MEDICAL MARIJUANA AND EMPLOYMENT DISCRIMINATION

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I. INTRODUCTION

Over 400,000 people are currently using marijuana for medical purposes.[1] In most cases, state law permits the use. Even though state law permits the use of marijuana for medical purposes, the use of marijuana for *any purpose* is still prohibited by federal law. In many cases, the users are actively employed or seeking employment. These applicants and employees are protected by state and federal laws against discrimination based on race, color, national origin, gender, religion, disability, age and military service. An issue exists, however, as to whether the use of marijuana for medical purposes is also protected.

This paper examines the relationship between state laws that permit the use of marijuana for medical purposes and the ability of an employer to discharge an employee for marijuana use. The extent to which medical marijuana laws might be used by a discharged employee to support a claim of employment discrimination is examined. This paper addresses the issue by summarizing the federal law prohibiting marijuana use, by discussing the state laws that permit use of marijuana for medical purposes, by examining the federalism issue thus created and the federal response to state medical marijuana laws, and by examining four state court decisions directly addressing the issue of discrimination against medical marijuana users. We conclude by discussing the future of the medical marijuana employment discrimination debate.

II. THE FEDERAL PROHIBITION AGAINST MARIJUANA USE

President Nixon officially launched the war on drugs in 1970. One result of this effort was the passage of the Comprehensive Drug Abuse Prevention

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[1] Mikos, Robert A., *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 633-669 (2011).

and Control Act of 1970, Title II of which is the Controlled Substances Act.[2] The purposes of the act were to consolidate various drug laws into a comprehensive statute, to provide meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and to strengthen law enforcement tools against international and interstate drug trafficking.[3] To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense or possess any controlled substance except as authorized by the Controlled Substances Act.[4]

All controlled substances are classified into five schedules, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body.[5] Marijuana is classified as a Schedule I substance based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment.[6] This classification renders the manufacture, distribution, or possession of marijuana a criminal offense.[7] Despite efforts to reclassify marijuana, it has remained a Schedule 1 drug since the enactment of the Controlled Substances Act.[8]

The same factors, in varying degrees, are used to categorize drugs in the other four schedules. For example, Schedule II substances also have a high potential for abuse which may lead to severe psychological or physical effects, but unlike Schedule I drugs, they have a currently accepted medical use.[9] Because the controlled substances listed in Schedule II through V have currently accepted medical uses, the Controlled Substances Act authorizes physicians to prescribe those substances for medical use provided that they do so within the bounds of professional practice.[10] By contrast, because Schedule I controlled substances are deemed to lack any accepted medical use, federal law prohibits virtually all use of those drugs.[11]

The Controlled Substances Act also addresses the relationship between the act and state law.[12] Section 903 provides:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that

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[2] 21 U.S.C. § 812 et seq (2012).
[3] *Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005).
[4] 21 U.S.C. §§ 841(a)(1), 844(a) (2010).
[5] 21 U.S.C. §§ 811, 812 (2012).
[6] 21 U.S.C. §§ 812(b)(1) and 812(c).
[7] 21 U.S.C. § 841(a)(1), 844(a).
[8] *Gonzales*, 545 U.S. at 14-15 and n. 23 (summarizing considerable efforts, ultimately unsuccessful, to reschedule marijuana).
[9] 21 U.S.C. § 812 (b).
[10] See *United States v. Moore*, 423 U.S. 122, 142-43, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975).
[11] *Gonzales*, 545 U.S. at 14.
[12] 21 U.S.C. 903 (2010).

> provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and the State law so that the two cannot consistently stand together.[13]

As a result, states are free to pass their own drug laws unless there is a direct, positive conflict between the state law and federal law.

III. STATE MEDICAL MARIJUANA LAWS

Although marijuana has, since the passage of the Controlled Substances Act, been an illegal drug, marijuana has enjoyed an underground cultural acceptance in this country. Marijuana has not been viewed in the same light as more dangerous drugs such as cocaine and methamphetamine.

In the late 1990s, some touted marijuana as having medicinal value in relieving the pain of cancer patients and other seriously ill people suffering from debilitating conditions. The underground cultural acceptance by many of marijuana use coupled with the sympathy expressed toward those with debilitating illnesses allowed marijuana to gain a form of legitimacy. The acceptance of marijuana use reached an apex in November 1996 with the passage of Proposition 215 in California, an initiative measure approved by California voters.[14] Also known as the Compassionate Use Act, this law legalized the use of marijuana under California law for medical purposes.

The Compassionate Use Act states, as its purposes, to ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician, to ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes are not subject to criminal prosecution or sanction, and to encourage federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.[15] The law gives patients and caregivers an affirmative defense to certain state criminal charges involving marijuana, including its possession, cultivation and use, so long as they comply with the provisions of the Act.[16]

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[13] *Id*.
[14] Proposition 215 added § 11362.5 to the CAL. HEALTH AND SAFETY CODE.
[15] CAL. HEALTH & SAFETY CODE § 11362.5 (2004).
[16] CAL. HEALTH & SAFETY CODE § 11357 (2004).

Since the passage of the Compassionate Use Act, other states have followed suit.[17] The number of states with laws permitting some form of marijuana use for medical purposes and, or, providing an affirmative defense against state criminal prosecution for medical marijuana use, is now fifteen and counting. Although the state laws vary, all of them permit a resident to possess, consume and cultivate marijuana by obtaining a qualifying diagnosis and recommendation from a board-licensed physician.[18] As it pertains to the federal preemption issue, those portions of the state laws that permit the use of marijuana for medical purposes have proven to be more problematic than those portions of the state laws that exempt individuals from prosecution under state criminal laws.[19]

Every state except California requires that the recommendation from the physician be in writing. In California, an oral recommendation will suffice.[20] In twelve states, an agency must review the diagnosis and recommendation before a patient may begin treatment.[21] Every state except California limits the quantity of marijuana that patients may legally possess at one time.[22] Some states also permit third party vendors to supply marijuana to qualified patients.[23]

Regulations of dispensaries differ significantly from state to state and even within states. Some states restrict the compensation that dispensaries may receive for providing marijuana.[24] Some states also limit the number of patients to which a dispensary may provide marijuana.[25] Few states have comprehensive laws regulating dispensaries. However, some local

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[17] Oregon (1998); Washington (1998); Alaska (1999); Maine (1999); Colorado (2000); Hawaii (2000); Montana (2004); Nevada (2004); Vermont (2004); Rhode Island (2006); New Mexico (2007); Michigan (2008); New Jersey (2009); and Arizona (2010).

[18] Mikos, Robert A., *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 633-669 (2011).

[19] See *State v. Gaines*, 346 Or. 160, 172, 206 P.3d 1042 (Or. 2009).

[20] See CAL. HEALTH & SAFETY CODE § 11362.5(d) (requiring the *written or oral recommendation or approval of a physician*).

[21] Mikos, Robert A., *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 633-669 (2011).

[22] See e.g. ME. REV. STAT. tit. 22, § 2383-A (2000?) (stating that a patient may possess up to 2.5 ounces of usable marijuana and six plants). The California Supreme Court recently invalidated legislatively-imposed quantity limitations. People v. Kelly, 222 P.3d 186, 196 (Cal. 2010).

[23] See e.g. OR. REV. STAT. § 475.304 (2010); N.M. STAT. ANN. § 26-2B-4(F) (2011).

[24] See e.g. OR. REV. STAT. § 475.304 (2010) (providing that growers may be reimbursed only for the costs of materials and utility bills, and not their labor); N.M. CODE R. § 7.34.4.8 (2011) (requiring licensed growers to be non-profit and not provide volume discounts).

[25] See e.g. OR. REV. STAT. § 475.320(2)(c) (2010) (requiring that each grower may serve at most only four qualified patients).

communities have imposed zoning and licensing requirements on marijuana dispensaries.[26]

The probability that additional states will adopt medical marijuana laws is high. In addition to the states with current medical marijuana laws, sixteen other states and the District of Columbia have laws that recognize the medical value of marijuana.[27] Each year bills are introduced in these states that would add them to the list of states with medical marijuana laws. In two other states, Florida and Idaho, appellate court decisions have recognized a medical necessity defense for persons charged with illegal marijuana possession or cultivation.[28]

IV. THE FEDERAL RESPONSE TO STATE MEDICAL MARIJUANA LAWS

The passage of state medical marijuana laws led to one of the most interesting federalism debates of the decade. At the state level are state laws that permit the use of marijuana for medical purposes. At the federal level are federal laws that prohibit the use of marijuana, providing that it has no medical value.

The United States Supreme Court first addressed the issue in 2001.[29] The specific question in *Oakland Cannabis Buyers' Cooperative* was whether there was a medical necessity exception for manufacturing and distributing marijuana. A medical necessity exception would provide an affirmative defense to federal prosecution under the Controlled Substances Act. The Court held, however, that there is no medical necessity exception to the federal prohibition against manufacturing and distributing marijuana.[30] The Court also noted that the lack of a medical necessity exception would also apply to the use and possession of marijuana for medical purposes.[31]

A second United States Supreme Court case was decided in 2005.[32] In *Gonzalez v. Raich*, the Court held that Congress had acted within its authority under the Commerce Clause in prohibiting the possession, manufacture and distribution of marijuana even when state law authorized its

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[26] See e.g. *Ams. For Safe Access v. City of Los Angeles*, No. BC433942 (Cal. Super. Ct. Dec. 10, 2010) (unpublished) (discussing and enjoining restrictions imposed by the City of Los Angeles).

[27] Marijuana Policy Project, State-By-State Medical Marijuana Laws, SI (2008), http://docs.mpp.org/pdfs/download-meteriasl/SBSR NOV2008_1.pdf.

[28] *Sowell v. State*, 738 So.2d 333 (Fl. 1998); *State v. Hastings*, 801 P.2d 563, 565, 118 Idaho 854 (Id. 1990).

[29] See *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 486, 121 S.Ct. 1711, 149 L.Ed.2d. 722 (2001).

[30] *Id*.

[31] *Id*. at 494, n.7.

[32] *Gonzales v. Raich*, 545 U.S. 1, 29, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005).

use for medical purposes.[33] As a result, an individual who might be permitted under state law to use marijuana for medical purposes would nonetheless be violating federal law and subject to federal criminal prosecution. The Court in *Raich* sent the case back to the Ninth Circuit U.S. Court of Appeals to consider additional legal issues.

Following remand from the Supreme Court, the plaintiff renewed her claims based on common law necessity, fundamental rights protected by the Fifth and Ninth Amendments, and rights reserved to the states under the Tenth Amendment.[34] On the common law necessity claim, the Court ruled that the medical necessity criminal defense cannot be used in a civil action to enjoin federal prosecution.[35] With respect to the constitutional claims, the Court ruled that there is not yet a constitutional right to use marijuana to preserve one's life.[36]

In a related case, the Ninth Circuit U.S. Court of Appeals held that doctors cannot be prosecuted for recommending that their patients use medical marijuana.[37] The U.S. Supreme Court did not grant certiorari in *Conant*.[38]

Notwithstanding these federal decisions, many states continue to endorse the use of marijuana for medical purposes. In fact, five states have adopted medical marijuana laws since the decision in *Raich*.[39] The Oregon Attorney General, in response to the United States Supreme Court's decision is *Raich,* issued an opinion that the decision in *Raich* would not affect the operation of Oregon's medical marijuana program.[40] The Oregon Attorney General focused on the exemption from state criminal prosecution for medical marijuana use contained in the Oregon Medical Marijuana Act. The Attorney General concluded that in enacting the Controlled Substances Act, Congress did not have the power to require Oregon to adopt, as state criminal law, the policy choices represented in that federal act. Congress does not have the power to compel a state to enact or enforce federal laws.[41]

Even though the federal courts may have spoken, the debate has not been resolved. The battleground shifted from the interpretation and effect of the state medical marijuana laws to the enforcement of those laws. Early in

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[33] *Id*. at 33.
[34] *Raich v. Gonzales*, 500 F.3d. 850, 857 (9th Cir. 2007).
[35] *Id*.
[36] *Id*.
[37] *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002).
[38] *Walters v. Conant*, 540 U.S. 946 (2003).
[39] Mikos, Robert A., *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 633-669 (2011).
[40] Oregon Attorney General Letter of Advice dated June 17, 2005, to Susan M. Allan, Public Health Direction, Department of Human Services.
[41] *New York v. United States*, 505 U.S. 144, 149, 112 S.Ct. 2408, 120 L.Ed2d 120 (1992).

the debate, the Clinton administration's drug czar, former General Barry McCaffrey, issued a harsh statement outlining the steps the federal government would take to thwart the nascent medical marijuana movement.[42] Among other things, McCaffrey threatened to vigorously prosecute persons who supplied medical marijuana, revoke the prescription writing authority of physicians who recommended marijuana to patients, and deny various federal benefit (including licenses) to anyone who used marijuana pursuant to the California Compassionate Use Act.[43]

Throughout the Clinton administration and the Bush administration, the Drug Enforcement Agency continued to enforce the federal prohibition against marijuana use, even for medical purposes.[44] The enforcement efforts, however, were less than vigorous. Although a few cases were widely publicized, the federal government did not commit significant resources to stop marijuana use. In fact, 99% of all marijuana arrests in the United States are made by state and local officials, not federal officials.[45] Since 1996, there are no known cases in which the federal government has prosecuted patients for small amounts of marijuana in the states that have enacted medical marijuana laws.[46] In those states that permit the use of medical marijuana for medical purposes, marijuana use has flourished.

Departing from the policies of previous administrations, the Obama administration articulated a policy that has further encouraged medical marijuana users. In 2009 the Obama administration announced a new federal policy toward medical marijuana – a policy to cease Department of Justice enforcement of the federal ban. The new Non-Enforcement Policy was formally promulgated in an October 2009 memorandum to U.S. Attorneys from Deputy Attorney General David Ogden.[47] The memorandum urged federal prosecutors not to enforce the federal marijuana ban against persons who act in *clear and unambiguous compliance* with state medical marijuana laws.[48] The policy reaffirmed the administration's commitment to pursue *significant traffickers* of illegal narcotics and *manufacturing and distribution*

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[42] Administrative Response to Arizona Proposition 200 and California Proposition 214, 62 Fed. Reg. 1664 (Feb. 11, 1997).
[43] *Id*.
[44] See, e.g. "Bob Egelko, Pot Advocate Gets 1 Day in Jail and Gives Judge a Piece of His Mind," *S.F. Chron*. (Jul. 7, 2007), http://www.sfgate.com/crime/article/SAN-FRANCISCO-Pot-advocate-gets-1-day-in-jail-2571348.php (detailing the Bush administration's prosecution of Ed Rosenthal, the so-called guru of ganga).
[45] Marijuana Policy Project, State-By-State Medical Marijuana Laws, SI (2008), http://docs.mpp.org/pdfs/download-meteriasl/SBSR NOV2008_1.pdf.
[46] *Id*.
[47] Memorandum from David W. Ogden, Deputy Attorney General to Selected U.S. Attorneys (Oct. 19, 2009), http://blogs.usdoj.gov/blog/archives/192.
[48] *Id*.

networks, but suggested that prosecuting medical marijuana defendants was not the most efficient use of federal government's resources.[49]

The Non-Enforcement Policy appears designed to empower state governments to regulate medical marijuana according to local preferences. While the policy does not legalize medical marijuana under federal law, it does seemingly allow states to do so under state law, unencumbered by the barriers imposed by prior administrations.[50] In those states that allow the medical use of marijuana, the Non-Enforcement Policy will circumvent the attitude of Congress and the Courts toward marijuana use.

V. STATE COURT DECISIONS ADDRESSING MEDICAL MARIJUANA USE AND EMPLOYMENT DISCRIMINATION

Even though the federal courts have confirmed that the use of marijuana is illegal under federal law, even for medical purposes, those who advocate the use of marijuana have been encouraged because of the lack of federal enforcement. The next logical step for medical marijuana advocates was to move the debate from whether the use of medical marijuana is prohibited to whether the use of medical marijuana is protected.

The venue for this debate thus shifted to the workplace where many employers routinely drug test applicants and employees for drug use. If an applicant or employee tests positive for drug use, they are not hired or they are dismissed. In three states with medical marijuana laws, the perceived victims of these drug policies challenged the right of the employers to adversely affect their employment because of their use of marijuana for medical purposes.

In Oregon, two cases addressed medical marijuana use and employment discrimination.[51] In both cases, the courts explored the relationship between the state's medical marijuana law, the state's disability discrimination law, the Americans with Disabilities Act (ADA) and the Federal Controlled Substance Act.

In Oregon, use of marijuana for medical purposes is authorized under the Oregon Medical Marijuana Act.[52] This act allows persons with debilitating medical conditions to obtain a registry identification card if the medical use of marijuana might mitigate the symptoms or effects of the

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[49] *Id*.
[50] Mikos, Robert A., *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 633-669 (2011).
[51] *Washburn v. Columbia Forest Prods., Inc.*, 134 P.3d 161, 340 Or. 469 (Or. 2006); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.,* 348 Or. 159, 230 P.3d 518 (Or. 2010).
[52] OR. REV. STAT. § 475.306(1).

person's condition.[53] It also exempts those persons from state criminal liability for manufacturing, delivering, and possessing marijuana if certain conditions are met.[54]

Oregon law also makes it illegal to discriminate against an otherwise qualified person because of a disability and requires, among other things, that employers make reasonable accommodation for a person's disability unless doing so would impose an undue hardship on the employer.[55] Under Oregon law a disabled person is defined as an individual who has a physical or mental impairment that substantially limits one or more major life activities, or one who has a record of such impairment, or one who is regarded as having such impairment.[56]

Under the ADA, the federal definition of *disability* is similar to the Oregon definition. Under the ADA, disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such an impairment, or being regarded as having such an impairment.[57] The similarity between the Oregon definition of disability and the federal definition of disability is important because Oregon law also requires Oregon courts to construe the state's disability-related employment provisions in a manner that is consistent with any similar provisions of the ADA.[58]

At issue in the first Oregon case was whether the state's disability-related employment provisions require an employer to make a disability-related accommodation for an employee who uses marijuana for medical purposes.[59] The plaintiff in this case, Robert Washburn, worked as a millwright for Columbia Forest Products, Inc. He suffered from muscle spasms in his legs that limited his ability to sleep. When prescription medications proved ineffective, Mr. Washburn's doctor approved him for participation in Oregon's medical marijuana program. He smoked marijuana in the evening before going to bed to counteract leg spasms and to help him sleep.

Mr. Washburn's employer, Columbia Forest Products, Inc., had a workplace drug policy that prohibited employees from reporting for work with a controlled substance in their system. The test used by Columbia indicated only whether a person had used drugs within a two-to-three week period prior to the test. The test was incapable of determining whether a person was drug impaired at the time of testing. After testing positive for

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[53] OR. REV. STAT. § 475.309(2).
[54] OR. REV. STAT. § 475.309(1).
[55] OR. REV. STAT. § 659A.100 to 659A.145.
[56] OR. REV. STAT. § 659A.100(1)(a).
[57] 42 U.S.C. § 12102(2) (2000).
[58] OR. REV. STAT. § 659A.139.
[59] *Washburn v. Columbia Forest Prods., Inc.*, 134 P.3d 161, 340 Or. 469 (Or. 2006).

marijuana use, Mr. Washburn was placed on a leave of absence. Shortly thereafter, he requested that Columbia accommodate his condition by allowing him to take a different drug test that would only determine present drug impairment. Columbia engaged in discussions with Mr. Washburn regarding his request, but when negotiations broke down, his employment was terminated. Mr. Washburn then filed suit against his employer alleging disability-related discrimination in the workplace. The trial court granted summary judgment for the employer, holding, in part that Mr. Washburn was not *disabled* under the pertinent Oregon statutes.

The Court of Appeals disagreed with the trial court, finding that Mr. Washburn was *disabled* under Oregon law. The Court of Appeals also held that the requirement under Oregon law to interpret the Oregon disability discrimination law consistently with the ADA did not require absolute symmetry between the state and federal law.[60] The Court of Appeals also held that at a matter of state law, the employee's medical use of marijuana was *not unlawful* for the purposes of the federal Controlled Substance Act.[61] The decision of the Court of Appeals was entered prior to the United States Supreme Court's decision in *Raich*.

Columbia appealed the decision of the Court of Appeals to the Oregon Supreme Court. The Oregon Supreme Court concluded that Mr. Washburn was not *disabled* under Oregon disability discrimination laws.[62] The Supreme Court reversed the decision of the Court of Appeals and affirmed the judgment of the trial court. In reaching its decision, the Oregon Supreme Court focused on that portion of the definition that requires a disabled person to have an impairment that *substantially limits* a major life activity.[63] The Court concluded that the Oregon legislature intended the definition of disabled person to be construed in light of mitigating measures that counteract or ameliorate an individual's impairment.[64] Because Mr. Washburn was able to counteract his leg spasms and the resulting sleep problems by using prescription medication, the Court found that his impairment did not rise to the level of a substantial limitation on a major life activity.[65] Because Mr. Washburn was not a disabled person under Oregon disability discrimination laws, Columbia had no statutory duty to accommodate his physical limitation by allowing him to use marijuana.

In a concurring opinion, Justice Kistler of the Oregon Supreme Court also expressed the view that federal law preempts state employment

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[60] *Id*. at 109-110; 104 P.3d 609.
[61] *Id*. at 114-115; 104 P.3d 609.
[62] *Washburn*, 134 P.3d 161.
[63] OR. REV. STAT. § 659A.100(1); OR. REV. STAT. § 659A.100(2)(d).
[64] *Washburn*, 134 P.3d 161.
[65] *Id*.

discrimination law to the extent that it requires employers to accommodate medical marijuana use.[66] He noted that the federal Controlled Substances Act prohibits possessing, manufacturing, dispensing and distributing marijuana.[67] That prohibition applies even when a person possesses, manufactures, dispenses or distributes marijuana for medical use.[68] Because an individual cannot use marijuana without possessing it, the federal prohibition on possession is inconsistent with the state requirement that an employer accommodate it use. State law cannot require what federal law prohibits, and when the two laws conflict, federal law controls.[69] Therefore, Justice Kistler contended that the Controlled Substances Act preempts state employment discrimination law to the extent that the state law requires accommodation of an employee's medical use of marijuana.[70]

In a second Oregon decision, an employee was discharged after advising his employer that he used marijuana for medical purposes.[71] The employee was initially hired on a temporary basis as a drill press operator. During his employment, the employee used marijuana one to three times each day after work hours. The employee's work was satisfactory and he was being considered for permanent employment. Knowing that he would be required to pass a drug test as a condition to permanent employment, the employee advised his supervisor of his marijuana use for medical purposes. One week later the employee was fired.

The employee filed a complaint with the Oregon Bureau of Labor and Industries (BOLI), alleging discrimination in violation of Oregon disability discrimination laws.[72] As previously, noted, these laws makes it illegal to discriminate against an otherwise qualified person because of a disability and require, among other things, that employers make reasonable accommodation for a person's disability unless doing so would impose an undue hardship on the employer.[73] The BOLI investigated the claim and filed a complaint on the employee's behalf alleging that the employer has discharged the employee because of his disability and that the employer had failed to reasonably accommodate the employee's disability, both in violation of Oregon law.[74]

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[66] *Id*. at 167.
[67] 21 U.S.C. §§ 841(a), 844.
[68] *United States v. Oakland Cannabis Buyer's Coop.*, 532 U.S. 483, 494 and n. 7, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001).
[69] See *California V. ARC Am. Corp.* 490 U.S. 93, 100-01, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989) (state law preempted when it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible).
[70] *Washburn v. Columbia Forest Prods., Inc.*, 134 P.3d 161, at 167, 340 Or. 469 (Or. 2006).
[71] *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.,* 348 Or. 159, 230 P.3d 518 (Or. 2010).
[72] OR. REV. STAT. § 659A.100 to 659A.145.
[73] OR. REV. STAT. § 659A.112(2).
[74] OR. REV. STAT. § 659A.112(2)(c) and (g); OR. Rev. Stat. § 659A.112(2)(e).

As in *Washburn*, at issue in this case was the conflict between state and federal law regarding medical marijuana use in the context of employment discrimination. In this particular case, the employee suffered from anxiety, panic attacks, nausea, vomiting, and severe stomach cramps that substantially limited his ability to eat. He began using marijuana in 1996 to self-medicate his condition. In 2002, he consulted a physician who signed a statement regarding the employee's debilitating medical condition. This statement allowed the employee to obtain a registry identification card under the Oregon Medical Marijuana Act.[75] No prescription was required. The card was renewed in 2003 and was current when the employee was hired on a temporary basis. The card authorized the employee to engage in the medical use of marijuana, subject to certain restrictions.[76] The card also exempted the employee from state prosecution for the possession, distribution and manufacture of marijuana.[77]

However, as noted above, the federal Controlled Substance Act prohibits the manufacture, distribution, dispensation, and possession of marijuana even when state law authorizes its use to treat medical conditions.[78] The employer, therefore, argued that Oregon state law did not require the employer to accommodate the employee's use of marijuana to treat a medical condition because the possession of marijuana is illegal under federal law.

At the administrative level, the commissioner of the BOLI issued an order in the employee's favor based on the administrative law judge's findings. The administrative law judge found that the employee was a disabled person under Oregon law.[79] The administrative law judge found, however, that the employer had not discharged the employee because of his disability, but because of his marijuana use, and that discharging the employee for that reason was not a violation of Oregon law.[80] Nevertheless, the administrative law judge found that the employer had violated Oregon law by failing to reasonably accommodate the employee's impairments.[81] In particular, the administrative law judge found that the employer had failed to engage in a meaningful interactive process with the employee to reasonably accommodate the employee's disability.

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[75] OR. REV. STAT. § 475.309(2).
[76] OR. REV. STAT. § 475.306(1).
[77] OR. REV. STAT. § 475.309(1).
[78] *The Federal Controlled Substance Act*, 21 U.S.C. § 801 et seq. (2010); *Gonzales v. Raich*, 545 U.S. 1, 29, 125 S.Ct. 2195 (2005); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 486, 121 S.Ct. 1711 (2001) (holding there is no medical necessity exception to the federal prohibition against manufacturing and distributing marijuana).
[79] OR. REV. STAT. § 659A.
[80] OR. REV. STAT. § 659A.112(2)(c) or (g).
[81] OR. REV. STAT. § 659A.112(2)(e) and (f).

The administrative law judge relied, in part, on the decision of the Oregon Court of Appeals entered in *Washburn* two weeks prior to the administrative hearing.[82] The Oregon Supreme Court later reversed the *Washburn* appellate court decision.[83]

The employer appealed the decision to the Court of Appeals. At the appellate level, the employer argued that the Oregon law prohibiting disability discrimination must be interpreted consistently with the federal ADA.[84] The employer reasoned that because the ADA protections do not apply to persons who are currently engaged in illegal drug use, and because the federal Controlled Substances Act prohibits the possession of marijuana without regard to whether it is used for medicinal purposes, the ADA does not apply to persons who are currently engaged in the use of medical marijuana.

Like the ADA, Oregon law provides that the protections afforded by the Oregon disability discrimination law do not apply to persons who are currently using illegal drugs.[85] Therefore, the employer argued that if interpreted consistent with federal law, the Oregon disability discrimination law does not apply to persons who are currently engaged in medical marijuana use. The employer argued that, in any event, the United States Supreme Court's opinion in *Raich* and the Supremacy Clause required such an interpretation.

The Court of Appeals declined to directly address the issues raised by the employer. The Court of Appeals found that the employer had not raised the issues at the administrative level and could not therefore raise them on appeal.[86] As a result, the Court of Appeals affirmed the initial decision in favor of the employee.

On appeal of the appellate court decision, the Oregon Supreme Court reversed the Court of Appeals, finding that the employer had preserved the right to assert the issues on appeal. The Court also held that under Oregon's employment discrimination laws, the employer was not required to accommodate the employee's use of medical marijuana.[87] The Court reasoned that because the protections of the Oregon disability discrimination laws do not apply to an employee who is currently engaged in the illegal use of drugs, the employer had no obligation to engage in a meaningful

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[82] *Washburn v. Columbia Forest Prods., Inc.*, 197 Or. App. 104, 104 P.3d 609 (Or. Ct. App. 2005).
[83] *Washburn v. Columbia Forest Prods., Inc.*, 134 P.3d 161, at 167, 340 Or. 469 (Or., 2006).
[84] 42 U.S.C. § 12111 et seq (2009).
[85] OR. REV. STAT. § 659A.124.
[86] *Emerald Steel Fabricators, Inc. v. BOLI*, 220 Or. App. 423, 186 P.3d 300 (Or. Ct. App. 2008).
[87] *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.,* 348 Or. 159, 230 P.3d 518 (Or. 2010).

interactive process with the employee to reasonably accommodate the employee's disability through his use of marijuana.[88]

In reaching its decision, the Oregon Supreme Court rejected the argument that the employee's use of medical marijuana was entirely legal under state law and therefore not an *illegal* use of drugs under Oregon disability discrimination laws. The Court examined the definition of illegal use of drugs under Oregon law.[89] The Oregon law includes drugs which are unlawful under state law or under the federal Controlled Substances Act, but excludes drugs taken under the supervision of a licensed health care professional, or other uses authorized by the federal Controlled Substances Act or under other provisions of state or federal law.[90]

The Oregon Supreme Court found that marijuana use was unlawful under the federal Controlled Substances Act, and that neither exclusion from the definition of illegal use of drugs applied. The Court found that under the Oregon Medical Marijuana Act, the employee's use of marijuana was not under the supervision of a licensed health care professional. The Court also held that the federal Controlled Substances Act preempts the Oregon Medical Marijuana Act to the extent that the state law affirmatively authorizes the use of medical marijuana.[91] The Court reasoned that affirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the federal Controlled Substances Act.[92] Therefore, the use of medical marijuana was not authorized under state or federal law.

A similar conclusion was reached in the State of Washington regarding the relationship between the state's medical marijuana law and the state's employment discrimination law.[93] At issue in the *Roe v. TeleTech* case was whether an employee has a private cause of action, under state law or as a matter of public policy, against an employer who discharges an employee for authorized medical marijuana use. The Washington Supreme Court held that no such private cause of action exists.

In 1998, voters in Washington adopted the Washington State Medical Use of Marijuana Act (MUMA).[94] The MUMA provided an affirmative defense against criminal prosecution of physicians for prescribing medical

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[88] *Id*.
[89] OR. REV. STAT. § 659A.122.
[90] *Id*.
[91] *Id*.; See *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992).
[92] *Michigan Canners & Freezers Ass'n v. Agric. Mktg. and Bargaining Bd.*, 467 U.S. 461, 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984).
[93] Roe v. TeleTech Customer Care Mgmt., 171 Wash.2d 736, 257 P.3d 586 (Wash. 2011).
[94] Initiative Measure 692 (I-692), codified at RCW 69.51A.

marijuana and of qualified patients and their designated primary caregivers for engaging in the medical use of marijuana.

In this particular case, the plaintiff, Jane Roe[95] suffered from debilitating migraine headaches that caused chronic pain, nausea, blurred vision, and sensitivity to light. On June 26, 2006, she became a patient of Dr. Thomas Orvald at The Hemp and Cannabis Foundation Medical Clinics in Bellevue, Washington. Roe was already using cannabis more than four times a day, totaling around one gram. On that same day, Dr. Roe provided Roe a *Documentation of Medical Authorization to Possess Marijuana for Medical Purposes in Washington State* based on her terminal illness or debilitating conditions. Upon receiving the documentation, Roe began using marijuana in her home in compliance with the MUMA.

On October 3, 2006, TeleTech Customer Care Management offered Roe a position as a customer service representative. The offer was contingent on the results of reference and background checks and a drug screening. Roe was provided TeleTech's drug policy requiring all employees to have a negative drug test result. The policy emphasized that noncompliance would result in ineligibility for employment with TeleTech. Roe acknowledged receipt of TeleTech's drug policy, informed TeleTech of her use of medical marijuana, and offered to provide the company with a copy of her authorization. Roe took a drug test on October 5, 2006 and started training at TeleTech on October 10. She continued to train and work as a customer service representative until October 18, 2006. On October 10, 2006, TeleTech learned of Roe's positive drug test results. Roe's supervisor confirmed that the company's drug policy does not make an exception for medical marijuana. On October 18, 2006, TeleTech terminated Roe's employment.

Roe sued TeleTech claiming that TeleTech terminated her employment in violation of the MUMA and in violation of clear public policy allowing medical marijuana use in compliance with the MUMA. The superior court granted TeleTech's motion for summary judgment finding that the MUMA provides only an affirmative defense to criminal prosecution under state drug laws and does not imply a civil cause of action. The Court of Appeals affirmed the superior court's decision.[96] Based on the unambiguous language of the MUMA, the Washington Supreme Court affirmed the lower courts' decision.

In examining the language of the MUMA, the Court noted that the purpose section of the statute states: "The people of Washington State find

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[95] The plaintiff filed her case under a pseudonym because of her fear of prosecution for her medical marijuana use under federal law.

[96] *Roe v. TeleTech Customer Care Mgmt.* (Colo.), LLC, 152 Wash. App. 388, 216 P.3d 1055 (Wash. Ct. App. 2009).

that some patients with terminal or debilitating illnesses, under their physician's care, may benefit from the medical use of marijuana."[97] The only reference to employment in the MUMA as passed by the voters in the initiative provided, "Nothing in this chapter requires any accommodation of any medical marijuana use in any place of employment, in any school bus or on any school grounds, or in any youth center."[98]

In 2007, the Washington legislature amended the MUMA's reference to employment to read, "Nothing in this chapter requires any accommodation of any on-site use of marijuana in any place of employment, in any school bus or on any school grounds, in any youth center, in any correctional facility, or smoking medical marijuana in any public place as that term is defined in RCW 70.160.020."[99]

Roe argued that the original language of the MUMA demonstrated a sweeping purpose to prohibit an employer from discharging an employee for authorized use of medical marijuana. She claimed that because the MUMA explicitly does not require an employer to accommodate medical marijuana use in *any place* of employment, it implicitly requires an employer to accommodate an employee's medical marijuana use outside the workplace. The Washington Supreme Court, however, found that the MUMA's explicit language does not require reading into the MUMA an implicit obligation to accommodate off-site medical marijuana use. The Court found that the language of the MUMA unambiguously does not regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use.[100]

The Washington Supreme Court also rejected Roe's argument that the MUMA provides a private cause of action as a matter of public policy. In Washington, the common law at-will employment rule provides that an employer may discharge an at-will employee for "no cause, good cause, or even cause morally wrong, without fear of liability."[101] A narrow exception to the general at-will employment rule prohibits an employer from discharging an employee "when the termination would frustrate a clear manifestation of public policy."[102]

In its holding, the Washington Supreme Court found that the MUMA's language and court decisions interpreting the statute do not support a broad public policy that would remove all impediments to the authorized medical marijuana use or forbid an employer from discharging an employee because

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[97] Former RCW 69.51A.005 (1999).
[98] Former RCW 69.51A.060(4) (1999?).
[99] RCW 69.51A.060 (2007).
[100] *Roe v. TeleTech Customer Care Mgmt.*, 171 Wash.2d 736, 257 P.3d 586 (Wash. 2011).
[101] *Thompson v. St. Regis Paper Co.*, 102 Wash.2d 219, 226, 685 P.2d 1081 (Wash. 1984).
[102] *Ford v. Trendwest Resorts, Inc.*, 146 Wash.2d 146, 152, 43 P.3d 1223 (Wash. 2002).

she uses medical marijuana. The Court also noted that Washington patients have no legal right to use marijuana under federal law.[103] As a result, it would be contrary to previous directives to proceed cautiously when finding a public policy exception to the at-will employment doctrine to hold that a broad public policy exists that would require an employer to allow an employee to engage in illegal activity.[104]

The Washington Supreme Court also referenced a statement from the Washington State Human Rights Commission, the agency charged with investigating employee discrimination claims, acknowledging "it would not be a reasonable accommodation of a disability for an employer to violate federal law, or allow an employee to violate federal law, by employing a person who uses medical marijuana."[105] Though an employee is still free to sue an employer for wrongful discharge, the commission will not investigate claims of discrimination due to medical marijuana use because federal law prohibits marijuana possession.[106]

In addition to Oregon and Washington, California has also considered the issue of medical marijuana use and employment rights.[107] At issue in the *Ross v. RagingWire* case was whether an employee fired for his medical marijuana use could bring a cause of action against his employer for disability-based discrimination under the California Fair Employment and Housing Act (FEHA), or for wrongful termination in violation of public policy. The Court held that nothing in the text or history of the Compassionate Use Act suggests that voters intended the measure to address the respective rights and duties of employers and employees.[108] Therefore, under California law, an employer may require pre-employment drug tests and take illegal drug use into consideration in making employment decisions.[109]

The plaintiff in *Ross* suffered from strain and muscle spasms in his back as a result of injuries he sustained while serving in the United States Air Force. Because of his condition, he was a qualified individual with a disability under the FEHA and received governmental disability benefits. In September 1999, he began to use marijuana on his physician's recommendation pursuant to the Compassionate Use Act.

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[103] See 21 U.S.C. §§ 812, 844(a).
[104] *Thompson*, 102 Wash.2d at 226.
[105] Laura Lindstrand, *Washington Non-discrimination Laws and the Use of Medical Marijuana*, WASH. STATE HUMAN RIGHTS COMM'N (June 7, 2011), http://www.hum.wa.gov/Documents/Guidance/medical%20marijuana.doc.
[106] *Id*. at 2.
[107] *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 70 Cal.Rptr.3d 382, 42 Cal.4th 920 (Cal. 2008).
[108] *Id*.
[109] *Loder v. City of Glendale*, 14 Cal.4th 846, 59 Cal.Rptr.2d 696, 927 P.2d 1200 (Cal. 1997).

On September 10, 2001, RagingWire Telecommunications, Inc. offered Mr. Ross a job as lead systems administrator. RagingWire required Mr. Ross to take a drug test. Before taking the test, Mr. Ross provided the testing clinic a copy of his physician's recommendation for marijuana. Mr. Ross took the test on September 14 and began work on September 17. On September 20, RagingWire informed Mr. Ross that he was being suspended as a result of testing positive for a chemical found in marijuana. After a decision by the company's board of directors, Mr. Ross was informed on September 25 that he was being fired because of his marijuana use.

Thereafter, Mr. Ross filed suit against RagingWire claiming that his disability and use of marijuana to treat pain did not affect his ability to do the essential functions of the job for which he was hired, and that by discharging him, RagingWire violated the FEHA. Mr. Ross asserted that he was fired because of his disability and that RagingWire also failed to make reasonable accommodation for his disability. Mr. Ross also asserted that his firing was a violation of public policy. The superior court ruled in favor of RagingWire and the Court of Appeals affirmed the trial court's decision.

In affirming the decision of the lower court, the California Supreme Court acknowledged that the FEHA does make it unlawful for an employer to refuse to hire or discharge an employee because of his physical disability or medical condition if the employee is able to perform his or her essential duties with reasonable accommodations.[110] Nevertheless, the Court held that the FEHA does not require employers to accommodate the use of illegal drugs.[111]

The California Supreme Court noted that the Compassionate Use Act did not give marijuana the same status as legal prescription drugs. No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law,[112] even for medical users.[113] California's voters merely exempted medical users and their primary caregivers from criminal liability under two specifically designated state statutes. Nothing in the text or history of the Compassionate Use Act suggests that voters intended the measure to address the respective rights and obligations of employers and employees.[114]

The California Supreme Court also addressed a provision enacted after the passage of the Compassionate Use Act that provides:

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[110] Gov. Code, §§ 12940, subd. (a)(1) & (2).
[111] *Ross*, 174 P.3d 200.
[112] 21 U.S.C. §§ 812, 844(a).
[113] *Gonzales v. Raich*, 545 U.S. 1, 29, 125 S.Ct. 2195 (2005); *United States v. Oakland Cannabis Buyers' Coop*., 532 U.S. 483, 486, 121 S.Ct. 1711 (2001) (holding there is not medical necessity exception to the federal prohibition against manufacturing and distributing marijuana).
[114] *Ross*, 174 P.3d 200.

> Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment or on the property or premises of any jail, correctional facility, or other type of penal institution in which prisoners reside or persons under arrest are detained.[115]

The Court rejected the argument that this provision implicitly requires employers to accommodate employees' use of medical marijuana at home.[116]

In addition, the California Supreme Court rejected Mr. Ross's claim that his discharge violated public policy. California law provides that either party to a contract of employment without a specified term may terminate the contract at will,[117] subject to the exception that an employer may not discharge an employee for a reason that violates a fundamental public policy of the state.[118] The Court found that Mr. Ross's discharge did not violate any public policy established by the Compassionate Use Act or the California Constitution.[119]

Although the courts of Oregon, Washington and California have all rejected the idea that the use of medical marijuana should be protected from employment discrimination, the rulings have not gone without dissent. In fact, only one of the cases discussed above was unanimous. In *Emerald*, the dissent argued that the Oregon Medical Marijuana Act did not stand as an obstacle to enforcement of the Federal Controlled Substances Act, and that the federal law should not preempt Oregon law authorizing the use of medical marijuana.[120]

In *Roe*, the dissent argued that Roe had established the grounds for a clear public policy exception to the common law at-will employment rule.[121] The dissent expressed the view that marijuana should be treated like any other medication, and that when used to treat conditions that would qualify as a disability, the employer should reasonably accommodate the disabled employee unless the accommodation would be an undue hardship on the employer.[122]

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[115] CAL. HEALTH & SAFETY CODE § 11362.785(a) (2004).
[116] *Ross*, 174 P.3d 200.
[117] LAB. CODE § 2922.
[118] *Stevenson v. Superior Court*, 16 Cal.4th 880, 887, 66 Cal.Rptr.2d 888, 941 P.2d 1157 (Cal. 1997).
[119] *Ross*, 174 P.3d 200.
[120] *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.,* 348 Or. 159, 230 P.3d 518 (Or. 2010).
[121] *Roe v. TeleTech Customer Care Mgmt.*, 171 Wash.2d 736, 257 P.3d 586 (Wash. 2011).
[122] *Id*. (citing *Riehl v. Foodmaker, Inc.*, 152 Wash.2d 138, 145, 94 P.3d 930 (Wash. 2004)).

In *Ross*, the dissent also urged the majority to treat marijuana like other prescription drugs that pose risks of absenteeism and impaired productivity.[123] Because the FEHA requires an employer to accommodate a disabled employee's doctor-approved medical use of other substances that potentially could impair job performance, the dissent contended that Mr. Ross stated a cause of action for disability discrimination under California's FEHA.[124] Under the Compassionate Use Act, marijuana use is allowed for medical treatment on a doctor's recommendation. Therefore, the dissent argued that absent a showing that the marijuana use would impair the employer's interests, an employer should not be allowed to fire an employee for offsite and off-duty, doctor-recommended marijuana use as a medical treatment, and that to do so would violate the Compassionate Use Act and the FEHA.[125]

VI. THE FUTURE OF MEDICAL MARIJUANA EMPLOYMENT DISCRIMINATION

Although medical marijuana users may have lost the battle in state court for protection from discrimination based on their marijuana use, the war is not over. The battle may be shifting from the courthouse to the statehouse.

In California in 2008 a bill was introduced to prohibit discrimination based on medical marijuana use.[126] The bill would declare it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, based upon the person's status as a qualified patient or arising from a qualified patient's positive drug test for marijuana. The bill would allow victims of such discrimination to bring civil actions for damages and attorney fees. The bill did not prohibit employers from terminating an employee or taking other corrective action against an employee who is impaired on the property or premises of the place of employment, or during the hours of employment, because of the medical use of marijuana, nor did it require employers to accommodate a medical marijuana patient's use of marijuana on the property or premises of the place of employment.[127] Although both houses of the state legislature approved the bill, the governor vetoed it. The bill was reintroduced in 2011, but died in committee.[128]

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[123] *Ross*, 174 P.3d 200.
[124] *Id*.
[125] *Id*.
[126] A.B. 2279, 2008 Leg. Sess. (Cal. 2008), available at http://wrww.leginfo.ca.gov/pub.
[127] *Id*.
[128] S.B. 129, 2011-2012 Leg. Sess. (Cal. 2011), available at http://wrww.leginfo.ca.gov/pub.

Notwithstanding this setback, it is highly probable that future legislatures will consider adding medical marijuana use to the list of protected class traits. Because each state is free to adopt its own discrimination laws, the debate will continue from state to state. As more states consider the adoption of medical marijuana laws, more states will also consider the adoption of anti-discrimination laws to protect medical marijuana use. Since thirty-one states currently recognize that marijuana has some medical value, the potential for future marijuana legislation is high.

VII. CONCLUSION

The use of marijuana for medical purposes is a very divisive issue. At the state level, the trend appears to be toward greater acceptance. Voters and state legislators continue to consider and approve medical marijuana legislation. At the other end of the spectrum, Congress steadfastly refuses to recognize that marijuana has any medical value. And, the federal courts are consistently holding that possessing and using marijuana, even for medical purposes, remains a federal crime.

At the federal executive level, it appears that the policy toward enforcement of the Controlled Substances Act as it pertains to marijuana has shifted from one of aggressive prosecution to the current Obama Administration's hands-off Non-Enforcement Policy. Federal enforcement may be irrelevant in any event since only 1% of marijuana arrests occur at the federal level.

As the acceptance of medical marijuana use grows, both legislatively and through shifting enforcement policies, the focus will shift from whether the medical use of marijuana should be prohibited, to whether the medical use of marijuana should be protected.

One area in which medical marijuana users are seeking protection is the area of employment discrimination. Employers with no drug use policies are terminating employees who use marijuana, even when that use is for medical purposes. Employees are claiming such practices constitute wrongful discharge in violation of medical marijuana laws, disability discrimination laws and public policy.

In this paper we examined four state court decisions addressing the relationship between medical marijuana laws, the federal Controlled Substances Act, state disability discrimination laws and the federal ADA. In each case, the Court refused to recognize a claim.

The biggest obstacle faced by medical marijuana users remains the fact that possession and use of marijuana is a federal crime. As a result, courts remain reluctant to penalize employers who terminate employees for illegal drug use, or who refuse to accommodate such use.

Nevertheless, the debate is ongoing. The decisions favoring employers have not been without dissent. Furthermore, employees are going back to the statehouse seeking legislative action to protect their medical marijuana use by making it illegal for employers to discriminate against medical marijuana users or fail to accommodate their disability related use of marijuana. State voters and state legislators have championed the use of marijuana for medical purposes. And, since thirty-one states recognize that marijuana has medical value, it seems likely, if not probable, that in the not too distant future, medical marijuana use will move from being a permitted activity to being a protected activity.