Cannabis Legalization in Illinois and Disability Rights
Equip For Equality

▶ Protection and advocacy (P&A) system for the State of Illinois
▶ **Mission:** Advance the human & civil rights of people with disabilities in Illinois
▶ **Free legal assistance** for people with disabilities about issues related to their disability
▶ **Legal teams:** Civil Rights, Special Education, Abuse Investigations

Voice: 800.537.2632 TTY: 800.610.2779
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Employment Rights Helpline

- For job seekers and employees with disabilities
- Helpline staff can:
  - Discuss employee rights under the ADA
  - Answer employment rights questions
  - Assist with reasonable accommodations
  - Help callers understand their options
  - Share fact sheets, sample letters and forms
  - Give referrals and other assistance as needed

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Today’s Session

Overview of Relevant Laws

- Americans with Disabilities Act
- Federal Fair Housing Act
- Illinois Human Rights Act
- Compassionate Use of Cannabis Program Act

Questions
Americans with Disabilities Act

- Federal civil rights law
- Title I: Employment
- Title II: Public entities
- Title III: Private businesses
- Does not apply to private, multi-family housing
- Has non-discrimination and more proactive requirements – reasonable accommodations
Americans with Disabilities Act
Who is protected?

- **Actual Disability**
  - An individual who has an *impairment* that substantially limits a major life activity

- **Record of**
  - Record of or history of an actual disability

- **Regarded As**
  - *Perceived* to have an impairment

- **Association**
  - Association with a person with a disability
Americans with Disabilities Act
Who is not protected?

▶ An individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use
▶ Whether a substance is illegal depends on whether it is illegal as defined by the federal Controlled Substances Act (CSA).
▶ **CSA**: Marijuana is an illegal controlled substance with no exception for medicinal use
▶ **Result**: Courts uniformly hold that the ADA does not protect people who currently use marijuana
What does currently engaging mean?

If an individual fails a drug test, courts easily reach the conclusion that they are currently engaged in the use of illegal drugs

- *See, e.g., Daniels v. City of Tampa* 2010 WL 1837796 (M.D. Fla. Apr. 12, 2010) (finding the plaintiff to be “currently engaged” in the illegal use of drugs when the plaintiff was involved in a vehicle accident and the required post-accident drug/alcohol test was positive for cocaine)
What does **currently** engaging mean?

More complicated question:
- How long does an individual have to be drug-free to no longer be considered currently engaging in the illegal use of drugs?
- No categorical rules
- **Courts/EEOC:** An applicant’s or employee’s drug use is current if it occurred recently enough to justify an employer’s reasonable belief that the individual’s involvement with drugs is an ongoing problem.
What does *currently* engaging mean?

**Suarez v. Penn. Hosp. of Univ. of Penn. Health Sys.**


- 5.5 months after completing 29 days of intensive inpatient treatment, nurse was fired from her job
- Employer: Drug use was recent enough to justify belief that her usage was an ongoing problem
- **Court:** Not currently engaging; covered by ADA
- When nurse was discharged from treatment program, it was recommended that she return to the practice of nursing two weeks after the date of her release; complied with monitoring contract
The ADA **does** apply in the following situations ...

- Individual successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs or has otherwise been rehabilitated successfully and is no longer engaging in such use.
- Individual is *participating in a supervised rehabilitation program* and is no longer engaging in such use
- Individual is *erroneously* regarded as engaging in such use, but is not engaging in such use
- Entity does not act on the basis of drug-use
The ADA does apply in the following situations ...

**EEOC v. Pines of Clarkston**


- Employee with epilepsy who used medical marijuana was fired
- **Employer:** Used illegal drugs – no ADA protections
- **Employee:** Not true. Really fired due to epilepsy
- **Court:** Jury could find reason was pretextual
  - Employee was “grilled about her epilepsy” - told that “the position would be too stressful for her based on her medical condition”
Does the ADA apply?

- **John** has a history of drug addiction, including cannabis. He participated in a drug rehabilitation program and has not used cannabis in nine months. He is not hired for a job because of concerns that he will begin using cannabis again.
Does the ADA apply?

- **Jake** previously smoked marijuana socially, but hasn’t done so in nine months. He is not hired for a job because of concerns that he will begin using cannabis again.
Does the ADA apply?

- Cynthia lives in Illinois. She has a medical marijuana card and uses marijuana in the evenings to treat her PTSD. She is given a job offer, but then fails a drug test based on her marijuana use.
Does the ADA apply?

- Jose spends significant time outside of his job with a group of co-workers. His friends all tested positive for marijuana. Jose’s boss sees him outside in the parking lot with these friends, concludes that he also uses cannabis and fires him.
Does the ADA apply?

- **Natalie’s** son has had treatment for substance abuse in the past. Natalie is applying for new jobs and, after her prospective employer learns this information, Natalie is not hired.
Disability-Inquiries & Medical Exams

- The ADA prohibits employers from certain disability-related inquiries and medical exams.
- Rules differ based on stage of employment:
  - Pre-employment
  - Post-conditional job offer
  - Current employees
- Tests for illegal use of drugs are not medical exams so can be conducted at any stage of employment.
- Inquiries about drug use:
  - Current use = OK under the ADA
  - Past use = Not OK if questions get at addiction
Public Entities & Private Businesses

- Titles II and III do **not** prohibit discrimination against current users of illegal drugs, **except**:

- Public entities and places of public accommodation cannot deny someone access to **health services** or **services connected with drug rehabilitation** on the basis of illegal drug use.
Federal Fair Housing Act

- Disability does not include current, illegal use or addiction to a control substance, as defined by CSA
- Not a large body of case law about this definition or whether permitting medical marijuana is a reasonable modification

State laws

Illinois Human Rights Act

Compassionate Use of Medical Cannabis Program Act
Illinois Human Rights Act

- Protects people from disparate treatment and requires reasonable accommodations
- Disability does not include an employee currently engaging in the illegal use of drugs. 775 ILCS 2-104(C)(1).
- An employer “may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees.” 775 ILCS 5/2-104(C)(3)(a).
- No published cases involving cannabis from state court (yet)
Recent case in the Illinois Human Rights Commission

In the Matter of the Request for Review by: Craig Miller, Petitioner

2020 WL 719967 (IHRC Feb. 11, 2020)

- Employee failed drug test based on medical marijuana use; ultimately fired
- Commission denied request for review
- The Employer is within its rights to establish a zero-tolerance policy, medical marijuana prescription or not
- Cited Compassionate Use Act
Hope for success in state court? Court decisions outside of Illinois

*Callaghan v. Darlington Fabrics*


- Applicant not hired due to medical marijuana use
- **Court:** Stated a claim under Rhode Island anti-discrimination law
  - Employer should have engaged in the interactive process to determine if reasonable accommodations were available
Hope for success in state court? Court decisions outside of Illinois

*Barbuto v. Advantage Sales and Marketing*
477 Mass. 456 (July 17, 2017)

- Plaintiff with Crohn’s disease used medical marijuana legally, but denied employment after failing drug test
- **MA Supreme Court:** Found for EE (reversed MTD)
- Viable claim under MA anti-discrimination law
- Rejected argument that medical marijuana use is *per se* unreasonable because marijuana is a federal crime
- Permitting off-site use of medical marijuana may be reasonable or unreasonable (safety, statutory obligation, etc.)
Illinois Compassionate Use of Medical Cannabis Program Act

Anti-discrimination requirements:

▸ No school, employer, or landlord may refuse to enroll or lease to, or otherwise penalize, a person solely for his or her status as a registered qualifying patient or a registered designated caregiver, unless failing to do so would put the school, employer, or landlord in violation of federal law or unless failing to do so would cause it to lose a monetary or licensing-related benefit under federal law or rules. This does not prevent a landlord from prohibiting the smoking of cannabis on the premises. 410 ILCS 130/40)(a)(1)
Illinois Compassionate Use of Medical Cannabis Program Act

But employers are expressly permitted to:

▸ Enforce a policy concerning drug testing, zero-tolerance, or a drug free workplace if the policy is applied equally to everyone

▸ Discipline for violating a workplace drug policy

▸ Discipline for failing a drug test, if failing to discipline would result in the employer violating federal law or cause it to lose a federal contract or funding

Unclear if there is a private right of action

410 ILCS 130/50
Hope from other states?
State medical marijuana laws

*Whitmire v. Wal-Mart Stores, Inc.*

- Customer Service Supervisor held a medical marijuana card to treat chronic pain
- Given drug test after workplace accident
- Tested positive & fired
- Claims under state laws, including *Arizona Medical Marijuana Act*
  - AMMA prohibits employment discrimination
  - Exception if employee uses, possesses, or is impaired on employer’s premises or during work hours
Whitmire continued

- AZ law: Impairment can’t be based only on presence of metabolites of marijuana in insufficient concentration to cause impairment
- Here, no expert testimony about concentration level
- Wal-Mart moved for summary judgment – good faith belief of impairment
- Court: Granted summary judgment to employee *sua sponte*
  - Firing a registered qualifying patient who tests positive regardless of marijuana concentration is a bright line disregard of state law
  - Test itself insufficient without expert testimony
Court decisions outside of Illinois

**Callaghan v. Darlington Fabrics**


- Applicant also brought a claim that employer violated state medical marijuana law
- Court: Granted summary judgment to employee
  - Implied right of action
  - Discrimination on the basis of “status” of a medical marijuana card holder protected use, too
  - No issue of preemption – laws have different purposes
Other state medical marijuana laws

Some courts have held that state medical marijuana laws are not preempted by the ADA or the CSA


▸ **Noffsinger v. SSC Niantic Operating Co.**, 273 F.Supp.3d 326 (D. Conn. 2017) (after job offer rescinded for applicant with PTSD due to medical marijuana, court found the ADA does not preempt state medical marijuana law)
Pro-employer decisions


- *Curry v. MillerCoors* 2013 WL 4494307 (D.Colo. Aug. 21, 2013): “Discharging an employee under these circumstances is lawful, regardless of whether the employee consumed marijuana on a medical recommendation, at home or off work.”
Pro-employer decisions

  Washington law “does not … protect an employee from being discharged because of authorized medical marijuana use”

  Michigan law “does not regulate private employment”
Take-aways and Resources

▸ Important to educate cannabis users about what law does – and does not – do

▸ Advocate for stronger anti-discrimination protections at the federal and state level

▸ ADA Legal Brief and Webinar: Drugs, Alcohol and Conduct Rules (EFE, Jan. 2020)
  ▸ www.accessibilityonline.org/ada-legal/archives/110778

▸ EFE Fact Sheet: Cannabis/Marijuana in the Workplace: www.equipforequality.org/marijuana/
Questions?

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