12, 2012) (holding that the side effects of the plaintiff's pain medication did not qualify as a disability under the ADA where the plaintiff did not claim that such side effects were a permanent condition, did not make any showing that she discussed the possibility of an alternative pain medication with her doctor, and where plaintiff discontinued use of the medication, showing "that it was not required").

27 Despite recognizing that "the *McDonnell Douglas* burden-shifting framework applies to her ACRA claim," (Doc. 35 at 13), Plaintiff failed to make any argument contending that Defendant's proffered reasons for her termination were pretext for disability discrimination. (*See* Doc. 35). Accordingly, even if Plaintiff had met her *prima facie* burden, Plaintiff's wrongful termination claim under the ACRA still would not survive summary judgment.

28 *Quinones v. Potter* involved an employee who alleged, in part, that her former employer retaliated against her in violation of Title VII. *Quinones*, 661 F.Supp.2d at 1117. There, the district court granted summary judgment for the employer on the employee's retaliation claim because the employee failed to demonstrate that she engaged in any protected activity. *Id.* at 1126–27. Specifically, the district court determined that the employee's submission of medical documentation, requests for continued temporary light duty assignments, and requests for "time on the clock" to work on her EEOC complaint did not constitute "protected activities," nor reasonably put her former employer on notice that she was opposing discrimination. *Id.* at 1127.

29 Although the district court has previously applied this *McDonnell Douglas* burden-shifting framework in the context of a retaliatory discharge claim under A.R.S. § 23-1501(A)(3)(c)(iii), the Court could find not find any opinions from the Arizona Court of Appeals or Arizona Supreme Court applying this framework to a claim under A.R.S. § 23-1501(A)(3)(c)(iii). Nevertheless, the Arizona Court of Appeals recently noted in

an unpublished decision that the Arizona Court of Appeals "has applied the *McDonnell Douglas* burden-shifting framework to wrongful discharge claims under A.R.S. § 41–1464 (alleged retaliation for asserting employment discrimination violations), *see Najar v. State*, 198 Ariz. 345, 347–48, ¶ 8, 9 P.3d 1084 (App. 2000), and *we agree ... that the framework likewise applies to claims under § 23–1501*." *Czarny v. Hyatt Residential Mktg. Corp.*, No. 1 CA-CV 16-0577, 2018 WL 1190051, at *2 (Ariz. Ct. App. Mar. 8, 2018) (emphasis added). Pursuant to Rule 111 of the Supreme Court of Arizona, the Court recognizes that *Czarny v. Hyatt Residential Mktg. Corp.* is a memorandum decision and, thus, is not precedential. AZ ST S CT Rule 111(c). However, this memorandum decision may be cited for persuasive value, as it is here, since "it was issued on or after January 1, 2015; no opinion adequately addresses the issue before the court; and the citation is not to a depublished opinion or a depublished portion of an opinion." *Id.*

EMPLOYMENT LAW ALERT

NUKK-FREEMAN & CERRA, P.C.
EMPLOYMENT ATTORNEYS

ATTENTION NEW JERSEY EMPLOYERS:

UPDATE ON WORKPLACE PROVISIONS IN NEW JERSEY RECREATIONAL MARIJUANA LAW

As we reported, on February 22, 2021, Governor Murphy signed NJ A21 (the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act ("NJCREAMMA") and A1897/4269 that together provide various employment-related protections for adult recreational cannabis users, adding to the existing protections for registered users of medical cannabis. [**Click here for our February 24, 2021 eAlert about these laws**] The Act, however, states that some of those provisions would not become effective until the NJ Cannabis Regulatory Commission ("CRC") adopted its initial rules and regulations for the Act.

On August 19, 2021, the CRC adopted its **initial rules** concerning the recreational use of marijuana. Unfortunately, with the exception of addressing the "physical evaluation" requirement under NJCREAMMA, the initial rules are silent as to the Act's workplace provisions. Regarding the "physical evaluation" requirement, the CRC stated that "until such time that the Commission, in consultation with the Police Training Commission established pursuant to [the Act], develops standards for a Workplace Impairment Recognition Expert certification, no physical evaluation of an employee being drug tested in accordance with [the Act] shall be required." As you may recall, the Act provides that, in addition to testing for the presence of cannabis metabolites in blood, urine, or saliva, employer drug tests must also include a "physical evaluation" to determine impairment. Pursuant to its initial rules, this physical evaluation, which must be performed by an individual certified as a "Workplace Impairment Recognition Expert," is not yet in effect.

Given the lack of guidance that employers were expecting, it is unclear at this time as to what, if any, other employment provisions under NJCREAMMA are effective. It is recommended that employers review their drug testing policies and reach out to counsel before taking any adverse action based on a positive marijuana drug test or a marijuana-related conviction. We will continue to monitor for any new information from the State.

If you have any questions relating to this eAlert or would like assistance reviewing your applicable policies, please reach out to the NFC Attorney with whom you typically work, or call us directly. We are happy to assist with this or any other employment law issue.

Employment Law Solutions That Work.

NEW JERSEY | NEW YORK | CALIFORNIA

nfclegal.com

Nukk-Freeman & Cerra, PC | Chatham Executive Center, 26 Main Street, Chatham, NJ 07928

EMPLOYMENT LAW ALERT

NUKK-FREEMAN & CERRA, P.C.
EMPLOYMENT ATTORNEYS

ATTENTION NEW YORK EMPLOYERS:

New York Enacts Employment Protections for Off-Duty Adult Cannabis Use

Following closely on the heels of New Jersey [CLICK HERE for our February 24, 2021 eAlert], New York has now legalized adult recreational cannabis use. On March 31, 2021, Governor Cuomo signed the "Marihuana Regulation and Taxation Act" ("MRTA"), which creates a new Cannabis Law and establishes a Cannabis Control Board and Office of Cannabis Management to form a regulated and taxed cannabis industry in New York.

Although the MRTA expressly states that it is not intended to limit the authority of employers to enact and enforce policies pertaining to cannabis in the workplace, it does create certain restrictions on that authority. Employers should be aware of the following important points, effective immediately:

1. **Employers may not discriminate on the basis of off-duty, off-premises use of cannabis.** The new law adds the legal use of cannabis to the protections of New York Labor Law Section 201-d, which prohibits employers from discriminating against an applicant or employee for certain off-duty legal activities. This means that employers may not refuse to hire, terminate, or take other adverse action against an individual who uses cannabis lawfully while off-duty and off-premises. Employers still may enforce policies prohibiting employees from cannabis use or possession during work hours (including paid and unpaid breaks), on employer premises, and while using an employer's equipment or other property, such as a company car.

2. **Employers may prohibit employees from being impaired while working.** An employer may prohibit and take adverse employment action where the employee is impaired at work by the use of cannabis. The new law specifically defines impairment as "manifest[ing] specific articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms interfere with an employer's obligation to provide a safe and healthy workplace, free from recognized hazards, as required by state and federal occupational safety and health law". Although it is not yet clear what will be considered "specific articulable symptoms" or who is qualified to make this assessment, employers should take care to identify – and, importantly, to document – behavior impacting the employee's performance or workplace safety prior to taking any adverse action based on suspected cannabis use.
3. **Employers also may take adverse action for off-duty usage under certain limited conditions.** Employers may take adverse action based on off-duty cannabis usage if: (i) the employer's actions are required by state or federal statute, regulation, ordinance, or other state or federal government mandate, or (ii) where failing to take such action would cause the employer to be in violation of federal law or result in the loss of a federal contract or federal funding. Employers should carefully review the terms of any such mandate or federal contract or funding provision to determine whether such an exception may apply.
4. **Employers may not rely solely on a positive drug test.** Although the new law does not expressly address drug testing in the employment context, an employer may only take adverse action for off-duty cannabis usage where the employee is impaired while working (or under one of the limited exceptions discussed above in point 3). Thus, while drug testing for cannabis is not prohibited, most employers may no longer take adverse action against an applicant or employee based solely on a positive drug test without indication of impairment. *As a reminder, however, New York City employers have been restricted since May 2020 from testing job candidates for cannabis as a condition of employment, with limited exceptions*.
5. **Employers may need to revise background check policies.** The new law provides for the automatic expungement of certain cannabis convictions no longer criminalized (for example, possessing up to 3 ounces or smoking in a public place where smoking tobacco is allowed). Employers should ensure that their existing criminal background check policies do not include

consideration of cannabis-related offenses that are now considered lawful.

6. **The medical cannabis program has been expanded.** The new law expands the protections provided to medical users of cannabis since 2014 by, among other things, adding to the covered medical conditions for which cannabis may be prescribed and the type of cannabis products patients may use. Medical cannabis users must be afforded the same rights and protections available to injured workers under the workers' compensation law when such workers are prescribed medications that may prohibit, restrict or require modification of the performance of their job duties and will still be deemed to have a "disability" under the New York Human Rights Law. An employer may continue to enforce policies prohibiting all employees, including medical cannabis patients, from performing their duties while impaired.

If you have any questions relating to the MRTA or would like guidance in reviewing and revising your drug testing, criminal background check, drug-free workplace or other policies, please feel free to reach out to the NFC Attorney with whom you typically work or call us at 973.665.9100.

Employment Law Solutions That Work.

NEW JERSEY | NEW YORK | CALIFORNIA

nfclegal.com

Nukk-Freeman & Cerra, PC | Chatham Executive Center, 26 Main Street, Chatham, NJ 07928

EMPLOYMENT LAW ALERT

NUKK-FREEMAN & CERRA, P.C.
EMPLOYMENT ATTORNEYS

ATTENTION NJ EMPLOYERS: IT'S TIME TO GET INTO THE WEEDS

NEW JERSEY ENACTS NEW EMPLOYMENT PROTECTIONS FOR ADULT CANNABIS USERS

In November 2020, New Jersey voters approved the legalization of adult recreational cannabis use. On February 22, 2021, after months of negotiations between the Governor's Office and the State Legislature and within minutes of a state deadline, Governor Murphy signed a trio of bills establishing the legal and regulatory framework for recreational cannabis.

Among the new laws are NJ A21 (the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization ("CREAMM") Act) and A1897/4269, which together provide various employment-related protections for adult recreational cannabis users, adding to the existing protections for registered users of medical cannabis. [**CLICK HERE** for our July 22, 2019 eAlert on the Jake Honig Compassionate Use Medical Cannabis Act.]

Although the CREAMM Act is effective immediately, its employment-related protections do not become operative until the Cannabis Regulatory Commission adopts its initial rules and regulations. Here are some FAQs on what we know so far:

Q1: Can we require prospective employees to undergo a drug test for cannabis?

A: Yes. Employers may require drug testing as part of pre-employment screening. See Q3 for limitations on relying on a positive result.

Q2: Can we test current employees for cannabis?

A: Yes. Employers may test current employees for controlled substances, including cannabis, upon reasonable suspicion that the employee was using cannabis during the performance of work responsibilities, upon finding "observable signs" of intoxication, or in connection with a work-related accident subject to investigation by the employer. Drug tests that include cannabis also may be done randomly or as a regular screening of current employees to determine use during work hours.

Employers may use the outcome of such tests to determine appropriate employment actions, but may not rely solely on a positive result.

Q3: Can my company have a blanket policy against hiring an applicant or providing for discipline or termination of an employee who tests positive for cannabis?

A: No. An employer may not refuse to employ or take any adverse action "solely due to the presence of cannabinoid metabolites in the employee's bodily fluid," unless failure to do so would put the company in violation of a federal contract or cause it to lose federal funding.

Employers also should keep in mind that, if an employee or job applicant tests positive for cannabis, the Jake Honig Act requires the employer to provide written notice of the opportunity to present a "legitimate medical explanation", including authorization for medical cannabis issued by a health care practitioner, proof of registration as a medical cannabis user, or both. [**CLICK HERE** for more information about this mandated process in our July 22, 2019 eAlert.]

Q4: What must a cannabis drug test entail?

A: Drug tests of applicants or employees must include two components: (1) "scientifically reliable" objective testing methods (e.g., blood, urine or saliva testing), **AND** (2) a physical evaluation to determine the current state of impairment.

Q5: Who may conduct the physical evaluation portion of the drug test?

A: A physical evaluation to determine an employee's or applicant's state of impairment must be conducted by an individual certified as a "Workplace Impairment Recognition Expert," under standards to be set forth by the Commission. Workplace Impairment Recognition Experts can be full- or part-time employees or employers may consider contracting out this service.

Q6: Can we terminate an employee for smoking marijuana at home during his or her free time?

A: No. Employers may not refuse to hire, discharge from employment, or take any other adverse action against an individual "because that person does or does not smoke, vape, aerosolize or otherwise use cannabis items" during non-working hours.

Q7: Can my company have a drug-free workplace policy?

A: Yes. Notwithstanding these new protections, an employer still may maintain a drug-free workplace policy and may prohibit the possession or use of cannabis in the workplace or the use of cannabis or intoxication by employees during work hours.

In addition to the CREAMM Act's restrictions, companies should be aware that A1897/4269 prohibits an employer from relying solely on for employment decisions, requiring an applicant to reveal, or taking adverse actions against an applicant

solely on the basis of an arrest, charge, conviction or adjudication of delinquency for certain manufacture, sale or use offenses relating to small amounts of marijuana or hashish, derivatives of cannabis.

An employer who does so is subject to civil penalties of up to $1,000 for the first violation, $5,000 for the second and $10,000 for each subsequent violation. Exceptions are made for positions in law enforcement, corrections, the judiciary, homeland security, or emergency management. This provision takes effect later this year in conjunction with the decriminalization of the underlying offenses.

If you have any questions on these new restrictions or would like guidance in reviewing and revising your drug testing or other policies to ensure compliance, please reach out to the NFC Attorney with whom you typically work or call us at 973.665.9100.

Employment Law Solutions That Work.

NEW JERSEY | NEW YORK | CALIFORNIA

nfclegal.com

Nukk-Freeman & Cerra, PC | Chatham Executive Center, 26 Main Street, Chatham, NJ 07928

NUKK-FREEMAN & CERRA, P.C.
EMPLOYMENT ATTORNEYS

EMPLOYMENT LAW ALERT

ATTENTION EMPLOYERS: READ ABOUT WEED!
NEW JERSEY ENACTS EMPLOYMENT PROTECTIONS FOR MEDICAL MARIJUANA USERS

Effective immediately, registered users of medical marijuana (or, as referred to in the law, "cannabis") in New Jersey are entitled to certain employment-related protections. The new law, signed by Governor Murphy on July 2, 2019, also renames the state's 2010 Compassionate Use Medical Marijuana Act the "Jake Honig Compassionate Use Medical Cannabis Act", establishes a new Cannabis Regulatory Commission ("CRC") to oversee the program, and revises certain requirements for patients, prescribers, caregivers, producers and dispensaries.

The Act *prohibits employers from taking adverse employment action* – defined as refusing to hire, discharging, forcing to retire, or discriminating in compensation or other terms, conditions or privileges of employment – based solely on an individual's status as a medical cannabis patient registered with the CRC.

Unlike New York City's recent legislation (read NFC's e-alert on NYC's ban [HERE]), the New Jersey law does not prohibit employers from drug testing job applicants for cannabis, but rather imposes requirements in the event of a positive test result. In New Jersey, if an employee or job applicant now tests positive for cannabis pursuant to the employer's drug testing policy, the employer must provide the individual written notice of the opportunity to present a "legitimate medical explanation" for the positive result. Within 3 working days of the notice, the employee or applicant may submit information to explain the positive test result or may request a retest of the original sample at his or her own expense. A legitimate medical explanation may be an authorization for medical cannabis issued by a health care practitioner, proof of registration with the CRC, or both. Importantly, then, employers in New Jersey can no longer have blanket policies that prohibits employment for positive marijuana testing.

Notwithstanding these new protections, an employer may still prohibit, or take adverse employment action for, the possession or use of cannabis during work

hours or on the premises of the workplace outside of work hours.

In addition, the new law provides that no employer will be penalized under state law for employing a registered user but does not require an employer to commit any act in violation of federal law, that would result in loss of a licensing-related benefit pursuant to federal law, or that would result in the loss of a federal contract or federal funding. Thus, an employer may consider its obligations to maintain a drug-free workplace in connection with its federal contracts, licenses or grants in determining what actions to take in the event of a positive cannabis test by an applicant or employee in New Jersey.

CLICK HERE if you have any questions on these new protections or would like guidance in reviewing and revising your drug-testing policies to ensure compliance.

Employment Law Solutions That Work.

New Jersey | nfclegal.com | New York

NFC Timed Agenda for Celesq Presentation Clearing the Haze Around Workplace Marijuana Rules		
Topic	Slide	Estimated Time (minutes)
Introduction	1	2
Marijuana in the Workplace	2	2
Legal History in the Workplace	3	2
Terminology	4	2
Types of Use	5	2
Cannabis for Fun – Federal	6	4
Cannabis for Fun - State	7 - 10	6
Cannabis for Medicine	11 - 12	5
Cannabis for Fun/Medicine– Wrap It Up	13	2
Marijuana Illegal Federal Law	14	3
Conflicts btw Federal & State	15	4
Case Law	16 - 17	8
Interplay with the ADA	18	5
Impact on Drug Testing	19	5
What Do We Know Today?	20	2
Common Employer FAQs	21	6