

Fall 2015

## **Nip it in the Bud: Compassionate Use of Medical Cannabis Pilot Program Act Does Not Provide Employees a Legal Remedy for Adverse Action Based Upon Use in Compliance with the Statute, 49 J. Marshall L. Rev. 193 (2015)**

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### **Recommended Citation**

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NIP IT IN THE BUD: COMPASSIONATE USE  
OF MEDICAL CANNABIS PILOT PROGRAM  
ACT DOES NOT PROVIDE EMPLOYEES A  
LEGAL REMEDY FOR ADVERSE ACTION  
BASED UPON USE IN COMPLIANCE WITH  
THE STATUTE

TYLER DUFF\*

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I. INTRODUCTION

In 2010, Brandon Coats was fired from his job because he tested positive for the use of a federally prohibited drug.<sup>1</sup> Coats' termination may have seemed a simple enough decision for his supervisors because of the company's drug policy prohibiting the

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<sup>1</sup>Bruce Barcott, *Even in Colorado Medical Marijuana Can Still Get You Fired*, TIME (June 15, 2015) <http://time.com/3921738/coats-colorado-dish-medical-marijuana-work-law/>.

use of that drug.<sup>2</sup> Despite the seeming simplicity of Coats' termination, it represents an intricate legal issue.<sup>3</sup> Significantly, Coats was not fired for his use of any drug, but for his medicinal use of marijuana in compliance with Colorado state law.<sup>4</sup> While any use of marijuana is federally prohibited,<sup>5</sup> twenty-three states and the District of Columbia permit the medicinal use of marijuana.<sup>6</sup> In four of those states, Alaska, Colorado, Oregon and Washington, the recreational use of marijuana is also now legal.<sup>7</sup> This legal dichotomy, the federal illegality and state legality, is the reason why Illinois, with its passing of the Compassionate Use of Medical Cannabis Pilot Program Act ("the CUA"), and its promises of protection for patients,<sup>8</sup> may not prevent an employer from terminating an employee for marijuana use in compliance with the CUA.<sup>9</sup>

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<sup>2</sup> See *Coats v. Dish Network, L.L.C.*, 303 P.3d 147, 149 (Colo. App. 2013) (stating that the marijuana-positive drug test results of the plaintiff violated the company's drug policy).

<sup>3</sup> See Barcott, *supra* note 1 (lamenting that the arguments presented before the Colorado Supreme Court on the legality of Coats' termination represent "the kind of Alice in Wonderland logic born of a circumstance in which marijuana is simultaneously a state-legal medicine and a federally illegal drug").

<sup>4</sup> See *Coats*, 303 P.3d at 149 (stating that Coats "used marijuana within the limits of [his] license," but still violated his employer's drug policy). Coats used marijuana to treat symptoms stemming from a car accident that left Coats a quadriplegic with leg spasms. Barcott, *supra* note 1. Coats' physical limitations and marijuana use did not stop him from being considered a model employee during his three years with his employer. Barcott, *supra* note 1.

<sup>5</sup> See generally 21 U.S.C. § 841 (2012) (governing the use of controlled substances). The Controlled Substances Act prohibits individuals from "manufactur[ing], distribut[ing], or dispens[ing], or possess[ing] with intent to manufacture, distribute, or dispense a [Schedule 1] controlled substance." *Id.* Marijuana is classified as a Schedule I controlled substance. 21 U.S.C. § 812 (2012). As such, it has "no currently accepted medical use in treatment in the United States." *Id.*

<sup>6</sup> *Marijuana Resource Center: State Laws Related to Marijuana*, THE WHITE HOUSE, [www.whitehouse.gov/ondcp/state-laws-related-to-marijuana](http://www.whitehouse.gov/ondcp/state-laws-related-to-marijuana) (last visited Dec. 20, 2015) [hereinafter *Marijuana Resource Center*].

<sup>7</sup> *Id.* "Voters in Alaska, Colorado, Oregon, and Washington state also passed initiatives legalizing the sale and distribution of marijuana for adults 21 and older under state law." *Id.* "District of Columbia voters approved Initiative 71, which permits adults 21 years of age or older to grow and possess (but not sell) limited amounts of marijuana." *Id.*

<sup>8</sup> See 410 ILL. COMP. STAT. ANN. 130/5 (West 2014) (stating "the purpose of this Act is to protect patients with debilitating medical conditions, as well as their physicians and providers, from arrest and prosecution, criminal and other penalties, and property forfeiture if the patients engage in the medical use of cannabis"). See also, 410 ILL. COMP. STAT. ANN. 130/40 (West 2016) (providing "[n]o school, employer, or landlord may refuse to enroll or lease to, or otherwise penalize, as person solely for his or her status as a registered qualifying patient" under a provision entitled "Discrimination prohibited").

<sup>9</sup> See 410 ILL. COMP. STAT. ANN. 130/50 (West 2014) (providing that employers may adopt drug policies, including drug free and zero tolerance

This comment provides that the CUA does not, and could not, provide registered users a viable cause of action for such discipline. An overview of the federal prohibition and state legalization of marijuana provides the background information necessary to understand the analysis that follows. That analysis surveys judicial opinions from multiple jurisdictions interpreting the impact of the federal prohibition on the rights of employees under state laws legalizing medical marijuana. Further, it employs the reasoning of those opinions to interpret relevant Illinois statutes. Ultimately, this comment concludes that until the federal law prohibiting marijuana is amended, thus permitting Illinois lawmakers to amend the CUA, then no registered user will have a viable cause of action to address their employer's adverse action based upon the registered user's medical use of marijuana.

## II. THE FEDERAL CLASSIFICATION OF MARIJUANA AND STATE LEGALIZATION OF MEDICAL MARIJUANA

### A. *The Federal Classification of Marijuana*

Marijuana was not always federally prohibited.<sup>10</sup> In fact, prior to the late 1930s it was legally used by American doctors to treat a variety of ailments,<sup>11</sup> and was even recognized in the official pharmacopeia of the United States.<sup>12</sup> The federal government began its regulation of marijuana by taxing it under the Marijuana Tax Act.<sup>13</sup> The Act came about due to the newly founded Federal Bureau of Narcotics.<sup>14</sup> It was intended to discourage the recreational use of marijuana, which had surged during prohibition, as individuals searched for a euphoriant to replace alcohol.<sup>15</sup> Around the same time that the federal

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policies, and may discipline employees for violations of those policies in non-discriminatory manner). Further, the CUA states that it should not be construed to "limit an employer's ability to discipline an employee for use in compliance with state law. *Id.*

<sup>10</sup> See Erwin Chemerisnky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 81 (2015) (detailing that "[f]or most of American history, marijuana was legal to grow and consume").

<sup>11</sup> See generally T. H. Mikuriya, *Marijuana in Medicine: Past, Present and Future*, 110 CAL. MED. J. 34 (1969) (providing an overview of the use of marijuana as medicine during the nineteenth and twentieth centuries in America).

<sup>12</sup> RUDOLPH GERBER, *THE NEW FINANCIAL DEAL LEGALIZING MARIJUANA* 14 (2004).

<sup>13</sup> *Id.* at 11-12.

<sup>14</sup> See *id.* at 4-11 (describing the creation and management of the Federal Bureau of Narcotics and the head of the Bureau's penchant for sensationalism and racism in shaping national attitudes towards marijuana).

<sup>15</sup> *Id.* at 3.

government began to discourage marijuana use, the drug was removed as a recognized medicine from the official pharmacopeia of the United States.<sup>16</sup>

In 1970, Congress took the regulation of marijuana further with the enactment of the Controlled Substances Act (“CSA”),<sup>17</sup> which is still enforced today.<sup>18</sup> The CSA classifies drugs into five different schedules.<sup>19</sup> A substance’s classification depends on its potential for abuse, accepted medical use, and safety in treatment.<sup>20</sup> Aside from a congressional amendment, the Attorney General may reclassify or remove a substance under the CSA.<sup>21</sup> The CSA classifies marijuana as a Schedule I drug, saying it has “a high potential for abuse,” “no currently accepted medical use,” and “a lack of accepted safety for use of the drug.”<sup>22</sup> Based on these determinations, Schedule I substances, including marijuana, may not be prescribed for medical purposes.<sup>23</sup> However, substances classified under the other four schedules may be prescribed pursuant to various limitations.<sup>24</sup>

The CSA requires assessments of the medical value of all controlled substances to determine their classification under the CSA.<sup>25</sup> At the time of the CSA’s enactment, the Schedule I classification of marijuana was controversial due to the lack of research that had been conducted on the drug to that point.<sup>26</sup> But since marijuana is illegal, research regarding the drug’s benefits is limited to “preapproved research project[s]” authorized by the Food and Drug Administration.<sup>27</sup> Interestingly, the federal

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<sup>16</sup> *Id.* at 14.

<sup>17</sup> Ruth C. Stern & J. Herbie DiFonzo, *The End of the Red Queen’s Race: Medical Marijuana in the New Century*, 27 QUINNIPIAC L. REV. 673, 688 (2009). The CSA was the culmination of President Richard Nixon’s “war on drugs.” *Gonzales v. Raich*, 545 U.S. 1, 10 (2005).

<sup>18</sup> See *DEA Mission Statement*, UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, [www.dea.gov/about/mission.shtml](http://www.dea.gov/about/mission.shtml) (last visited Dec. 20, 2015) (setting forth the Drug Enforcement Administration’s mission “to enforce the controlled substances laws and regulations of the United States”).

<sup>19</sup> 21 U.S.C. § 812 (2012).

<sup>20</sup> *Id.*

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

<sup>22</sup> *Id. Contra* Miklos Pongratz, *Constitutional Law – Medical Marijuana and the Medical Necessity Defense in the Aftermath of United States v. Oakland Cannabis Buyers’ Cooperative*, 25 W. NEW ENG. L. REV. 147, 147 (2003) (referencing the findings of a report funded by the federal government that found marijuana has medical use in limited circumstances).

<sup>23</sup> Pongratz, *supra* note 22, at 151.

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

<sup>25</sup> See 21 U.S.C. § 812 (2012) (listing “accepted medical use” as a consideration in all five schedules).

<sup>26</sup> Annaliese Smith, *Marijuana as a Schedule I Substance: Political Ploy or Accepted Science*, 40 SANTA CLARA L. REV. 1137, 1137 (2000).

<sup>27</sup> *Gonzales*, 545 U.S. at 14 (citing 21 U.S.C. § 823(f)).

government mostly refrains from funding research projects regarding the medical benefits of marijuana usage.<sup>28</sup>

Regardless of the lack of research, the American Medical Association (“AMA”), the largest federal association of physicians, supports the Schedule I classification of marijuana.<sup>29</sup> The AMA asserts that marijuana “is a dangerous drug and as such is a public health concern.”<sup>30</sup> Contrary to these declarations, a majority of individual physicians support the use of medical marijuana, according to a poll conducted by The New England Journal of Medicine.<sup>31</sup> Moreover, an overwhelming number of American citizens favor legalization for medicinal purposes.<sup>32</sup> Similarly, a near-majority of states legalized the use of marijuana for medical purposes.<sup>33</sup> Those laws reflect that the state lawmakers determined marijuana has medical value.<sup>34</sup>

Marijuana’s classification as a Schedule I drug under the CSA perpetuates the presumption that marijuana has no medical value.<sup>35</sup> The Supreme Court of the United States has refused to consider the potential medical value of marijuana because of the

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<sup>28</sup> See Matt Ferner, *Colorado Funds Multiple Studies On Marijuana’s Medical Possibilities*, HUFFINGTON POST (Dec. 19, 2014, 5:10 PM), [www.huffingtonpost.com/2014/12/17/medical-marijuana-research\\_n\\_6342552.html](http://www.huffingtonpost.com/2014/12/17/medical-marijuana-research_n_6342552.html) (explaining that the federal government provides grants for research that overwhelmingly focuses on marijuana’s negative effects).

<sup>29</sup> Steven Nelson, *AMA Reaffirms Opposition to Marijuana Legalization*, U.S. NEWS & WORLD REP. (Nov. 20, 2013 1:58 PM), [www.usnews.com/news/articles/2013/11/20/ama-reaffirms-opposition-to-marijuana-legalization.html](http://www.usnews.com/news/articles/2013/11/20/ama-reaffirms-opposition-to-marijuana-legalization.html).

<sup>30</sup> *Id. Contra Gonzales*, 545 U.S. at 9 (noting the “respondents’ strong arguments that ... marijuana does have valid therapeutic purposes”).

<sup>31</sup> Jonathan N. Adler, M.D. & James A. Colbert, M.D., *Medicinal Use of Marijuana – Polling Results*, 368 NEW ENG. J. MED. 30 (2013). The polling results surprised the authors. *Id.*

<sup>32</sup> See Elizabeth Mendes, *New High of 46% of Americans Support Legalizing Marijuana*, GALLUP (Oct. 28, 2010), [www.gallup.com/poll/144086/New-High-Americans-Support-Legalizing-Marijuana.aspx](http://www.gallup.com/poll/144086/New-High-Americans-Support-Legalizing-Marijuana.aspx) (reporting that 70% of Americans favor legalizing medical marijuana).

<sup>33</sup> See *Marijuana Resource Center: State Laws Related to Marijuana*, *supra* note 6 (reporting that 23 states and the District of Columbia have laws legalizing marijuana for medical purposes).

<sup>34</sup> See 410 ILL. COMP. STAT. ANN. 130/5 (West 2014) (finding marijuana has been used as a medicine for or 50 centuries and “[m]odern medical research has confirmed the beneficial uses of cannabis in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions”).

<sup>35</sup> See Alex Kreit, *Controlled Substances, Uncontrolled Law*, 6 ALB. GOV’T L. REV. 332, 354-355 (2013) (explaining how the Controlled Substances Act does not require a burden of proof for determining the accepted medical use of a drug before classification, and how marijuana’s Schedule I classification prevents meaningful research to prove otherwise).

drug's Schedule 1 classification by the CSA.<sup>36</sup> No matter what state laws might allow, the CSA fully prohibits the distribution, possession, or use of marijuana.<sup>37</sup>

### B. *The Legalization of Medical Marijuana in Illinois*

While Illinois law maintains the illegality of marijuana for recreational use,<sup>38</sup> it now permits the use of medical marijuana.<sup>39</sup> On August 1, 2013, former Governor Pat Quinn signed the CUA into law, declaring that the law was “tightly and properly drafted.”<sup>40</sup> The CUA requires various state agencies to register cultivation centers,<sup>41</sup> dispensaries,<sup>42</sup> and individual users.<sup>43</sup> The stated purpose of the CUA is to allow patients with documented debilitating medical conditions to treat with marijuana, while

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<sup>36</sup> See *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 499 (2001) (ruling that the Schedule I classification of marijuana under the Controlled Substances Act “precludes consideration” of medical necessity as a defense for the distribution of marijuana).

<sup>37</sup> 21 U.S.C. § 812 (2012).

<sup>38</sup> 720 ILL. COMP. STAT. ANN. 550/1 (West 2014). Illinois sought to “establish a reasonable penalty system which is responsive to the current state of knowledge concerning cannabis” through the Cannabis Control Act. *Id.* The Cannabis Control Act recognizes that “previous legislation enacted to control or forbid the use of cannabis has often unnecessarily and unrealistically drawn a large segment of [the Illinois] population within criminal justice system without succeeding in deterring the expansion of cannabis use.” *Id.* Nonetheless, the Cannabis Control Act maintains the criminalization of the possession, manufacture, and delivery of cannabis for recreational purposes. *Id.*

<sup>39</sup> Compassionate Use of Medical Cannabis Pilot Program Act, 410 ILL. COMP. STAT. 130/1-999 (West 2014).

<sup>40</sup> Sophia Tareen, *Illinois Governor Signs Medical Marijuana Bill*, HUFFINGTON POST (Aug. 1, 2013, 1:30 PM), [www.huffingtonpost.com/2013/08/01/illinois-governor-signs-m\\_0\\_n\\_3690379.html](http://www.huffingtonpost.com/2013/08/01/illinois-governor-signs-m_0_n_3690379.html).

<sup>41</sup> 410 ILL. COMP. STAT. ANN. 130/85 (West 2014). Registered by the Department of Agriculture. *Id.* A cultivation center is “a facility operated by an organization or business that is registered by the Department of Agriculture to perform necessary activities to provide only registered medical cannabis dispensing organizations with usable medical cannabis.” 410 ILL. COMP. STAT. ANN. 130/10 (West 2014).

<sup>42</sup> 410 ILL. COMP. STAT. ANN. 130/115 (West 2014). Dispensaries are registered by the Department of Financial and Professional Regulation. *Id.* A dispensary is referred to in the statute as a “dispensing organization.” 410 ILL. COMP. STAT. ANN. 130/10 (West 2014). A dispensary is a “facility operated by an organization or business that is registered by the Department of Financial and Professional Regulation to acquire medical cannabis from a registered cultivation center for the purpose of dispensing cannabis, paraphernalia, or related supplies and educational materials to registered qualifying patients.” *Id.*

<sup>43</sup> 410 ILL. COMP. STAT. ANN. 130/55 (West 2014). Registered by the Department of Public Health. *Id.* Referred to in the statute as “qualifying patients.” *Id.* This comment will use “qualifying patients” interchangeably with “registered user(s).”

protecting those individuals from penalties stemming from their use of marijuana.<sup>44</sup> Despite this intention, the CUA provides employers the ability to discipline an employee using marijuana in compliance with the law.<sup>45</sup> Additionally, the CUA fails to provide registered users any meaningful protection from such discipline.<sup>46</sup>

The CUA states:

(b) Nothing in this Act shall prohibit an employer from enforcing a policy concerning drug testing, zero-tolerance, or a drug free workplace provided the policy is applied in a nondiscriminatory manner.

(c) Nothing in this Act shall limit an employer from disciplining a registered qualifying patient for violating a workplace drug policy.

(d) Nothing in this Act shall limit an employer's ability to discipline an employee for failing a drug test if failing to do so would put the employer in violation of federal law or cause it to lose a federal contract or funding.<sup>47</sup>

Drug policies prohibiting marijuana, like those mentioned in the CUA, are still popular in those states that have legalized marijuana for medical purposes.<sup>48</sup> These drug policies are facilitated by the federal prohibition of marijuana, and some employers may even be encouraged by the federal prohibition of marijuana to enact such policies.<sup>49</sup>

Employers often enforce such drug policies by testing for *use* rather than *impairment*.<sup>50</sup> Drug testing for use, specifically through urinalysis, “cannot ascertain the quantity of a drug consumed, the time of consumption, or its effect on the user.”<sup>51</sup>

<sup>44</sup> 410 ILL. COMP. STAT. ANN. 130/5 (West 2014).

<sup>45</sup> 410 ILL. COMP. STAT. ANN. 130/50 (West 2014).

<sup>46</sup> See *Id.* (stating that no cause of action exists against an employer for actions based on a good faith belief that the employee used cannabis on the job, or was impaired by cannabis on the job). But see KENNETH D. TUNNELL, PISSING ON DEMAND: WORKPLACE DRUG TESTING AND THE RISE OF THE DETOX INDUSTRY 116 (2004) (providing that when employers test for drugs, they typically utilize urinalysis tests, which exclusively produce results concerning use, not impairment).

<sup>47</sup> 410 ILL. COMP. STAT. ANN. 130/50 (West 2014).

<sup>48</sup> See Yuki Noguchi, *Colorado Case Puts Workplace Drug Policies to the Test*, NATIONAL PUBLIC RADIO (Aug. 12, 2014, 4:32 PM), [www.npr.org/sections/health-shots/2014/08/12/339822911/colorado-case-puts-workplace-drug-policies-to-the-test](http://www.npr.org/sections/health-shots/2014/08/12/339822911/colorado-case-puts-workplace-drug-policies-to-the-test) (discussing employers in Colorado maintaining drug-free policies regardless of the legality of medical marijuana use).

<sup>49</sup> See Marcia Heroux Pounds, *Medical Marijuana Could Cost Employees Their Jobs*, SUN SENTINEL (Oct. 30, 2013, 1:45 PM), [www.sun-sentinel.com/business/careers/fl-medical-marijuana-workplace-20141030-story.html](http://www.sun-sentinel.com/business/careers/fl-medical-marijuana-workplace-20141030-story.html) (describing a CEO's choice to terminate the employment of “good employees who tested positive for a remnant of marijuana” because of the illegal status of the drug).

<sup>50</sup> See TUNNELL, *supra* note 46 and accompanying text.

<sup>51</sup> Debra R. Comer, *A Case Against Workplace Drug Testing*, 5 ORG. SCI. 259, 261 (1994).

Thus, drug testing for use does not “demonstrate the very performance impairment its proponents seek to deter or detect for the sake of productivity and safety.”<sup>52</sup> As a result, an individual may be in full compliance with the state law (use off-duty), but still violate an employer’s drug policy (test positive for use), and subsequently be disciplined.<sup>53</sup> While a test for impairment has yet to receive universal acceptance,<sup>54</sup> efforts are underway to develop an effective impairment test.<sup>55</sup>

In addition to the leeway given to employers to discipline registered users, the CUA provides registered users very limited protection in the workplace.<sup>56</sup> The CUA only provides medical marijuana users protection from discrimination based on their *status* as registered users.<sup>57</sup> Notably absent is any indication of protection from discrimination based on use of marijuana in compliance with the law.<sup>58</sup> Even this anti-discrimination provision is limited, however, by a provision stating that if failing to discriminate would put the employer in violation of federal law then the employer may discriminate based on status.<sup>59</sup> This situation may manifest where an employer receives federal funding on the condition of adopting and enforcing a drug policy.<sup>60</sup>

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<sup>52</sup> *Id.* See also Kimberly A. Lammers, *Positive Drug Test Result as “Misconduct”: Dolan v. Svitak*, 29 CREIGHTON L. REV. 341, 370 (1995) (stating “[t]here is no correlation between a certain positive testing [for use] level and an individual’s level of impairment, because drug metabolism differs among individuals”). Outside of accuracy, testing for impairment provides employers a myriad of other benefits, including: time and cost efficiency, and employee’s acceptance to the test. Comer, *supra* note 51.

<sup>53</sup> See Barcott, *supra* note 1 (providing a prime example of this scenario, Brandon Coats claims he used only off-duty and in compliance with the law when he tested positive for use and was subsequently terminated).

<sup>54</sup> See *No Easy Answers for DUI Concerns as Marijuana Gains Support*, NATIONAL PUBLIC RADIO (Feb. 24, 2014, 9:14 AM), [www.npr.org/2014/02/23/280310526/with-support-for-marijuana-concern-over-driving-high-grows](http://www.npr.org/2014/02/23/280310526/with-support-for-marijuana-concern-over-driving-high-grows) (detailing the current methods for testing for use are incompatible and impractical for law enforcement needs related to enforcing laws against driving under the influence of marijuana).

<sup>55</sup> See Melissa Santos, *Breath Test to Detect Pot is Being Developed at WSU*, THE NEWS TRIBUNE (NOV. 28, 2014), [www.thenewstribune.com/news/local/politicsgovernment/article25899145.html](http://www.thenewstribune.com/news/local/politicsgovernment/article25899145.html) (noting that a professor and graduate student at Washington State University are “working to develop a breath test that could quickly determine whether a driver is under the influence of marijuana”).

<sup>56</sup> 410 ILL. COMP. STAT. ANN. 130/40 (West 2014).

<sup>57</sup> See *Id.* (prohibiting discrimination on the basis of status as a registered user).

<sup>58</sup> See *Id.* (prohibiting discrimination based “solely for his or her status as a [registered user]”). Notably absent from this section is any prohibition of discrimination based on use. *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200, 212 (Cal. 2008) (citing 41 U.S.C. § 702) (stating that “federal grant recipients are subject to a similar drug-free workplace requirement”).

The absence of any statutory protection for workplace discipline based upon use is significant. Without the CUA's protection, registered users are defenseless against discipline because Illinois presumes at-will employment.<sup>61</sup> This means that employment may be terminated at any time, for any legal justification.<sup>62</sup> But, federal and state laws carve out exceptions to this general rule.<sup>63</sup> This includes the federal law prohibition of discriminating on the basis of race, color, religion, sex, or national origin,<sup>64</sup> as well as disability.<sup>65</sup> On the state level, the Illinois Human Rights Act ("IHRA") limits the at-will employment relationship by prohibiting employers from discriminating on a variety of bases,<sup>66</sup> including physical disability.<sup>67</sup> Arguably, disciplining an individual for his or her use of marijuana, which is being used to treat an existing disability, amounts to discriminating against that individual based on his or her disability.<sup>68</sup> That logic would bring an individual using marijuana for medical purposes within the protection of the statutes prohibiting discrimination on the basis of disability.

However, that argument becomes near impossible in light of the disconnect between federal and state laws governing the use of marijuana.<sup>69</sup> The following section provides that the federal

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<sup>61</sup> See *Cromwell v. City of Momence*, 713 F.3d 361, 362 (7th Cir. 2013) (citing *Duldulao v. Saint Mary of Nazareth Hosp. Ct.*, 505 N.E.2d 314 (Ill. 1987) (stating Illinois presumes at-will employment)).

<sup>62</sup> 27 BRUCE BONDS & MARTIN LUTHER, ILL. PRAC. SERIES *Illinois Workers' Compensation* § 23.2 (2015).

<sup>63</sup> Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV. 3-11 (Jan. 2001) (discussing common law exceptions to employment-at-will doctrine in the 50 states).

<sup>64</sup> 42 U.S.C.A. § 2000e-2 (West 2012).

<sup>65</sup> 42 U.S.C.A. § 12112 (West 2012).

<sup>66</sup> See 775 ILL. COMP. STAT. ANN. 5/1-102 (West 2014) (stating it is the public policy of Illinois to "secure...freedom from" discrimination based on: "race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, or unfavorable discharge from military service").

<sup>67</sup> *Id.*

<sup>68</sup> See Lori A. Bowman & Jonathan S. Longino, *Taking the High Road – The Healthcare Provider's Duty to Accommodate Employees' Medical Marijuana Use*, 5 J. HEALTH & LIFE SCI. L. 34, 52 (2012) (detailing an employee's claim that an employer was required to accommodate employee's use of marijuana because the use was to treat a physical disability).

<sup>69</sup> Compare 410 ILL. COMP. STAT. ANN. 130/5 (West 2014) (stating "the purpose of [the CUA] is to protect patients with debilitating medical conditions, as well as their physicians and providers, from arrest and prosecution, criminal and other penalties, and property forfeiture if the patients engage in the medical use of cannabis") with 21 U.S.C. § 841 (2012) (classifying marijuana as a Schedule 1 controlled substance and prohibiting individuals from from "manufactur[ing], distribut[ing], or dispens[ing], or possess[ing] with intent to manufacture, distribute, or dispense" that controlled substance). This disconnect is only widened by the federal government's unpredictable enforcement of its prohibition of marijuana. See

prohibition of marijuana has frustrated the ability of state lawmakers to draft and enact laws that fully provide for their stated purpose: to protect individuals choosing to use marijuana to treat a debilitating medical condition. This prevents an individual from bringing a claim against an employer for discipline based on the individual's use in compliance with Illinois law.

### III. JUDICIAL OPINIONS FROM VARIOUS JURISDICTIONS INTERPRETING CLAIMS BROUGHT UNDER STATE LAWS, AND APPLICATION OF THOSE RATIONALES IN ILLINOIS

Despite Illinois' legalization of medical marijuana, its prohibition under federal law prevents registered users from seeking protection under state law.<sup>70</sup> The following section surveys judicial opinions from various jurisdictions. Though not exhaustive, these opinions provide that courts will not provide relief to employees who have been terminated based upon the state-complying use of medical marijuana. The opinions overwhelming support the conclusion that no matter which state law is being interpreted, whether it legalizes medical marijuana or prohibits employer discrimination, the federal prohibition of marijuana denies registered users any legal remedy for employment discipline stemming from their state law-complying marijuana use.<sup>71</sup>

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generally Julian Brookes, *Where Does Obama Stand on Medical Marijuana Crackdown*, ROLLING STONE (Nov. 7, 2011), [www.rollingstone.com/politics/news/where-does-obama-stand-on-the-medical-marijuana-crackdown-20111107](http://www.rollingstone.com/politics/news/where-does-obama-stand-on-the-medical-marijuana-crackdown-20111107) (describing the contradiction between federal statements on the enforcement of marijuana prohibition and federal action on marijuana prohibition). The Department of Justice has stated that it would not prioritize prosecution of activities legal under state medical marijuana laws. David Stout & Solomon Moore, *U.S. Won't Prosecute in States That Allow Medical Marijuana*, N.Y. TIMES (Oct. 19, 2009), [www.nytimes.com/2009/10/20/us/20cannabis.html?\\_r=0](http://www.nytimes.com/2009/10/20/us/20cannabis.html?_r=0). Simultaneously, other departments of the executive branch unleashed crackdowns, including enforcement of regulations by United States Treasury Department; United States Internal Revenue Services; United States Bureau of Alcohol, Tobacco, Firearms, and Explosives; and United States Justice Department. Brookes, *supra* note 69. Moreover, these crackdowns include the Drug Enforcement Agency's 270 para-military style raids on medical marijuana cultivation centers and dispensaries within four years. Press Release, Am. for Safe Access, Report: Obama Justice Department Has Spent Nearly \$300 Million on Aggressive Medical Marijuana Enforcement (June 13, 2013).

<sup>70</sup> See Jones Walker, *Medical Marijuana and the Workplace: Happy Times or Legal Land Mines?*, 11 MISS. EMP. L. LETTER 2 (2012) (stating that "the courts thus far have been unanimous in ruling that legal use of medical marijuana doesn't insulate an employee from running afoul of his employer's drug-free workplace policies").

<sup>71</sup> There are also court opinions relying solely on state law to find that plaintiffs did not have a cause of action. For instance, the Sixth Circuit found

### A. Courts Reject Claims Brought under State Laws that Legalize Medical Marijuana

The language of the CUA does not provide employees a private cause of action against an employer.<sup>72</sup> Further, the CUA explicitly states that employers may take action against employees for drug use in violation of company policies.<sup>73</sup> Regardless, it likely would not have made a difference if the Illinois legislature attempted to provide employees a cause of action against employers. This is because courts deny registered users a cause of

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that the language of the Michigan Medical [Marijuana] Act did not restrict private employers, thus it did not provide the plaintiff a cause of action against his employer for wrongful termination. *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 434-37 (6th Cir. 2012). The court grounded its holding in the language of the state medical marijuana statute. *Casias*, 695 F.3d at 436. Similarly, in *Savage v. Maine Pretrial Services, Inc.*, the Supreme Court of Maine held that the Maine statute legalizing medical marijuana did not create a private cause of action against employers. *Savage v. Maine Pretrial Services, Inc.*, 58 A.3d 1138, 1142-43 (Me. 2013). The court applied this reasoning to an employee's claim that her former employer violated that statute by terminating her because of her *status* as an *applicant* for a license to operate a medical marijuana dispensary. *Id.* at 1140. The court found that the plaintiff's status as an *applicant* was not conduct that brought her sufficiently under the act to consider the law as provide her protection. *Id.* at 1142. Regardless, the court went on to make a father-reaching determination that the statute does not create a cause of action against employers. *Id.* at 1142. While *Savage* did not arise from the termination of registered user, the opinion may be indicative of future interpretations of causes of actions based upon Maine's medical marijuana statute. For instance, the District Court of Maine has yet to issue an opinion on the merits in *Thomas v. Adecco USA, Inc.* See *Thomas v. Adecco USA, Inc.*, No 13-CV-00070-JAW, 2013 WL 6119073 (D. Me. Nov. 21, 2013) (denying Plaintiff's motion to remand). In *Thomas*, that Plaintiff's complaint states that her employer's refusal to rehire her violated the Maine statute legalizing medical marijuana. *Id.* at \*2. However, if *Savage* is any indication, the employee in *Thomas* will not be able to bring a case against her employer based upon Maine's medical marijuana statute, because *Savage* declared that statute does not create a cause of action. *Savage*, 58 A.3d at 1142.

<sup>72</sup> See 410 ILL. COMP. STAT. ANN. 130/50 (West 2014) (stating that the act should not be construed to "create or imply a cause of action for any person against an employer" when the employer has a "good faith belief" that a person used or was impaired by marijuana during work hours of work). See also 410 ILL. COMP. STAT. ANN. 130/40 (West 2014) (prohibiting an employer from penalizing "a person solely for his or her status as a registered qualifying patient," with the caveat that an employer may do so if "failing to do so would . . . violat[e] . . . federal law or . . . cause it to lose a monetary . . . benefit under federal law"); 410 ILL. COMP. STAT. ANN. 130/50 (West 2014) (stating that the act does *not* prohibit an employer from: 1) enforcing their drug policy, as long as it is applied nondiscriminatorily, 2) disciplining an employee for a violation of that drug policy, and 3) "disciplin[ing] an employee for failing a drug test if failing [to discipline the employee] would put the employer in violation of federal law").

<sup>73</sup> 410 ILL. COMP. STAT. ANN. 130/50 (West 2014).

action for adverse employment treatment based upon their use of marijuana in compliance with state law. Most of these opinions are based upon the federal prohibition of marijuana.

In *Roe v. TeleTech Customer Management (Colorado) LLC*, a plaintiff brought a complaint alleging wrongful termination under the Washington State Medical Use of Marijuana Act.<sup>74</sup> There, the employer learned of the employee's pre-employment drug test results, which were positive for marijuana, and terminated the employee for violation of their drug policy despite the employee's license under the Washington State Medical Use of Marijuana Act.<sup>75</sup> The Washington Supreme Court found that the act, while legalizing medical marijuana, did not create a private cause of action against employers by its language or underlying policy.<sup>76</sup> The plaintiff's policy argument failed because the court refused to accept that any public policy could be based on an illegal activity, and marijuana use is illegal under federal law.<sup>77</sup>

According to the Washington Supreme Court, the claim under state law "cannot be completely separated" from the federal prohibition of marijuana.<sup>78</sup> Because the two cannot be separated, the court overlooked the purpose of the Washington State Medical Use of Marijuana Act, which is to permit individuals to make a medical decision in conjunction with professional medical advice,<sup>79</sup> and refused to interfere with an employer's decision to terminate employment based on the employee's state-complying medicinal use of marijuana.<sup>80</sup> This opinion reveals that the federal prohibition of marijuana prevents courts from applying the policy behind the statutes legalizing medical marijuana in a manner that provides users legal remedies for discipline stemming from their state-complying use.

Similarly, in *Beinor v. Industrial Claim Appeals Office*, a Colorado appellate court refused to provide an individual any legal remedy for negative effects in the employment context stemming from his medicinal use of marijuana in compliance with state

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<sup>74</sup> *Roe v. TeleTech Customer Care Management (Colorado) LLC*, 257 P.3d 586, 589 (Wash. 2011) [hereinafter *TeleTech*]. Roe brought the claim under a pseudonym because of the federal prohibition of marijuana. Vitaliy Mkrtychyan, Note, 47 GONZ. L. REV. 839, 857 n.167 (2011).

<sup>75</sup> *TeleTech*, 257 P.3d at 589.

<sup>76</sup> *Id.* at 597.

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

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

<sup>79</sup> See WASH. REV. CODE ANN. § 69.51A.005 (West 2015) (stating "[h]umanitarian compassion necessitates that the decision to use marijuana by patients with terminal or debilitating medical conditions is a personal, individual decision, based upon their health care professional's professional medical judgment and discretion").

<sup>80</sup> See *TeleTech*, 257 P.3d at 597 (holding that that the act, while legalizing medical marijuana, did not create a private cause of action against employers by its language or underlying policy).

law.<sup>81</sup> The employee's medicinal use of marijuana violated the zero-tolerance drug policy of his employer.<sup>82</sup> He was subsequently fired and the Industrial Claim Appeals Office disqualified him from receiving unemployment benefits.<sup>83</sup> The Industrial Claim Appeals Office decision was based upon state law disqualifying persons from unemployment compensation when termination resulted from the presence of a "not medically prescribed controlled substance."<sup>84</sup>

The employee appealed the Industrial Claim Appeals Office decision.<sup>85</sup> He argued that because he used marijuana in full compliance with state law, he had a right to marijuana, and was entitled to the unemployment benefits that the Industrial Claim Appeals Office denied him.<sup>86</sup> The court upheld the Industrial Claim Appeals Office order denying benefits because the state's constitutional amendment legalizing the medicinal use of marijuana did not provide a right to use marijuana.<sup>87</sup> In making that determination, the court cited to a number of limits on the possession of marijuana.<sup>88</sup> Ultimately, the disqualification of the employee from receiving unemployment benefits due to the use of marijuana cannot violate a nonexistent right.<sup>89</sup>

Additionally, the court found that the state law disqualifying the employee from unemployment benefits was properly applied, even if the employee used in compliance with the constitutional amendment legalize medical marijuana.<sup>90</sup> The court reasoned that marijuana is an illegal drug because the constitutional amendment legalizing medical marijuana did not make marijuana a prescribed substance.<sup>91</sup> And the use of an illegal drug is grounds for disqualification from unemployment compensation.<sup>92</sup> Thus, the Industrial Claim Appeals Office

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<sup>81</sup> *Beinor v. Industrial Claim Appeals Office*, 262 P.3d 970, 976 (Colo. App. 2011) *cert. denied*, No. 11-676 2012 WL 1940833, at \*1 (Colo. 2012). The majority took pain to state the narrow nature of the issue before the court, and that the issue of "whether the amendment limits an employer from discharging an employee for using medical marijuana" was outside the scope of the opinion. *Id.* Nonetheless, the court went on to state that state medical marijuana laws have "been interpreted not to require employers to accommodate employees' off-site use of medical marijuana." *Id.*

<sup>82</sup> *Id.* at 971-72.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 972.

<sup>86</sup> *Id.* at 973.

<sup>87</sup> *Id.* at 976.

<sup>88</sup> *Id.* at 975.

<sup>89</sup> *See Id.* at 976 (stating that "[t]o interpret the medical marijuana amendment as claimant suggests – as a blanket 'right' . . . would require use to disregard the amendment's express limitations . . . [w]e decline to do so").

<sup>90</sup> *Id.* at 974-75.

<sup>91</sup> *Id.* at 973.

<sup>92</sup> *Id.* The court explained that doctors do not *prescribe* medical marijuana

properly applied the law disqualifying individuals from receipt of unemployment benefits when the individual uses a not medically prescribed controlled substance, including marijuana.<sup>93</sup>

The *Beinor* court also found that marijuana's federal classification as a Schedule 1 substance prohibits its prescription.<sup>94</sup> This is significant because the *Beinor* court already determined that marijuana could not legally be prescribed under the state law.<sup>95</sup> As long as federally classified as a Schedule 1 substance, marijuana could never be used pursuant to a prescription.<sup>96</sup> Subsequently, the use of marijuana while classified as a Schedule 1 substance would always be grounds for disqualification from unemployment benefits under Colorado state law.<sup>97</sup> The *Beinor* decision demonstrates that state law does not provide a right to users of medical marijuana in compliance with the law to violate the drug policies of employers.<sup>98</sup> As seen in other states, users cannot bring a cause of action for a violation of that right, as the employee attempted to do.

In Illinois, a cause of action under the CUA would likely meet a similar fate as those brought by the individuals discussed above. As provided below, the CUA does not provide a cause of action, either by its language or policy. The language of the CUA demonstrates that lawmakers did not intend to create an unlimited right to use marijuana. For instance, the CUA creates numerous limitations on such use, including limiting where an individual may use marijuana.<sup>99</sup> Like the statute interpreted in *Beinor*,<sup>100</sup> the CUA's limitations on marijuana use represent that it was not intended to provide registered users the unlimited right to smoke marijuana. Therefore, adverse action by an employer would not infringe on that right.

Further, notably absent from the CUA is any explicit language providing a cause of action to registered users for

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but "provide 'written documentation' stating that the patient has a debilitating medical condition and might benefit from the medical use of marijuana," which qualifies an individual to apply for license to use medical marijuana. *Id.*

<sup>93</sup> *Id.* at 974-75.

<sup>94</sup> *Id.* at 973-74.

<sup>95</sup> *Id.* at 973.

<sup>96</sup> *See id.* at 974 (citing 21 U.S.C. § 812 (1999)) (stating "[m]arijuana . . . remains a Schedule I controlled substance...and consequently cannot be prescribed").

<sup>97</sup> *See id.* at 973-75 (holding that because marijuana is grounds for disqualification from unemployment benefits under Colorado state law because it is not used pursuant to a prescription, in part due to the federal classification of marijuana as a Schedule 1 controlled substance).

<sup>98</sup> *See id.* at 976 (finding that the constitutional amendment "does not give medical marijuana users the unfettered right to violate employers' policies and practices regarding use of controlled substances").

<sup>99</sup> 410 ILL. COMP. STAT. ANN. 130/30 (West 2014).

<sup>100</sup> *See supra* notes 86-87 and accompanying text.

adverse action in the workplace stemming from their off-duty use. The closest it comes is providing protection from discrimination on the basis of a person's *status* as a registered user, not on the basis of use.<sup>101</sup> Once again, that protection is limited if the employer would violate federal law, or lose federal funding, as a result of not discriminating.<sup>102</sup> Thus, an individual could not bring a cause of action for discrimination based on *use* under the CUA.

Also, the policy underlying the CUA would not provide an individual a cause of action. “[T]he purpose of [the CUA] is to protect patients with debilitating medical conditions . . . [from] criminal and other penalties[.]”<sup>103</sup> Arguably, “other penalties” is limited to those enforced by the judiciary. However, “other penalties” may be interpreted to include penalties outside of the judicial system, including termination of employment. But, as demonstrated by the interpretation in *TeleTech*,<sup>104</sup> Illinois courts would likely find that there is no formidable public policy argument for the use of a drug that is illegal under federal law.

While Illinois lawmakers may attempt to provide individuals with debilitating medical conditions the opportunity to choose to treat with marijuana,<sup>105</sup> the above case law demonstrates that they are incapable of providing any protection from employer discipline based on such use. Is it possible that these decisions are the reasons why Illinois lawmakers did not provide such protection? Meanwhile, registered users may not even be aware their use may legally form the basis for adverse action by an employer with a pre-existing drug policy.<sup>106</sup> This produces a troublesome result: a law aimed at alleviating the burdens on a vulnerable group,<sup>107</sup> might make that group more vulnerable.

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<sup>101</sup> 410 ILL. COMP. STAT. ANN. 130/30 (West 2014).

<sup>102</sup> 410 ILL. COMP. STAT. ANN. 130/40 (West 2014).

<sup>103</sup> *Id.*

<sup>104</sup> See *supra* notes 76-79 and accompanying text.

<sup>105</sup> See 410 ILL. COMP. STAT. 130/5 (2014 (stating that “the purpose of this Act is to protect patients with debilitating medical conditions, as well as their physicians and providers, from arrest and prosecution, criminal and other penalties, and property forfeiture if the patients engage in the medical use of cannabis”).

<sup>106</sup> See Glenn H. Reynolds, *You Are Probably Breaking the Law Right Now*, USA TODAY (March 29, 2015, 4:58 PM), [www.usatoday.com/story/opinion/2015/03/29/crime-law-criminal-unfair-column/70630978/](http://www.usatoday.com/story/opinion/2015/03/29/crime-law-criminal-unfair-column/70630978/) (opining that the United States needs “judges to abandon the presumption that people know the law”).

<sup>107</sup> See 410 ILL. COMP. STAT. 130/5 (2014 (stating that “the purpose of this Act is to protect patients with debilitating medical conditions, as well as their physicians and providers, from arrest and prosecution, criminal and other penalties, and property forfeiture if the patients engage in the medical use of cannabis”).

### B. Courts Reject Claims Brought under State Laws that Prohibit Discrimination

In addition to denying claims under state laws legalizing medical marijuana, courts reject claims brought under state laws governing employment relationships. This comment opened by detailing the termination of Brandon Coats. Coats filed a complaint against his employer, “claiming that his termination violated the Lawful Activities Statute . . . an employment discrimination provision of the Colorado Civil Rights Act (CCRA).”<sup>108</sup> That statute provided that employers could not terminate employees for “any lawful activity” occurring outside of work.<sup>109</sup> Coats argued that such language provided his off-duty use of marijuana, as a lawful activity under state law, could not be the basis for discipline by his employer.<sup>110</sup> The Court disagreed, ruling that “lawful activity” must encompass state and federal definitions because the activities of Colorado employees are subject to both Colorado and federal law.<sup>111</sup> Because federal law makes any marijuana use illegal, Coats could not bring a claim under Colorado's Lawful Activities Statute.<sup>112</sup>

In the dissenting opinion, Judge Webb argued that lawful activity must be determined without reference to federal law.<sup>113</sup> Judge Webb believed the majority incorrectly relied upon a generic definition of lawful, encompassing federal and state law, instead of utilizing statutory interpretation.<sup>114</sup> Looking to the “spirit of the law”,<sup>115</sup> Judge Webb found that the courts should only look to state law in determining the definition of lawful.<sup>116</sup> Unfortunately for Brandon Coats and Judge Webb, the Supreme Court of Colorado agreed with the majority.<sup>117</sup>

California courts also relied upon the federal prohibition of marijuana to deny an individual redress under the state law prohibiting discrimination by employers, the Fair Employment and Housing Act. In *Ross v. RagingWire Telecommunications, Inc.*,

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<sup>108</sup> *Coats*, 303 P.3d at 149 *aff'd* 350 P.3d 849 (Colo. 2015).

<sup>109</sup> *Id.* at 150.

<sup>110</sup> *Id.* at 149.

<sup>111</sup> *Id.* at 150-51.

<sup>112</sup> *Id.* at 152.

<sup>113</sup> *Id.* at 155 (Webb, J. dissenting).

<sup>114</sup> *Id.* at 155-56 (Webb, J. dissenting).

<sup>115</sup> Notably, the “spirit of the law” analysis included an examination of the differences between Colorado Lawful Activities Statute and the federal law governing employment relations. *Id.* The federal laws that govern employment relations, which Judge Webb referenced, are the Age Discrimination in Employment Act, the Americans with Disabilities Act, and Title VII. *Id.*

<sup>116</sup> *Id.* at 156 (Webb, J. dissenting).

<sup>117</sup> See *Coats v. Dish Network, LLC*, 350 P.3d 849, 850 (Colo. 2015) (refusing to “restrict” the definition of lawful to state law absent the legislatures intent to require that restriction).

the Supreme Court of California reviewed the lower court's rejection of the plaintiff's complaint alleging that his employer violated the Fair Employment and Housing Act by discharging him for his disability.<sup>118</sup> The plaintiff suffered from severe back pain from injuries he sustained while serving in the United States Air Force.<sup>119</sup> He used marijuana under California's Compassionate Use Act to treat his painful symptoms.<sup>120</sup> Sometime after he began this use, Ross began work with a company that required him to take a drug test.<sup>121</sup> When the results returned a week later, they indicated that Ross had been using marijuana, and he was terminated.<sup>122</sup>

Ross alleged that his termination violated state law prohibiting employers from discriminating on the basis of a medical condition.<sup>123</sup> However, the court was unsympathetic to his claim.<sup>124</sup> The court found that an employer may discharge an employee for the illegal use of drugs.<sup>125</sup> And, since marijuana is still illegal under federal law, such a termination would not violate the state statute because the employment statute had not been amended to require the accommodation of marijuana use.<sup>126</sup> The court noted that the plaintiff's position would have been dramatically different had marijuana not been federally classified as a Schedule 1 substance.<sup>127</sup> Because of its Schedule 1 classification, the court stated that "[n]o state law could completely legalize marijuana for medical purposes[.]"<sup>128</sup> Finally, the court found that Ross could not build a claim based upon a theory that the employer violated public policy, largely because to find a claim under public policy would impose obligations on third parties that the law legalizing marijuana did not intend to impose.<sup>129</sup>

Unsurprisingly, the Supreme Court of Oregon's interpretation of a similar claim resulted in a similar ruling. In

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<sup>118</sup> *Ross*, 174 P.3d at 203.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 204.

<sup>124</sup> *See id.* (stating that the antidiscrimination in employment statute "does not require employers to accommodate the use of illegal drugs").

<sup>125</sup> *Id.* at 205.

<sup>126</sup> *Id.*

<sup>127</sup> *See id.* at 204 (stating that the "[p]laintiff's position might have merit if the Compassionate Use Act gave marijuana the same status as a any legal prescription drug").

<sup>128</sup> *Id.* The court pointed to the Controlled Substances Act's prohibition of marijuana and the United States Supreme Court's opinions declaring that prohibition included its medical use. 21 U.S.C.A. § 812 (West 2012); *Gonzales*, 545 U.S. 1; *Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483.

<sup>129</sup> *Id.* at 208-09.

*Emerald Steel Fabricators, Inc. v Bureau of Labor and Industries*, the Supreme Court of Oregon reversed the Court of Appeals decision upholding state labor bureau's employee-friendly decision.<sup>130</sup> There, the plaintiff brought a complaint with the state labor bureau under state employment discrimination laws.<sup>131</sup> Those laws prohibit discrimination on the basis of a disability and require employers to make reasonable accommodations for those disabilities.<sup>132</sup> The Bureau of Labor and Industries found that the employer violated the state statutes that prohibit employers from discriminating on the basis of disability, and require employers to reasonably accommodate a disability.<sup>133</sup> The Bureau of Labor and Industries brought charges against the employer under those statutes, but the administrative law judge found that the employer's actions only violated the statute requiring reasonable accommodation.<sup>134</sup> The Court of Appeals upheld that decision, but the Supreme Court of Oregon reversed.<sup>135</sup>

The Supreme Court of Oregon reasoned that the medicinal use of marijuana is an illegal use of drugs that is not protected by the state employment statute, because the federal Schedule 1 classification of marijuana preempts the state statute legalizing medical marijuana.<sup>136</sup> The "illegal use" determination was clearly based on the federal prohibition of marijuana.<sup>137</sup> The court found that due to the federal prohibition of marijuana, the state law authorizing the employee's use of medical marijuana is unenforceable through the employment statute.<sup>138</sup>

Similarly, Illinois' anti-discrimination law, the IHRA, does not provide registered users with a cause of action for discrimination based on their use in compliance with state law. The IHRA prohibits an employer from disciplining an employee on "the basis of discrimination," including discrimination against an

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<sup>130</sup> *Emerald Steel Fabricators, Inc. v Bureau of Labor and Industries*, 230 P.3d 518, 536 (Or. 2010)

<sup>131</sup> *Id.* Plaintiff had a wide range of symptoms limiting his ability to eat. *Id.* at 520. After varied attempts to allieve those symptoms with prescription medication, employee began to use marijuana to self-medicate. *Id.* Over six years later, plaintiff became licensed under the Oregon Medical Marijuana Act, which legalized medical marijuana. *Id.*

<sup>132</sup> *Id.* at 521.

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

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

<sup>135</sup> *Id.* at 520.

<sup>136</sup> *Id.* at 533-34.

<sup>137</sup> *See id.* at 535 (supplementing the court's primary analysis with a rejection of the argument that marijuana should be excluded from the state definition of "illegal use of drugs" because it is taken under the supervision of a doctor). The court rejected this secondary argument because federal law essentially prohibits the use of marijuana "under the supervision of a licensed healthcare professional." *Id.*

<sup>138</sup> *Id.* at 534.

individual with a disability.<sup>139</sup> Under the IHRA, a physical or mental disease is considered a disability, if the employee displays characteristics of the disease.<sup>140</sup> However, “[f]or purposes of [the IHRA], the term ‘disability’ shall not include any employee or applicant who is currently engaging in the use of illegal drugs, when an employer acts on the basis of such use.”<sup>141</sup> Illinois courts, like Colorado, California and Oregon,<sup>142</sup> will likely determine that the IHRA does not provide employees protection from discrimination for the use of marijuana in compliance with the CUA because marijuana is federally illegal. Since the IHRA was not amended specifically to include protection from discrimination on the basis of the state-legal use of marijuana, then a court will likely find it does not provide such protection.<sup>143</sup> Illinois registered users are susceptible to discipline by their employers without this protection.

It is worth noting that an individual is unable to bring a cause of action under federal law because of marijuana’s illegal status on the federal level.<sup>144</sup> Thus, an individual would be unable to utilize the ADA as a launching pad for redress against an employer terminating the registered user for their use in compliance with state law.<sup>145</sup>

However, changes at the federal level may provide states the opportunity to create causes of action for employees that face discipline by employers stemming from the employees’ state-complying use of medical marijuana.

#### IV. PROVIDING REGISTERED USERS A LEGAL REMEDY FOR ADVERSE ACTION BY EMPLOYERS

The conflict between the state and federal laws governing medical marijuana must be resolved in order to provide a legal remedy for employer discipline stemming from the state law-complying use of marijuana. In order to resolve this inconsistency and provide Illinois registered users adequate legal options, the

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<sup>139</sup> See 775 ILL. COMP. STAT. ANN. 5/1-102 (West 2014) (declaring the state of Illinois policy to secure all from discrimination on basis of physical or mental disability).

<sup>140</sup> 775 ILL. COMP. STAT. ANN. 5/1-103 (West 2014).

<sup>141</sup> 775 ILL. COMP. STAT. ANN. 5/1-102 (West 2014).

<sup>142</sup> *Supra* notes 111-12, 126, 136-38 and accompanying text.

<sup>143</sup> See *supra* note 126 and accompanying text.

<sup>144</sup> See 42 U.S.C. § 12114 (2012) (providing that the federal prohibition of discrimination on the basis of disability does not protect “any employee or applicant who is currently engaging in the illegal use of drugs”).

<sup>145</sup> See *James v. City of Costa Mesa*, 700 F.3d 394, 397 (9th Cir. 2012) (holding “that the [Americans with Disabilities Act] does not protect against discrimination on the basis of marijuana use, even medical marijuana use... unless that use is authorized by federal law.”)

following two statutory amendments must be made. First, the Attorney General or Congress should reclassify the schedule of marijuana under the CSA. Upon reclassification, Illinois lawmakers could amend the CUA to limit an employer's ability to take discipline against registered users for use in compliance with the CUA, but would not need to amend the IHRA.

### A. *The CSA*

Congress should amend the CSA to reclassify marijuana to Schedule III or IV. Substances in these Schedules are recognized as medicines and can be distributed as such, pursuant to prescription.<sup>146</sup> The statutory limitations on prescriptions under Schedule III or IV classifications might address certain legislators concerns of abuse, at least until more research is done on the matter.<sup>147</sup> A doctor may further limit any prescription.<sup>148</sup> For instance, a prescription may be limited by refill capability.<sup>149</sup> Prescriptions permit a doctor to determine the individual needs of the patient based on their medical condition.<sup>150</sup> Arguably, prescriptions provide more oversight of an individual's use than the current state system, in which a doctor provides written documentation of a medical condition that the individual uses to apply to the state to use marijuana at their discretion.<sup>151</sup>

While Schedule III or IV classification is preferred, Schedule II classification may be necessary as a compromise due to the partisan nature of Congress,<sup>152</sup> and the opposing views of the two main parties on marijuana's medical value.<sup>153</sup> However,

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<sup>146</sup> 21 U.S.C. § 829 (2012).

<sup>147</sup> *See Id.* (stating “[e]xcept when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without a written or oral prescription in conformity with section 503(b) of that Act. Such prescriptions may not be filled or refilled more than six months after the date thereof or be refilled more than five times after the date of the prescription unless renewed by the practitioner”).

<sup>148</sup> Valerie Blake, *Fighting Prescription Drug Abuse with Federal and State Law*, 15 AM. MED. ASS'N J. ETHICS 443 (2013).

<sup>149</sup> *Id.* at 444.

<sup>150</sup> *See id.* at 443 (stating that there must be a “legitimate medical purpose for prescriptions” that the doctor determines in the “usual course of practice”).

<sup>151</sup> 410 ILL. COMP. STAT. ANN. 130/55 (West 2014). The CUA requires that an individual must apply for state approval to use marijuana. *Id.* The application must include “written certification . . . issued by a physician[.]” *Id.*

<sup>152</sup> Maureen Grope, *New Analysis Shows an Increasingly Partisan Congress*, USA TODAY (May 19, 2015 1:12 PM), [www.usatoday.com/story/news/politics/2015/05/19/bipartisanship-index-congress-lugar/27584907/](http://www.usatoday.com/story/news/politics/2015/05/19/bipartisanship-index-congress-lugar/27584907/).

<sup>153</sup> *See Democratic Views on Marijuana*, REPUBLICAN VIEWS (Nov. 9, 2014), [www.republicanviews.org/democratic-views-on-marijuana/](http://www.republicanviews.org/democratic-views-on-marijuana/) (detailing the

Schedule II classification is not ideal because Schedule II substances may only be dispensed directly from a doctor to an individual.<sup>154</sup> Thus, Schedule II classification of marijuana is unsuitable for the practical needs of marijuana users, many of whom may need to treat with marijuana on a recurring basis.<sup>155</sup> To require a registered user to visit their doctor every time they wish to treat would be costly and time consuming.<sup>156</sup>

Drafting an amendment to reclassify marijuana would not be a difficult task. The amendment would literally require congress to remove references to marijuana under Schedule I, and add marijuana under Schedule III, IV, or V. If Congress did not amend the Controlled Substances Act, the Attorney General should reclassify marijuana. The Attorney General is granted the power to reschedule substances classified under the CSA.<sup>157</sup> Unfortunately, this is unlikely to happen under the tenure of the current Attorney General, Loretta Lynch, because she has not shown any intention to reclassify marijuana.<sup>158</sup>

## B. *The CUA and IHRA*

While the federal government's rigid attitude toward marijuana suggests otherwise, enforcement of the CSA requires cooperation with state agencies.<sup>159</sup> Ninety-nine out of every one hundred cannabis arrests in the United States are made under state law.<sup>160</sup> These numbers demonstrate that the enforcement of marijuana laws is an overwhelmingly state mandated practice.<sup>161</sup> Indeed, the Illinois legislature references the reality of enforcement of marijuana laws in the provision of the CUA that declares its findings.<sup>162</sup> Because the use of marijuana is

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Republican parties general opposition to legalization of marijuana in contrast to the general views of Democrats).

<sup>154</sup> 21 U.S.C. § 829 (2012).

<sup>155</sup> See Jenn Shelby, *Morgan Freeman Admits to Regular Medical Marijuana Use*, INDEPENDENT (May 11, 2015 11:52 AM) (stating that actor Morgan Freeman takes the drug regularly for pain relief).

<sup>156</sup> Keith Wagstaff, *Average American Loses \$43 During Each Doctor Visit*, NBC NEWS (Oct. 7, 2015, 1:35 PM), [www.nbcnews.com/business/consumer/average-american-loses-43-during-each-doctor-visit-n440136](http://www.nbcnews.com/business/consumer/average-american-loses-43-during-each-doctor-visit-n440136).

<sup>157</sup> 21 U.S.C. § 811 (2012).

<sup>158</sup> Valerie Richardson, *Loretta Lynch's Hard-line Stance on Marijuana is Making Colorado Sweat*, WASH. TIMES (Feb. 1, 2015), [www.washingtontimes.com/news/2015/feb/1/loretta-lynchs-stance-on-pot-may-be-problematic-fo/?page=all](http://www.washingtontimes.com/news/2015/feb/1/loretta-lynchs-stance-on-pot-may-be-problematic-fo/?page=all).

<sup>159</sup> Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1, 19-20 (2013).

<sup>160</sup> 410 ILL. COMP. STAT. ANN. 130/5(d) (West 2014).

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

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

overwhelming state governed, statutory amendments at the state level are required.

As demonstrated in the analysis, is it likely that Illinois courts will interpret the CUA to not provide registered users a cause of action against employers that discipline employees using marijuana in compliance with the CUA. Currently, the language of the CUA only provides registered users protection from employer discrimination on the basis of the registered user's *status* as a registered user.<sup>163</sup> The CUA also provides employers with a variety of methods to discipline an employee that has used marijuana, even if the use was in compliance with the law.<sup>164</sup>

First, the legislature should amend the statute to provide protection for the *actual use* of medical marijuana by registered users.<sup>165</sup> This amendment may appear in the statute as: "No employer may discipline a person for his or her use of marijuana in compliance with this Act, except in the instance that the employer has a good faith belief that the person is impaired during the hours of employment." This amendment provides that use may not be the basis for termination of employment. However, it also provides for the interests of employers in employing unimpaired persons. Further, the "good faith" language provides considerable room for employers in enforcing their drug-free work policies.

Second, the legislature should amend the CUA to provide guidelines for employer drug policies with respect to employees using marijuana in compliance with the CUA. One guideline could require that discipline for marijuana use under the CUA be limited to action based on the results of impairment tests, rather than urinalysis tests.<sup>166</sup> Urinalysis test results indicate usage of marijuana, and are not based on whether job performance is impacted by such use.<sup>167</sup> Limiting discipline to impairment rather than use would also satisfy employers by preventing the presumed side effects of marijuana from affecting work performance.<sup>168</sup> The

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<sup>163</sup> 410 ILL. COMP. STAT. ANN. 130/40 (West 2014).

<sup>164</sup> 410 ILL. COMP. STAT. ANN. 130/50 (West 2014).

<sup>165</sup> See ILL. CONST. art. 4, § 8 (setting forth the requirements of passing a bill, including amending an existing law, in the State of Illinois).

<sup>166</sup> See Comer, *supra* note 51 (comparing testing for use and testing for impairment). Drug testing for use, specifically through a urine test, "cannot ascertain the quantity of a drug consumer, the time of consumption, or its effect on the use." *Id.* Drug testing for use does not prevent the "performance impairment its proponents seek to deter or detect." *Id.*

<sup>167</sup> See *id.* (explaining a type of impairment testing, performance testing, "to be more effective and efficient than" urine tests).

<sup>168</sup> See Emily Swanson, *The Pothead Stereotype Lives, Even Among Americans Ready to Legalize Marijuana*, HUFFINGTON POST (Apr. 19, 2014), [www.huffingtonpost.com/2014/04/19/marijuana-poll\\_n\\_5175017.html](http://www.huffingtonpost.com/2014/04/19/marijuana-poll_n_5175017.html) (surveying American views on marijuana users). The Department of Labor also provided a laundry list of the effects of drug use on the workplace, including: unexcused absences, tardiness, adverse job performance, and

guideline would effectively limit an employer's discipline of an employee for their marijuana use to instances when such use is not in compliance with the CUA.<sup>169</sup>

Such a guideline may require a standard of impairment, much like alcohol's standard for influence. Standards of impairment provide for the adequate enforcement of laws prohibiting impairing during certain activities, like driving or biking.<sup>170</sup> Additionally, they provide for the goals of those laws, like making sure people are safe to drive or bike.<sup>171</sup> While certain states, including Illinois, have bills setting a standard of impairment,<sup>172</sup> those standards may be arbitrary according to at least one toxicologist.<sup>173</sup> The ability for an employer to determine an employee's impairment from marijuana, and not just their detectable use of marijuana, is necessary to accommodate both drug-free work policies and an employee's desire to treat debilitating medical conditions in compliance with state law.

Finally, based on this comment's analysis, amendments to the IHRA may not be necessary. The federally illegal nature of marijuana is what disposes claims brought under antidiscrimination statutes.<sup>174</sup> This is because the antidiscrimination statutes interpreted explicitly excluded the use of illegal drugs from protection.<sup>175</sup> Similarly, the IHRA excludes the use of illegal drugs from protection against discrimination by

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termination. *Drug Free Workplace Advisor*, U.S. DEP'T OF LABOR, (last visited Oct. 22, 2014), [www.dol.gov/elaws/asp/drugfree/benefits.htm](http://www.dol.gov/elaws/asp/drugfree/benefits.htm). *Contra* Sharon L. Larson, Joe Eyerman, Misty S. Foster & Joseph C. Gfroerer, *Worker Substance Use and Workplace Policies and Programs*, U.S. DEP'T HEALTH & HUMAN SERVS., (June 2007) available at [www.dronet.org/comunicazioni/news/samhsa\\_work.pdf](http://www.dronet.org/comunicazioni/news/samhsa_work.pdf) (explaining that such effects may be limited to chronic users and do not result from substance use per se). Also, certain impairment tests are more accurate, less expensive, and more immediate than tests for use. Comer, *supra* note 51.

<sup>169</sup> The CUA does not protect registered users that use "on the employer's premises or during the hours of employment" or are impaired while working. 410 ILL. COMP. STAT. ANN. 130/50 (West 2014). Narrowing testing to impairment, rather than the large scope encompassing use, may serve both the CUA and the employer's interests.

<sup>170</sup> Trevor Hughes, *Feds Test How Stoned is Too Stoned to Drive*, USA TODAY (July 27, 2014, 3:55 PM), [www.usatoday.com/story/news/nation/2014/07/25/federal-marijuana-and-alcohol-driving-research/12496767/](http://www.usatoday.com/story/news/nation/2014/07/25/federal-marijuana-and-alcohol-driving-research/12496767/).

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

<sup>172</sup> Jim Dey, *Pot Bill Also Establishes New DUI Standard*, THE NEWS-GAZETTE (May 28, 2015, 7:00 AM), [www.news-gazette.com/opinion/columns/2015-05-28/jim-dey-pot-bill-also-establishes-new-dui-standard.html](http://www.news-gazette.com/opinion/columns/2015-05-28/jim-dey-pot-bill-also-establishes-new-dui-standard.html).

<sup>173</sup> Michael Shepherd, *Experts: Effort to Set Blood Standard for Marijuana-Impaired Driving Not Backed by Science*, CENTRAL MAINE (April 30, 2014), [www.centralmaine.com/2015/04/30/experts-effort-to-set-blood-standard-for-marijuana-impaired-driving-not-backed-by-science/](http://www.centralmaine.com/2015/04/30/experts-effort-to-set-blood-standard-for-marijuana-impaired-driving-not-backed-by-science/).

<sup>174</sup> *Supra* notes 111-12, 126, 136-38 and accompanying text.

<sup>175</sup> *Supra* notes 111-12, 126, 136-38 and accompanying text.

employers.<sup>176</sup> If marijuana is reclassified, then the registered users use would no longer be illegal under the CSA. A registered user would then have a viable discrimination claim against his or her employer, if terminated for using marijuana to treat a disability.

Any potentially viable claim against a disciplining employer would only be made possible by amendments to both the CSA and the CUA. The conflict between the CSA and CUA leaves registered users severely limited in their legal remedies upon discipline from an employer for their use in compliance with the CUA. Instead of pretending this problem doesn't exist, all lawmakers need to cooperate and adequately address the problem.

## V. CONCLUSION

The federal prohibition of marijuana and Illinois' legalization of medical marijuana creates a conundrum for employed individuals who are using marijuana in compliance with the CUA. Judicial opinions from jurisdictions across the country demonstrate how claims brought under state law legalizing medical marijuana and state antidiscrimination statutes fail due to the federal prohibition of marijuana. Similar results are imminent here in Illinois with the recent passing of the CUA. The federal and state law amendments that this comment proposes to address this legal failure would adequately provide for the purpose of the CUA: to protect registered users who choose to treat their debilitating medical conditions with marijuana.<sup>177</sup>

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<sup>176</sup> 775 ILL. COMP. STAT. ANN. 5/2-104 (West 2014).

<sup>177</sup> See 410 ILL. COMP. STAT. ANN. 130/5 (West 2014) (stating "the purpose of this Act is to protect patients with debilitating medical conditions, as well as their physicians and providers, from arrest and prosecution, criminal and other penalties, and property forfeiture if the patients engage in the medical use of cannabis").