

Notes & Comments

**MEDICAL MARIJUANA IN NEVADA:
RECONCILING FEDERAL LAW, ASSEMBLY BILL 453, EMPLOYMENT AT WILL,
AND THE AMERICANS WITH DISABILITIES ACT**

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Introduction

During the 2001 session of the Nevada State Legislature, the state of Nevada adopted Assembly Bill 453.¹ In so doing, Nevada became the eighth state in the United States, in addition to the District of Columbia, to adopt legislation allowing seriously ill patients to use medical marijuana.² Assembly Bill 453 (“AB 453”) was enacted, in large part, in response to the results of a statewide ballot initiative in 1998 and 2000 wherein voters requested that the state constitution be amended to authorize the use of marijuana by those suffering from cancer, AIDS, glaucoma, and other illnesses in which marijuana is reported to ease the pain and suffering of those afflicted.³

The adoption of AB 453 has added another level of complexity and confusion for Nevadans regarding medical marijuana. Most opinions, including those of the Drug Enforcement Administration (“DEA”) and the United States Supreme Court, consider possession and use of marijuana illegal. The Supreme Court has gone one step further by rejecting the assertion that marijuana use can be considered by some to be a medical necessity. Federal administrative regulations, while mostly in agreement with the Supreme Court and the DEA, sometimes allow exceptions to drug policies when drugs are prescribed by a physician.

Employers in Nevada are subject to even greater concern and confusion. In Nevada, or any employment-at-will state for that matter, may an employer terminate an employee for exercising his or her rights to medical marijuana under AB 453? Moreover, will an employer

¹ *Nevada Assembly approves medical marijuana*, Vol. 15, No. 14 WORKPLACE SUBSTANCE ABUSE ADVISOR (June 14, 2001).

² *Marijuana for medical use to become law in Nevada*, Vol. 15, No. 15 WORKPLACE SUBSTANCE ABUSE ADVISOR (June 28, 2001).

³ *supra* note 1.

who terminates an employee for exercising these rights be considered in violation of the Americans with Disabilities Act (“ADA”)? This Note will discuss the topic of medical marijuana, with special emphasis on the effect that it will have on employment in Nevada.

Part I of this Note examines the statutory background and judicial history of medical marijuana. Included in this examination is a detailed look at federal treatment of medical marijuana, the text of AB 453, Nevada’s relevant case law on employment-at-will, and relevant cases and statutes involving the ADA.

In Part II, the often conflicting positions of the United States Code (“USC”), the Supreme Court, AB 453, the Nevada Revised Statutes (“NRS”), and the ADA are reconciled, as much as they can be, and imminent problems regarding these factions are discussed.

I. Background

A. Federal Treatment of Medical Marijuana

Since 1950, the federal government has steadfastly refused to consider marijuana as anything other than a Schedule I drug. The Controlled Substances Act (“CSA”),⁴ categorizes

⁴ 21 U.S.C.S. § 812(b) (1) (A)-(C), also known as the Controlled Substances Act (“CSA”). This statute provides that “(b) Placement on schedules; findings required. Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) SCHEDULE I.

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.”

drugs into five schedules.⁵ This division depends in part on whether a particular drug has a currently accepted medical use.⁶

Prior to 1987, the phrase “currently accepted medical use” was usually defined as meaning that the FDA had evaluated the substance for safety and approved it for interstate marketing in the United States pursuant to the Federal Food, Drug, and Cosmetic Act of 1938 (“FDCA”).⁷ This definition was broadened, however, when the First Circuit held in *Grinspoon v. Drug Enforcement Admin.* that there is no linkage between FDA approval and “currently accepted medical use” under the CSA.⁸ Instead, the *Grinspoon* court held that Congress had intended that a determination of “currently accepted medical use” be left to the discretion of DEA administrators and subject to administrative appeals by parties wishing to dispute such determinations.⁹

This definition of “currently accepted medical use” is a key component in the scheduling of drugs under the CSA. The CSA regulates the manufacture and distribution of the substance on the basis of the schedule in which it has been categorized.¹⁰ Schedule I is the most restrictive classification.¹¹ A drug can be classified as a Schedule I drug by the United States Attorney General only if three conditions are met.¹² A Schedule I drug must (1) have no currently

⁵ *Id.*

⁶ *Id.*

⁷ *Grinspoon v. Drug Enforcement Admin.*, 828 F.2d 881, 884 (1st Cir. 1987). (The Federal Food, Drug, and Cosmetic Act can be found at 21 U.S.C. § 355).

⁸ *Id.* at 887.

⁹ *Id.* at 892.

¹⁰ 21 U.S.C.S. § 812 (b) (1) (A) – (C) .

¹¹ *Id.*

¹² *Id.*

accepted medical use in treatment in the United States, (2) have a high potential for abuse, and (3) have a lack of accepted safety for use under medical supervision.¹³

There is only one exception permitting use of a Schedule I drug. A Schedule I drug may be legally used only in connection with Government-approved research projects.¹⁴ Other drugs included in lesser schedules can be dispensed and prescribed for medical use.¹⁵ The federal government uses three different mechanisms to regulate the use of Schedule I drugs like marijuana: (1) federal statutes, (2) cases heard in the federal courts, and (3) administrative regulations of various federal agencies.

1. Federal Statutes

The United States has not always considered marijuana an illegal substance.¹⁶ Marijuana, as well as the hemp plant from which it is derived, have been used in both medical and industrial applications for centuries.¹⁷ In fact, several historical documents, including the Declaration of Independence, were written on hemp.¹⁸ In the nineteenth century, marijuana was considered by the United States Dispensatory as a “drug that has special value in some morbid conditions and

¹³ *Id.* (In *Grinspoon v. Drug Enforcement Admin.*, supra note 7, the First Circuit articulated that this public safety concern related to the potential for abuse and unlawful dissemination to the public at large).

¹⁴ 21 U.S.C.S. § 823(f).

¹⁵ 21 U.S.C.S. § 829.

¹⁶ Allison L. Bergstrom, *Medical Use of Marijuana: A Look at Federal & State Responses to California's Compassionate Use Act*, 2 DEPAUL J. HEALTH CARE L., Fall, 1997, at 158.

¹⁷ Marty Bergoffen & Roger Lee Clark, *Hemp as an Alternative to Wood Fiber in Oregon*, 11 J. ENVTL. L. & LITIG. 119, 120 (1996) [hereinafter Bergoffen & Clark].

¹⁸ *Id.*

the intrinsic merit and safety of which entitles it to a place once held in therapeutics.”¹⁹ As incredible as it may seem today, in 1937 marijuana could be found in drug stores with common medications like aspirin and Epsom salts.²⁰

In 1937, however, the pressure to restrict the availability of hemp and marijuana originated with the cotton, timber, and chemical industries.²¹ These pressures resulted in the implementation of a stamp tax²² which severely restricted, through tariffs, the possession or sale of marijuana.²³ In addition to this tax, Congress also passed the Narcotic Drugs Import and Export Act²⁴ which assessed penalties for the illegal importation and smuggling of drugs and which made the unexplained possession of marijuana presumptive of guilt under the act unless the accused could express a sufficient justification to the jury.²⁵ The simultaneous existence of these two statutes created a paradox for marijuana users that was addressed by the United States Supreme Court in *Leary v. United States* in 1969.²⁶

In 1965, Dr. Timothy Leary was indicted and convicted for the illegal smuggling of marijuana into the U.S. and for failure to pay the marijuana transfer tax.²⁷ He argued that had he paid the tax, he would have incriminated himself under the federal smuggling statute and state

¹⁹ LESTER GRINSPOON, M.D. & JAMES BAKALAR, MARIJUANA, THE FORBIDDEN MEDICINE 5-6 (1993).

²⁰ *Id.*

²¹ Bergoffen & Clark, *supra* note 14.

²² Marijuana Tax Act, 21 U.S.C. § 4741 *et seq.*, repealed by the Controlled Substances Act of 1970, 21 U.S.C. § 801.

²³ Bergoffen & Clark, *supra* note 14.

²⁴ 21 U.S.C. § 176(a), repealed by the Controlled Substances Act of 1970, 21 U.S.C. § 801.

²⁵ *Id.*

²⁶ *Leary v. United States*, 395 U.S. 6 (1969).

²⁷ *Id.* at 10-11.

narcotics laws.²⁸ The Supreme Court agreed with Leary and held the Marijuana Tax Act unconstitutional.²⁹ Additionally, the Court held that the Narcotic Drugs Import and Export Act was invalid under the Due Process Clause.³⁰

In response to *Leary*, Congress enacted the Controlled Substances Act of 1970³¹, which categorized all controlled substances into five schedules of various restrictions.³² Marijuana was placed in Schedule I, which barred the use or distribution of any substance with the limited exception of use for government-approved research and, even then, only under strict storage and record keeping restrictions.³³

As mentioned earlier,³⁴ the three conditions for Schedule I classification are (1) no currently accepted medical use, (2) high potential for abuse, and (3) lack of accepted safety for use under medical supervision.³⁵ The quandary that has enveloped marijuana's classification as a Schedule I drug involves whether or not marijuana has a currently accepted medical use. The courts have considered this issue on numerous occasions since the adoption of the Controlled Substances Act in 1970, and these cases will be discussed later in this Note.

Federal statute dictates that "except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally ... to manufacture, distribute, or dispense, or possess

²⁸ *Id.* at 16.

²⁹ *Id.* at 29.

³⁰ *Id.* at 53.

³¹ 21 U.S.C. §§ 801-904.

³² *Id.*

³³ *See id.* §§ 822-823, 872.

³⁴ 21 U.S.C.S. § 812 (b) (1) (A) - (C) .

³⁵ *Id.*

with intent to manufacture, distribute, or dispense, a controlled substance."³⁶ Correspondingly, all states have adopted measures criminalizing the manufacture, distribution, and possession of marijuana.³⁷

2. Federal Case Law

Since the adoption of the Controlled Substances Act, there have been numerous attempts to change marijuana's Schedule I classification. The first attempt occurred in 1972, when the National Organization for the Reform of Marijuana Laws (NORML) petitioned the Bureau of Narcotics and Dangerous drugs to either remove marijuana from the Controlled Substances Act altogether or, in the alternative, to reclassify marijuana as a Schedule V drug.³⁸ Courts have considered reclassification of marijuana six times.³⁹ Notable among these attempts was *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*⁴⁰, which attempted only to reduce marijuana's classification from Schedule I to Schedule II.⁴¹ The court used a five part test to determine whether reclassification was appropriate:

(1) whether the drug has a known and reproducible chemistry,

³⁶ 21 U.S.C.S. § 841(a)(1).

³⁷ Roger A. Hoffman, MARIJUANA AS MEDICINE 38 (1982). See also *Leary v. United States*, 395 U.S. 6, 16 (1969).

³⁸ Denial of Marijuana Scheduling Petition, 54 Fed. Reg. 53767, 53773 (1989).

³⁹ See *National Org. for the Reform of Marijuana Laws (NORML) v. Ingersoll*, 497 F.2d 654 (D.C. Cir. 1974); *National Org. for Reform of Marijuana Laws (NORML) v. Drug Enforcement Admin.*, 559 F.2d 735 (D.C. Cir. 1977); *National Org. for the Reform of Marijuana Laws v. Drug Enforcement Admin. & Dept. of Health Educ. & Welfare*, No. 79-1660 (D.C. Cir. Oct. 16, 1980); *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 930 F.2d 936 (D.C. Cir. 1991); *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131 (D.C. Cir. 1994); *United States v. Oakland Cannabis Buyers' Coop. & Jeffrey Jones*, 121 S. Ct. 1711 (2001).

⁴⁰ 15 F.3d 1131 (D.C. Cir. 1994).

⁴¹ *Id.* at 1132-33.

- (2) whether adequate safety studies were performed,
- (3) if there were well-controlled and adequate studies showing marijuana's efficacy,
- (4) whether marijuana was accepted by qualified experts, and
- (5) whether scientific evidence of marijuana's efficacy was widely available.⁴²

As in previous attempts to reclassify marijuana, the court denied the request for a scheduling change because, according to the five criteria, marijuana had “no accepted medical use.”⁴³ The court based this determination on the

“testimony of numerous experts that marijuana's medicinal value ha[d] never been proven in sound scientific studies. The Administrator reasonably accorded more weight to the opinions of these experts than to the anecdotal testimony of laymen and doctors on which petitioners relied. The Administrator noted that with one exception, none of [these doctors] could identify under oath the scientific studies they swore they relied on. Only one had enough knowledge to discuss the scientific technicalities involved. Eventually, each one admitted he was basing his opinion on anecdotal evidence, on stories he heard from patients, and on his impressions about the drug.”⁴⁴

Claims of medicinal value or medical necessity were simultaneously helped and hindered in 1985 when the Food and Drug Administration approved Marinol.⁴⁵ Marinol, a synthetic form of THC (the active component in marijuana), was approved for use as a treatment for nausea and vomiting.⁴⁶ The effects of Marinol were purported to be identical to marijuana in proportionate amounts.⁴⁷

Proponents of medical marijuana use are not satisfied that Marinol is an effective substitute for marijuana, however. Many patients have countered that smoking marijuana, rather

⁴² *Id.* at 1135. (quoting Final Order, 57 Fed. Reg. 10,499 (Mar. 26, 1992)).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 47 Fed. Reg. 10082-83 (1985).

⁴⁶ *Id.*

⁴⁷ *Id.*

than ingesting THC in a pill form, provides significantly better relief for pain and nausea.⁴⁸ Others have cited difficulties in taking the pill orally⁴⁹, while others have objected to the effects of a single immediately acting dose of Marinol as opposed to the gradual effects accomplished by smoking marijuana.⁵⁰ An additional obstacle to Marinol's ability to serve as a marijuana replacement has been its high cost compared to marijuana.⁵¹ Therefore, many patients eligible for a regimen including Marinol have resorted to the illegal use of marijuana, often with the approval of their doctors.⁵² These benefits favoring marijuana over Marinol are important weapons in claims that marijuana use is medically necessary for patients qualifying under state medical marijuana programs.

Most recently, the United States Supreme Court ruled 8-0⁵³ that claims of medical necessity for marijuana use were not supported by the Controlled Substances Act, even though

⁴⁸ *Plaintiff's Complaint for Declaratory and Injunctive Relief, Conant v. McCaffrey*, 172 F.R.D. 681 (N.D. Cal. 1997) (No. 97-0139). (This case is also noteworthy in that the court held that the government is permanently enjoined from (i) revoking a physician's DEA registration merely because the doctor recommended medical marijuana to a patient based on sincere medical judgment and (ii) from initiating any investigation solely on that ground. This injunction applied whether or not the physician anticipated that the recommendation would be used by the patient to obtain marijuana in violation of federal law.)

⁴⁹ 47 *Fed. Reg.* 10082-83 (1985).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Justice Breyer did not participate in *Oakland Cannabis Buyers* because his brother, Charles Breyer, was the U.S. district court judge who issued the original decision that rejected the defendant's, Oakland Cannabis Buyers' Cooperative, claim that its members could rely on a defense of "medical necessity" since they alleged that marijuana provided the only source of relief for their ailments.

California had approved such use in a 1996 voter initiative.⁵⁴ Moreover, Congress' decision not to include such an exception could not be attributed to error.⁵⁵

In *United States v. Oakland Cannabis Buyers' Coop. & Jeffrey Jones*⁵⁶, a cooperative had been organized to distribute marijuana to qualified persons for medical reasons.⁵⁷ The federal government sued to enjoin the cooperative and its executive director, Jones, from this distribution, alleging that these activities were a violation of the Controlled Substances Act.⁵⁸ The United States District Court of Northern California enjoined the cooperative's activities, rejecting the cooperative's defense that its marijuana distributions were medically necessary.⁵⁹ The cooperative appealed, and the Ninth Circuit reversed the District Court.⁶⁰ The Ninth Circuit held that medical necessity was a legally cognizable defense that was likely applicable under the circumstances.⁶¹

The Supreme Court stopped short of holding that necessity could never be a defense.⁶² Instead, the Court reasoned that necessity could not be employed as a defense when Congress had enacted clear and unambiguous legislation that precludes the use of a necessity exception.⁶³ The cooperative claimed that elimination of the necessity defense would require an explicit

⁵⁴ *United States v. Oakland Cannabis Buyers' Coop. & Jeffrey Jones*, 121 S. Ct. 1711, 1718 (2001).

⁵⁵ *Id.* at 1718-19.

⁵⁶ 121 S. Ct. 1711 (2001).

⁵⁷ *Id.* at 1715.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1715-16.

⁶⁰ *Id.* at 1716.

⁶¹ *Id.*

⁶² *Id.* at 1718.

⁶³ *Id.*

statement of exclusion in the statute.⁶⁴ The Court disagreed, citing that the statute's provisions left no doubt that the medical necessity defense was unavailable.⁶⁵

The language that the Court relied upon in eliminating the medical necessity defense was the "currently accepted medical use" clause previously discussed.⁶⁶ The Court noted that Congress, not the Attorney General, specifically placed marijuana as a Schedule I drug.⁶⁷ Thus, Congress had made a determination that marijuana had no medical benefits worthy of an exception.⁶⁸

While *Oakland Cannabis Buyers* seems at first glance to be a decisive blow against medical use of marijuana, the Supreme Court left a small loophole for states that seek to permit marijuana use for those with painful illnesses. This loophole, and its resultant use by certain states (including Nevada) to employ a medical marijuana strategy in spite of apparent federal prohibition, will be discussed in Part II of this Note.

3. Administrative Regulations

As a general rule, federal administrative agencies hold that marijuana use is illegal for any reason.⁶⁹ However, there are inconsistencies in the treatment of marijuana use by the

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1719.

⁶⁸ *Id.*

⁶⁹ See generally General, Special Federal Aviation Regulations, 14 C.F.R. § 61.15; Federal Aviation Administration, Department of Transportation, Air Carriers and Operators for Compensation or Hire, 14 C.F.R. § 121; Federal Railroad Administration, Department of Transportation, Control of Alcohol and Drug Use, 49 C.F.R. § 219.101; Federal Transit Administration, Department of Transportation, Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations, 49 C.F.R. § 655.21.

various agencies. While none of the agencies go so far as to condone the use of marijuana (even medicinally), some of these inconsistencies are quite revealing with respect to the government's (and society's) opinions regarding marijuana use, its medical benefits, and its handling compared to alcohol and other narcotics.

For example, the Department of Transportation extends its disdain for narcotics not only to its employees and the drivers it regulates, but even to its handicapped passengers.

The definition of "individual with a disability" excludes someone who is currently engaging in the illegal use of drugs, when a covered entity is acting on the basis of such use. This concept is more important in employment and public accommodations contexts than it is in transportation, and is discussed at greater length in the DOJ and EEOC rules. Essentially, the definition says that, although drug addiction (i.e., the status or a diagnosis of being a drug abuser) is a disability, no one is regarded as being an individual with a disability on the basis of current illegal drug use. Moreover, even if an individual has a disability, a covered entity can take action against the individual if that individual is currently engaging in illegal drug use. For example, if a person with a mobility or vision impairment is ADA paratransit eligible, but is caught possessing or using cocaine or marijuana on a paratransit vehicle, the transit provider can deny the individual further eligibility. If the individual has successfully undergone rehabilitation or is no longer using drugs, as explained in the preamble to the DOJ rules, the transit provider could not continue to deny eligibility on the basis that the individual was a former drug user or still was diagnosed as a person with a substance abuse problem.⁷⁰

Under this regulation, a handicapped individual possessing marijuana for medical purposes under a valid state law would be deprived of the use of paratransit services, since possession would still be considered "illegal drug use" under federal law.

Other agencies are somewhat more lenient regarding marijuana in the workplace. The United States Coast Guard, for example, offers more lenient punishment if the marijuana use is for experimental, rather than recreational, purposes.

⁷⁰ Transportation Services for Individuals with Disabilities, 49 C.F.R. § 37 Appendix D (2001).

An Administrative Law Judge enters an order revoking a respondent's license, certificate or document when –

(a) A charge of misconduct for wrongful possession, use, sale, or association with dangerous drugs is found proved. In those cases involving marijuana, the Administrative Law Judge may enter an order less than revocation when satisfied that the use, possession or association, was the result of experimentation by the respondent and that the respondent has submitted satisfactory evidence that he or she is cured of such use and that the possession or association will not recur.

(b) The respondent has been a user of, or addicted to the use of, a dangerous drug, or has been convicted for a violation of the dangerous drug laws, whether or not further court action is pending, and such charge is found proved. A conviction becomes final when no issue of law or fact determinative of the respondent's guilt remains to be decided.⁷¹

Thus, the Coast Guard evaluates marijuana use based on the intent of the user, rather than on a “strict liability” standard that use for any purpose is judged similarly. Intent or, alternatively, the determination whether marijuana use was habitual or experimental, is left to the discretion of the Administrative Law Judge.

The Department of Transportation has even anticipated the legalization of medical marijuana at the federal level in adopting extremely flexible language in its regulation of the Merchant Marine Academy:

Operation of a motor vehicle on Academy property while intoxicated, under criteria set forth in the statutes of the State of New York, is prohibited. The consumption or possession by any person on Academy property of alcoholic beverages, narcotic drugs, hallucinogens, marijuana, barbiturates, amphetamines or any other substances controlled under the laws of the State of New York or the United States is prohibited. ***These prohibitions shall not apply in cases where drugs are being used as prescribed for a patient by a licensed physician.***⁷²
(emphasis added).

⁷¹ Marine Investigation Regulations - Personnel Action, 46 C.F.R. § 5.59 (2001).

⁷² Regulations Governing Public Buildings and Grounds at the United States Merchant Marine Academy, 46 C.F.R. § 386.11 (2001).

As the above examples illustrate, federal case law, statutes, and administrative regulations are in a state of flux regarding marijuana. As more states adopt medical marijuana laws, the inconsistencies between federal and state law will likely become even more pronounced.

B. Assembly Bill 453

On June 14, 2001, the Nevada Assembly defied the federal government and ratified the results from two referendum elections by passing Assembly Bill 453, legalizing the use of marijuana in Nevada for medical purposes.⁷³ The bill, sponsored by Assemblywoman Chris Giunchigliani, D-Las Vegas, allows seriously ill Nevadans to grow up to seven marijuana plants for personal use.⁷⁴ The measure was passed despite the United States Supreme Court ruling in *United States v. Oakland Cannabis Buyers' Coop. & Jeffrey Jones*⁷⁵ which held that federal laws do not recognize any medical necessity for marijuana use.⁷⁶ “This implements the will of the people. This is a state's rights issue which Nevadans hold dear,” Giunchigliani stated.⁷⁷ The medical marijuana plan was also supported by Assemblywoman Vivian Freeman, D-Reno.⁷⁸ Freeman commented that she was surprised by “all the hoops [we have] to jump through for something

⁷³ Ed Vogel, *WILL OF THE PEOPLE: Medical marijuana law earns signature*, Las Vegas Review-Journal, at http://www.lvrj.com/lvrj_home/2001/Jun-15-Fri-2001/news/16324960.html (last modified June 15, 2001).

⁷⁴ *Nevada Assembly approves medical marijuana*, Vol. 15, No. 14 WORKPLACE SUBSTANCE ABUSE ADVISOR (June 14, 2001).

⁷⁵ *United States v. Oakland Cannabis Buyers' Coop. & Jeffrey Jones*, 121 S. Ct. 1711 (2001).

⁷⁶ *supra* note 57.

⁷⁷ *Id.*

⁷⁸ *Id.*

that's so helpful.”⁷⁹ Freeman, a retired nurse, said that the bill should have been passed "a long time ago."⁸⁰ Assemblyman Greg Brower, R-Reno, opposed the bill and urged lawmakers to adopt the federal position that marijuana use, for any purpose, is illegal.⁸¹ Brower noted that the ruling opens the door for prosecution of those who distribute the drug for medical reasons.⁸² “This bill puts Nevadans in a Catch-22,” Brower remarked.⁸³ “It says we're not going to prosecute for use - it's a federal crime, but don't worry about that.”⁸⁴

Besides Nevada and the District of Columbia, voters in Arizona, Alaska, California, Colorado, Maine, Oregon and Washington have approved legislation allowing medical marijuana.⁸⁵ The Nevada bill authorizes the creation of a state registry for patients whose doctors recommend they use marijuana for medical reasons.⁸⁶ For those registered, the penalty for possessing marijuana would be reduced from a felony to a misdemeanor.⁸⁷

Under this bill, a person with an ounce or less of marijuana could be charged with a misdemeanor, rather than a felony, and fined up to \$600.⁸⁸ A second offense would result in a

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* (See D.C. CODE ANN. § 48-902 (2001); ARIZ. REV. STAT. § 32-1901 (2000); ALASKA STAT. § 17.37.010 (Michie 2001); CAL. HEALTH & SAFETY CODE § 11362.5 (Deering 2001); COLO. REV. STAT. § 18-18-406.3 (2001); ME. REV. STAT. ANN. tit. 22, § 2383-B (2000); OR. REV. STAT. § 475.306 (1999); WASH. REV. CODE. ANN. § 69.51A.040 (West 2001)).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

higher fine and referral to a treatment or rehabilitation program.⁸⁹ Third-time offenders would be charged with a gross misdemeanor and have to pay a steeper fine.⁹⁰ These charges could be applied even if the accused is registered under the state medical marijuana program.

On its face, AB 453 doesn't appear to do anything more than reduce marijuana possession for medical reasons from a felony to a misdemeanor. Since federal law does not prohibit classification of drug offenses as misdemeanors, the State of Nevada appears to have taken advantage of a loophole to minimize the punishment for medical marijuana users. The Office of the Attorney General, however, has openly embraced medical marijuana use in light of the adoption of AB 453.

Steve George, assistant attorney general for the State of Nevada, stated the AG's opinion that "[r]egardless of the Supreme Court decision, the state of Nevada is not going to enforce" the arrest of those using marijuana for medical reasons with the approval of their physicians.⁹¹ "We will move forward with [our state] mandate."⁹²

Because Nevada's medical marijuana initiative was the first to be adopted since the *Oakland Cannabis Buyers* decision, Nevada was prohibited from "legalizing" marijuana as other states had done. Instead, elected officials in Nevada attempted to appease their constituents by (1) having the legislature minimize the penalties for possession of small amounts of marijuana and (2) having the attorney general, also an elected official in Nevada, issue a statement that provides an official guarantee that medical marijuana users will not be prosecuted.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Untitled*, Vol. 15, No. 13 WORKPLACE SUBSTANCE ABUSE ADVISOR (June 1, 2001).

⁹² *Id.*

Thus, Nevada has adopted a three-stage approach to circumventing federal law to allow medical marijuana possession and use. AB 453 permits registered users to grow their own marijuana. First, by permitting cultivation rather than designing a distribution scheme, Nevada steers clear of violating any distribution statutes. Second, by reducing the classification of medical marijuana crimes to misdemeanors, the state avoids any allegations that they have legalized medical marijuana. Instead, Nevada has merely reduced penalties for such use. Last, the Attorney General's office has announced that they are using their discretionary powers in refusing to actively prosecute misdemeanor offenders who are registered as medical marijuana users. While this approach may create a small loophole for Nevada to squeeze through, there are still problems with this approach relating to employment at will and the Americans with Disabilities Act. These problems, combined with the tenuous nature of Nevada's attempt to circumvent federal law, make medical marijuana a unreliable option now that may disappear entirely as courts examine Nevada's strategy.

C. The State of Nevada and Employment at Will

Nevada is an employment at will state.⁹³ "An employee may rebut this presumption by proving by a preponderance of the evidence that there was an express or implied contract of employment that provided for termination only for cause."⁹⁴

The Nevada Supreme Court considered the issue of the limits that can be imposed on employers when terminating employees in *D'Angelo v. Gardner*.⁹⁵ There, the court held that there were only three appropriate claims for relief for wrongful termination:⁹⁶

⁹³ *American Bank Stationery v. Farmer*, 106 Nev. 698, 701 (Nev. 1990).

⁹⁴ *Id.*

The law relating to claims by employees against their employers for wrongful discharge is rapidly evolving and is often lacking in the clarity one would expect to find in the more static areas of judicial decision-making. For this reason we thought it useful to give a preliminary overview of the three discrete claims for relief which we consider in this opinion, namely, a claim for breach of contract, a claim for the tortious breach of the implied covenant of good faith and fair dealing which can arise out of certain employer-employee contractual relationships (sometimes called a "bad-faith discharge tort") and tortious discharge (sometimes called a "public policy tort"). **1. Breach of Employment Contract.**

Employment contracts are ordinarily and presumably contracts which are terminable at will; however, an employer may expressly or impliedly agree with an employee that employment is to be for an indefinite term and may be terminated only for cause or only in accordance with established policies or procedures. We have called this a contract of "continued employment," a contract which an employee can enforce in accordance with its terms. **2. Bad Faith Discharge Tort.** This tort is committed when an employer, acting in bad faith, discharges an employee who has established contractual rights of continued employment and who has developed a relationship of trust, reliance and dependency with the employer. By its nature this kind of employer-employee relationship cannot develop in an at-will employment; consequently, a bad faith discharge tort cannot be committed against an at-will employee as can a tortious discharge. **3. Tortious Discharge.** This tort, the so-called public policy tort, is the simpler of the two subject employment torts. An employer commits a tortious discharge by terminating an employee for reasons which violate public policy. "Although this kind of public policy tort cannot ordinarily be committed absent the employer-employee relationship, the tort, the wrong itself, is not dependent upon or directly related to a contract of continued employment such as that existing in the present case."⁹⁷ Discharging an employee for seeking industrial insurance benefits, for performing jury duty or for refusing to violate the law are examples of tortious discharge.⁹⁸

An employee terminated for medical marijuana use in Nevada could conceivably rely on two different theories of relief, based on whether or not an employment contract exists. If a contract is present, the employer would ordinarily be required to show just cause, such as

⁹⁵ 107 Nev. 704 (1991).

⁹⁶ *Id.* (emphasis added).

⁹⁷ *K Mart Corp. v. Ponsock*, 103 Nev. 39, 46, 732 P.2d 1364, 1369 (1987). (emphasis added)

⁹⁸ *See, e.g.,* NRS 6.190; *Hansen v. Harrah's*, 100 Nev. 60 (1984).

misconduct. If there is no contract, an employee would have to rely on a claim of tortious discharge in order to seek damages for wrongful termination. Relevant case authority and analysis regarding wrongful termination and medical marijuana will be explored in section 2 of this Note.

D. Americans with Disabilities Act

Another interesting complexity with the ramifications of medical marijuana use and the workplace involves the Americans with Disabilities Act.⁹⁹ To establish a prima facie claim of discrimination under the ADA, a discharged employee must prove (1) that he has a disability, (2) that he was qualified for the job from which he was discharged, and (3) that his discharge was the result of his disability.¹⁰⁰ In cases involving medical marijuana use, the question arises as to whether an employee has a disability under the ADA. Certainly, afflictions like cancer and glaucoma would likely be considered disabilities by the ADA. But the analysis in these cases generally centers on specific language in the ADA that excludes users of illegal drugs.

In *Zenor v. El Paso Healthcare System, Ltd.*, the Fifth Circuit addressed whether the ADA excludes persons who are currently using illegal drugs from its protection.¹⁰¹ Zenor was an employee who was addicted to cocaine.¹⁰² After being unable to report to work one evening because of his addiction, Zenor elected to enroll himself in the drug rehabilitation program

⁹⁹ 42 U.S.C. § 12101 *et seq.*

¹⁰⁰ *Zenor v. El Paso Healthcare System, Ltd.*, 176 F.3d 847 (5th Cir. 1999); *See generally Robertson v. Neuromedical Ctr.*, 161 F.3d 292, 294 (5th Cir. 1998); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 320 (5th Cir. 1997); *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 36 (5th Cir. 1996).

¹⁰¹ *Zenor*, 176 F.3d at 853.

¹⁰² *Id.* at 851.

offered through his employer, El Paso Healthcare System.¹⁰³ Because Zenor's job required access to pharmaceutical cocaine, El Paso Healthcare terminated Zenor's employment after he returned from drug rehab.¹⁰⁴ Zenor sued El Paso Healthcare on a variety of claims, including violation of the ADA.¹⁰⁵

According to the *Zenor* court, the ADA specifically exempts current illegal drug users from being considered "qualified individuals".¹⁰⁶ The court further held that "federal law does not proscribe an employer's firing someone who currently uses illegal drugs, regardless of whether or not that drug use could otherwise be considered a disability."¹⁰⁷ Noting that Texas law has a strong presumption in favor of at-will employment (like Nevada), the Fifth Circuit held that the creation of a drug rehabilitation program did not create an enforceable contract granting rights beyond that of at-will employment.¹⁰⁸ For contractual rights to be created, a policy must "specifically and expressly limit the employer's ability to terminate the employee."¹⁰⁹ "The policy must contain an explicit contractual term altering the at-will relationship, and must alter that relationship in a meaningful and special way."¹¹⁰

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 852.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 853. (*citing* 42 U.S.C. 12114(a)). ("For purposes of this title, the term '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 acts on the basis of such use.")

¹⁰⁷ *Zenor*, 176 F.3d at 853.

¹⁰⁸ *Id.* at 862.

¹⁰⁹ *Id.* (*citing* *Vida v. El Paso Employees' Fed. Credit Union*, 885 S.W.2d 177, 182 (Tex. App. 1994)).

¹¹⁰ *Id.*

Since marijuana use is still considered illegal by both the federal government and Nevada (albeit as a misdemeanor in Nevada, not a felony), it seems clear that marijuana users, even those registered through a state's medical marijuana program, may be excluded from ADA protection under 42 U.S.C. § 12114(a).¹¹¹ This issue has not yet been decided by the courts, and may ultimately be decided based on a choice of competing interpretations of the ADA:

The ADA's definition of "illegal use of drugs"¹¹² 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 provision of federal law, but does include the use of drugs that are unlawful to possess or distribute under the Controlled Substances Act.¹¹³ Marijuana is a drug that is unlawful to possess or distribute under the Controlled Substances Act.¹¹⁴ Yet Proposition 215¹¹⁵ has caused uncertainty because an otherwise qualifying person who uses marijuana may claim that she did so "under supervision by a licensed health care professional."¹¹⁶ If that is the correct reading of the ADA, employers will have to

¹¹¹ 42 U.S.C. § 12114(a). ("Qualified individual with a disability. For purposes of this title, the term '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 acts on the basis of such use.").

¹¹² See Americans with Disabilities Act of 1990. 42 U.S.C. § 12114(c) (1) (1994).

¹¹³ See *id.* § 12111(6) (A).

¹¹⁴ 21 U.S.C. § 812(c) (Schedule I) (c) (10) (1994).

¹¹⁵ California's Compassionate Use Act, codified as CAL. HEALTH & SAFETY CODE § 11362.5 (Deering 2001).

¹¹⁶ 42 U.S.C. § 12111(6) (A) (1994). Even if Proposition 215 were controlling over the ADA, many patients who qualify under Proposition 215 would remain excluded by the ADA, because the ADA requires the medication be taken by a person who is under the supervision of "a licensed health care professional," while section 11362.5 requires a recommendation from a "physician." See Cal. Health & Safety Code § 11362.5 (West Supp. 1998). Were the courts to define "physician" broadly, an inordinate number of healers would be able to recommend marijuana, despite not being licensed health care professionals. The ADA, however, does not require that the health care professionals prescribe the medication. See 42 U.S.C. § 12111(6) (A) (1994). If it did, there could be no real concern that employers would be required to accommodate employees who qualify as patients under Proposition 215, because physicians cannot currently prescribe marijuana, which is still a Schedule I drug. See 21 U.S.C. § 812(c) (Schedule I) (c) (10) (1994).

accommodate qualifying workers for whom a physician has recommended marijuana.¹¹⁷ However, that reading is not required by the language of the ADA taken as a whole.

While the above reading conforms with the literal language of the ADA, it ignores the language immediately following the phrase "under supervision by a licensed health care professional," which states "or other uses authorized by the Controlled Substances Act"¹¹⁸ Read together, the second phrase limits the first; that is, the first phrase is limited to instances in which the licensed health care professional has prescribed a controlled substance as authorized by the Controlled Substances Act. The "other uses" language suggests that the preceding phrase, "under supervision" is a use authorized by the Controlled Substances Act.¹¹⁹ Because marijuana remains a Schedule I drug, one with no recognized medical use, its use is not authorized by the Controlled Substances Act and cannot, therefore, be one properly prescribed by a licensed health care professional.¹²⁰

Senate ADA hearings have already addressed the issue of a worker's use of marijuana.¹²¹ In written responses to Senators' questions during those hearings, a Deputy Attorney General addressed the problem.¹²² The administration argued that those who use illegal drugs should not fall within the definition of a person with a "handicap," but then stated that the administration did 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.¹²³

The Justice Department recognizes that the ADA may protect some employees who use marijuana, but the Deputy Attorney General's reference to marijuana use only applies to the specific language in the ADA and would not extend protection beyond the limited use of marijuana recognized by the federal government. Therefore, under federal law at the time of the ADA's adoption, a patient could

¹¹⁷ See 42 U.S.C. § 12111(9) (1994).

¹¹⁸ See *id.* § 12111(6)(A).

¹¹⁹ *Id.*

¹²⁰ See 21 U.S.C. § 812 (1994).

¹²¹ See Americans with Disabilities Act of 1989: Hearings on S.933 Before the Comm. on Labor and Human Resources and the Subcomm. on the Handicapped, 101st Cong. 828 (1989) (written responses of John P. Mackey, Dep. Asst. Att'y Gen.).

¹²² *Id.*

¹²³ *Id.* at 837-38.

lawfully use marijuana if she came within the Compassionate Use Program. According to the Deputy Attorney General, medical marijuana use would be within the meaning of the term "illegal use of drugs"¹²⁴ unless it was prescribed as part of the Compassionate Use Program, because only then would it be a use "authorized by ... another provision of Federal law."¹²⁵

Given the strong anti-drug protections reflected in other provisions of the ADA,¹²⁶ the timing of its enactment (at the height of the Bush administration's War on Drugs), and the subsequent suspension of the Compassionate Use Program¹²⁷, a reading extending protection to employees who use illegal drugs for medical reasons would pervert congressional intent. This competing interpretation of the ADA, however, is plausible.¹²⁸

Though not likely, medical marijuana could eventually be permitted by the courts under the ADA. Under a "competing federal interests" theory, the federal government's need to keep marijuana illegal in all cases would compete with the ADA's right to provide relief for a person "handicapped" by diseases such as cancer and glaucoma. While marijuana proponents could point to federal acceptance of known pain relievers such as morphine, the federal government

¹²⁴ 42 U.S.C. § 12114(a) (1990).

¹²⁵ Comm. on Educ. and Labor, 101st Cong., Legislative History on the Americans with Disabilities Act 8 (Comm. Print 1990) (defining the illegal use of drugs as not including "the use of controlled substances, including the use of 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.").

¹²⁶ See, e.g., 42 U.S.C. § 12114(a) (1990) ("For purposes of this subchapter, the term '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 acts on the basis of such use."); 42 U.S.C. § 12114(c) (1990) ("A covered entity - (1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees; (2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace").

¹²⁷ Lester Grinspoon & James Bakalar, Marijuana as Medicine: A Plea for Reconsideration, 23 JAMA 1875 (1995) (announcing the Public Health Service's suspension of the Compassionate Use Program "because it undercut the [Bush] administration's opposition to the use of illegal drugs").

¹²⁸ Vitiello, Michael, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM, Spring, 1998, at 707, 733-736.

would likely counter by asserting that these “handicapped” individuals could properly be treated with Marinol. Given these compelling arguments on both sides, it seems likely that any court decision will be appealed and the United States Supreme Court may ultimately be asked to decide whether medical marijuana use is permitted under the ADA.

II. Reconciling These Four Interests

In Part I of this Note, the background regarding the four competing interests that comprise medical marijuana policy in Nevada were discussed: (1) federal law (including case law, statutes, and administrative regulations), (2) Assembly Bill 453, (3) employment at will, and (4) the Americans with Disabilities Act. In this section, practical application of these interests will be discussed with an emphasis on guidance for employers and employees affected by medicinal use of marijuana.

A. What Does Assembly Bill 453 Allow?

Assembly Bill 453, once codified, will permit Nevada residents to seek permission from their physicians to grow and use marijuana to relieve the pain associated with illnesses such as cancer and glaucoma.¹²⁹ Once a physician has granted permission for such use, a patient must apply to be listed on a state medical marijuana registry.¹³⁰ After the patient has been listed on the registry, personal cultivation of up to seven marijuana plants is permitted.¹³¹ The patient may then smoke the marijuana personally cultivated to diminish the effects of his or her illness.¹³²

¹²⁹ Assembly Bill, No. 453, ch. 592, 2001 Nev. Stat.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

It is important to note, however, that such “permission” to grow and smoke marijuana in Nevada is illusory. Because the federal government considers marijuana illegal,¹³³ Nevada adopted an end run approach to avoiding conflict with the federal government by merely reducing the classification of medical marijuana crimes from felony to misdemeanor¹³⁴ and by publicly announcing that prosecution of such misdemeanors would not occur in Nevada.¹³⁵

B. Does *U.S. v. Oakland Cannabis Buyers’ Cooperative*¹³⁶ Nullify AB 453?

On May 14, 2001, the United States Supreme Court issued its decision in *United States v. Oakland Cannabis Buyers’ Cooperative and Jeffrey Jones*.¹³⁷ In an 8-0 decision, the Court made an important determination regarding medical marijuana use. First, the Court unanimously held that a medical necessity defense could not be used as a defense to manufacturing and distributing marijuana.¹³⁸ However, three Justices¹³⁹ observed in a concurring opinion that the holding of the court was limited to the manufacture and distribution of marijuana for medical purposes.¹⁴⁰

The three Justices noted that the Court’s decision did not address the issue of whether a medical necessity defense might be available for seriously ill patients that might use marijuana

¹³³ See, e.g., *United States v. Oakland Cannabis Buyers’ Coop. & Jeffrey Jones*, 121 S. Ct. 1711 (2001).

¹³⁴ Assembly Bill, No. 453, ch. 592, 2001 Nev. Stat.

¹³⁵ *Untitled*, Vol. 15, No. 13 WORKPLACE SUBSTANCE ABUSE ADVISOR (June 1, 2001).

¹³⁶ 121 S. Ct. 1711 (2001).

¹³⁷ *Id.*

¹³⁸ *Id.* at 1722.

¹³⁹ *Id.* (The three Supreme Court Justices participating in the concurrence were Justices Stevens, Souter, and Ginsburg).

¹⁴⁰ *Id.*

for relief.¹⁴¹ The concurrence disagreed with the majority's suggestion that necessity might not ever be considered a defense to a federal statute that does not explicitly provide for it.¹⁴² In fact, the minority noted that previous Supreme Court decisions leave no doubt that the common law necessity defense remains viable.¹⁴³ Whether or not a necessity defense is available for medicinal users of marijuana, rather than distributors, is a matter beyond the ruling of *Oakland Cannabis Buyers* and is left open by it.¹⁴⁴

Necessity is defined as "controlling force; irresistible compulsion; a power or impulse so great that it admits no choice of conduct. That which makes the contrary of a thing impossible."¹⁴⁵ The necessity defense originated in the common law, and is alternatively referred to as the "necessity", "choice of evils," or "competing harms" defense.¹⁴⁶ Where the finder of fact determines that a defendant meets the elements of the necessity defense, they deem the act, though a violation of the word of the law, to be lawful.¹⁴⁷ Thus, a medical necessity

¹⁴¹ *Id.* at 1723.

¹⁴² *Id.*

¹⁴³ *Id.* (citing *United States v. Bailey*, 444 U.S. 394, 415 (1980), "We therefore hold that, where a criminal defendant is charged with escape and claims that he is entitled to an instruction on the theory of duress or necessity, he must proffer evidence of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force. Our principal difference with the dissent, therefore, is not as to the existence of such a defense but as to the importance of surrender as an element of it") (emphasis added).

¹⁴⁴ *Id.* at 1724. The minority concurrence suggested that the issue of medical necessity for medical marijuana users should be decided on the authority of *Hecht Co. v. Bowles*, 321 U.S. 321 (1944) and *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

¹⁴⁵ BLACK'S LAW DICTIONARY 1030 (6th ed. 1990).

¹⁴⁶ Michael J. Yaworsky, Annotation, *Driving While Intoxicated: "Choice of Evils" Defense that Driving Was Necessary to Protect Life or Property*, 64 A.L.R.4TH 298, section 1a n.2 (1995).

¹⁴⁷ George C. Blum, Annotation, *Defense of Necessity, Duress, or Coercion in Prosecution for Violation of State Narcotic Laws*, 1 A.L.R.5TH 938 (1995).

defense could be characterized as justification for an unlawful act based on medical reasons so great that the offender has no viable alternative. As a general rule, courts have been reluctant to recognize the medical necessity defense for marijuana use. Typical of such rejection is *Kauffman v. State*¹⁴⁸, where a paraplegic defendant presented the defense. Kauffman endured intense pain from uncontrollable muscle spasms and crippling symptoms¹⁴⁹ and his prescribed medication was ineffective to alleviate his symptoms.¹⁵⁰ Marijuana was the only substance Kauffman found that relieved his pain.¹⁵¹ The trial court refused to allow a medical necessity defense and Kauffman was convicted for unlawful possession and sentenced to prison for ten years.¹⁵²

Based in part on the *Kauffman* decision, there continues to be a reluctance on the part of doctors to prescribe marijuana for medicinal use based on the potentially harsh penalties. Medical groups, like the California Medical Association, the California Academy of Family Physicians, and the San Francisco Medical Society have warned their members not to recommend medical marijuana for fear of government prosecution and incarceration for felonies potentially carrying ten-year sentences.¹⁵³ Additionally, several physicians individually have

¹⁴⁸ *Kauffman v. State*, 620 So.2d 90 (Ala. Crim. App. 1992), *reh'g denied*, Volume Number Ala. App. (Ala. Crim. App. Jan. 22, 1993), *cert. denied*, Volume Number Ala. App. (Ala. Apr. 30, 1993).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 91.

¹⁵¹ *Id.*

¹⁵² *Id.* at 90.

¹⁵³ See Rebecca Voelker, *New Marijuana Laws in 2 States Prompt Caution*, 276 JAMA 1786, 1787 (1996); Herbert A. Sample, *Clinton May Punish Doctors Who Recommend Marijuana*, SAN DIEGO UNION-TRIB., Dec. 30, 1996, at A1; Luz Villarreal, *Court Fight Looms on Pot Measure*, L.A. DAILY NEWS, Dec. 31, 1996, at N1.

indicated that the risks of government prosecution have forced them to abandon recommendations of medical marijuana as a viable treatment for their patients.¹⁵⁴

At the opposite end of the legal spectrum is the 1979 case of *Washington v. Diana*¹⁵⁵, where the court permitted a medical necessity claim by a defendant suffering from multiple sclerosis. The court ruled that Samuel Diana could utilize the defense if he showed by a preponderance of the evidence: (1) [he] reasonably believed his use of marijuana was necessary to minimize the effects of multiple sclerosis; (2) the benefits derived are greater than the harm sought to be prevented by the controlled substances law; and (3) no drug is as effective in minimizing the effects of the disease.¹⁵⁶ The Court of Appeals remanded the case back to the trial court for a hearing to determine whether medical necessity existed.¹⁵⁷ The trial court was instructed to balance the defendant's interest in preserving his health against the State's interest in regulating the drug.¹⁵⁸ There is, however, no available record to indicate the result of that hearing if it was held.

As a result of the *Oakland Cannabis Buyers'* decision, Nevada tailored Assembly Bill 453 to comply with its holding regarding distribution of marijuana, while permitting its use through the dual approach of simultaneously reducing the classification of medical marijuana cultivation and use to misdemeanor status while publicly announcing that violations of the misdemeanor would not be prosecuted by the state. Thus, *Oakland Cannabis Buyers'* does not

¹⁵⁴ Supporters of Prop. 215 Smoldering: The Clinton Administration Is Accused of Intimidating Doctors, ORANGE COUNTY REG., Dec. 31, 1996, at A4.

¹⁵⁵ *Washington v. Diana*, 604 P.2d 1312 (Wash. Ct. App. 1979).

¹⁵⁶ *Id.* at 1316-17.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

nullify AB 453; in fact, AB 453 was narrowly tailored to comply with the letter of the Supreme Court's decision while disregarding its spirit.

C. What are Employers' Rights Regarding Termination of Employees That Are Medical Marijuana Users?

In considering employers' rights involving termination of employees that participate in Nevada's medical marijuana system, the preliminary question that must be addressed involves whether or not the employer-employee relationship is purely at-will, or if an employment contract (either explicit or implied) exists.

Typically, an employment contract allows for termination of an employee for just cause. In Nevada, the standard for just cause has generally concerned whether or not the employee has committed misconduct connected with his work.

“[A]n employee is guilty of ‘misconduct connected with his work’ when he deliberately violates a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or omissions are of such a nature or so recurrent as to manifest a willful disregard of those interests and the duties and obligations he owes his employer.”¹⁵⁹ The Nevada Supreme Court has broadly construed this definition of misconduct in cases where it has considered not only wrongful termination, but also eligibility for unemployment benefits.¹⁶⁰

Certainly, a medical marijuana user in Nevada would likely be found to have committed misconduct, since possession and use of marijuana is not only still a felony under federal statute, but is also a misdemeanor in Nevada. While an employer might be challenged to meet the

¹⁵⁹ *Branch v. Virginia Employment Comm'n*, 249 S.E.2d 180, 182 (Va. 1978).

¹⁶⁰ *See, e.g., Clevenger v. Nevada Employment Sec. Dep't*, 105 Nev. 145 (1989).

“legitimate business interests” standard or to prove that the offense would be “connected” with the employee’s work, it is likely that a termination for medical marijuana use would be upheld, given Nevada’s strong predisposition toward employer’s rights.

The Nevada Supreme Court, however, has not adopted a position that any form of marijuana use is proper grounds for termination. In *Clevenger v. Nevada Employment Sec. Dep’t.*,¹⁶¹ an employee had been terminated for off-duty marijuana use.¹⁶² The court held that such termination was appropriate only if the rule prohibiting off-duty drug use had a reasonable relation to the work performed and to the employer's legitimate safety concerns. Because the employee worked with explosives, the court held that termination was appropriate for continued marijuana use.¹⁶³ The *Clevenger* decision suggests that termination for off-duty marijuana use must be reasonably related to work performance and safety concerns. Thus, employees enrolled in a medical marijuana program might be able to ward off termination for marijuana use by showing that such off-duty use would not negatively impact performance or cause safety dangers in the workplace.

Could an employee be terminated merely for registering under the medical marijuana program created in AB 453? Oddly enough, the answer is likely “Yes”. The Nevada Supreme Court has held that intent to possess narcotics is a crime, just as actual possession is a crime.¹⁶⁴ A patient seeking to cultivate and use marijuana for medical reasons is required to (1) obtain

¹⁶¹ *Id.*

¹⁶² *Id.* at 147.

¹⁶³ *Id.* at 149.

¹⁶⁴ *Moore v. State*, 96 Nev. 220 (1980).

permission from a physician, and (2) register with the state as a medical marijuana user.¹⁶⁵

Either one of these acts would likely qualify as “intent to possess” marijuana, and thus be considered a criminal act in Nevada. Commission of a criminal act would likely be considered misconduct, and thus proper justification for discharge under most employment contracts.

A tangential question regarding whether an employee is an at-will or contracted employee involves implied employment contracts. Often, such implied contracts are based on specific wording in employee handbooks. Whether or not an employee has an employment contract or is merely an at-will employee is critical in determining whether an employer must have just cause to terminate an employee or if the employer may prohibit for any reason other than those that would constitute a tortious discharge.

In *Southwest Gas Corp. v. Ahmad*¹⁶⁶, the Nevada Supreme Court affirmed a summary judgment while recognizing that contractual obligations can be implicit in employer practices and policies as reflected in an employee handbook.¹⁶⁷ When an employer issues an employee handbook containing termination provisions and the employee has "knowledge of the pertinent provisions therein," this "supports an inference that the handbook formed part of the employment contract of the parties."¹⁶⁸ In *Ahmad*, the employer issued a handbook containing provisions relating to termination of employment for cause, and delivered one of these handbooks to the employee, who read and "acknowledged" its contents.¹⁶⁹ Thus, the Nevada Supreme Court held

¹⁶⁵ Assembly Bill, No. 453, ch. 592, 2001 Nev. Stat.

¹⁶⁶ 99 Nev. 594 (1983).

¹⁶⁷ *Id.* at 595.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

that such facts would support an inference that the termination provisions contained in the handbook were part of an implied employment contract.¹⁷⁰

Just as there are cases in which handbooks and employment practices can be found to support an express or implied obligation of continued employment, there are cases in which such an obligation is absent as a matter of law. This was the situation in *Vancheri v. GNLV Corp.*¹⁷¹ There, although there was an employee handbook, the handbook did not contain employee disciplinary procedures or specification of "proper cause" for dismissal¹⁷²; thus, the terminated employee could not rely on a handbook to support a claim on his part that his employer owed to him a contractual obligation of continued employment.¹⁷³ Absent termination provisions in the handbook, the Supreme Court held in *Vancheri* that the mere existence of customary or informal procedures employed in cases of employee dismissal would not vitiate an essentially at-will employment.¹⁷⁴

Of course, the employer can easily prevent this inference from arising by including in its handbook an express disclaimer of implied contractual liability of the type found in *Perry v. Sears, Roebuck & Co.*¹⁷⁵ There, the pension plan manual at issue stated in bold type, "Employment rights not implied," and further stated that "Participation in the plan does not...interfere in any way with the right of the company to discharge or terminate you at any

¹⁷⁰ *Id.*

¹⁷¹ 105 Nev. 417 (1989).

¹⁷² *Id.* at 422 n.2.

¹⁷³ *Id.* at 422.

¹⁷⁴ *Id.*

¹⁷⁵ 508 So. 2d 1086 (Miss. 1987).

time."¹⁷⁶ In light of these statements, the court found that no inference of implied contractual liability was present.¹⁷⁷

Absent an employment contract, an at-will employee may be terminated for almost any reason that does not constitute tortious discharge.¹⁷⁸ But would terminating an employee for medicinal use of marijuana be considered a tortious discharge? It is well settled that an employee may not be terminated for reasons that violate public policy.¹⁷⁹ But it is highly debatable whether a termination for medical marijuana use would violate public policy.

Proponents of medical marijuana use would argue that the Nevada Legislature's enactment of AB 453 at the urging of the electorate would support the notion that there is a strong public policy in favor of medicinal marijuana. In both 1998 and 2000, Nevadans overwhelmingly voted to amend the state constitution to authorize the use of marijuana by those suffering from certain painful and terminal illnesses.¹⁸⁰ Rather than adopt a constitutional measure as requested by voters, lawmakers opted instead for modifications to the Nevada Revised Statutes ("NRS").¹⁸¹ While there might be several reasons for making the changes to statutory provisions rather than the Constitution, one important benefit would be that the NRS could be more quickly and easily changed (compared to a state constitutional modification) to

¹⁷⁶ *Id.* at 1088.

¹⁷⁷ *Id.*

¹⁷⁸ See generally, *K Mart Corp. v. Ponsock*, 103 Nev. 39 (1987).

¹⁷⁹ See, e.g., NRS 6.190; *Hansen v. Harrah's*, 100 Nev. 60 (1984); *K Mart Corp. v. Ponsock*, 103 Nev. 39, 46 (1987).

¹⁸⁰ See *Nevada Assembly approves medical marijuana*, Vol. 15, No. 14 WORKPLACE SUBSTANCE ABUSE ADVISOR (June 14, 2001). (These voter initiatives specifically mentioned cancer, AIDS, glaucoma and "other painful and potentially terminal illnesses").

¹⁸¹ *Id.*

stay in compliance with federal law in the event that the issue of medical marijuana use is revisited in the future.

Opponents would persuasively counter, however, that there can be no strong public policy argument for an illegal act. Nevada's efforts to comply with the United States Supreme Court decision in *Oakland Cannabis Buyers*' have resulted in medical marijuana still being technically illegal, though its illegality is disregarded by the Attorney General's office. Thus, it appears likely that employers in Nevada would continue to have the right to discharge at-will employees for marijuana use, even if that use is supported by the adoption of Assembly Bill 453.

D. Are Employees Protected by the Americans with Disabilities Act?

Labor lawyers have questioned whether an employee with an otherwise qualifying disability may claim the right to use marijuana under the Americans with Disabilities Act.¹⁸² Prior to the adoption of Assembly Bill 453, federal case law supported an employer's right to discharge an employee for marijuana use, even if that employee were disabled according to the ADA.¹⁸³

Has Assembly Bill 453 affected the ADA's treatment of medical marijuana use in Nevada? Probably not. The ADA excludes from its protection "any employee or applicant who is currently engaging in the illegal use of drugs".¹⁸⁴ The ADA recognizes an employer's right to

¹⁸² See *Marijuana Ballot in California Raises Questions Over Testing*, DRUG DETECTION REPORT, Sept. 20, 1996 (considering whether a doctor's recommendation of marijuana as a treatment regimen would serve as a legitimate medical excuse for a positive drug test).

¹⁸³ *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832-33 (9th Cir. 1995). (employer's termination of employees who used, sold, and purchased marijuana on company property was upheld on the basis that the discharge was the result of misconduct, not the employees' claims of disability).

¹⁸⁴ 42 U.S.C. § 12114(a).

test for drug use¹⁸⁵ and to prohibit illegal drug use in the workplace.¹⁸⁶ Again, the federal government's refusal to declassify marijuana as a Schedule I drug and Nevada's effort to comply with federal law by reducing penalties for marijuana use rather than legalization have resulted in the likelihood that ADA protection will not be afforded to employees terminated for medical marijuana use.

Conclusion

The Nevada Legislature should be applauded for its noble attempt to provide a means for medical marijuana treatment within its borders. Regardless of where one stands on the issue of marijuana's medicinal value, the Legislature acted on the clear and unambiguous wishes of the electorate in passing Assembly Bill 453. But the hard-line stance of the federal government and the United States Supreme Court have left states that want to allow medical marijuana use with only two choices: (1) assert a state's rights theory and openly defy the federal government, or (2) attempt to circumvent the federal government's mandate by using loopholes and unsettled law to craft a compromise measure destined to be either legislated out of existence or ruled illegal as contrary to federal statute.

Nevada has gamely tried to appear as a state that would stand up to the federal bully in its media posturing, but the Legislature has clearly embraced the "loophole" approach to dealing with this dilemma on the statutory front. It is certain that in the months and years to come, Nevada's medical marijuana statutes will continue to evolve in response to decisions in the federal courts. It is equally certain that Nevada employers will need to be vigilant on how these

¹⁸⁵ See *id.* § 12114(b), (d).

¹⁸⁶ See *id.* § 12114(d) (2).

changes affect their right to terminate employees for marijuana use. For now, employers seem to still have the right to terminate their at-will employees for marijuana use, even if that use qualifies for special treatment under Assembly Bill 453.

Employees that are subject to termination only for “just cause”, however, might be able to employ a “medical use” defense for terminations that result from marijuana use unless the employer can demonstrate that the off-duty use affected the employee’s work performance or that safety dangers occurred as a result of the marijuana use. In this regard, AB 453 is an improvement over previous schemes that resulted in felony treatment of all marijuana use and no possibility of a “medical use” defense in “just cause” terminations.