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## **Emerging From the Smoke: Does an Employer Have a Duty to Accommodate an Employee's Medical Marijuana Use After Garcia v. Tractor Supply Company?**

Lucía Moran  
*University of New Mexico*

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# EMERGING FROM THE SMOKE: DOES AN EMPLOYER HAVE A DUTY TO ACCOMMODATE AN EMPLOYEE’S MEDICAL MARIJUANA USE AFTER *GARCIA V. TRACTOR SUPPLY COMPANY*?

Lucía Morán\*

## INTRODUCTION

Imagine losing your job as a result of using a medicine prescribed to you by your doctor. This is the situation Mr. Rojerio Garcia, an HIV positive patient enrolled in the Medical Cannabis Program administered by the New Mexico Department of Health,<sup>1</sup> faced shortly after he was hired at a new job. Mr. Garcia disclosed to his prospective employer during his initial interview both his medical condition and his involvement in the Medical Cannabis Program.<sup>2</sup> Nonetheless, once Mr. Garcia was hired he was subjected to a drug test, and he was subsequently discharged after he tested positive for cannabis metabolites.<sup>3</sup> Finding no administrative remedy available, Mr. Garcia brought suit against his employer alleging unlawful discrimination under the Lynn and Erin Compassionate Use Act and the New Mexico Human Rights Act.<sup>4</sup>

In cases like Mr. Garcia’s, the landscape of access to medical marijuana remains increasingly hazy. On the federal level, marijuana is still classified alongside drugs like heroin as a Schedule I illegal drug in the Controlled Substances Act, and is defined as a drug “with no currently accepted medical use and a high potential for abuse.”<sup>5</sup> However, 29 states including Washington D.C. have passed laws legalizing the use of marijuana for specific medical purposes, despite the fact that federal law continues to criminalize marijuana distribution and possession.<sup>6</sup> In New Mexico, the Lynn and Erin Compassionate Use Act (“CUA”) allows medical marijuana prescribed by a doctor to be available to patients with certain debilitating medical

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1. See NEW MEXICO DEPARTMENT OF HEALTH, GENERAL INFORMATION, <https://nmhealth.org/about/mcp/svcs/info/> (last visited Nov. 11, 2016).

2. *Garcia v. Tractor Supply Co.*, 154 F.Supp.3d 1225, 1227 (D.N.M. Jan. 7, 2016).

3. *Id.*

4. *Id.*

5. Drug Scheduling, U.S. DRUG ENFORCEMENT AGENCY, <https://www.dea.gov/druginfo/ds.shtml> (last visited Dec. 2, 2017).

6. National Conference of State Legislatures, *State Medical Marijuana Laws*, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (last visited Dec. 2, 2017).

conditions.<sup>7</sup> While the CUA contains a provision that exempts doctors and patients from criminal and civil penalties resulting from the medical use and possession of a regulated amount of cannabis,<sup>8</sup> important protections for employees participating in the Medical Cannabis Program remain unresolved.

The question that lingers is, can the thousands of patients who use medical marijuana in New Mexico<sup>9</sup> and who are employed face adverse employment actions because of that use, or must an employer accommodate an employee's medical marijuana use? If a doctor recommends a patient treat an illness with medical marijuana, and the patient takes all the necessary administrative steps to register with the Department of Health and comply with the doctor's professional recommendation, how can the patient's medical use of marijuana be grounds for employment termination? In Part I, this Comment looks briefly at the history of medical marijuana and its purported medicinal value. Part I will also examine the evolution and history of medical marijuana laws in New Mexico, and discuss the decision by the New Mexican federal district court regarding medical marijuana and employment accommodation in *Garcia v. Tractor Supply Company*.<sup>10</sup>

Part II will explore the questions posed by the *Garcia* decision and begin by introducing the approaches to medical marijuana and employment accommodation that other jurisdictions have adopted. It will then analyze why states that prohibit an employer from discriminating against an employee with a medical marijuana prescription is sound policy. Part II will also analyze why New Mexico should adopt a similar approach. Part II will substantiate this analysis by exposing inconsistencies between prior New Mexico Court of Appeals decisions dealing with medical marijuana and compare them to the results of the *Garcia* case. It will then briefly discuss the viability of testing impairment levels of an employee rather than administering a standard drug test,<sup>11</sup> thereby maintaining workplace safety while respecting an employee's need to treat an illness.

Part III will conclude that New Mexico should adopt the approaches explored in Part II to deal with the ramifications of patients who use medical marijuana and who are also employed. It will suggest that requiring employers to accommodate employees with a valid medical marijuana prescription, so long as that use does not interfere with job performance, would further both the plain language and the intent of the Compassionate Use Act as well as the New Mexico Human Rights Act, and would promote fairness and consistency within the law.

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7. See N.M. STAT. ANN. 1978 § 26-2B-1 (2007).

8. *Id.* § 26-2B-4.

9. See NEW MEXICO DEPARTMENT OF HEALTH, MEDICAL CANNABIS PATIENT STATISTIC REPORT, <https://nmhealth.org/publication/view/report/3124/> (Sept. 30, 2016) (stating there are currently around 30,000 medical marijuana patients in New Mexico).

10. *Garcia v. Tractor Supply Co.*, 154 F.Supp.3d 1225 (D.N.M. 2016).

11. See Stacy A. Hickox, *Drug Testing of Medical Marijuana Users in the Workplace: An Inaccurate Test of Impairment*, 29 HOFSTRA LAB. & EMP. L. J. 273 (2012).

## I. BACKGROUND

### A. The Evolving History of Medical Marijuana and the Law

The use of marijuana and its derivatives for medicinal purposes is rooted in ancient historical practices. From its earliest inception as a medicinal tool, marijuana was prescribed by physicians to treat a wide range of ailments including physical pain and childbirth.<sup>12</sup> Marijuana and hemp were also commonly prescribed by early American physicians to address conditions like inflamed skin and incontinence.<sup>13</sup> The practice of prescribing medical marijuana in the United States came to a crawl when the Food and Drug Administration was created in 1906 to tackle the population's growing addition to morphine.<sup>14</sup> Eventually, the Federal Government criminalized the non-medical use of marijuana in 1937 after passing the Marihuana Tax Act, and since then, harsher and harsher penalties for the use of marijuana have been enacted.<sup>15</sup> Only recently has public opinion in the states shifted back toward acknowledging possible medical uses for marijuana, with 29 states and Washington D.C. enacting local laws permitting the medical use of marijuana by qualifying patients.<sup>16</sup>

New Mexico joined a state-led movement that recognized marijuana's potential for medical use during the 1970's, when in 1978 the state initiated a medical marijuana research program.<sup>17</sup> It was not until 2007, however, that New Mexico officially legalized the medical use of marijuana by certain patients under legislation known as the Lynn and Erin Compassionate Use Act ("CUA").<sup>18</sup> The CUA was designed and named in honor of Lynn Pierson and Erin Armstrong, both cancer patients who advocated for access to marijuana for patients suffering from chronic illnesses.<sup>19</sup> This Act now allows for patients with a "debilitating medical condition" like cancer, HIV/AIDS, glaucoma, epilepsy, and "any other medical condition . . . approved by the department" to qualify for a medical marijuana permit.<sup>20</sup> It also exempts these patients and their prescribing doctors from all criminal and civil penalties resulting from the regulated and approved use of medical marijuana to treat the qualifying medical conditions.<sup>21</sup>

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12. Patrick Stack & Claire Suddath, *A Brief History of Medical Marijuana*, TIME, <http://content.time.com/time/health/article/0,8599,1931247,00.html> (Oct. 21, 2009).

13. *Id.*

14. *Id.*

15. *Id.*

16. National Conference of State Legislatures, *State Medical Marijuana Laws*, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (last visited Dec. 2, 2107).

17. Scott C. Martin, *A Brief History of Medical Marijuana Law in America*, TIME, <http://time.com/4298038/marijuana-history-in-america/> (April 20, 2016).

18. *See* § 26-2B-1.

19. ABQJournal News Staff, *9:40am—Gov. Pushes Medical Marijuana Bill*, ALBUQUERQUE JOURNAL, Feb. 7, 2007, <https://www.abqjournal.com/23857/940am-gov-pushes-medical-marijuana-bill.html>.

20. N.M. STAT. ANN. § 26-2B-3 (2007).

21. *Id.* § 26-2B-4.

## B. Marijuana and its Potential for Therapeutic and Medicinal Use

Marijuana's continued classification as a Schedule I drug with no federally recognized medical use makes it very difficult for scientists and doctors to officially study and test it.<sup>22</sup> Notwithstanding, limited studies have been done on cannabinoids, chemical compounds found in the marijuana plant, which have in their individual capacities been shown to relieve nausea, reduce pain and inflammation, and increase appetite.<sup>23</sup> Cannabinoids have also been known, mostly through personal anecdotes and experiences rather than official clinical studies, to alleviate serious medical conditions that other strong prescription drugs have not, including severe epilepsy in children.<sup>24</sup> Other chronic conditions that are difficult to treat with traditional prescription drugs but that respond well to marijuana include cancer, post-traumatic stress disorder, and neuropathic pain.<sup>25</sup> However, due to the limited number of official clinical studies and available data on the risks and benefits associated with medical marijuana, the Food and Drug Administration has not approved it for sale as a medicine.<sup>26</sup>

Despite the fact that the FDA has not approved marijuana as a medicine, general attitudes towards its viability as such are shifting. In a recent study conducted by the New England Journal of Medicine, doctors across North America were polled about whether they would prescribe marijuana to a patient with certain medical symptoms or conditions, and 76% said they would.<sup>27</sup> This shifting perspective has led to over a million estimated medical marijuana patients who hold valid permits across the country.<sup>28</sup> In New Mexico, the most current report indicates that over 45,000 patients are actively participating in the state's medical cannabis program.<sup>29</sup> The overwhelming majority of these patients use medical marijuana to treat post-traumatic stress disorder, severe chronic pain, and cancer.<sup>30</sup>

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22. See *When Weed Is The Cure: A Doctor's Case for Medical Marijuana*, NPR (July 14, 2015), <http://www.npr.org/sections/health-shots/2015/07/14/422876973/when-weed-is-the-cure-a-doctors-case-for-medical-marijuana>.

23. NATIONAL INSTITUTE ON DRUG ABUSE, MARIJUANA AS MEDICINE, <https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine> (July 2015).

24. See Kate Pickert, *Pot Kids*, TIME, <http://time.com/pot-kids/> (2016).

25. See AMERICAN CANCER SOCIETY, MARIJUANA AND CANCER, <http://www.cancer.org/treatment/treatmentsandsideeffects/physicalsideeffects/chemotherapyeffects/marijuana-and-cancer> (March 4, 2015); see also *When Weed Is The Cure: A Doctor's Case for Medical Marijuana*, NPR, <http://www.npr.org/sections/health-shots/2015/07/14/422876973/when-weed-is-the-cure-a-doctors-case-for-medical-marijuana> (July 1, 2015).

26. See NATIONAL INSTITUTE ON DRUG ABUSE, MARIJUANA AS MEDICINE, <https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine> (July 2015).

27. Jonathan A. Adler & James A. Colbert, *Medicinal Use of Marijuana—Polling Results*, NEW ENGLAND J. OF MED., (May 30, 2013) (concluding that after polling 1,446 doctors of different specialties from across the nation and abroad, a majority of doctors would prescribe medical marijuana to specific patients).

28. PROCON.ORG, Number of Legal Medical Marijuana Patients (as of Mar. 1, 2016) <http://medicalmarijuana.procon.org/view.resource.php?resourceID=005889> (last visited Dec. 2, 2017).

29. NEW MEXICO DEPARTMENT OF HEALTH, MEDICAL CANNABIS PROGRAM PATIENT STATISTICS, <https://nmhealth.org/publication/view/report/4124/> (Nov. 30, 2017).

30. *Id.* The report indicates that the overwhelming majority of patients in New Mexico use medical marijuana to treat post-traumatic stress disorder (22,097 people), severe chronic pain (15,016), and cancer (2,701). Other listed conditions have fewer registered patients.

### C. The case of *Garcia v. Tractor Supply Company*

Rojerio Garcia was one of the thousands of patients in New Mexico lawfully using medical marijuana to treat the symptoms of his debilitating medical condition.<sup>31</sup> He was participating in the state's medical cannabis program and using marijuana prescribed by his doctor to treat his condition when he applied for a managerial job with Tractor Supply Company.<sup>32</sup> Mr. Garcia disclosed his medical status and participation in the medical cannabis program to the company during his initial interview.<sup>33</sup>

Mr. Garcia was subsequently hired and required to undergo a drug test, which came back positive for cannabis metabolites.<sup>34</sup> Due to this drug test result, Mr. Garcia's employment was terminated by Tractor Supply Company.<sup>35</sup> Mr. Garcia, after exhausting the available administrative remedies, brought suit in state court against the company alleging wrongful and discriminatory employment termination.<sup>36</sup> Tractor Supply Company successfully removed the case to federal court where it was dismissed for failure to state a claim upon which relief could be granted.<sup>37</sup>

The United States District Court for the District of New Mexico held that Mr. Garcia did not have a cause of action under the Lynn and Erin Compassionate Use Act and the New Mexico Human Rights Act because his employer had no duty to accommodate his medical marijuana use.<sup>38</sup> The issues of medical marijuana use and employment accommodation were issues of first impression in New Mexico.<sup>39</sup> The court found that because neither the Compassionate Use Act nor the New Mexico Human Rights Act contains explicit language mandating an employer accommodate an employee's medical marijuana use, such a duty to accommodate cannot be inferred from these statutes and imposed on employers by the court.<sup>40</sup>

In addition, the court held that Mr. Garcia did not have a cause of action under the New Mexico Human Rights Act because he was not discriminated against or terminated due to his serious medical condition.<sup>41</sup> The court separated Mr. Garcia's illness from his treatment, and reasoned that "[t]esting positive for marijuana was not because of Mr. Garcia's serious medical condition (HIV/AIDS), nor could testing positive for marijuana be seen as conduct that resulted from his serious medical condition. Using marijuana is not a manifestation of HIV/AIDS."<sup>42</sup>

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31. See *Garcia v. Tractor Supply Co.*, 154 F.Supp.3d 1225, 1226 (D.N.M. 2016).

32. *Id.* at 1227.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 1227, 1230.

38. *Id.* at 1229; see also, N.M. STAT. ANN. 1978, Ch. 28, Art. 1 (2017); N.M. STAT. ANN. 1978, Ch. 26, Art. 2B (2017).

39. *Garcia*, 154 F.Supp.3d at 1227.

40. *Id.* at 1227, 1229.

41. *Id.* at 1228.

42. *Id.*

The court relied primarily on how other states have handled issues of medical marijuana use and employment accommodation to reach the conclusion that the New Mexico Human Rights Act did not provide Mr. Garcia with a cause of action. The court found a Colorado case instructive, and explained that while an anti-discrimination law protects an employee with a disability from adverse employment actions, it does not protect the employee from an “employer’s standard policies against employee misconduct. In other words, a termination for misconduct is not converted into a termination because of a disability just because the instigating misconduct somehow relates to a disability.”<sup>43</sup>

Additionally, the court found that requiring a company with branches in many other states to accommodate an employee’s marijuana use would present too great a burden because the company would have to alter its workplace drug policies depending on which state law applied.<sup>44</sup> Adding to this point, the court concluded its judgement by addressing the conflicts presented by the Controlled Substance Act (“CSA”) and the CSA’s preemption of state law. The court reasoned that mandating an employer to accommodate a worker’s medical marijuana use would effectively be akin to asking the employer to accommodate conduct strictly prohibited under the CSA.<sup>45</sup> Specifically, the court stated that because marijuana is an illegal drug federally, requiring an employer to be aware of an employee’s use and to accommodate it would require the employer to “permit the very conduct the CSA proscribes.”<sup>46</sup> Thus, the court granted Tractor Supply Company’s motion to dismiss and held that an employer does not have a duty to accommodate an employee’s medical marijuana use under either the Compassionate Use Act or the New Mexico Human Rights Act.<sup>47</sup>

## II. ANALYSIS

The *Garcia* court’s ruling leaves two major questions largely unresolved. First, did the court correctly find that employees who use medical marijuana do not have a cause of action for wrongful and discriminatory termination under the Compassionate Use Act and the New Mexico Human Rights Act? The second question that the ruling invites is whether the court correctly applied the provisions of the Controlled Substances Act to the issue of accommodation, and whether the CSA presents a conflict for employers if they are required to accommodate an employee’s medical marijuana use.

### A. The States Divided: Three Different Approaches to Employment and Medical Marijuana

The federal district court in *Garcia* failed to find that an employer has a duty to accommodate an employee’s medical marijuana use due in large part to marijuana’s federal classification as an illegal substance and the unreasonable burden

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43. *Id.* (quoting *Curry v. MillerCoors, Inc.*, 2013 WL 4494307, at \*3 (D.Colo. Aug. 21, 2013)).

44. *Id.* at 1229.

45. *Id.* at 1230.

46. *Id.*

47. *Id.* at 1226, 1228.

such an accommodation would place on a company with locations nationwide.<sup>48</sup> The court, in reaching this conclusion, relied on the interpretation of similar statutes by courts in other jurisdictions.<sup>49</sup>

Generally, there are three different approaches that states use to deal with the intersection of employment accommodation and medical marijuana use.<sup>50</sup> Several states have chosen to include explicit anti-discrimination clauses directly in the medical cannabis statute, preventing employers from taking adverse employment action against an employee based solely on medical marijuana use.<sup>51</sup> One state has not only enacted anti-discrimination clauses, but has also classified a medical marijuana patient as having a recognized disability under the state's Human Rights Act.<sup>52</sup> Normally, reasonable accommodation provisions require an employer to accommodate medical marijuana use after making a holistic determination of the nature of the job and any possible accommodations that could be offered to help the employee successfully manage those duties.<sup>53</sup> These provisions provide an exception to the duty to accommodate if doing so would compromise the safety of the worker or another person.<sup>54</sup> Typically, this exception for "safety-sensitive" employment positions is invoked when the job involves driving, operating heavy machinery, or other high risk activities.<sup>55</sup> Also, anti-discrimination provisions do not allow the employee to be intoxicated while at work or to use marijuana on the jobsite or in a public place.<sup>56</sup>

Arizona is one such state that has chosen to prohibit discrimination against employees lawfully complying with the state-run medical cannabis program.<sup>57</sup> Under the Arizona Medical Marijuana Act, an "employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or

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48. *Id.* at 1229, 1230.

49. *Id.* at 1230.

50. See Francesca Liquori, *National Attorneys General Training and Research Institute, The Effects of Marijuana Legalization on Employment Law*, 1 NAGTRI J. 2 (Feb. 18, 2016), <http://www.naag.org/publications/nagtri-journal/volume-1-number-2/the-effects-of-marijuana-legalization-on-employment-law.php>.

51. Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New Jersey (anti-discrimination bills pending at this time), New York, Pennsylvania, and Rhode Island are the jurisdictions that have incorporated protections for employees using medical marijuana during non-work hours. Dale L. Deitchler, *The Workplace and Medical Marijuana: Employer Guidelines for Navigating the Legal Haze*, INSIDE COUNSEL (Apr. 15, 2015), <http://www.insidecounsel.com/2015/04/15/the-workplace-and-medical-marijuana-employer-guide>; M. Tae Phillips and Michael J. Riccobono, *New Jersey Bill Would Provide Employment Protections for Medical Marijuana Patients*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Apr. 11, 2017), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/new-jersey-bills-would-provide-medical-marijuana-employment-protections.aspx>.

52. N.Y. PUBLIC HEALTH LAW §3369(2) (McKinney 2017).

53. See Liquori, *supra* note 50.

54. See *id.*; see also Kathleen Harvey, *Protecting Marijuana Users in the Workplace*, 66 CASE W. RES. L. REV. 209 (2015).

55. Deitchler, *supra* note 51.

56. *Id.*

57. Joseph A. Yastrow, *A Survey of Medical Marijuana Laws Impacting the Workplace* (2015), [http://www.americanbar.org/content/dam/aba/events/labor\\_law/am/2015/yastrow.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/labor_law/am/2015/yastrow.authcheckdam.pdf).

otherwise penalize a person based upon” that person’s status as a medical marijuana patient or that person’s positive drug test indicating medical marijuana use.<sup>58</sup>

The confines of accommodation are strictly defined, however, and the employer is not required to accommodate the use of medical marijuana during work hours or in the workplace.<sup>59</sup> The anti-discrimination clause in the Arizona Medical Marijuana Act protects employees from termination or other employment discrimination based solely on authorized medical marijuana use, but still gives employers enough control to ban marijuana use from the workplace and from high-risk jobs. The anti-discrimination statute requires employers to engage in a more nuanced analysis of the employee’s medical marijuana use, specifically “whether the . . . employee is lawfully enrolled in the state’s medical marijuana program, whether the level of cannabis shown on the [drug] test is consistent with such use, and whether there is a job-related reason that a medical marijuana user could not be hired. . . .”<sup>60</sup> Absent a showing of high-risk job duties, intoxication, or marijuana use on the jobsite, an employee cannot be terminated solely for medical marijuana use.<sup>61</sup>

Minnesota’s THC Therapeutic Research Act, much like Arizona’s Medical Marijuana Act, contains a specific provision protecting registered patients of the state’s cannabis program from a range of civil penalties, including adverse employment consequences due to medical marijuana use.<sup>62</sup> As in Arizona, an employee cannot be terminated under Minnesota’s statute solely based on a positive drug test showing cannabis metabolites.<sup>63</sup> Instead, the employer must determine whether the employee’s marijuana use impairs the employee’s ability to perform job duties.<sup>64</sup> Minnesota also gives employees the opportunity to explain drug test results that come back positive before an employer can take any adverse action, and if the employee is a registered cardholder, the employee cannot be terminated on the basis of a positive drug test alone.<sup>65</sup> These provisions are substantially similar to those in Arizona’s Medical Marijuana Act because they are intended to protect workers from arbitrary discrimination based on legal medical marijuana use, while at the same time allowing employers to take medical marijuana use into consideration when safety is a concern.

New York takes this approach one step further by classifying a medical marijuana patient as technically having a disability under the New York Human

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58. ARIZ. REV. STAT. ANN. § 36-2813(B) (2010).

59. *Id.* § 36-2813(B)(2).

60. Hunton & Williams LLP, *Anti-Discrimination Provisions in State Medical Marijuana Laws Raise Additional Considerations for Workplace Drug Testing*, HUNTON EMPLOYMENT AND LABOR LAW PERSPECTIVES (Jan. 22, 2015), <http://www.huntonlaborblog.com/2015/01/articles/criminal-background-checks/antidiscrimination-provisions-in-state-medical-marijuana-laws-raise-additional-considerations-for-workplace-drug-testing/>.

61. *Id.*

62. *See* MINN. STAT. §152.32(3)(c) (2014).

63. *See* Hunton & Williams, *supra* note 60.

64. MINN. STAT. §152.32(3)(c)(2) (2014).

65. *Id.*; §181.953(6)(b) (2004).

Rights Act.<sup>66</sup> Classifying medical marijuana patients as automatically having a disability means an employer must accommodate the employee's disability that necessitates marijuana use and the use itself as one and the same, and not as separate, unrelated entities.<sup>67</sup> Nevertheless, like in other jurisdictions with anti-discrimination or accommodation requirements, an employer in New York is not obligated to accommodate on-the-job intoxication or use.<sup>68</sup>

Anti-discrimination laws like those in New York, Arizona, and Minnesota likely create a direct cause of action for the employee facing discrimination stemming from medical marijuana use.<sup>69</sup> Creating such a cause of action ensures the enforcement of anti-discrimination provisions and treats both the medical condition and the means of treatment, marijuana, as a private affair that need not interfere with employment so long as that treatment does not affect job performance or jeopardize workplace safety.

The trend set by states like Arizona, Minnesota, and New York towards accommodation for medical marijuana patients and employees is growing. New Jersey, like many other states that have legalized medical marijuana but have yet to address employment issues, is taking another look at its statute and moving towards enacting anti-discrimination provisions to protect employees using medical marijuana.<sup>70</sup> Currently, the New Jersey Compassionate Use Act provides no protection or direct cause of action for employees facing discriminatory hiring practices, but that could soon change.<sup>71</sup> In February 2016, a bill was introduced that would bring New Jersey in line with states like Minnesota and amend the New Jersey Compassionate Use Act to prohibit employers from terminating employees based solely on medical marijuana use.<sup>72</sup> This bill was a response to the growing litigation surrounding the New Jersey Compassionate Use Act and employers' refusal to accommodate employee's medical marijuana use.<sup>73</sup>

In fact, New Jersey's proposed anti-discrimination provisions or reasonable accommodation requirements seem to be an emerging nationwide trend. For instance, Pennsylvania's newly enacted state-run medical marijuana program has

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66. N.Y. Public Health Law §3369(2) (McKinney 2017); *see also* Sharon P. Stiller, *Anti-Discrimination Statutes*, 13A N.Y. PRAC, EMPLOYMENT LAW IN NEW YORK § 4:160.50 (2d ed.) (last updated Nov. 2017).

67. Stiller, *supra* note 66.

68. *See* Kathleen Harvey, *Protecting Marijuana Users in the Workplace*, 66 CASE W. RES. L. REV. 209 (2015).

69. *See* N.Y. PUBLIC HEALTH LAW §3369 (McKinney 2017); ARIZ. REV. STAT. ANN. § 36-2813(B) (2010); MINN. STAT. §152.32(3)(c) (2014).

70. *See* Ivo Becica, *Up In Smoke – Are Employers Required to Accommodate Medical Marijuana Use?*, HR LEGALIST (Apr. 20, 2016), <http://www.hrlegalist.com/2016/04/up-in-smoke-are-employers-required-to-accommodate-medical-marijuana-use/>.

71. *See* N.J. STAT. ANN. §24:6I-14 (2010); *see also*, Becica, *supra* note 70

72. Becica, *supra* note 70.

73. *See*, Susan K. Livio, *NJ Transit Sued for Suspending Employee in Medical Marijuana Program*, NJ.COM, Apr. 4, 2014, [http://www.nj.com/politics/index.ssf/2014/04/nj\\_transit\\_sued\\_for\\_suspending\\_employee\\_in\\_medical](http://www.nj.com/politics/index.ssf/2014/04/nj_transit_sued_for_suspending_employee_in_medical_marijuana_program.html)

[\\_marijuana\\_program.html](http://www.nj.com/politics/index.ssf/2014/04/nj_transit_sued_for_suspending_employee_in_medical_marijuana_program.html) (describing problems that arise when employees who are also medical marijuana patients are not afforded accommodations at work and the lawsuits that result).

adopted an explicit anti-discrimination protection for employees.<sup>74</sup> These two states will join a growing list of jurisdictions that provide for anti-discrimination protections in the workplace.<sup>75</sup> As more and more states pass bills legalizing the use of marijuana for medical purposes, they will have to consider the ramifications for employment that come with this legalization. Choosing to address employment issues directly in the statutes provides clear guidance for employers as to the expectations that come with this new treatment as well as protection for employees who participate in the cannabis program.<sup>76</sup>

Many of the remaining states that have medical marijuana programs approach medical marijuana and employment law like *Garcia* did, holding that an employer has no duty to accommodate an employee's medical marijuana use because such accommodation would directly conflict with federal law and is not mandated by state statute.<sup>77</sup> This approach jeopardizes medical marijuana patients who are employed, and disregards state law that recognizes marijuana as a viable medicine. Additionally, accommodating an employee's medical marijuana use does not require an employer to accommodate drug use outside the tight confines of legal medical marijuana. States with medical cannabis programs all narrowly restrict the boundaries of marijuana use, and none permit employees to work while intoxicated or to use marijuana in public places. Participants in medical cannabis programs are also thoroughly screened and must comply with the directives of the state health department.<sup>78</sup>

Implementing a test to monitor an employee's level of impairment rather than a standard drug test would serve as an added protection for employers who accommodate an employee's medical marijuana use.<sup>79</sup> Preliminary research has shown that marijuana, when used correctly for health reasons as opposed to recreationally, generally has little effect on work-performance.<sup>80</sup> Standard drug testing is a limited means to detect impairment because it only reveals the presence of cannabis metabolites, which can enter the body and linger in a person's system

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74. PA. STAT. § 10231.2103(b)(1) (2016).

75. Currently, states with medical marijuana statutes that contain anti-discrimination clauses or protections for participating employees include Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Pennsylvania, and Rhode Island. Yastrow, *supra* note 57. *See also*, The Arkansas Medical Cannabis Act, Section 103(f)(3). The states with anti-discrimination protections for employees constitute almost half of all states which have legalized medical marijuana.

76. The medical marijuana bill recently enacted in Arkansas in 2016 contains an anti-discrimination clause that would protect workers using physician prescribed medical marijuana from employment discrimination. ARK. CONST. AMEND. 98, § 3.

77. *See, e.g.* Emerald Steel Fabricators Inc. v. Bureau of Labor and Indus., 230 P.3d 518, 536 (Or. 2010) (holding that the Oregon Medical Marijuana Act did not require an employer to accommodate an employee's medical marijuana use because such use is illegal under the Controlled Substances Act); Coates v. Dish Network, LLC, 350 P.3d 849, 853 (Colo. 2015) (holding an employee can be terminated as a result of medical marijuana use because such use is not "lawful activity" under federal law); Ross v. Ragingwire Telecomms., Inc., 174 P.3d 200, 203 (Cal. 2008) (holding an employer did not have to accommodate an employee's "illegal drug use").

78. Deitchler, *supra* note 51.

79. *See* Stacy A. Hickox, *Drug Testing of Medical Marijuana Users in the Workplace: An Inaccurate Test of Impairment*, 29 HOFSTRA LAB. & EMP. L. J. 273 (2012).

80. *Id.* at 290.

for up to four weeks after being ingested.<sup>81</sup> Tests measuring levels of impairment rather than the presence of cannabis metabolites have proven to be more effective at preventing accidents and improving workplace safety than standard drug testing alone.<sup>82</sup> Low cost alternatives to traditional drug tests that have already been implemented and that have successfully monitored an employee's level of impairment include direct observation of an employee's behavior, "requiring . . . an employee keep a cursor on track during a computer simulation, or . . . evaluation of eye movements."<sup>83</sup>

### **B. The New Mexico Court of Appeal's Workers' Compensation Decisions and Repercussions**

While New Mexico state courts have not yet ruled on the issue of medical marijuana and employment discrimination, the New Mexico Court of Appeals has decided three significant cases dealing with medical marijuana and workers' compensation. These decisions are pivotal because they could control the outcome of any future litigation involving medical marijuana and employment accommodation. For example, in *Vialpando v. Ben's Automotive Services*, *Lewis v. American General Media*, and *Maez v. Riley Industrial*, the New Mexico Court of Appeals consistently found medical marijuana to be a necessary medical treatment compensable under the Lynn and Erin Compassionate Use Act and the Workers' Compensation Act.<sup>84</sup>

In *Vialpando*, an employee was injured on the job and suffered excruciating pain resulting from the injury.<sup>85</sup> The employee applied for workers' compensation to participate in the physician certified medical marijuana program due to the severe level of pain he was experiencing that was not successfully controlled by strong narcotics.<sup>86</sup> The Workers' Compensation Judge found that the worker was "entitled to ongoing and reasonable medical care" and approved the application for medical marijuana.<sup>87</sup> The employer appealed to the Court of Appeals.<sup>88</sup>

The Court of Appeals found that not only was medical marijuana a "reasonable and necessary health care service," but also that a certification to the state-run medical marijuana program issued by a physician was "the functional equivalent of a [medical] prescription."<sup>89</sup> The Court of Appeals also focused on the intent behind the enactment of the Lynn and Erin Compassionate Use Act, which was for medical marijuana to be easily accessible to those who qualify for it.<sup>90</sup> The court recognized that allowing for medical marijuana to be compensable under the

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81. *See id.* at 301.

82. *See id.* at 306.

83. *Id.* at 305.

84. *Vialpando v. Ben's Automotive Services*, 2014-NMCA-084, 331 P.3d 975; *see also*, *Lewis v. Am. Gen. Media*, 2015-NMCA-090, 355 P.3d 850; *Maez v. Riley Indus.*, 2015-NMCA-049, 347 P.3d 732.

85. *Vialpando*, 2014-NMCA-084, ¶ 2.

86. *Id.* ¶ 3.

87. *Id.* ¶ 4 (internal quotation marks omitted).

88. *Id.*

89. *Id.* ¶¶ 13–14.

90. *Id.* ¶ 13 (quoting the Lynn and Erin Compassionate Use Act, § 26-2B-2).

Workers' Compensation Act furthered the legislative intent of the CUA because it "allow[ed] [for] the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions."<sup>91</sup>

This decision finding medical marijuana to be both a reasonable and necessary medical treatment under workers' compensation was echoed and reaffirmed again by the Court of Appeals in later decisions. In *Maez v. Riley Industrial*, the Court of Appeals held that the worker's attending doctor "adopted a treatment plan that called for medical marijuana. By the very nature of such treatment, medical marijuana was a necessary" medical treatment, as deemed by the worker's doctor, and thus was a legitimate, physician approved treatment plan that should be accorded the same deference as any other prescription medicine.<sup>92</sup>

Similarly, the Court of Appeals held again in *Lewis v. American General Media* that medical marijuana is a reasonable and necessary medical treatment and is compensable under workers' compensation.<sup>93</sup> The professional opinions of the worker's doctors recommending that the worker treat symptoms of debilitating pain with medical marijuana was given deference.<sup>94</sup> The court found marijuana to be compensable, reasonable, and necessary to the worker's medical treatment on this basis and the plain language and legislative intent of the Compassionate Use Act.<sup>95</sup>

### C. The Best Approach for New Mexico: Untangling the Garcia Case

#### 1. Distinguishing an illness from its medicine

The *Garcia* Court held that an employer has no duty to accommodate an employee's medical marijuana use. The court reached this conclusion in part by relying on the *Curry* case and its interpretation of the rights owed to an employee under the Colorado medical cannabis statute.<sup>96</sup> By adopting this approach to medical marijuana and employment accommodation, the Court chose to separate the illness from the treatment. The Court chose to distinguish two inextricably linked concepts and decided that an employee could be terminated based on one, the medicine, but not the other, the illness that causes the need for the medicine. Yet, the illness unquestionably necessitates the medicine, and to separate the two is to misunderstand the dynamics of health, to undercut the rights of a patient in choosing a treatment plan, and to dismiss the laws of the state.

This careful parsing of employment termination on the basis of a medicine and not an illness is inconsistent with the intent of the Lynn and Erin Compassionate Use Act and the New Mexico Human Rights Act. These Acts and their intent are comparable on the federal level to the Americans with Disabilities Act ("ADA"). For instance, the Equal Employment Opportunity Commission, the agency responsible for enforcing the ADA, has brought claims on behalf of employees whose only

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91. *Id.* (quoting the Lynn and Erin Compassionate Use Act, § 26-2B-2).

92. *Maez v. Riley Indus.*, 2015-NMCA-049, ¶ 27, 347 P.3d 732.

93. *Lewis v. Am. Gen. Media*, 2015-NMCA-090, ¶ 2, 355 P.3d 850.

94. *See id.* ¶ 20.

95. *See id.* ¶ 32.

96. *Garcia v. Tractor Supply Co.*, 154 F.Supp.3d 1225, 1228 (D.N.M. 2016).

indication of a disability has been the use of a prescription drug.<sup>97</sup> These non-obvious disabilities, such as mental illness, epilepsy, HIV/AIDS, and others, are still considered disabilities within the meaning of the ADA and are often only detectable through their prescription medication treatments, as they usually display no noticeable outward signs or symptoms.<sup>98</sup> At the state level, the New Mexico Court of Appeals has already held that medical marijuana is a necessary and reasonable medical treatment. It is likely, therefore, that the New Mexico Human Rights Act would protect not only the serious medical condition, but also its reasonable and necessary treatment as defined by the Court of Appeals.

Thus, the similarities between the New Mexico Human Rights Act and the ADA are worth acknowledging and briefly exploring. Employers who terminate employees based on the prescription medicine used to treat a disability violate the ADA non-discrimination requirement.<sup>99</sup> Similarly, the New Mexico Human Rights Act prohibits an employer from discriminating against an employee based on a medical condition.<sup>100</sup> Just as specified under both the ADA and the New Mexico Human Rights Act, an employee cannot be terminated based on a disability and the enforcement of the ADA has often equated a disability or illness with its treatment.<sup>101</sup> It is possible to infer that the New Mexico Human Rights Act is intended to protect people with serious medical ailments from discrimination, and that protection also extends to the medicine used to treat the illness, especially after the rulings by the New Mexico Court of Appeals which found medical marijuana to be a reasonable and necessary medical treatment.

The Court in *Garcia* set a tricky precedent when it reasoned that Mr. Garcia's employment was legitimately terminated due to his medical marijuana use and not due to his serious medical condition. A patient who wishes to participate in the New Mexico Medical Cannabis Program has difficult obstacles to clear, contrary perhaps to popular belief. The patient must have a recognized qualifying medical condition which must be both "chronic and debilitating," and demonstrate that "standard medical treatments have failed to provide adequate relief" and that the "benefits of using medical cannabis outweigh the detrimental side effects."<sup>102</sup> The patient must then successfully navigate through lengthy bureaucratic steps so that

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97. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Press release: Dura Automotive Systems to Pay \$750,000 to Settle EEOC ADA Lawsuit (Sept. 5, 2012), <https://www1.eeoc.gov/eeoc/newsroom/release/9-5-12.cfm>; see also, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Dayton Superior Corporation to Pay \$50,000 to Settle EEOC Disability Discrimination Lawsuit (Jan. 4, 2013), <https://www1.eeoc.gov/eeoc/newsroom/release/1-4-13a.cfm>.

98. The Americans with Disabilities Act, 42 U.S.C. § 12102 (2009).

99. *Id.* § 12112.

100. N.M. STAT. ANN. 1978, § 28-1-7(A) (2004).

101. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: DISABILITY RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (B)(1) (March 4, 2005), <https://www.eeoc.gov/policy/docs/guidance-inquiries.html> (defining a "disability-related inquiry" and likely prohibiting under the ADA questions such as: "asking an employee whether s/he currently is taking any prescription drugs or medications, whether s/he has taken any such drugs or medications in the past, or monitoring an employee's taking of such drugs or medication.")

102. ZIA HEALTH AND WELLNESS MEDICAL CANNABIS PROGRAM, FAQ (2016), <https://www.medicalcannabisprogram.com/mmj/medical-marijuana-program-faq>.

the patient's participation in the program is adequately overseen and monitored by the New Mexico Department of Health.<sup>103</sup>

In these ways, the process to obtain a medical marijuana prescription is much more rigorous than the process to obtain the average prescription medicine.<sup>104</sup> Without a qualifying serious medical condition, of which there is a list, a patient cannot be accepted into the Medical Cannabis Program. The Court, in deciding Mr. Garcia's employment was terminated for marijuana use and not for his serious medical condition, chose to ignore the fact that without the medical condition, Mr. Garcia would not have a medical marijuana card. The court also stunted the intent and the reach of the Lynn and Erin Compassionate Use Act, which was enacted so that patients could, with the guidance of their physician, choose a treatment plan that included medical marijuana. This intent is strengthened by the New Mexico Human Rights Act, which gives patients the security of knowing that they cannot be terminated or discriminated against based on their disability or illness. From the intent of the Compassionate Use Act and from the New Mexico Court of Appeals decisions regarding medical marijuana, it follows that the New Mexico Human Rights Act protects not only the serious medical condition from discrimination, but the method of treatment as well.

Medical marijuana is legally available under New Mexico state law for qualifying patients, and the debate about whether an employer must accommodate an employee's doctor-prescribed use should end there. In keeping with the intent of the Compassionate Use Act, the New Mexico Human Rights Act, and the New Mexico Court of Appeals decisions, a person's medical treatment should remain a personal decision between the patient and the doctor. Compelling an employer to accommodate an employee's medical marijuana use would mean only that the employer cannot terminate an employee solely based on the legal treatment the employee has chosen. In this regard, accommodation of medical marijuana would maintain a clear separation between an employer and an employee's personal medical decisions, and would be in line with the intent of the Compassionate Use Act, the New Mexico Human Rights Act, and the New Mexico Court of Appeals decisions.

Accommodation would in no way require an employer to allow an employee to use medical marijuana on the job-site or during work hours, or allow an employee to work while intoxicated.<sup>105</sup> Instead, accommodation would only mean that if an employee chooses to treat a serious medical condition with medical marijuana during non-work hours, and that use does not interfere with the employee's job performance, then medical marijuana should not be a factor in employment decisions. The *Garcia* Court, in ruling that the employee was

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103. *See id.*

104. *See* NATIONAL INSTITUTES OF HEALTH, *Getting a Prescription Filled* (Aug. 1, 2015), <https://medlineplus.gov/ency/article/001956.htm> (describing how to obtain a prescription medicine, which typically consists of seeing a doctor and filling the prescription at a pharmacy).

105. No state that requires employers to accommodate employee medical marijuana use requires accommodation of on-the-job marijuana use or visible intoxication. *See*, G.M. Filisko, *Employers and Workers Grapple With Laws Allowing Medical Marijuana Use*, ABA JOURNAL (Dec. 1, 2015), [http://www.abajournal.com/magazine/article/employers\\_and\\_workers\\_grapple\\_with\\_laws\\_allowing\\_marijuana\\_use/](http://www.abajournal.com/magazine/article/employers_and_workers_grapple_with_laws_allowing_marijuana_use/) (last visited Dec. 17, 2017).

terminated due to his medical treatment and not his medical condition, gave the employer a say in the employee's private medical decisions. This decision not only gives an employer undue influence over an employee's private medical decision, but is also contrary to the intent and plain language of the New Mexico Human Rights Act, the Lynn and Erin Compassionate Use Act, and the controlling New Mexico Court of Appeals decisions.

*2. Can an employer face penalties for an employee's medical marijuana use?*

The next consideration that must be addressed if employers are to accommodate an employee's medical marijuana use is whether the employer can face any legal repercussions for that accommodation. One area of concern for employers could stem from the Drug Free Workplace Act. The Drug Free Workplace Act requires employers who wish to contract with or receive grants from the federal government to comply with specific conditions.<sup>106</sup> However, employers are not required to administer drug tests to their employees or report the results of drug tests in order to meet the requirements of the Drug Free Workplace Act.<sup>107</sup> The only requirements imposed on employers to keep federal grants or contracts is to make employees aware that the workplace is drug-free, meaning no drug-use is permitted on-site and that adverse action can be taken against an employee who does not comply with this policy.<sup>108</sup> The Act makes no mention or prohibition of an employee's at-home use of a drug that is legal under state law like medical marijuana.<sup>109</sup>

There appears to be no legal consequence an employer can face for accommodating an employee's medical marijuana use other than the loss of federal grants or contracts under the Drug Free Workplace Act. Consequently, the only remaining barrier to accommodation is an employer's concern for workplace safety. Again, this issue can be addressed by creating a strict workplace policy that prohibits employees from using medical marijuana on-the-job and by implementing a test for impairment that would prevent employees from working while intoxicated. In fact, every state that requires employers to accommodate an employee's medical marijuana use already has such prohibitions and protections written into their statutes.<sup>110</sup> Medical marijuana accommodation is viable so long as it is not abused, and employees bear the responsibility of complying with the state Medical Cannabis Program and an employer's job performance standards.

### III. CONCLUSION

#### A logical way forward for New Mexico

The New Mexico Court of Appeals cases finding medical marijuana to be compensable under the Workers' Compensation Act provide critical guidance for

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106. 41 U.S.C. §§ 8102–03 (2011).

107. *Id.* § 8102.

108. *Id.* § 8102(A)–(C).

109. *See id.* § 8102(A).

110. *See* Deitchler, *supra* note 51.

New Mexico's future approach to medical marijuana and employment discrimination. The Court of Appeals has set the precedent that medical marijuana is not only compensable, but that it is a reasonable and necessary medical treatment, and that a recommendation from a physician to the state's Medical Cannabis Program is the working equivalent of a prescription.

In keeping with the logic of these rulings, it follows that because many medical marijuana patients have disabilities recognized under the New Mexico Human Rights Act, the course of treatment must also be protected under the both the plain language of the Act and the Court of Appeals' decisions. This would entail making employment decisions, including hiring decisions, based solely on an employee's qualifications and not on the employee's medical status or positive drug test indicating legal medical marijuana use. This approach would fulfill the intent of the New Mexico Human Rights Act and the Lynn and Erin Compassionate Use Act by allowing patients with serious illnesses to treat those illnesses with medical marijuana and protect them from adverse employment actions based solely on that use. It would also be consistent with the New Mexico Court of Appeals' decisions on medical marijuana, and provide protection for those who choose this reasonable, necessary, and legal medical treatment option.

Accommodating an employee's medical marijuana use would also exempt employers from tolerating intoxicated employees or on-the-job use. An effective way to simultaneously accommodate an employee's use and address an employer's concern for workplace safety would be to implement a test measuring an employee's level of impairment rather than a standard drug test.<sup>111</sup> A test for impairment would be a cost-effective alternative to a traditional drug test and would prevent discrimination based exclusively on medical marijuana use rather than safety or job-performance.

The parameters of accommodation would be clearly delineated so that while an employer cannot terminate an employee based only on medical marijuana use, the employer has grounds to terminate an employee if the medical marijuana use interferes with job-performance or workplace safety. Such an accommodation would strike the balance between an employee's privacy and right to choose to treat a serious medical condition with medical marijuana, and an employer's need to maintain a safe work zone. Such an accommodation would also satisfy the intent of the Lynn and Erin Compassionate Use Act and the New Mexico Human Rights Act, and be consistent with the holdings of the New Mexico Court of Appeals workers' compensation cases. Accommodating an employee's medical marijuana use in this way would account for the intent of the relevant state authorities and be a logical way forward for New Mexico and New Mexican medical marijuana patients.

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111. See Stacy A. Hickox, *Drug Testing of Medical Marijuana Users in the Workplace: An Inaccurate Test of Impairment*, 29 HOFSTRA LAB. & EMP. L. J. 273 (2012).