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Employment Law—Dazed and Confused: Arkansas Employers and the Arkansas Medical Marijuana Amendment of 2016

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EMPLOYMENT LAW—DAZED AND CONFUSED: ARKANSAS EMPLOYERS AND THE ARKANSAS MEDICAL MARIJUANA AMENDMENT OF 2016.

I. INTRODUCTION

Has the passage of the Arkansas Medical Marijuana Amendment of 2016 ("Amendment") dazed and confused Arkansas employers? Medical marijuana laws have changed the employment landscape. Employers who continue to manage and discipline marijuana users the same way they did as prior to the passage of medical marijuana laws could face repercussions. The following case highlights an employer who made this mistake.

In 2008, Wal-Mart hired Carol Whitmire as a cashier for one of its stores in Arizona.[1] Whitmire worked diligently for Wal-Mart, evidenced by her promotion to "Customer Service Supervisor" in 2013.[2] Around this time, a doctor gave Whitmire a prescription for medical marijuana.[3] Later, Whitmire injured her wrist while working and reported the injury to Wal-Mart's human resources department, who then followed standard pre-medical marijuana law procedures when it ordered Whitmire to take a urine test.[4] Whitmire failed the urine test because of her use of medical marijuana.[5] Human resources personnel, lacking expertise regarding medical marijuana, assumed that Whitmire was under the influence of marijuana at work.[6] Wal-Mart then terminated Whitmire based on this belief.[7] However, Arizona's medical marijuana statute included protections for medical marijuana patients against employment penalties based only on a failed drug test.[8] In the end, a federal court in Arizona ruled that Wal-Mart unfairly discriminated against Whitmire by terminating her for no reason other than a failed drug test[9] and granted summary judgment in favor of Whitmire.[10]

Whitmire provides a glimpse into Arkansas employers' potential challenges. The Arkansas Medical Marijuana Amendment of 2016 left employers confused about their options when dealing with medical marijuana users in

1. Whitmire v. Wal-Mart Stores Inc., 359 F. Supp. 3d 761, 769 (D. Ariz. 2019).
2. *Id.*
3. *Id.* at 770.
4. *Id.*
5. *Id.* at 770–71.
6. *Id.* at 785 (holding that personnel did not have the requisite "knowledge, skill, experience, training, or education" to determine whether Whitmire was under the influence of marijuana).
7. *Whitmire,* 359 F. Supp. 3d at 771.
8. ARIZ. REV. STAT. ANN. § 36-2813 (2010).
9. *Whitmire*, 359 F. Supp. 3d at 791.
10. *Id.* at 792.

the workplace. Specifically, confusion over what an employer can do when they believe an employee used or is under the influence of marijuana while at work. This confusion will continue and the goals of the Arkansas Medical Marijuana Amendment of 2016 undermined, unless Arkansas courts interpret the Arkansas Medical Marijuana Amendment of 2016 as requiring employers to have *proof* of marijuana intoxication or use at the workplace before taking disciplinary actions against medical marijuana users.

In other words, this Note argues that Arkansas courts should interpret the Amendment as requiring employers to observe marijuana use or behavior associated with marijuana intoxication, instead of depending solely on suspicions or a failed drug test, before being able to take disciplinary action against medical marijuana users. Section II examines the background and language of the Amendment.[11] Next, Section III delves into arguments that, if successful, would preclude all lawsuits under the Amendment.[12] Section IV then examines how courts in other states have interpreted medical marijuana laws similar to the Amendment.[13] Section V looks at the Amendment's good faith exception, which, if interpreted loosely, would require no proof.[14] Section VI offers solutions for employers to address this proof burden.[15].

II. BACKGROUND

Marijuana's medicinal history in the United States has deep roots.[16] In the nineteenth century, American medical journals listed marijuana as an effective treatment for medical problems such as stomach pain and gout.[17] However, this positive perception of marijuana began to diminish in the early twentieth century.[18] A negative perception grew from various factors, including fears that addicts would substitute marijuana for other drugs as well as negative stereotypes towards immigrant communities associated with the drug.[19] Further, propaganda at the time cast the image that marijuana users were prone to acts such as rape, theft, and even murder.[20]

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11. *See infra* Section II.
12. *See infra* Section III.
13. *See infra* Section IV.
14. *See infra* Section V.
15. *See infra* Section VI.
16. *See* Michael Berkey, *Mary Jane's New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 417, 420–21 (2011) (stating that medical journals listed the positive health effects of marijuana use).
17. *Id.*
18. *Id.* at 423 (explaining that negative rumors about marijuana users began to circulate).
19. *Id.*
20. Kaloyan Ivanov, *High Times: The Evolution of the Stigma on Marijuana and Attempts to Tear it Down*, LAKE FOREST COLL. (Feb 18, 2017), https://www.lakeforest.edu/news/high-times-the-evolution-of-the-stigma-on-marijuana-and-attempts-to-tear-it-down.

Because of this growing negative perception, state and local governments began to issue bans on the drug.[21] Prohibitions remained a state issue until 1932, when the federal government introduced a model act available for state governments to pass, the Uniform Narcotic Drug Act.[22] Congress passed the act motivated by "the growing hysteria about dope fiends and criminality."[23] Supporters of the act promoted its adoption by creating fabricated horror stories about marijuana use filled with racial stereotypes.[24]

Congress also passed the Marihuana Tax Act of 1937.[25] This act placed business and tax restrictions on doctors who prescribed marijuana, leading to a dramatic decrease in doctors willing to prescribe medical marijuana.[26] Shortly after the passage of this law, all states made possession of marijuana illegal,[27] and Congress continued to pass laws that changed federal drug regulations.[28] After this spurt of legislation, Congress went dormant in passing substantial new marijuana legislation until the later part of the century.[29] Ending this dormancy, in 1970, Congress passed the prohibitive Controlled Substances Act (CSA) which remains as the primary federal regulation for marijuana.[30]

In the latter twentieth century, the recreational use of marijuana gained popularity.[31] While the federal government maintained its total ban on marijuana,[32] some states began to ease legal restrictions and allow research into the therapeutic benefits of marijuana.[33] In 1996, California became the first

21. Berkey, *supra* note 16, at 423.
22. *Id.*
23. *Id.*
24. *Id.* at 424 (asserting that civil servant Henry Anslinger, head of the Federal Bureau of Narcotics from 1932 to 1962, concocted fictitious stories to further anti-marijuana political goals, causing state legislatures to ignore scientific reports when passing legislation restricting marijuana use).
25. *Id.* at 425. "Marihuana" is the spelling originally used by the federal government and then adopted by some states. *See e.g.*, *Why is marijuana sometime spelled with an "h" and other times spelled with a "j"?*, STATE OF MICH., https://www.michigan.gov/cra/faq/licensing-list/additional-new/why-is-marijuana-sometimes-spelled-with-an-h-and-other-times-spelled-with-a-j (last visited Dec. 26. 2022). This Note adopts the modern spelling where a "j" is used.
26. Berkey, *supra* note 16, at 425.
27. LISA N. SACCO, CONG. RSCH. SERV., R43749, DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS 4 (2014).
28. *Id.* at 4–5.
29. *Id.*
30. *Id.* at 5–6.
31. Berkey, *supra* note 16, at 426.
32. *Id.*
33. *Id.* at 427.

state to legalize medical marijuana.[34] This started a trend, and thirty-seven additional states eventually legalized marijuana in some form.[35]

Arkansas followed this trend and passed the Arkansas Medical Marijuana Amendment of 2016 by a ballot measure.[36] The Arkansas General Assembly then added provisions to the Amendment in 2017,[37] thus, both a majority of Arkansas voters and the Arkansas General Assembly approved the current medical marijuana policy. The policy goals of the Amendment aim to protect qualified medical marijuana patients from both criminal prosecution and business discrimination.[38] The Amendment clearly states this goal:

> A qualifying patient or designated caregiver in actual possession of a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner or denied any right or privilege, including without limitation a civil penalty or disciplinary action by a business, occupational, or professional licensing board or bureau, for the medical use of marijuana in accordance with this amendment . . . .[39]

Based on this passage, the Amendment intends for qualified patients to have some protections in the workplace.

The Amendment balances employer's interests with those of qualified medical marijuana patients.[40] Section 3(A) states the protections for qualified users: "An employer shall not discriminate against an applicant or employee in hiring, termination, or any term or condition of employment, or otherwise penalize an applicant or employee, based upon the applicant's or employee's past or present status as a qualifying patient."[41] Importantly, the Amendment's protections extend only to those considered *qualifying patients*.[42] The Amendment defines qualifying patients as individuals a doctor has diagnosed with a qualifying medical condition and who are properly registered with the Arkansas Department of Health.[43] The Amendment casts a broad net on what

34. Sarah Trumble, *Timeline of State Marijuana Legalization Laws*, THIRD WAY (May 2, 2016), https://www.thirdway.org/infographic/timeline-of-state-marijuana-legalization-laws.

35. Jeremy Berke et al., *2 New States Voted to Legalize Marijuana in the 2022 Elections. See a List of Every State Where Cannabis is Legal*, BUS. INSIDER (Nov. 09, 2022 3:48 PM), https://www.businessinsider.com/legal-marijuana-states-2018-1.

36. *Overview of Arkansas's Medical Marijuana Amendment*, MARIJUANA POL'Y PROJECT, https://www.mpp.org/states/arkansas/overview-arkansass-medical-marijuana-amendment/ (last visited Oct.15, 2022).

37. *Id.*

38. ARK. CONST. amend. XCVIII, § 3(a).

39. *Id.*

40. *Id.* § 3(f)(3)(A) (listing protections for employees but also listing situations where employers can discriminate, such as the employee being in the workplace under the influence of marijuana).

41. *Id.*

42. *Id.* (mentioning only protections for qualifying patients) (emphasis added).

43. *Id.* § 2(14)(A).

conditions and diseases count as qualifying medical conditions.[44] Specifically, the Amendment mentions diseases such as cancer and glaucoma as qualifying medical conditions.[45] However, a disease, medical condition, or treatment that produces certain symptoms, such as severe nausea, are also qualifying medical conditions.[46] Therefore, with such a broad range of qualifying conditions, thousands of Arkansans likely meet the Amendment's definition of qualifying patient.

On the other hand, the Amendment also protects the interest of the employer. For example, sections (f)(3)(B)(i) and (f)(3)(B)(iii) allow employers to avoid hiring medical marijuana patients in certain situations, such as safety-sensitive positions.[47] Further, section (f)(3)(B)(ii)(b) provides a safe harbor where an employer can act against a qualified marijuana user without facing legal repercussions when acting under a good faith belief that an employee was "under the influence of marijuana while on the premises of the employer or during the hours of employment, provided that a positive test result for marijuana cannot provide the sole basis for the employer's good faith belief."[48]

However, to utilize this good faith exception, the employer must provide evidence other than a failed drug test.[49] The basis for this reasoning derives from the fact that the standard test for marijuana is not effective at determining whether a person is under the influence, how much of the drug was taken, or when the drug was last used.[50] One scholar stated, "[a] positive urine test establishes nothing more than some prior use or exposure to the controlled substance, and should not be used as evidence of current intoxication or impairment."[51] The reason for this is because such tests are based on the presence of marijuana metabolites in the body that can remain detectable for up to four weeks after the use of marijuana.[52] Since employers cannot depend on drug tests, they must have other proof or evidence on which to base employment decisions.[53] The next logical question consists of what Arkansas courts will require for sufficient proof.

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44. *See* ARK. CONST. amend. XCVIII, § 2(13)(A).
45. *Id.*
46. *Id.*§ 13(B).
47. *Id.* § 3(f)(3)(B).
48. *Id.*
49. *Id.* (stating "that a positive test result for marijuana cannot provide the sole basis for the employer's good faith belief").
50. Stacy A. Hickox, *Drug Testing of Medical Marijuana Users in the Workplace: An Inaccurate Test of Impairment*, 29 HOFSTRA LAB. & EMP. L.J. 273, 299 (2012).
51. *Id.* at 300.
52. *Id.* at 301.
53. ARK. CONST. amend. XCVIII, § 3(f)(3)(B) (stating that a drug test cannot be the only proof of intoxication, indicating that other proof must be provided).

The Amendment only requires a good faith belief, but this belief must be reasonable and not maliciously or negligently formed.[54] Courts have not yet determined the proof or evidence threshold required to meet this standard.[55] Nevertheless, the Amendment states that the belief can be based on observed behavior or appearance.[56] To that end, the Amendment states that an analysis of an employee's behavior to determine if he or she is under the influence can include any unordinary conduct of the qualifying patient, such as unusual speech, unusual coordination, disregard for safety, or involvement in an accident that damages equipment or leads to an injury.[57]

III. PREVENTATIVE ARGUMENTS AGAINST CLAIMS UNDER MEDICAL MARIJUANA STATUTES

This section identifies common employer arguments that have prevented lawsuits under other states' medical marijuana statutes: preemption and no private cause of action. It also examines possible obstacles under Arkansas's at-will employment standard.

A. Preemption

Preemption arises out of the U.S. Constitution's Supremacy Clause, which states that legitimate federal laws "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[58] Essentially, when federal and state law conflict, federal law displaces state law.[59] Courts have held that federal law can preempt state law in various ways,[60] but federal statutes do not preempt a state law unless it is "clear and manifest" that preemption was Congress's intent.[61]

The federal law that poses the most substantial preemption threat to the Amendment is the Controlled Substances Act.[62] Under the CSA, it is illegal

54. *Id.* § 2(23)(A).

55. At the time this Note was published, no Arkansas appeals court had ruled on a case concerning this part of the Amendment.

56. *Id.* § 2(23)(C)(i).

57. *Id.* § 2(26)(B).

58. U.S. CONST. art. VI, cl. 2.

59. Legal Info. Inst., *Preemption,* CORNELL LAW SCH., https://www.law.cornell.edu/wex/preemption (last visited Dec. 30, 2022).

60. Noffsinger v. SSC Niantic Operating Co., 273 F. Supp. 3d 326, 333 (D. Conn. 2017) (stating that federal law can preempt state law by express preemption, field preemption, and obstacle preemption).

61. *Id.*

62. Controlled Substances Act, 21 U.S.C. §§ 801–971.

to possess, use, or distribute any marijuana.[63] The United States Supreme Court has stated that "[t]he main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances."[64] In other states, employers have argued that the CSA preempts medical marijuana statutes.[65]

Under medical marijuana statutes that contained no anti-discrimination provision, the preemption argument has prevailed.[66] In *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, the Supreme Court of Oregon decided a case concerning a medical marijuana statute that did not contain an anti-discrimination provision.[67] The Supreme Court of Oregon looked at how this statute and the federal CSA "intersect in the context of an employment discrimination claim."[68] The court did not look at the statute's role in the employment sector but, instead, looked at its broad purpose.[69] The statute unambiguously attempted to make medical marijuana use legal.[70] However, this purpose stood in defiance of the goals of the CSA to prohibit the use of marijuana, including medicinal,[71] and the court ruled that this conflict preempted the state law.[72] Seemingly, the court's result is reasonable based on the broad-purpose examination conducted.[73]

However, other courts in states with statutes that contain an anti-discrimination provision performed a narrower examination.[74] Specifically, Rhode Island and Connecticut courts have interpreted medical marijuana statutes with anti-discrimination provisions.[75] The Connecticut court even recognized the result in *Emerald Steel* and explained the legal difference:

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63. *Noffsinger*, 273 F. Supp. 3d at 334.

64. Gonzales v. Raich, 545 U.S. 1, 12 (2005).

65. *Noffsinger*, 273 F. Supp. 3d at 333; *see* Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 R.I. Super. LEXIS 88, at *38–39 (R.I. Super. Ct. 2017); *see also* Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d. 518, 526 (Or. 2010).

66. *See generally Emerald Steel*, 230 P.3d at 526 (listing reasons why the preemption argument is successful when there is no anti-discrimination provision).

67. *Id.* at 519–20 (noting that the statute only exempted medical marijuana patients from criminal liability).

68. *Id.* at 520.

69. *Id.* at 529.

70. *Id.*

71. *Id.*

72. *Emerald Steel*, 230 P.3d. at 529.

73. *Id.* (analyzing the broad purpose of the law instead of a narrower inspection of the law in the context of employment conditions).

74. *See generally* Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 R.I. Super. LEXIS 88, at *14 (R.I. Super. Ct. 2017); Noffsinger v. SSC Niantic Operating Co., 273 F. Supp. 3d 326, 334–35 (D. Conn. 2017).

75. *Callaghan*, 2017 R.I. Super. LEXIS 88, at *14 ("The question is, then, does the protection Rhode Island affords employees come into such a positive conflict?"); *Noffsinger*, 273 F. Supp. 3d at 334–35 (explaining that the Connecticut statute differs from the one in *Emerald Steel* because the statute in *Emerald Steel* did not explicitly ban employment discrimination).

> The very different question presented in *Emerald Steel* was whether the CSA more generally preempted a provision of Oregon law that authorized the use of medical marijuana. Here, by contrast, the question is whether the CSA preempts a provision that prohibits an employer from taking adverse action against an employee on the basis of the employee's otherwise state-authorized medicinal use of marijuana.[76]

Essentially, these courts view medical marijuana statutes with anti-discrimination provisions as regulating employment relationships.[77] Compared to the broader view of statutes with no anti-discrimination provisions,[78] this narrower view makes a drastic difference because there is a presumption against preemption in areas of the law traditionally left to the states, such as employment.[79] Drawing on this, the Connecticut court ruled that the purpose of the CSA did not involve employment: The CSA "does not make it illegal to employ a marijuana user; [n]or does it purport to regulate employment practices in any manner."[80] Because of the presumption against preemption and lack of frustration of purpose, courts, like those in Connecticut, have ruled against preemption arguments when the statutes included anti-discrimination provisions.[81]

The Amendment contains an anti-discrimination section, section 3(f)(3)(A).[82] This section states, "An employer shall not discriminate against an applicant or employee in hiring, termination, or any term or condition of employment, or otherwise penalize an applicant or employee, based upon the applicant's or employee's past or present status as a qualifying patient."[83] Arkansas courts should follow the logic of other state courts and interpret this anti-discrimination provision in a way such that the CSA does not preempt the Amendment.

Looking at the Amendment's anti-discrimination provision, the provision moderates the employment relationship rather than the broad purpose of legalizing marijuana.[84] This part of the Amendment centers on employers, employees, and the relationship between the two.[85] Like other courts, Arkansas courts should not find this provision to be preempted by federal law and ineffective. As stated, traditionally, the federal government leaves

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76. *Noffsinger*, 273 F. Supp. 3d at 335.
77. *Id.* at 336.
78. *See supra* notes 66–73 and accompanying text.
79. *Callaghan*, 2017 R.I. Super. LEXIS 88, at *14.
80. *Noffsinger*, 273 F. Supp. 3d at 334.
81. *See Callaghan*, 2017 R.I. Super. LEXIS 88, at *15; *see also Noffsinger*, 273 F. Supp. 3d at 336.
82. ARK. CONST. amend. XCVIII, § 3(f)(3)(A).
83. *Id.*
84. *Id.*
85. *Id.*

employment law to the states.[86] Arkansas courts should not strip the state legislature of its ability to regulate the employer-employee relationship. Simply, the CSA does not concern the employer-employee relationship because that statute does not mention regulating or punishing employers for employing drug users.[87] There is no clear intent emanating from Congress through the CSA that Congress meant for the act to regulate the employer-employee relationship.[88] Therefore, like other states with anti-discrimination provisions, it would be inappropriate for lawsuits under the amendment to be preempted by the CSA.

B. Private Right of Action

Another argument against lawsuits under medical marijuana statutes is that the statutes do not establish a private right of action.[89] In Arkansas, courts have held they can determine whether a private right of action exists, even if the legislature did not explicitly communicate so in unambiguous language in the statute.[90] Specifically, courts attempt to "give effect to the intent of the General Assembly."[91] Courts also interpret unambiguous language with the normal and usual meaning.[92] Further, courts attempt to interpret provisions of a statute in a way that is "sensible, consistent, and harmonious."[93] Moreover, the Arkansas Constitution provides "[e]very person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character."[94] However, monetary damages are only allowed when the statute specifically calls for it.[95] To this end, courts will attempt to "construe the statute so that no word is left void, superfluous, or insignificant, and . . . give meaning and effect to every word in the statute, if possible."[96]

Looking at the plain language of the Amendment, it is clear the Amendment creates a private right of action. First, Section 3(3)(B) of the Amendment mentions "[a] cause of action" and then lists exemptions for employers.[97] A

86. *Callaghan*, 2017 R.I. Super. LEXIS 88, at *14.
87. Controlled Substances Act, 21 U.S.C. §§ 801–971.
88. *Id.*
89. *See* Noffsinger v. SSC Niantic Operating Co., 273 F. Supp. 3d 326, 338 (D. Conn. 2017); *see also Callaghan*, 2017 R.I. Super. LEXIS 88, at *5.
90. Baptist Health v. Murphy, 2010 Ark. 358, at 28–29, 373 S.W. 3d 269, 287–88 (stating that to determine whether a private right of action exists requires interpretation of the statute); *see also* Young v. Blytheville Sch. Dist., 2013 Ark. App 50, at 6, 425 S.W.3d 865, 871.
91. *Baptist Health,* 2010 Ark. 358, at 29, 373 S.W. 3d at 288.
92. *Id.*, 373 S.W. 3d at 288.
93. *Id.*, 373 S.W. 3d at 288.
94. ARK. CONST. art. II, § 13.
95. Larry Hobbs Farm Equip., Inc v. CNH Am., LLC, 375 Ark. 379, 389, 291 S.W.3d 190, 197 (2009).
96. *Young*, 2013 Ark. App 50, at 7, 425 S.W.3d at 871.
97. ARK. CONST. amend. XCVIII, § 3(f)(3)(B).

cause of action must exist for this part of the statute to make sense and be harmonious with the rest. If a cause of action does not exist, the exemptions are pointless. Also, Section 3(3)(D) lists instructions for damages based "on an employment discrimination claim."[98] As stated earlier, Arkansans are entitled to remedies created by statutes,[99] but monetary damages are only available if the statute provides for them.[100] Section 3(3)(D) shows the intent of the Arkansas legislature was to make monetary damages available through a private cause of action brought by private citizens if an employer violates the Amendment. Additionally, Section 3(3)(E) of the Amendment lists a statute of limitations of one year for a cause of action.[101] Again, for this section to read harmoniously with the rest of the Amendment, a private cause of action must be available; otherwise, the section regarding the statute of limitations would be meaningless. Simply put, there must be a private cause of action under the Amendment, because an Arkansas court cannot allow so many sections of a statute to be without meaning.[102] Therefore, an argument that the Amendment did not create a private cause of action is unlikely to succeed.

C. At-Will Employment

Another question to examine is if Arkansas's at-will employment status could prevent a lawsuit under the Amendment. At-will employment means that the employer could terminate or change the terms of employment for any reason.[103] In effect, at-will employers can terminate an employee for good cause, bad cause, or no cause at all without facing legal repercussions.[104] However, the law restricts this power if it violates a public policy; for example, employers cannot discriminate against constitutionally protected classes.[105]

Arkansas law follows this trend. The Supreme Court of Arkansas first utilized the public policy exception in *Sterling Drug, Inc. v. Oxford*.[106] In that case, a salesman claimed his company terminated him for reporting the

98. *Id.* § 3(f)(3)(D).
99. ARK. CONST. art. II, § 13.
100. *Larry Hobbs Farm Equip.*, 375 Ark. at 389, 291 S.W. 3d at 197.
101. ARK. CONST. amend. XCVIII, § 3(f)(3)(E).
102. *See* Noffsinger v. SSC Niantic Operating Co., 273 F. Supp. 3d 326, 334 (D. Conn. 2017).
103. *At-Will Employment-Overview*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 15, 2008), https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx.
104. Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 3.
105. Alison Doyle, *Exceptions to Employment at Will*, THE BALANCE CAREERS (July 21, 2020), https://www.thebalancecareers.com/exceptions-toemployment-at-will-2060484.
106. Sterling Drug, Inc. v. Oxford, 294 Ark. 239, 249, 743 S.W.2d 380, 381(1988).

company's wrongdoing to a government agency.[107] The court utilized this exception and stated that, "[w]e hold that an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state."[108] Specifically, "[i]t is generally recognized that the public policy of a state is found in its constitution and statutes."[109] The court then referenced Ark. Code. Ann. § 5-53-112, which forbids retaliation against an informant.[110] Essentially, Arkansas has a public policy that favors citizen informants, and employers who terminate employees for reporting crimes violated this public policy.[111]

Further, the at-will doctrine does not prevent discrimination lawsuits.[112] For example, in *Island v. Buena Vista Resort*, a woman sued her previous employer for sexual harassment based on the Arkansas Civil Rights Act,[113] which created a protected class based on gender by forbidding gender discrimination.[114] The woman claimed that the owner of the company she worked for continued to make sexual advances toward her and that she was fired after she refused such advances.[115] However, the male owner claimed he terminated the woman because he wanted to replace her with his son.[116] Then, the owner argued that as long as he could provide a gender-neutral reason for the termination the at-will doctrine precluded a discrimination lawsuit.[117]

However, the court rejected the owner's argument.[118] The court concluded "that the possible existence of a non-gender-based reason for appellant's termination is not determinative of her sexual-harassment claim,"[119] affirming that protected classes take precedence over the at-will doctrine. Arkansas follows the at-will doctrine because of common law, and Arkansas courts do not allow common law doctrine to override codified law.[120] Therefore, if Arkansas's codified law creates a protected class, the protections

107. *Id.* at 242, 743 S.W. 2d at 381.
108. *Id.* at 249, 743 S.W.2d at 381.
109. *Id.*, 743 S.W.2d at 381.
110. ARK. CODE ANN. § 5-53-112 (2021).
111. *Sterling*, 294 Ark. at 250, 743 S.W.2d at 381.
112. *See generally* Island v. Buena Vista Resort, 352 Ark. 548, 552, 103 S.W.3d 671, 673 (2003).
113. *Id.* at 553, 103 S.W.3d at 673.
114. *Id.* at 556, 103 S.W.3d at 675.
115. *Id.* at 553, 103 S.W.3d at 673.
116. *Id.*, 103 S.W.3d at 673.
117. *Buena Vista Resort*, 352 Ark. at 561, 103 S.W.3d at 678.
118. *Id.*, 103 S.W.3d at 678.
119. *Id.*, 103 S.W.3d at 678.
120. Ark. Dep't of Corr. v. Jennings, 2017 Ark. App. 446, at 9, 526 S.W.3d 924, 929 (stating that Arkansas follows the at-will doctrine because of common law as opposed to statutory law).

afforded to that class cannot be prevented by the at-will doctrine.[121] In other words, the Amendment made qualifying patients a protected class by forbidding businesses from denying rights and privileges to such patients.[122] The public policy of a state is in its codified law, including a state's constitution.[123] As the Amendment is part of the Arkansas Constitution,[124] the protections afforded to qualifying patients must be part of the state's public policy. Accordingly, Arkansas courts must apply the public policy exception in a lawsuit brought under the Amendment because the at-will doctrine cannot override the codified protections. [125] Therefore, the at-will doctrine should not prevent a lawsuit brought under the Amendment.

IV. RESULTS IN OTHER STATES WITH SIMILAR PROTECTIONS FOR MEDICAL MARIJUANA USERS

As previously mentioned, the Amendment has provisions that protect qualified patients in the workplace,[126] but Arkansas courts have not yet interpreted these provisions.[127] However, Rhode Island, Connecticut, and Arizona have medical marijuana laws similar to Arkansas's Amendment. Additionally, courts in these jurisdictions have interpreted the statutes to require that employers have proof of marijuana use or possession before disciplining qualified patients.[128] In light of these similarities, Arkansas courts should use these decisions as guidance when interpreting the Amendment.

A. Rhode Island

Rhode Island's statute is similar to Arkansas's Amendment in that it protects both applicants and employees who are qualified medical marijuana

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121. *Id.*, 526 S.W.3d at 929 ("While it is true that Arkansas is, by common law, an employment-at-will state, a common-law doctrine cannot override the clear and specific enactments of the Arkansas General Assembly . . . .").

122. ARK. CONST. amend. XCVIII, § 3(A).

123. *Jennings*, 2017 Ark. App. at 9, 526 S.W.3d at 929 (quoting 1 HOWARD W. BRILL & CHRISTIAN H. BRILL, ARKANSAS LAW OF DAMAGES § 19:2 (6th ed. 2014)) ("Public policy is established by the Constitution and statutes.").

124. *See* ARK. CONST. amend. XCVIII.

125. *Jennings*, 2017 Ark. App. at 9, 526 S.W.3d at 929 (stating codified law cannot be overridden by the common law at-will doctrine).

126. ARK. CONST. amend. XCVIII, § 3(f)(3)(A).

127. *Medical Marijuana Laws and Anti-Discrimination Provisions,* MARIJUANA POL'Y PROJECT, https://www.mpp.org/issues/medical-marijuana/medical-marijuana-laws-anti-discrimination-provisions/ (last updated Feb. 7, 2022).

128. *See generally id.*; *see infra* Section IV(A)–(C) (listing pertinent parts of state statutes and court decisions that interpreted the statutes).

patients from discrimination.[129] In *Callaghan v. Darlington Fabrics Corp.*, the Rhode Island Supreme Court interpreted the state's anti-discrimination provision.[130] Christine Callaghan claimed that Darlington violated the anti-discrimination provision in Rhode Island's medical marijuana statute.[131] Callaghan, a qualified patient under the Rhode Island statute, applied for one of Darlington's internship positions.[132] Callaghan informed Darlington of her qualified patient status and that she would not stop using medical marijuana if Darlington selected her.[133] Because Callaghan could not pass a mandatory drug test, Darlington decided to eliminate Callaghan from consideration for the position based on her qualified patient status.[134]

Darlington believed that a qualified patient would be a risk at the workplace and require accommodations that Darlington did not believe were mandated by the statute.[135] The court agreed with Darlington's stance that the statute did not require Darlington to make accommodations for Callaghan at the workplace, such as modifying work schedules or reassigning duties.[136] However, Callaghan did not ask for accommodations at the work site, and Callaghan agreed to confine her marijuana use to outside of the workplace.[137] The court ruled Darlington could not disqualify Callaghan solely for being a medical marijuana patient and granted summary judgment in her favor against Darlington.[138] In other words, disqualifying a qualified patient based only on the suspicion that their status would inhibit their work performance violated the protections of the medical marijuana statute.[139] According to this interpretation, evidence or proof that medical marijuana use would affect the applicant's job performance is necessary for the employer's decision to overcome the statute's protections.[140]

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129. *Compare* Protections for the Medical Use of Marijuana, 21 R.I. GEN. L. § 21-28.6-4 (2019), *with* ARK. CONST. amend. XCVIII, § 3(f)(3)(A) ("An employer shall not discriminate against an applicant or employee in hiring, termination, or any term or condition of employment, or otherwise penalize an applicant or employee, based upon the applicant's or employee's past or present status as a qualifying patient or designated caregiver.").

130. 2017 R.I. Super. LEXIS 88, at *6 (R.I. Super. Ct. 2017).

131. *Id.* at *2.

132. *Id.*

133. *Id.* at *3–4.

134. *Id.*

135. *Id.* at *27–28 (stating that the defendant claimed its work facility had dangerous equipment that would require accommodations for a medical marijuana user).

136. *Callaghan*, 2017 R.I. Super. LEXIS 88, at *28–30.

137. *Id.*

138. *Id.*at *29–31.

139. *See id.* at *28–31.

140. *See id.* (hinting that the result could have been different if accommodations were being asked for or if Callaghan admitted she would use marijuana at work).

B. Connecticut

Connecticut's medical marijuana statute also has an anti-discrimination provision that protects both applicants and employees.[141] The federal district court in Connecticut applied this provision in *Noffsinger v. SSC Niantic Operating Co.*[142] SSC Niantic rescinded a job offer it had made to Katherine Noffsinger after Noffsinger informed the company that she was a qualified medical marijuana patient and unable to pass a drug test.[143] Noffsinger claimed that SSC Niantic violated Connecticut's medical marijuana statute by discriminating against her.[144]

Both parties agreed that the only reason SSC Niantic rescinded Noffsinger's offer was her inability to pass a drug test.[145] The court emphasized that an employer could limit drugs, the use of drugs, and qualified patients from working under the influence at the employer's work premises.[146] However, the evidence suggested that Noffsinger only used medical marijuana during the evenings and that this time frame would not intersect with when Noffsinger would be working at SSC Niantic.[147] The court then granted summary judgment in favor of Noffsinger.[148] Like *Callaghan*, the Connecticut court reasoned that disqualifying a qualified patient based only on the suspicion that their status would inhibit their work performance violated the protections of the medical marijuana statute.[149] The employer needed actual proof that medical marijuana use or intoxication would occur on the worksite instead of just preconceived beliefs.[150]

C. Arizona

Arizona's medical marijuana law is similar to Arkansas's medical marijuana Amendment. Arizona's law has an anti-discrimination provision, an exception if the employer believes in good faith that an employee is on work premises under the influence, and the exception does not apply if the only evidence suggesting impairment is a drug test.[151] The federal district court in

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141. CONN. GEN. STAT. ANN. § 21a-408p (2022).
142. 338 F. Supp. 3d 78, 81 (D.Conn 2018).
143. *Id.*
144. *Id.* at 81, 83.
145. *Id.* at 84.
146. *Id.* at 85.
147. *Id.* at 86 (stating that Noffsinger solely used medical marijuana during the evenings).
148. *Noffsinger*, 338 F. Supp. 3d 78, at 86.
149. *See id.* at 85–86.
150. *See id.* (hinting that a different result could have been reached if the employer had shown medical marijuana use would have taken place at work).
151. *See* ARIZ. REV. STAT. ANN. § 36-2813 (2022).

Arizona applied this law in *Whitmire v. Wal-Mart Stores Inc.*[152] Carol Whitmire worked for Wal-Mart until Wal-Mart fired her after she failed a drug test.[153] Wal-Mart asked Whitmire to take a drug test after a workplace injury.[154] Importantly, Whitmire talked to Wal-Mart supervisors on the day they accused her of being impaired on the job.[155]

Wal-Mart based its decision to fire Whitmire on how one of its supervisors interpreted Whitmire's drug test results; the supervisor believed that the level of marijuana metabolites found in Whitmire were so high that Whitmire was under the influence while at work.[156] The supervisor specifically stated that it was "upon reasonable belief, Plaintiff's May 24, 2016 positive test result for marijuana indicated that she was impaired by marijuana during her shift that same day."[157] The court stated Wal-Mart fired Whitmire based solely on the drug test "*in the absence of any other evidence of impairment.*"[158] The court then granted judgment in favor of Whitmire on her discrimination claim under the Arizona Medical Marijuana Statute. [159] Again, this decision shows that actual proof of marijuana intoxication, such as observance of intoxicated behavior or on-premises use, is required before an employer can take disciplinary action.

D. Ramifications

Noffsinger, *Callaghan*, and *Whitmire* highlight different parts of the employment cycle. *Callaghan* concerned the pre-offer part of the hiring process,[160] *Noffsinger* took place during the conditional offer phase,[161] and *Whitmire* involved a current employee.[162] However, all required the employer to have actual proof of marijuana intoxication, on-premises use at the workplace, or future on-premises use before the employer could act. The courts did not allow employers to base decisions on mere suspicion or a drug test alone. The Amendment—like Connecticut, Rhode Island, and Arizona's medical

152. 359 F. Supp. 3d 761, 744 (D. Ariz. 2019).
153. *See supra* Section I.
154. *See id.*
155. *Whitmire*, 359 F. Supp. 3d at 770–71 (stating that Whitmire spoke with different Wal-Mart managers and supervisors on the day of her workplace injury and the day of her follow up complaint).
156. *Id.* at 771.
157. *Id.*
158. *Id.* at 789 (emphasis added).
159. *Id.* at 800–01.
160. Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 R.I. Super LEXIS 88, at *4 (R.I. Super. Ct. 2017) (stating no employment offer had been made to Callaghan, and, instead, Callaghan was disqualified from consideration when her medical marijuana use became known).
161. Noffsinger v. SSC Niantic Operating Co., 338 F. Supp 3d 78, 81 (D. Conn. 2018).
162. *Whitmire*, 359 F. Supp. 3d at 769.

marijuana statutes—grants protections to applicants and employees.[163] Arkansas courts should use these decisions as guidance because these interpretations flow logically with the Amendment's structure and language.[164] Accordingly, this would require Arkansas employers to provide proof, not just suspicions or a drug test, when taking action against medical marijuana users in similar situations.

To remind, the Amendment states, "An employer shall not discriminate against an applicant or employee in hiring, termination, or any term or condition of employment, or otherwise penalize an applicant or employee, based upon the applicant's or employee's past or present status as a qualifying patient or designated caregiver."[165] Arkansas courts should interpret this provision as requiring at least some proof that marijuana use occurred on-premises, will occur on premises, or that the employee was under the influence of marijuana while at work—like the Connecticut, Arizona, and Rhode Island courts. Conclusively, employers must present some proof of this to support the employer's decisions because the Amendment specifically forbids employment decision being based on the patient's status, which would include preconceived beliefs or suspicions associated with that status. The fact that multiple other courts follow this interpretation strengthens this position.

The Amendment then states employers will not be penalized if they act under a good faith belief that a qualifying patient possessed medical marijuana or was under the influence of medical marijuana.[166] A difficult question regarding interpretation then arises: How difficult would it be to prove the employer acted on a "good faith belief?" Therefore, the key to determining the Amendment's protections is in deciphering what is included in a "good faith belief."

V. GOOD FAITH BELIEF EXCEPTION

On its face, a "good faith belief" seems like a manageable standard for employers to meet or even abuse; however, a closer review of the standard reveals this is not the case. The Amendment defines a good faith belief as a "reasonable reliance on a fact, or that which is held out to be factual, without intent to deceive or be deceived and without reckless or malicious disregard for the truth."[167] While Arkansas courts have not yet interpreted what is required on behalf of employer's in the Amendment's context, another more

163. ARK. CONST. amend. XCVIII, § 3(f)(3)(A) ("An employer shall not discriminate against an applicant or employee in hiring . . . .").

164. *Id.* § 3(f).

165. *Id.*

166. *Id.* § 3(B)(ii).

167. ARK. CONST. amend. XCVIII, § 2(23)(A).

defined area of the law contains a standard with similar language: Arkansas's Voluntary Drug-Free Workplace Program.

The Voluntary Drug-Free Workplace Program is an Arkansas Workers' Compensation Commission program.[168] The main benefit of this volunteer program is a reduction in the employer's workers' compensation insurance premium.[169] The program mandates rules that employers must follow to continue to receive benefits.[170] One of these rules requires employers to drug test an employee if there is reasonable suspicion the employee is using drugs or alcohol.[171] In this context, reasonable suspicion is "a belief that an employee is using or has used drugs or alcohol . . . drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience."[172]

There are several similarities between the requirements for reasonable suspicion and a good faith belief. Both rest on the employer's belief that an employee is using drugs; however, the employer must base that belief on facts.[173] Also, both requirements include a reasonableness factor.[174] The reasonable suspicion standard requires a "reasonable inference," while the good faith belief requires "reasonable reliance." "Inference" is "a conclusion or opinion that is formed because of known facts or evidence."[175] Therefore, a person needs facts to form an inference. In other words, an inference relies on facts. When deconstructed, a "reasonable inference" must include "reasonable reliance."

While the good faith belief standard does not mention "specific objective and articulable" facts,[176] it is hard to imagine the employer not needing to meet this requirement. If the employer cannot depend on a drug test to meet the good faith belief, it must depend largely on situational facts. If the employer cannot articulate the specific facts that led to its good faith belief, it is hard to envision the employer being able to take advantage of the exception. Further, one could read the good faith belief as allowing an employer to base its belief on general facts, such as medical marijuana patient status, about the employee. However, the Amendment limits its use to a belief that the

168. *Voluntary Drug-Free Workplace Program*, ARK. WORKERS' COMP. COMM'N, http://www.awcc.state.ar.us/drugfree.html (last visited Mar. 8, 2022).

169. ARK. CODE. ANN. § 11-14-112 (2021).

170. *Id.* (stating employers will only get the benefits if they implement a drug free workplace program).

171. 099-00 Code Ark. R. § 001 (LexisNexis 2022).

172. *Id.*

173. *Compare id.* § 001(III)(U), *with* ARK. CONST. amend. XCVIII, § 2(23)(A).

174. *Compare* 099-00 Code Ark. R. § 001(III)(U), *with* ARK. CONST. amend. XCVIII, § 2(23)(A).

175. *Inference*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/inference (last visited Feb 19, 2022).

176. ARK. CONST. amend. XCVIII, § 2(23)(A).

employee is on work premises under the influence.[177] Thus, an employer needs specific and articulable facts.

Essentially, a "good faith belief" and the standard found under the Arkansas Voluntary Drug-Free Workplace Program have the same requirements, just in different words. The main difference between the two is that if the employer has "reasonable suspicion" they must drug test the employee,[178] while on the other hand, the employer must show a good faith belief to act against an employee in certain situations.[179]This slight difference might be enough for Arkansas courts to not want to transfer the requirements under a "reasonable suspicion" to the "good faith belief" exception.

However, in Connecticut, a "reasonable suspicion" standard for drug testing does grant employee protections and must be met before the statute permits employers to act. Connecticut's law requires employers to have reasonable suspicion that an employee is under the influence of drugs or alcohol before employers can mandate a drug test.[180] Courts in Connecticut interpreted this standard as focusing on the employer's perception.[181] But, Connecticut law also requires the suspicion to be objective and based on reasonable, articulable facts.[182] So, the Connecticut reasonable suspicion standard contains the same requirements as Arkansas's reasonable suspicion standard.[183] Being so homogenous, Arkansas courts should interpret the good faith exception as requiring similar proof as Connecticut's reasonable suspicion standard. The following cases show what type of evidence Connecticut courts require under this standard.

In *Poulos v. Pfizer, Inc.*, security guards caught an employee attempting to steal office supplies, which led to supervisors having a disciplinary meeting with the employee.[184] At the meeting, supervisors discussed the employee's past behavior. This behavior included actions that occurred before the theft incident, such as the employee's problematic attendance, the employee borrowing money from an office fund and coworkers, and incidents of flare-ups with coworkers.[185] The supervisors believed the employee's behavior was aberrant and that this aberrant behavior granted reasonable suspicion.[186] The

177. *Id.* § 3(f)(3)(B)(ii).
178. 099-00 Code Ark. R. § 001(III)(U).
179. ARK. CONST. amend. XCVIII, § 3.
180. CONN. GEN. STAT. ANN. § 31-51x (2022).
181. Imme v. Fed. Express Corp., 193 F. Supp. 2d 519, 524 (D. Conn. 2002).
182. Poulos v. Pfizer, Inc., No. 520719, 1999 Conn. Super. Lexis 665, at *23 (Conn. Super. Ct. Mar. 15, 1999).
183. 099-00 Code Ark. R. § 001 (standard requires "a belief that an employee is using or has used drugs or alcohol . . . drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience").
184. 1999 Conn. Super. Lexis 665, at *3–8.
185. *Id.* at *24–25.
186. *Id.* at *25.

employer defined aberrant behavior as "a bizarre behavioral incident or a number of uncharacteristic behaviors over some period of time."[187]

The court ruled that the statute in question required employers to have reasonable suspicion at the time an employee's performance was supposedly affected by drugs or alcohol.[188] Therefore, the supervisors should have only examined the employee's performance when the employee attempted to steal office supplies.[189] But, the examination the supervisors performed was not detailed and primarily focused on events outside of the theft incident.[190] Importantly, during the theft incident, none of the supervisors or security personnel reported any criteria listed in the employer's policy that would indicate intoxication, such as glassy eyes, unsteady walk, or slurred speech.[191] The court concluded that the "[employer]'s decision maker did not have specific and articulable facts which would objectively support the conclusion required by the statute."[192] Therefore, the employer did not have reasonable suspicion.[193]

Imme v. Fed. Express Corp. is another case decided under the Connecticut reasonable suspicion drug test law.[194] In this case, a supervisor, trained in drug recognition under the company's policy,[195] suspected a third-year employee was under the influence at work.[196] The supervisor had worked with the employee long enough to know the employee's normal behavioral patterns.[197] During the incident, the supervisor noticed the employee behaving strangely,[198] including getting into a verbal altercation, chewing on a piece of plastic, pacing back and forth suspiciously, and talking to himself through a company radio.[199] Consequently, the supervisor asked the employee to take a drug test, but the employee refused.[200] This refusal provided grounds for the employer to fire the employee.[201]

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187. *Id.* at *28–29.
188. *Id.* at *30.
189. *See id.* at *30–31.
190. *Poulos*, 1999 Conn. Super. Lexis 665, at *24–25.
191. *Id.* at *31.
192. *Id.*
193. *Id.* at *32.
194. 193 F. Supp. 2d 519, 521 (D. Conn. 2002).
195. *Id.* (stating the supervisor received training about once a year on drug policy procedures, including what to look for and do under the FedEx drug policy).
196. *Id.* (stating the employee had been at FedEx longer than three years but had only been in his then current position for three years at the time of the incident).
197. *Id.* at 522 (noting the supervisor stated the employee was normally loud, energetic, and aggressive).
198. *Id.* at 521.
199. *Id.* at 521–22.
200. *Imme*, 193 F. Supp. 2d at 522.
201. *Id.*

The court looked at the totality of the circumstances to determine if reasonable suspicion to fire the employee existed.[202] This examination included the supervisor's training, knowledge, experience with the employee in question,[203] and all the strange behavior the supervisor noticed during the event.[204] Further, the supervisor compared the strange behavior to how the employee normally acted.[205] The court concluded that all of this evidence gave the employer reasonable suspicion to believe the employee was under the influence of drugs,[206] and ruled in favor of the employer.[207]

Comparing these cases shows what evidence Arkansas courts should require under the good faith exception. First, the employer must be able to list specific facts. In *Imme,* the supervisor noted several different employee actions that led to its belief that the employee was under the influence.[208] While in *Poulos,* the employee simply noted the behavior was aberrant and defined aberrant in a generalized way.[209] Also, only facts contributing to the belief surrounding the specific incident of intoxication will be relevant. In *Poulos,* the employer considered factors that occurred outside of the incident at issue, such as attendance and another incident where the employer borrowed money from an office fund.[210] The court determined that these facts were irrelevant when calculating reasonable suspicion.[211] While in *Imme,* the employer primarily focused on factors that occurred during the incident or the day of the incident.[212] The court ruled these factors were relevant in the calculation of reasonable suspicion.[213]

To remind, this Note's thesis was that the Arkansas Medical Marijuana Amendment of 2016 placed a proof burden on employers before employers could take action against medical marijuana users. Looking at how other state courts interpret statutes with similar language, Arkansas courts should interpret that a proof burden does exist, and employers can no longer make employment decisions against medical marijuana users based solely on the

202. *Id.* at 525.
203. *Id.*
204. *Id.* at 526.
205. *Id.*
206. *Imme*, 193 F. Supp. 2d at 526.
207. *Id.* at 528.
208. *Id.* at 521–22.
209. Poulos v. Pfizer, Inc., No. 520719, 1999 Conn. Super. Lexis 665, at *25–29 (Conn. Super. Ct. Mar. 15, 1999).
210. *Id.* at *24–25.
211. *Id.* at *30–31.
212. *Imme*, 193 F. Supp. 2d at 521–22.
213. *Id.* at 526.

suspicion of marijuana use or intoxication. However, the threshold to meet it should not be difficult.[214]

VI. EMPLOYER SOLUTIONS

Employers have the challenge of adopting solutions that not only protect the employer's interest but also do not discriminate against qualified patients. Studies have established a connection between drug abuse and problems such as theft, compromised workplace safety, productivity problems, absenteeism, and increased medical costs.[215] Further, impaired workers expose the employer to possible liabilities, such as lawsuits where the intoxicated employee injures coworkers or third parties.[216] However, the Amendment seeks to protect qualified patients from the inherent unfairness of being punished solely for their status as a qualified patient.[217] Effective solutions will balance these opposing concerns.

A. Procedural Training

Using Connecticut's reasonable suspicion standard as guidance, employers should focus on specific facts centered on the incident of workplace intoxication.[218] Employers should focus on facts that occurred during or near the timeframe of the alleged intoxication incident.[219] For the most part, negative facts about the employee that occurred before the alleged incident will be irrelevant.[220] Further, employers should record their observations of the employee's behavior as specifically as possible.[221] In terms of quality, other courts have required individualized suspicion, which is more than an inarticulate hunch, to fulfill reasonable suspicion.[222] The employer establishing

214. *Id.* (showing that a wide range of behavior satisfied the standard as long as it was abnormal from regular behavior).

215. John Winn, *When the Going Gets Weird, the Weird Turn Pro: Management Best Practices in the Age of Medicinal Marijuana*, 25 ROGER WILLIAMS U. L. REV. 60, 63 (2020).

216. *Id.* at 64–65.

217. ARK. CONST. amend. XCVIII, § 3(a).

218. *See supra* Section V.

219. *Imme*, 193 F. Supp. 2d at 521–22.

220. Poulos v. Pfizer, Inc., No. 520719, 1999 Conn. Super. Lexis 665, at *24–25 (Conn. Super. Ct. Mar. 15, 1999) (stating that bad attendance and stealing money from coworkers and the company Christmas fund did not contribute to the calculation of reasonable suspicion).

221. *See Imme*, 193 F. Supp. 2d at 521–22 (court ruled that employer noting several specific strange behavioral issues such as chewing on plastic, pacing, and the employee talking to themselves was enough to establish reasonable suspicion); *but see Poulos*, 1999 Conn. Super. Lexis 665, at *26 (court ruled that employer only noting that employee's behavior was aberrant was not enough evidence to conclude reasonable suspicion).

222. *See* Greer v. McCormick, No. 14-cv-13596, 2017 U.S. Dist. Lexis 54087, at *2 (E.D. Mich. Apr. 10, 2017) (quoting Smith v. White, 666 F. Supp. 1085, 1089 (E.D. Tenn. 1987));

procedures like these would ensure focus on the intoxication event as opposed to the status of the qualified patient.

For some Arkansas employers, meeting this standard will only require training their supervisors on proper procedure with no substantive side of training. Supervisors know or learn the normal behavior of employees.[223] In situations of suspected intoxication, the supervisor would notice any abnormal behavior from the employee, indicating potential drug use.[224] If the supervisor notes and remembers the behavior of the employee, he or she could fulfill the requirements of the good faith exception.[225] Some Arkansas employers already have supervisors who perform such functions because it is a requirement for the Voluntary Drug-Free Workplace Program.[226] However, this Note still suggests that employers require substantive training as well, especially large employers. The reasoning is the possibility of a situation where the supervisor does not know the employee's behavior well enough.

B. Substantive Training

For substantive training, employers must know the symptoms of marijuana intoxication. Symptoms of cannabis intoxication include psychological and behavioral changes.[227] These changes include euphoria, altered judgment, impaired motor coordination, anxiety, and slowed reaction time.[228] A diagnosis of cannabis intoxication depends on the presence of at least two of the following signs: conjunctival injection (red eyes), appetite increase, dry mouth, or tachycardia (rapid heartbeat).[229]

Unfortunately, marijuana's effects on cognitive function are not as straightforward and depend on various factors.[230] Specifically, factors such as age, experience with marijuana, gender, and mood could change the effects that marijuana has on cognitive function.[231] The manner in which the user

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see also Reeves v. Singleton, 994 S.W.2d 586, 592 (W.D. Mo. 1999) ("A reasonable suspicion is more than a 'hunch'.").

223. *Imme*, 193 F. Supp. 2d at 521 (showing an example of a supervisor knowing the normal behavior of the employee they supervise).

224. *Id.*

225. ARK. CONST. amend. XCVIII, § 3(f)(3)(A) ("An employer shall not discriminate against an applicant or employee in hiring, termination, or any term or condition of employment, or otherwise penalize an applicant or employee, based upon the applicant's or employee's past or present status as a qualifying patient or designated caregiver.").

226. Townley v. Ga. Pac. Corp., 2012 Ark. App. 48, at 6, 338 S.W.3d 475, 479 (asserting that employer drug tested an employee under the reasonable suspicion mandate; the employer noted the employee was acting drowsy, slurred his speech, and had a workplace accident).

227. Hickox, *supra* note 50, at 284-85.

228. *Id.*

229. *Id.* at 284.

230. *Id.* at 286.

231. *Id.*

smokes marijuana and the ingested dosage can also vary the impact of impairment on cognitive function.[232] In effect, determining if a person is under the influence of marijuana is complicated.[233] However, employers can look at how other entities determine marijuana intoxication.

Like employers, police departments around the country must address issues created by medical marijuana statutes, such as catching those who drive under the influence (DUI). In some states, police officers cannot rely solely on a chemical test when determining if a driver is under the influence of marijuana.[234] In these states, a DUI charge depends on the police officer evaluating the driver's behavior and physical condition.[235] Normally, the police officer tasked with the evaluation is a special "drug recognition expert."[236] These special experts have extended training that can include a month of initial training and years of refresher courses on the effects of marijuana.[237] A typical examination by a drug recognition expert ("DRE") follows certain steps. First, the DRE determines if a drug other than alcohol is causing the impairment, and if so, the DRE moves the suspect to a controlled environment.[238] In the controlled environment, the DRE will test the suspect's physiological elements, such as blood pressure and heart rate.[239] The DRE will also ask the suspect to perform various tests, such as walking in a line and turning around, standing with closed eyes and estimating how much time passes, and standing on one leg and touching one's fingers to one's nose.[240] Specifically for cannabis, the DRE looks for an elevated pulse, dilated pupils, lack of eye convergence (such as being able to cross one's eyes), bloodshot eyes, body tremors, and eyelid tremors.[241] Normally, DRE's look for multiple indicators or failure of the physical test before determining that the suspect is impaired.[242]

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232. *Id.*

233. Maki Becker, *There's No Breath Test for Drugs. Here's How Police Detect Driving While High*, BUFFALO NEWS (Apr. 3, 2019), https://buffalonews.com/news/local/crime-and-courts/theres-no-breath-test-for-drugs-heres-how-police-detect-driving-while-high/article_bdca7912-8531-5907-af6e-dce177c43460.html (stating that testing for marijuana impairment was not "simple" primarily because there are no straightforward tests, such as a breath test, available for marijuana intoxication).

234. Teri Moore, *How Do Police Officers Determine Marijuana Impairment in Drivers?*, REASON FOUND. (Feb. 22, 2018), https://reason.org/commentary/how-do-police-officers-determine-marijuana-impairment-in-drivers/.

235. *Id.*

236. Becker, *supra* note 233.

237. *Id.*

238. Moore, *supra* note 234.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* (asserting that an officer looking for multiple signs to determine impairment is like needing to have multiple ingredients before declaring a certain thing is a pizza).

Like the police, employers would benefit from having supervisors trained in drug recognition. Although not to the extent that DRE officers are trained, it is not unheard of for supervisors to be trained in drug recognition.[243] For example, the Department of Transportation required its supervisors to undergo one hour of training on the signs and symptoms of drug use and maintain documentation of the supervisors' participation in the training.[244] This Note advises that all employers should follow the DOT's actions and begin to train their supervisors on similar practices.

Once supervisors have been trained, employers could also model test programs like the programs that police departments have implemented. One possibility is impairment testing that involves a computer. For example, software programs that require the employee to manipulate a cursor in a video simulation.[245] Other machine-based tests use an eye scanner to measure ocular response time and then compare the employee's results with an unimpaired baseline result.[246] Further, other psychomotor tests could be utilized, such as those used by DRE police officers and some employers.[247] However, employers should still use standard chemical drug tests in these situations, even though alone they are not conclusive, as some form of confirmation.[248]

If employers prefer a different option to those that police departments have taken, the private market may soon provide an answer. There are already businesses that provide training in substance abuse programs for supervisors.[249] These courses cover important topics such as the effects of abuse in the workplace, common indicators of drug abuse, and the proper procedure for incidents that arise.[250] Further, creators designed some of these courses for certain industries, such as construction.[251] Some of these programs may already be substantive enough for medical marijuana.[252] If not, it is likely that future businesses will attempt to take advantage of this void and create programs to teach employers specifically about medical marijuana.

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243. FIRST LAB INC., A SUPERVISOR'S MANUAL: GUIDELINES FOR REASONABLE SUSPICION DRUG AND ALCOHOL TESTING, at 8 (2002).

244. *Id.* at 7.

245. Winn, *supra* note 215, at 73.

246. *Id.*

247. Hickox, *supra* note 50, at 305–06.

248. Winn, *supra* note 215, at 73.

249. *Alcohol & Substance Abuse for Supervisors and Managers For General Industry*, CLICKSAFETY, https://www.clicksafety.com/alcohol-substance-abuse-for-supervisors-and-managers-for-general-industry (last visited Feb. 20, 2022).

250. *Id.*

251. *Alcohol And Substance Abuse for Construction*, CLICKSAFETY, https://www.clicksafety.com/alcohol-and-substance-abuse-for-construction (last visited Feb. 20, 2022).

252. CLICKSAFETY, *supra* note 249 (addressing substance abuse which oftentimes includes marijuana).

C. Possible Solutions Outside of the Good Faith Exception.

While not the focus of this Note, other sections of the Amendment would allow employers to avoid hiring qualified patients in certain situations. Section 3(f)(3)(B)(iii) concerns positions that the Amendment describes as "safety sensitive."[253] This part of the Amendment states employers are allowed "to exclude a qualifying patient from being employed in or performing a safety sensitive position based on the employer's good faith belief that the qualifying patient was engaged in the current use of marijuana."[254] The definition section of the Amendment defines a "safety sensitive" position as any position that involves a safety sensitive function as defined by the United States Department of Transportation, state government agencies, or federal government agencies.[255] Further, employers are allowed to exclude persons from positions where an intoxicated qualified patient may threaten health or safety.[256] The Amendment then lists job activities that qualify under this standard, such as carrying a gun, performing life-threatening procedures, or operating heavy equipment.[257] Suppose the employer decides to go with this option, this Note suggests the employer analyze the job position with an attorney to make sure the job position qualifies under this section.

Further, section 3(f)(3)(B)(i) might also allow employers to avoid hiring qualified patients. This section allows employers to take action in accordance with a drug-free workplace policy that complies with state or federal law.[258] The most important state or federal law in this regard is the Federal Drug-Free Workplace Act of 1988.[259] This law defines drug-free workplace as a workplace where the drug manufacture, distribution, possession, and use do not occur.[260] The law requires federal contract holders or grant recipients to follow the requirements of the law, including having a drug-free policy that is enforced on employees.[261] It is easy to see how there could be possible conflicts between this law and hiring qualified patients, as marijuana is still illegal under federal law.[262] Arkansas employers who receive federal funding might be able to use section 3(f)(3)(B)(i) of the Amendment to avoid hiring qualified

253. ARK. CONST. amend. XCVIII, § 3(f)(3)(B)(iii).
254. *Id.*
255. *Id.* at § 2(25)(A).
256. *Id.* at § 2(25)(B).
257. *Id.*
258. *Id.* at § 3(f)(3)(B)(i).
259. Drug-Free Workplace Act of 1988, Pub. L. No. 111-350, § 3, 124 Stat. 3806 (codified as amended at 41 U.S.C. §§ 8101–06).
260. 41 U.S.C. § 8101.
261. *Id.* at § 8102.
262. *Drug Scheduling*, DEA, https://www.dea.gov/drug-information/drug-scheduling#:~:text=Schedule%20I%20drugs%2C%20substances%2C%20or,)%2C%20methaqualone%2C%20and%20peyote (last visited Feb. 20, 2022).

patients. If an employer thinks they might meet the qualification under this section, they should analyze their position and speak with a legal professional.

VII. CONCLUSION

In conclusion, the Arkansas Medical Marijuana Amendment of 2016's protections should place a burden of providing evidence of intoxication on employers before they can take disciplinary actions against qualified patients. The burden is low and the threshold should be easy for employers to meet.[263] In other words, employers must show actual proof of marijuana intoxication, such as observed intoxicated behavior or use, instead of basing decisions on a drug test or mere suspicions.

The Amendment's anti-discrimination provision allows claims that arise under it to withstand the preventative arguments of preemption, no private cause of action, and at-will employment.[264] In states with similar medical marijuana statutes, courts have interpreted that evidence was necessary and employers could not rely solely on drug tests, suspicions, or the qualified patient's status.[265]

Further, the good faith exception for employers is not as easy to meet as its title seems.[266] The exception requires reasonable reliance.[267] Since reasonable suspicion for drug tests contains a similar standard, Arkansas courts should adopt the reasonable suspicion standard as the standard for the good faith exception.[268] The reasonable suspicion standard requires specific facts focused on the intoxication event that occurred on the work premises.[269] Under this suggested standard, employers could no longer depend on pre-medical marijuana law procedures, where suspicion and drug test failures were enough to support adverse employment decisions. Employers would need actual proof that the medical marijuana patient used marijuana at work or was under the influence at work. This actual proof would include things such as observed strange behavior.

Luckily, there are plenty of solutions available to employers. First, some employers may only need to update their procedural processes.[270] Second, other entities, such as police departments, are having to face similar changes,[271] so employers could easily model or adopt some of the training that

263. *See supra* Section V.
264. *See supra* Section III.
265. *See supra* Section IV
266. *See supra* Section II; *see also supra* Section V.
267. *See supra* Section V.
268. *See supra* Section V.
269. *See supra* Section V.
270. *See supra* Section VI.
271. *See supra* Section VI.

these departments have implemented.[272] Third, employers could take advantage of private programs that provide education on the signs of marijuana intoxication.[273] Fourth, employers could speak to legal counsel to determine if they meet the requirements for exceptions that would allow them to not hire qualified medical marijuana patients.[274] Regardless, Arkansas employers must adapt to the new landscape surrounding medical marijuana. However, solutions are available for adoption by employers to help them escape the dazed and confused state that the Arkansas Medical Marijuana Amendment of 2016 left them in.

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272. *See supra* Section VI.
273. *See supra* Section VI.
274. *See supra* Section VI.

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