MARIJUANA AND THE CONCEPT OF JUST CAUSE [1]

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I. The Employment Problem Presented by Marijuana

Elkouri and Elkouri, in the 8th Edition of How Arbitration Works (Bloomberg, BNA Books 2016) at 16.2.A, page 16-3, observe that "studies estimate that 8.3 million American workers are drug users and cost their employers over $100 million each year". A report of the Mental Health Services Administration in 2006 estimated that 8.8% of Americans employed full-time were current illicit drug users. As the United States Department of Labor notes, "an estimated 3.1 percent of employed adults actually used illicit drugs before reporting to work or during work hours at least once in the past year, with about 2.9% working while under the influence of an illicit drug.[2]

These figures are the background to the challenges faced by advocates and arbitrators applying the just cause standard in discipline cases centered on marijuana usage by employees, which are accentuated by the following factors:

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[1] This paper incorporates some of the material presented by Jeffrey W. Jacobs, Arbitrator, Member of the National Academy of Arbitrators in a paper given before the Labor Arbitration Institute.

[2] U.S. Department of Labor, Working Partners for an Alcohol- and Drug-Free Workplace, http://www.dol.gov/asp/programs/drugs/workingpartners/stats/wi.asp#22 (accessed March 25, 2008) citing M. R. Frone, *Prevalence and distribution of illicit drug use in the workforce and in the workplace: Findings and implications from a U.S. national survey,* 91 Journal of Applied Psychology, 856-869 (2006).

1. Twenty-two states have adopted statutes legalizing the use of marijuana for medicinal purposes in some form. In addition, eight states and the District of Columbia have adopted statutes legalizing the use of marijuana for recreational purposes.

2. Despite the trend among the states, marijuana under federal law is considered a Schedule 1 drug and is illegal regardless of state statute permitting the use of marijuana for medical purposes or recreational purposes. 21 U.S.C.A. §812. Thus, there is the interplay of federal and state law which possibly could mean a different result as between private and state and local public employers.

3. There is the application, in any event, of certain federal statutes, namely, the Omnibus Transportation Employee Testing Act of 1991 (OTETA), Pub. L. No. 102-143, 105 Stat. 952, 953 (codified as amended in scattered sections of 45 U.S.C. and 49 U.S.C.). This statute could affect both private and public employers. There is also the Drug Free Workplace Act, 41 U.S.C. §701 which, though applying to only federal contractors and subcontractors, could preempt state marijuana laws.

4. Unlike alcohol where the level of blood alcohol content can determine whether a person is intoxicated or under the influence of alcohol as is noted in the Motor Vehicle Codes of most states, there is currently no specific standard that establishes when a person is under the influence of marijuana in relation to job performance.

5. There seems to be a recognition through general experience where reasonable suspicion of a person under the influence of alcohol can be detected. *See, e.g., United Parcel Service,* 101 LA 589 (Briggs, 1993), being under the influence of alcohol. This recognition is not as easily detected when dealing with marijuana.

6. When is testing for marijuana or drugs consistent with the just cause standard?

II. When Is Testing Permitted?

A. Reasonable Suspicion Testing

If the employer has "reasonable suspicion" that an employee is using marijuana on premises or is under the influence of marijuana, depending on the facts, arbitrators

will sustain the actions of the employer in ordering a drug test of such an employee. However, the use of marijuana and other drugs is more difficult to detect than alcohol in forming the basis for probable cause to test as the observation as to drug usage is not as obvious as in alcohol cases. Arbitrator DiLauro was presented with such a case, and urged caution to employers.

> Based on the unique circumstances surrounding this case, I must conclude that the grievant's conduct did provide "reasonable suspicion" that drugs may have been involved.[3]
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> This experience is a good example of what can happen when the Employer is given the right to test employees and the innocent are misapprehended in the pursuit of drug and alcohol abusers. The Authority should take heed: this case is an indication of what may lie ahead. It should be cautious in selecting employees to be tested, carefully consider the individual rights of the employees, and be prepared to defend the decision.[4]

Nevertheless, arbitrators have ruled that under certain situations, the employer will have reasonable suspicion to test. Where the employee has a history of past drug use combined with certain symptoms caused by that use, the employer can order the test if the symptoms occur again.[5] On the other hand, an arbitrator set aside the discharge of an employee who refused to take a drug test where the basis for the supervisor's suspicion of drug use was the employee's alleged smoking of marijuana in the plant four years earlier.[6]

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[3] *Southeastern P.A. Transportation Authority*, 89 LA 1280, 1284 (DiLauro, 1987).
[4] *Id.* at 1285.
[5] *Delaware,* 104 LA 845 (Gorman, 1993).
[6] *Packaging Corporation of America,* 120 LA 634 (Sugerman, 2004).

The observation of consumption or the smell of the use of a drug can provide reasonable grounds for ordering a test.[7] In *Lane County, Oregon*, 136 LA 585 (Jacobs, 2016), the reasonable suspicion was based upon a smell of the odor of marijuana coming from the employee's jacket. In *Kellogg Co.*, 135 LA 676 (Erbs, 2015), reasonable suspicion was based upon the observance of two co-workers who reported that the grievant seemed impaired.

Reasonable suspicion also exists in conjunction with a drug search. After a trained search dog alerted an employee's car while parked on company property, the arbitrator found reasonable suspicion to support the employer's order of a drug test of the employee.[8]

Reasonable suspicion was held not to exist when an employee refused to take a substance abuse test after the employee refused a work assignment because he was too sick to do it. *United Parcel Service*, 126 LA 1088 (Draznin, 2009). The collective bargaining agreement provided that: "Reasonable cause is defined as an employee's observable action, appearance or conduct that clearly indicates the need for a fitness for duty medical evaluation". 128 LA 1091. The supervisor cited withdrawal, anxiety and moodiness as reason to test the employee. The arbitrator rejected those grounds noting that "reasonable cause to challenge the fit-for-duty of an employee mandates that the observable action, appearance or conduct provides clear indicia that there is a question whether the employee can continue to work in the state she or he is in". 128 LA 1092 (emphasis in original).

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[7] *Borg-Warner Corp.*, 99 LA 209 (Bethel, 1992).

Reasonable suspicion, depending on the circumstances, need not be individualized. In *City of Ocala, FL*, 132 LA 494 (Terrill, 2013), 19 fire fighters were tested who had access to a fire truck from which narcotics were missing because the city was dealing with multiple "suspects".

B. Random Testing

The concept of random testing takes on various forms. Random testing is distinguishable from reasonable suspicion testing in that random testing may be triggered by an event, may be required by statute, or may be designed to test employees as a method to prohibit the use of drugs.

There are several basic factors to be recognized in analyzing the concept of random testing.

The National Labor Relations Board as to private employers has held that drug testing of incumbent employees is a mandatory subject of collective bargaining and that absent a "clear and unmistakable waiver" of the union's bargaining rights, an employer must bargain with the union prior to implementing a drug testing policy.[9]

State agencies usually would follow the NLRB's rationale in requiring bargaining on the subject of drug policy. There could be detailed negotiated policy or the parties may negotiate in a management rights article, a provision that an employer may implement reasonable policies subject to other provisions in the contract.

The United States Supreme Court decided two decisions dealing with drug testing in 1989. In *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989), the Court permitted

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[8] *Georgia Power,* 93 LA 846 (Holley, 1989).

testing of employees for positions that required direct involvement in drug interdiction or the carrying of weapons. In *Skinner v. Railway Labor Executives Association*, 89 U.S. 602 (1989), the Court upheld drug testing of train crew members involved in accidents. These cases that stand for the proposition that random drug testing of employees can be carried out by employers when there is a showing of "special needs" such as safety sensitive employment. Examples of special needs or safety sensitive positions supporting random testing include airline industry personnel,[10] correctional officers in regular contact with inmates,[11] police officers carrying firearms or engaged in drug interdiction efforts,[12] nuclear power engineers,[13] and school teachers.[14]

In the public sector, there have been decisions holding that random drug testing of civil service employees of the State of Michigan and public school teachers in Kentucky did not violate the Fourth Amendment protection against unreasonable searches and seizures.[15] On the other hand, the Arizona Supreme Court found that the City of Mesa random drug testing police for fire fighters violated the Fourth Amendment.[16] However, the Fourth Amendment does not apply to private employers.

In addition, Congress enacted the Omnibus Transportation Employee Testing Act of 1991 (OTETA). The OTETA permits random testing without probable cause for drugs

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[9] *Johnson-Bateman Co.*, 295 NLRB 180, 131 LRRM 1393 (1989).

[10] *Bluestein v. Skinner*, 908 F2d 451 (9th Cir. 1990).

[11] *Taylor v. O'Grady*, 888 F2d 1189, 1199 (7th Cir. 1989).

[12] *Guiney v. Roache*, 873 F2d 1557, 1558 (1st Cir. 1989) cert. den. 493 U.S. 963 (1989).

[13] *Rushton v. Nebraska Public Power District*, 844 F2d 562, 567 (8th Cir. 1988).

[14] *Knox County Education Assn. v. Knox County Board of Education*, 158 F3d 361 (6th Cir. 1998) cert. den 528 U.S. 812 (1999).

[15] *Auto Workers Local 1600 v. Winters*, 385 F3d 1003 (6th Cir. 2004); *Crager v. Board of Education of Knot County KY*, 313 F Supp 2d 690 (E.D. Ky, 2004).

[16] *Peterson v. City of Mesa*, 83 P3d 35 (Kriz) cert. den. 543 U.S. 814 (2004).

and alcohol for persons engaged in the operation of motor vehicles weighing more than 26,001 pounds, transporting hazardous materials, or a designed to transport 15 or more passengers. The Act applies to any employee who holds a commercial driver's license (CDL), whether the employee works for a private or public employer.[17] The Act designates 5 different types of testing, including pre-employment, post-accident, periodic recurring, reasonable suspicion, and the most controversial, random testing.[18] Testing protocol is set up by the rules promulgated by the Secretary of Transportation and printed in the federal regulations.[19]

The enactment of OTETA did extend both in private and public employment the extent of permissible random testing. On the other hand, a reading of the Federal regulations does not necessarily require discharge for a positive test.

The above discussion as to the concept of random testing does lead into the proposition that employers have used workplace accidents as a reason for drug testing. However, arbitrators generally find the employer has no basis for demanding a drug test unless either the employer's drug policy clearly states that there shall be post-accident testing,[20] or if the accident is very serious, or there is evidence that drugs or alcohol is a possible factor in the accident.[21]

C. Employee Waiver

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[17] http://www.goer.state.ny.us/train/onlinelearning/DFW/103.4.html (Accessed April 1, 2008).

[18] Omnibus Transportation Employee Testing Act of 1991 (OTETA), Pub. L. No. 102-143, 105 Stat. 952, 953 (codified as amended in scattered sections of 45 U.S.C. and 49 U.S.C.)

[19] *Procedures for Transportation Workplace Drug and Alcohol Testing Programs*, 49 C.F.R. 40.

[20] *Tribune Co.*, 93 LA 201 (Crane, 1989); *Stone Container Corp.*, 91 LA 1186 (Ross, 1988).

[21] *Regional Transp. Dist.*, 92 LA 213 (Goldstein, 1988); *Boise Cascade Corp.* 90 LA 105 (Hart, 1987).

In some instances, it is possible for an employee to waive probable cause for testing and require the employee to submit to testing. Arbitrator Dworkin affirmed that an employee waived the probable cause requirement for drug testing when the employee applied for a transfer and a drug test was taken at the new location prior to the transfer.[22] In this instance the Arbitrator noted that the employee should not have been unaware that a test would be required for this transfer.[23] Therefore, knowledge of a possible test may waive the probably cause to test requirement of a contract or drug policy.

III. The Tests

A. The Urine Sample

There are two drug tests based on urine samples – the Enzyme Multiplied Immunoassay Technique ("EMIT") test and the gas chromatography (GC/MS) test. The EMIT test is a screening test that is simple and inexpensive. The employer and/or laboratory set a threshold by which the sample is either deemed "positive" or "negative" for the presence of drugs. The EMIT system is highly sensitive in detecting relatively small amounts of drugs, it cannot specify which drugs. Because of this, it is generally accepted in the arbitrator community that a positive EMIT result is not grounds for discipline or discharge by itself. Therefore, major laboratories have also adopted this view, and will only issue a report that drugs are present if it has been detected by a

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[22] *Goodyear Tire and Rubber Co.*, 2000 WL 33325708 (Dworkin, 2000).
[23] *Id.*

screening test and a confirmatory test.[24] And where an employee is given two tests, and one shows positive and the other negative, arbitrators will not uphold termination.[25]

The GC/MS technique is the confirmatory test that is "considered to be one of the most accurate analytic methods for identifying drugs in body fluids."[26] The initials stand for gas chromatography in conjunction with mass spectrometry. Each drug has a molecular fingerprint that can be identified by comparison with the laboratory's library of standard patterns.

The United States Supreme Court has also favorably referred to this two-step procedure in *Skinner v Railway Labor Executives Association*, 489 US 602, 109 S.Ct. 1402 (1989).

The general procedure for an employee's drug test begins when the employee is sent to the testing facility. There are standards that a testing facility must maintain in order to provide the proper balance between the employee's due process and privacy rights and to ensure the integrity of the sample. The employee is provided a drug screen kit to collect a sample of his or her urine in the privacy of a bathroom. When the employee returns with the sample, the technician will begin the procedure to prepare the sample for testing, in the presence of the employee. The sample must be at least 45 mL of urine.[27] There is a temperature gauge on the sample container that records whether the sample is within 90 to 100 degrees Fahrenheit range required.[28] The technician must then

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[24] John Bourdeau, *Employment Testing Manual*, 12-15 (Warren Gorham & Lamont, 1998).
[25] *Southern Cal. Rapid Transit Dist.*, 101 LA 10 (Gentile, 1991).
[26] John Bourdeau, *Employment Testing Manual*, 12-20 (Warren Gorham & Lamont, 1998).
[27] 49 CFR Part 40.65(a).
[28] 49 CFR Part 40.65(b)(1).

examine for signs of tampering.[29] All of this must be done in the employee's presence, who must then sign off on the certification statement.

When procedures are not set forth or ambiguous in an employee handbook, contract, collective bargaining agreement, federal regulation, or any other type of binding writing, the procedure and test must be "reasonably reliable to decide [the grievant's] employment fate" on.[30]

B. Problems Associated with Drug Testing

There are problems that may arise in drug testing that may inhibit the results to be considered by employers or arbitrators in disciplining an employee. Such problems may include a break in the chain of custody of the sample, failure to perform a confirmation test, failure to split samples, contamination or general lab error. When using a drug or alcohol test to discipline an employee, it is the employer's burden to prove that there was an unbroken chain of custody.[31]

However, if the employee does feel there was an error in the testing, it is the employees responsibility (as long as the employee was properly notified), within 72 hours of learning of the positive results, to request the split sample be tested.[32]

Likewise, an employee may point out other failures in the process to avoid discipline from that testing. In a case where the technician failed to split the original specimen into two samples at the time of collection and took a portion of the sample and

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[29] 49 CFR Part 40.65(c).

[30] *Board of School Commissioners of Mobile County*, 121 LA 1524 (Hoffman, 2005).

[31] *Delaware*, 104 LA 845 (Gorman, 1993).

[32] 49 CFR 40.153, *Southwest Ohio Regional Transit Authority, Local 627*, 2004 WL 3407315 (Colvin, 2004).

shipped it to the confirmation lab, the arbitrator ruled that the failure to split the specimen in accordance with Department of Transportation regulations rendered the test invalid.[33]

C. Hair Testing

In the Eighth Edition of Elkouri and Elkouri, How Arbitration Works, BNA 2008 at Chapter 16.2A, page 16-6, the following statement is made: "The use of hair and saliva testing, as opposed to urine testing, to check for drug use is subject to debate". In fact, one arbitrator observed that "hair analysis is somewhat controversial and problematic as a testing technique" and deferred to finding a marijuana use from a random urine test rather than relying on a union offer that the employee had passed a hair test. *Temple-Inland Inc.*, 126 LA 856, 865 (Wheeler, 2009).

In 1 Zeese, Drug Testing Legal Manual, §2:39 (2d ed.), the author is critical of hair testing for marijuana and other drugs, noting that in 2013 the Massachusetts Civil Service Commission set aside the discharge of six Boston police officers who had been discharged following a positive test for cocaine based upon a hair test, concluding that the tests were unreliable and awarded back pay. In Zeese, the following letter is quoted authored in 1996 by the then Secretary of Health and Human Services, Donna Shalala wherein she wrote:

> The presence of drugs in hair is affected by the presence of melanin, the pigment in hair. As a result, persons with darker hair show a higher level of a drug than those with light hair... [this] presents a potential for racial bias.
>
> Women deposit more opiates in their hair than men .. [presenting] a potential for gender bias.
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> The presence of drugs in the hair can also be caused by environmental

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[33] *Mail Contractors of America, American Postal Workers Union*, 122 LA 1488 (Hoffman, 2006).

> contamination. As an example, if an individual is in the extended presence of others who were using drugs ... it would show up in the person's hair even though they themselves did not use the drugs.

Zeese also makes the statement that "an individual can test positive for several months from hair testing while other tests more typically result in positive results for only several days". These observations raise two interesting questions. There is the claim in some cases that the individual in a urine test tested positive for marijuana on the grounds that the individual passively inhaled it from acquaintances at parties or otherwise. The scientific evidence, absent unusual fact patterns, does not support such a claim. *See, Comprehensive Logistics Inc.*, 123 LA 1409 (Roumell, 2007).

On the other hand, if Zeese is correct in the references made, as noted in Secretary Shalala's letter, the presence of marijuana in the hair can be caused by environmental contamination. Then, too, if for instance an employee is put on a last chance agreement after testing positive for marijuana who subsequently is tested, could claim that a positive result could be the residue of previous use and not current use.

Despite this controversy, some arbitrators have accepted the results of hair testing in supporting discipline based upon the scientific evidence presented to the arbitrator as in *United States Steel Corp. (Gary Works)*, 133 LA 907 (2014), where Arbitrator Bethel upheld the discharge based upon a hair test where the employee failed a test for marijuana pursuant to random testing under a last chance agreement. What was persuasive to the arbitrator was the testimony of the employer's medical director.

Hair testing, and for that matter saliva testing, continues to be the subject of debate which is best answered, as in any case, in the arbitration forum by persuasive proofs as to the validity of the test.

IV. OTETA and the Federal Regulations

The description set forth thus far as to the testing aspect of urine tests follows not only the procedures recommended by John Bodurteau, Employment Testing Manual, 12-20 (Warren Gorham & Lamont) (1998) but are the procedures that employers have adopted consistent with the OTETA federal regulations which, in effect, have become the standard for urine testing. In addition to the testing procedures already noted, the federal regulations establish the procedure for testing, including requiring that the collection agency be certified as well as the testing lab. Both an EMT test and a confirming test must be made as well as a split sample so that the employee can request another test from the split sample.

The federal regulations also introduced a substance abuse professional and a medical review officer. The medical review officer reviews the test results. If the employee is determined to have used illegal drugs, then the medical review officer will refer the employee to a substance abuse professional who will set forth a plan of rehabilitation. The employee can no longer drive the vehicle involved until released by the SAP. The same is true with testing for alcohol under the Omnibus Transportation Act.

Drug testing cut-off levels are determined by the Code of Federal Regulations as indicated in the following table. Each number is represented in nanograms per milliliter.

The first column indicates the threshold at which amounts from the first test (EMIT) conclude a positive result. The second column represents the threshold at which the confirmation test will yield positive results.[34]

Type of Drug or Metabolite	Initial Test	Confirmation Test
(1) Marijuana metabolites (i) Delta-9-tetrahydrocannabinol-9-carboxylic acid (THC)	50	15
(2) Cocaine metabolites (Benzoylecgonine)	300	150
(3) Phencyclidine (PCP)	25	25
(4) Amphetamines (i) Amphetamine (ii) Methamphetamine	1000	500 500 (Specimen must also contain amphetamine at a concentration of greater than or equal to 200 ng/mL
(5) Opiate metabolites (i) Codeine (ii) Morphine (iii) 6acetylmorphine	2000	2000 2000 10 Test for 6-AM in the specimen. Conduct this test only when specimen contains morphine at a concentration greater than or equal to 2000 ng/mL.

The chart set forth in the Code of Federal Regulations has been accepted widely as determinative of whether there is a positive test for drugs, including marijuana. The statutory construction further authorizes validity testing, which tests the urine specimen for traces of contamination, dilution, or substitution.[35] Validity is important to the arbitration process as it may serve to discredit a negative test that may be used to counter a positive test.[36]

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[34] 49 CFR 40.87

[35] 48 CFR 40.89

[36] *See Comprehensive Logistics, Local 2-921*, 123 LA 1409 (Roumell, 2007).

V. Marijuana and the Just Cause Standard

A. Just Cause

Universally, collective bargaining agreements provide that discipline and discharge in one form or another shall be for just cause. The shorthand definition of just cause was suggested by Arbitrator Harry Platt in *Riley Stoker Corp.*, 7 LA 764, 767 (1947), when he suggested that just cause is what is reasonable, given the experience in the industry involved. More recently, Arbitrators Abrams and Nolan in Toward a Theory of "Just Cause in Employee Discipline Cases, 1985 Duke L J 594, suggested that in order to establish just cause there must be proof of the workplace policy or rule violation and then the question becomes one of whether there are mitigating factors. These basic concepts of just cause apply to marijuana based cases.

B. Proof of Violation, Namely, When Is an Employee "Impaired" by Marijuana Usage?

An employee may test positive for marijuana, but such a test may not be conclusive of the employee being impaired which was the conclusion of Arbitrator Orlando in *Zurn Industries LLC*, 132 LA 734 (2013), where the employee was tested following an accident and failed for marijuana use. Though the employee admitted use of marijuana off work, Arbitrator Orlando in granting the grievance and setting aside the discharge concluded that the employee was persuaded by the employer's testimony that the employee satisfactorily performed during the work day and there was no expert testimony as to what the test result meant.

In *Windstream Nebraska Inc.*, 136 LA 1354 (2016), Arbitrator Fitzsimmons reached the same result in setting aside a discharge where the employee was involved in a motor vehicle accident with another vehicle while driving a company vehicle. The driver of the other vehicle was solely at fault and the responding police officer observed no indication that the grievant was under the influence of drugs.

The results in *Zurn* and *Windstream Nebraska* are to be contrasted with another accident case where the arbitrator sustained the discharge of an employee who lost control of a company pickup truck, causing the truck to be totaled where it was established that the employee was both intoxicated by the use of alcohol and impaired because of marijuana usage.[37]

Wellington Industries Inc., 136 LA 1024 (McDonald, 2016), upheld the discharge of an employee with 24 years of service who caused $12,000 in damage to a hydraulic press who tested positive for marijuana. The results of the test were confirmed by a medical review officer and revealed that the grievant's THC levels were higher than 300. It is noted that the threshold of a confirming marijuana test is 15, indicating that according to the arbitrator "it is reasonable to believe that such use affected the grievant as he performed the die setting job".

In Footnote 7, Arbitrator McDonald noted:

> Pharmacokinetics is the study of how drugs appear in the blood stream and, after being cleared from the blood stream, remain in the body and continue in the body. Heavy smokers have a heavy load of tetrahydrocannabinol (THC) in their tissues which can, over time, be excreted into the blood, so that you can continue to see the metabolites of THC. Such metabolites can continue to be detectible in the blood stream for over 100 days after the last time it was ingested. (Proceedings of the 68th annual meeting, National Academy of Arbitrators, 2015, chapter 3).

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[37] *In re Diageo Usvi Inc.*, 137 LA 666 (Skulina, 2017).

In his paper, Arbitrator Jacobs, after noting that several states have "established *per se* levels of THC to constitute impaired driving", wrote:

> See, https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/ 812440-marijuana-impaired-driving-report-to-congress.pdf.
>
> Consult your state's law as to whether something is considered a criminal offense which might well be a factor to consider in an arbitration over discipline.
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> The operative chemical in marijuana is called "tetrahydrocannabinol," usually referred to as THC. It can be measured to determined its presence in the body just like alcohol can. Here however lies one of the issues: THC is not the same as alcohol. It reacts differently in the body, it metabolizes differently and its impairing impact is different. Unlike the 0.08 blood-alcohol level that's widely accepted as indicative of drunken driving, establishing a credible level for THC has been elusive.
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> In the study cited above the NHTSA outlines the chemical differences in the way in which alcohol is absorbed and eliminated from the body versus how THC reacts. It is a different process. Alcohol is water soluble while THC is fat soluble and this stays in the human system for longer periods. As the NHTSA observed, "THC can be detected for up to 30 days post ingestion. (citation omitted). [W]hile THC can be detected in the blood long after ingestion, the acute psychoactive effects of marijuana ingestion last for mere hours, not weeks or months." See, NHTSA paper, supra, at page 4 and citations to peer reviewed studies listed therein.
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> Certainly, an employer may decide by policy that a certain level is the threshold but that may run into the requirement to show just cause for discipline. Some of this difficulty is based on the nature of the drug itself, and how long it stays in the system and how long it results in a reduction of reflexes, judgment or other motor functions to constitute "impaired." It may also depend on the nature of the person's employment and whether the employee is in a safety sensitive position or not.
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> The scope of this paper is not intended to be a complete analysis of the medical and chemical research done on this subject. Suffice it to say that there is not general agreement on the impairing effects of marijuana on things like driving. Neither is there an apparent general consensus on the amount of THC or how long it has been in the system to result in "impairment."

The whole point is that, unlike blood alcohol level where 0.08 is accepted as being intoxicated and therefore impaired, at this point the question of whether an individual

who tests positive for marijuana is impaired can only be determined from the facts and circumstances of a particular circumstance as illustrated in the comparison between facts in *Zurn, Windstream Nebraska* with the facts in *Diageo Usei* and *Wellington.*

C. "Zero Tolerance" Policies

Sometimes employers unilaterally implement a so-called zero tolerance policy or rule concerning discipline or discharge upon testing positive for marijuana. Arbitrators normally do not permit zero tolerance policies to override just cause requirements. *See,* Abrams, Inside Arbitration: How an Arbitrator Decides Labor and Employment Cases, (Bloomberg BNA 2013 at 216-17) noting: "Just cause still applies even if management has promulgated a zero tolerance rule".

This concept has applied to drug testing policies wherein arbitrators have held that, despite zero tolerance policies, the surrounding circumstances of a positive drug test must be considered as in the case of *North Hampton Hosp. Co.*, 135 LA 953 (Trotter, 2015), where the arbitrator set aside the discharge of a 30 year employee who tested positive after she took her husband's properly prescribed controlled substance by mistake, suffering a migraine headache episode.[38]

On the other hand, there have been occasions where an arbitrator has upheld the discharge of an employee testing positive under a zero tolerance policy where the employer was subject to strict state control as well as the regulations of the U.S. Coast Guard.[39] Similarly, a zero tolerance policy was upheld as reasonable in a refinery which

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[38] *Also see, Bruce Hardwood Floors*, 108 LA 115 (Allen, Jr., 1997) where the discharge was set aside despite a zero tolerance policy due to the circumstances involved.

[39] *Argosy Gaming Co.*, 110 LA 540 (Fowler, 1998).

dealt "with highly volatile high pressure chemicals" and therefore could be considered as being in a safety sensitive industry.[40] *Also see, Temple Inland Inc.*, 126 LA 856 (Wheeler, 2009) where a positive test was held to be grounds for termination because of the clear provisions of the collective bargaining agreement so providing.

D. The Required Proof

In a marijuana case, if discharge is involved the standard of proof as suggested in *Wellington Industries Inc.*, 138 LA 124 (McDonald, 2016), is "clear and convincing evidence", relying on the cases cited in that opinion.[41]

E. The Mitigating Factors and Other Issues

A 28 year service of a highly regarded employee with no prior discipline caused Arbitrator Das in *United States Steel Corp. Great Lakes Plant*, 138 LA 1256 (2018), to reinstate an employee who had been discharged and provided for rehabilitation and a last chance agreement.

A 20 year work record with no prior discipline caused Arbitrator Goldberg to reinstate a discharged employee who had tested positive for marijuana in *Re Essex Group Inc.*, 137 LA 51 (2016).

F. Employee Assistance Programs and Rehabilitation

The current trend in company policies is to offer an Employee Assistance Program ("EAP") and rehabilitation on the first offense.[42] In many cases, the actual bargained contracts acknowledge that drug use may derive from a disease and that the

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[40] *Valero Servs*, 134 LA 1704, 1707 (Shieber, 2015).

[41] *Also see, Metropolitan Washington Airport Authority*, 111 LA 712 (Simmelkjaer, 1998); *United Technologies Automotive Inc.*, 197 WL 908559 (Hilgert, 1997).

disease may be properly treated through rehabilitation, including a program offered by the employee.[43] In fact, the mere existence of a generally corrective disciple company policy may find that discharge for a first offense of being under the influence in the work place maybe "unduly harsh."[44]

G. Just Cause and the Positive Test

Even when an employee may have a positive test and there are no faults involved with the chain of custody or the conditions of testing, testing positive for drugs may not rise to the level of just cause. A classic example of this is when there are mitigating circumstances, including failures on the part of the medical review officer from noting these circumstances to management. Arbitrator Smith notes that a Medical Review Officer is required to conduct independent research on specific and combinations of prescriptions and over the counter drugs' affect on the positive drug test.[45]

Arbitrators typically uphold employee drug testing as long as there are rules implemented which permit the employer to test its employees, and those rules are followed.[46] Usually, the rules must provide a standard and systematically fair means of testing for the test to be considered valid by an arbitrator. However, when either no rules exist authorizing testing under the scenario, or there is question of the accuracy and

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[42] *U.S. Steel Corp., Granite City Works, Local 1899*, 124 LA 978 (Das, 2007).
[43] *Id.*
[44] *Domtar Industries, United Steelworkers Local 13-1327*, 124 LA 902 (Shieber, 2007).
[45] Orange County FL, International Association of Firefighters, 123 LA 1464 (Smith, 2007).
[46] 117 LA 334.

independence of the test that was performed, the arbitrator usually reinstates the employee.[47]

Just cause for termination can follow when an individual refuses to take a test when either by policy or agreement or probable cause, the test is warranted.[48] However, termination does not result in all cases when there is a reasonable excuse or misunderstanding as to the requirement to take a drug test. In *Federal Bureau of Prisons*, 138 LA 454 (Owens, 2017), the termination of the grievant was reduced to a 14 day suspension where the grievant was told that his name was up for random testing near the end of the shift, but misunderstood that he was to be tested before going home in a situation where the grievant had 11 years of service with no previous discipline.

Arbitrators have sustained termination of employees who have provided adulterated samples at testing, not because technically a refusal to submit to testing but rather because of a dishonest or insubordinate act independently justifying arbitration.[49]

Bringing marijuana into the workplace has caused arbitrators to sustain discipline, including discharge.

H. Claiming the Influence of Marijuana to Avoid Discipline

In numerous situations, employers are finding that employees are invoking the influence of drugs as an attempt to avoid discipline derived from other misbehavior. For example, Arbitrator Das upheld the discharge of an employee who attempted to cash an

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[47] *Id.*

[48] *See Ohio Power Co.*, 124 LA 1162 (Daniel, 2007); *Pioneer Flour Mills and Teamsters, Local 1110*, 101 LA 816 (Bankston, 1993).

original and reissued check although the employee claimed, as a defense, that he was under the influence of drugs at the time.[50] The grievant attempted to use the company's EAP and rehabilitation programs to shield himself from unrelated discipline, however the arbitrator found no link between the influence of the drug and the attempted theft.[51]

VI. The Impact of Medical and Recreational Marijuana Statutes on Drug Policies and Just Cause

As already noted, 22 states have now passed medical marijuana statutes and eight plus the District of Columbia have legalized recreational marijuana. Most state marijuana laws may not directly address the employment issues implicated by the use of marijuana for medical or recreational purposes. Some statutes, however, do address the employment issue. For example, the Michigan Medical Marijuana Act provides that:

> (c) Nothing in this act shall be construed to require:
> (2) An employer to accommodate the ingestion of marijuana in any workplace or any employee working while under the influence of marihuana

See Section 7 of MMMA.

The Montana Act provides: "Nothing in this part may construe to require … (b) an employer to accommodate use of marijuana by a registered cardholder."[52]

On the other hand, the Arizona Medical Marijuana Act takes a different approach in that the AMMA specifically prohibits employers from discriminating against individuals in hiring, promotion or other terms and conditions of employment based on their status as registered medical marijuana cardholders. Likewise, Arizona employers may not terminate, otherwise discipline or refuse to hire a registered medical marijuana cardholder testing positive for the use of marijuana unless the individual testing positive used, possessed or was impaired by the drug on the employer's premises during working hours.[53]

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[49] *See, e.g., Continental Airlines*, 120 LA 980 (Vernon, 2004).
[50] *United States Steel Corp.* 124 LA 326 (Das, 2007).
[51] *Id.*
[52] MT LEGIS 153 (2013), 2013 Montana Laws Ch. 153 (H.B. 168).
[53] Ariz. Rev. Stat. Ann. ¶36-2813(B).

In addition to the specific language set forth in the applicable state medical marijuana act, the problem faced by the parties to a collective bargaining agreement is that, in regard to marijuana, under 21 U.S.C.A. § 812, the definition of a Schedule I drug is 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.

This means that marijuana under Federal law is illegal, regardless of a state statute permitting the use of marijuana for medical or recreational purposes. This point is highlighted by the Department of Transportation Regulations as to Medical Review Officers where in 49 CFR § 40.151 prohibit MROs from verifying as a negative test as a result of the use of medical marijuana, for the Regulation provides:

> As an MRO, you are prohibited from doing the following as part of the verification process:
>
> ...
>
> (e) You must not verify a test negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the controlled Substance Act. (*e.g.*, under a state law that purports to authorize such recommendations such as the "medical marijuana" laws that some states have adopted).

Either because of specific exemptions in the applicable state law, or because marijuana for any purpose is illegal under Federal law, or for both reasons, the State Supreme Courts of Washington, California, Oregon and Montana, where medical marijuana use had been recognized to varying degrees, have all declined to extend protections for medical marijuana users into the private employment realm. *Roe v. Teletech Customer Care Management*, 171 Wash.2d 736 (Wash. 2011); *Ross v. Raging Wire*

Telecommunications, Inc., 42 Cal.4th 920 (Cal. 2008); *Emerald Steel Fabricators v. Bureau of Labor and Industries*, 348 Or. 159 (Or. 2010); *Johnson v. Columbia Falls Aluminum Co.*, 350 Mont. 562 (Mont. 2009). Since these decisions, Washington, California and Oregon have enacted recreational marijuana statutes.

Applying the Michigan Medical Marijuana Act, the Sixth Circuit in *Casias v. Walmart*, 695 F.3d 428, held that the Michigan Medical Marijuana Act did not apply to private employers.[54]

A similar result in refusing to apply the then Colorado Medical Marijuana Act to an employee discharged who tested positive for marijuana, who had a medical marijuana card, on the grounds that the activity must be lawful both under State and Federal law was reached by a United States District Judge in Colorado.[55]

The dilemma posted by medical marijuana acts has been the subject of several articles.[56]

The dilemma posed by the medical and recreational marijuana statutes to employers, unions and labor arbitrators is highlighted by an earlier decision of the United States Supreme Court in *Associated Coal Corp. v. United Mineworkers of America District 17*, 531 U.S. 57 (2000), where the court held it was not against public policy for an arbitrator to reinstate a driver, subject to the Department of Transportation Regulations, who had tested positive for marijuana and, therefore, affirmed the

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[54] *See*, MCL § 333.26427(c)(2).

[55] *Curry v. Miller Coors, Inc.*, 36 IER Cases 716 (D. Colo. 2013).

[56] William Vertes & Sarah Barbantini, Caught in the Crossfire: The Dilemma of Marijuana "Medicalization" for Healthcare Providers, 58 Wayne L. Rev. 103, 115 (2012); Ari Lieberman & Aaron

arbitrator's decision. Despite the decision of the Supreme Court of Washington in *Roe v. Teletech Customer Care Management*, 171 Wash.2d 736 (Wash. 2011), holding that an employer was free to develop testing policies that banned medical marijuana, one Washington State arbitrator has used just cause principles to overturn the termination of an employee who failed a drug test due to medical marijuana use.[57]

In two decisions in California where the state prior to California adopting recreational marijuana but when the state did permit medical marijuana, Arbitrator Staudohar set aside a discharge in *Monterey County*, 123 LA 677, 681 (2007), where the employee who had been on leave for some time and returned to work, who had a medical marijuana card, was discharged because some marijuana was found in his desk. Though the central point of the analysis was the fact that it was not clear who was responsible for placing the marijuana in the desk, Arbitrator Staudohar did make the statement at 68 that the medical marijuana card "provided a 'viable defense' for medical usage".

In a subsequent case in *County of Solana*, 128 LA 1702 (2011), Arbitrator Staudohar concluded that the use of marijuana off duty had no effect on the employer's business and relied on the longevity of the employee and lack of previous discipline plus an attempt at rehabilitation as the basis for setting aside the discharge.

In Oregon, which at the time only had a medical marijuana Act, Arbitrator Gaba in *City of Portland*, 123 LA 1444 (2007), recognizing that Oregon had a "very lenient

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Solomon, A Cruel Choice: Patients Forced to Decide Between Medical Marijuana and Employment, 26 Hofstra Lab. & Emp. L.J. 619, 646 (2009) (citing 21 U.S.C. § 802).

[57] The arbitration case mentioned has gone unpublished, but has been cited by several publications in Washington, including Washington HealthCare News (http://www.stoel.com/Files/Medical-Marijuana-and-the-workplace.pdf) and the Society for Human Resource Management (http://skchra.shrm.org/blog/2012/03/termination-medical-marijuana-use-not-so-fast).

approach to marijuana", set aside the discharge of an employee who tested positive for marijuana.

Montgomery County, County of Solana and *City of Portland* all involved non-federal public employers. The question remains even though the Courts when challenged have not extended the protection of medical marijuana users to private employers whether arbitrators will nevertheless be influenced when applying the just cause standard in either the private or public sector by medical and recreational marijuana statutes.

There are several basic principles in dealing with issues where the employee tests positive for marijuana and has a medical marijuana card or certificate issued by the state involved. For example, if the policy states that an employee will be terminated for testing positive unless there is a legal justification then the issue becomes one of notice. It has long been recognized that "just cause requires that employees be informed of a rule, the infraction of which may result in suspension or discharge, unless the conduct is so clearly wrong that specific reference is not necessary". *Lockhead Aircraft Corp.*, 28 LA 829, 831 (Hepburn, 1957).

This principle has been applied in setting aside the discharge of an employee, despite a failed drug test, because the employee was not informed of a change in the drug policy.[58] Certainly, if the issue is the medical marijuana card, notice that such use may not be acceptable would seem to be required.

There are two other arbitration cases where medical marijuana cards were issued that bear examination. In *Lane County, Oregon*, 136 LA 585 (Jacobs, 2016), the

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[58] *Pacific Offshore Co.*, 106 LA 690 (Kaufman, 1996).

employee had worked for the county since March 2015 as a senior programmer and systems analysis. His work had been satisfactory. On November 12, 2015, the employee attended a training session where two supervisors smelled an odor of marijuana coming from the employee's jacket, causing the employee to be tested, with the test confirming marijuana usage. The employee had a serious and debilitating disease, causing his medical doctor to recommend marijuana, but not prescribed in order to avoid federal law. The employee took the marijuana only when off duty and under medical supervision and did obtain a medical certification card from the State of Oregon. The employee was discharged. In setting aside the discharge and awarding back pay, Arbitrator Jacobs wrote:

> The County argued that all one needs to look at is the policy against being under the influence and compare that to the positive test results to get the answer. If that were the only part of the policy, the County would frankly be right but there is much more to the County policy than that.
>
> Simply stated, the terms of the County's own policy undercut their case against the grievant. It was absolutely clear that under these facts the grievant did not use drugs while at work and was using them exclusively for medicinal purposes under the supervision of a medical healthcare provider. This is thus not a situation where someone is caught using at work or who was impaired due to drug or alcohol use while at work.
>
> The exception to the general policy against being under the influence of drugs or alcohol at work makes a specific exception for marijuana use 3 and provides as follows: "Nothing in this procedure is intended to prohibit the use of a drug taken under supervision by a licensed health care professional, where its use is consistent with its prescribed use and does not present a safety hazard or otherwise adversely impact an employee's performance or County operations."
>
> One could scarcely imagine a clearer message to the grievant that the use of marijuana under the supervision of a licensed health care professional falls squarely within the exception and that no disciplinary consequences would flow from that use. It is also quite significant that this stated exception is immediately after the main policy relied upon so heavily by the County. It is clearly an exception to that rule and provides the opposite notice to the employees that the County argued for here, i.e. that if they are using marijuana under the supervision of a licensed health care

> professional they fall within the exception. As already determined here, the grievant was using marijuana under the supervision and at the express recommendation of a licensed health care professional and his use fits squarely within this exception. Had there been evidence of impairment the result would be different but here there was none and the result flows directly from the terms of the policy and its stated exception.
>
> The County argued that the exception does not apply here because marijuana cannot legally be "prescribed." The County's argument is misplaced on this record and on that language. The County argued that a prescription is required but that is not what the exception actually says. The operative clause of the sentence says, "nothing in this procedure is intended to prohibit the use of a drug taken under supervision by a licensed health care professional." It says and means that if a person is using marijuana under the supervision of a licensed health care professional it is not prohibited as long as it is used as recommended and does not present a safety hazard or adversely impacts the person's employment or County operations. It does not require that it be prescribed. While this may appear to be parsing the sentence very closely it must be remembered that such parsing is appropriate, especially where someone's job is at stake.

(Emphasis supplied by this Author.)

Lane County, as one reads the above language of Arbitrator Jacobs, is most instructive. In *Lane County,* Arbitrator Jacobs found that the employee, who did not use marijuana on premise, was not impaired. But, if the employee had been impaired, then Arbitrator Jacobs suggests that discipline would have followed. The question is proof and the recognition of a medical marijuana card.

In the same year as *Lane County*, Arbitrator Dunn in *United Electrical, Radio and Machine Workers of America*, 2016 BNA LA Supp 200631 (2016), upheld a decision of the company to suspend an employee who tested positive for marijuana until the employee tested "clean" in a situation where the employee had a medical marijuana card, but chose to purchase the marijuana from sources other than a licensed dispensary. Thus, Arbitrator Dunn wrote:

> Moreover, the Company in June 2014 had established a medical marijuana rule which was fair and reasonable on its face, given the Massachusetts law in effect

> at that time. If an employee was consuming medical marijuana (or any other drug) pursuant to a lawful prescription, and the employee knew or should have known that the use (or misuse) of that drug could impair their ability to perform their jobs, then the employee was obligated to inform the Company of that fact. Then, once so informed, the Company could seek written assurance from the prescribing physician that so long as the prescribed drug was being taken in accordance with the prescribed amount and concentration, and at the prescribed times, it would not result in impairment of the employee during his working hours. In July 2015, under the then-existing Employee Handbook, it was not up to the employee to reach the conclusion on his own, without notification to the Company, that if he took the prescribed, medical marijuana some particular number of hours before returning to work, then he would not be impaired when at work. The Company rule as written and in effect in July 2015 certainly did not permit the grievant to consume marijuana illegally purchased off the street. with all the unknowns regarding such illegally purchased marijuana, and self-determine (without notice to the Company) that so long as he stopped consuming the marijuana before going to bed, he would be unimpaired when arriving at work the next morning.
>
> For all these reasons, I conclude that the Company did not violate Article 11, or any other provision of the Collective Bargaining Agreement, when it told A_ following his having tested positive for marijuana on July 24, 2015, that he could not return to work until testing clean.

Earlier in his opinion, Arbitrator Dunn observed: "The fundamental problem with this argument is that the grievant on July 24th tested positive for marijuana not because he had lawfully purchased and consumed medical marijuana pursuant to his doctor's prescription, but rather because he was smoking marijuana recreationally with and as provided by his friends, or smoking marijuana that he had purchased illegally 'on the street'."

The lessons gained from the arbitral decisions involving public employees in states having marijuana laws is that, though there may be some leniency, if the employee has notice of the company's policy and is impaired at work then the statutes do not protect the employee when the just cause standard is applied to possible discipline. Nevertheless, there could be a concern that some states do have anti-discrimination

provisions against discrimination for medical marijuana users. Yet, it would seem that even in such states the impairment may be an overriding consideration.

VII. The Troubled Employee

Ted St. Antoine, in The Common Law of the Workplace, BNA Books 2005 at §6.24-6.29, discussed the question of the troubled employee. Essentially, if the union can show that the employee is a possible addict, some arbitrators may in terms of relief provide for rehabilitation and last chance agreements. This depends on the policies of the company, the negotiated provisions in the collective bargaining agreement and the particular facts of the case. Again, it is the facts and the circumstances that will determine whether or not an arbitrator might be prone to consider some relief over and above or in lieu of discipline.

Conclusion

There is a shift in our society when it comes to marijuana. Though marijuana is still federally illegal, with 22 states recognizing some form of medical marijuana and eight states and the District of Columbia recognizing recreational marijuana, the parties, as in the case of alcohol, should be aware of this shift in society's tolerance. Impairment, provisions for testing, providing a drug-free workplace and negotiated policies and properly promulgated employer rules, along with the method of testing are all part of the ingredients considered in applying the just cause standard in the workplace when addressing marijuana and the need for a safe workplace.