MARIJUANA – IT'S HIGH TIME WE TALK MORE ABOUT IT

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I. INTRODUCTION AND SCOPE OF THE TOPIC

More than 40 states and the District of Columbia currently have laws broadly legalizing marijuana in some form. More and more states now regard marijuana as completely legal in any form. It is still illegal under federal law, but that too may change as well. Clearly, it is apparent that attitudes toward marijuana are changing and that what was once considered a gateway drug to the worst form of addiction is now considered in many areas of the country as far less dangerous than that.

Still though, it is considered illegal under federal law and many states continue to ban it outright and criminalize its use and possession. Like alcohol, it can impair judgment and reflexes and, again like alcohol, which is certainly legal as well, its use can result in dangerous impairment on the job – whether they ingested it while on duty or not.

Many states and the District of Columbia have adopted the most expansive laws legalizing marijuana for recreational use. A majority of states allow for limited use of medical marijuana under certain circumstances. Some medical marijuana laws are broader than others, with types of medical conditions that allow for treatment varying from state to state. Louisiana, West Virginia and a few other states allow only cannabis-infused products, such as oils or pills. Other states have passed laws allowing residents to possess cannabis only if they suffer from selected rare medical illnesses.

For a list of the states that have enacted laws regarding the use of marijuana, see, *National Highway, Traffic Safety Administration, NHTSA, Marijuana-Impaired Driving – A Report to Congress*, July 2017, https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf.

A number of states have also decriminalized the possession of small amounts of marijuana. In addition, final rules for recently passed medical marijuana laws are pending in some states as are potential measures to legalize its use in others.

Our discussion today will not attempt to sort out the state laws or how the federal law may impact those. The discussion today will focus on the questions of when and under what circumstances drug testing may be conducted, the level of proof necessary to establish drug use and impairment, which are separate issues, and some arbitral responses to drug use by employees and how arbitrators deal with discipline issued to those employees who test positive for marijuana.

There is no question that drug use is a problem and has been for some time. Elkouri notes that some "studies estimate that 8.3 million American workers are drug users and cost their employers over $100 billion each year." See Elkouri and Elkouri, *How Arbitration Works*, 8th Ed at 16.2.A at page 16-3, BNA Books (2016).[1]

[1] Elkouri's authors cite US Dep't of Health and Human Services, National Household Survey on Drug Abuse 1998. See Section 16.2.A and fn 5, 6 and 7.

MONTANA LAW RELATED TO MARIJUANA

Montana Marijuana Laws and the Workplace. Montana legalized marijuana for some purposes in 2022. MCA 16-12-108 subd. 5 sets forth a number of provisos about employers' rights with respect top marijuana use by their employees.

The statute provides as follows: Nothing in this chapter may be construed to:

(a) require an employer to permit or accommodate conduct otherwise allowed by this chapter in any workplace or on the employer's property;

(b) prohibit an employer from disciplining an employee for violation of a workplace drug policy or for working while intoxicated by marijuana or marijuana products;

(c) prevent an employer from declining to hire, discharging, disciplining, or otherwise taking an adverse employment action against an individual with respect to hire, tenure, terms, conditions, or privileges of employment because of the individual's violation of a workplace drug policy or intoxication by marijuana or marijuana products while working;

(d) prohibit an employer from including in any contract a provision prohibiting the use of marijuana for a debilitating medical condition; or

(e) permit a cause of action against an employer for wrongful discharge pursuant to **39-2-904** or discrimination pursuant to **49-1-102**.

Thus while Montana law protects employees who legally use marijuana off-duty, employers can still maintain drug-free workplaces. As a summary this appears to be the lay of the land, so to speak:

1. Employee Protections:

- Off-duty use: Employers generally cannot discriminate against employees for legal marijuana use off-premises during non-working hours.
- Drug testing: Employers cannot refuse to hire or take adverse action against an employee solely for a positive marijuana drug test, unless one of the exceptions below applies.

2. Employer Rights:

- On-duty use: Employers can prohibit marijuana use or possession during work hours, on employer premises, and while using employer property.
- Impairment: Employers can discipline or terminate employees who are impaired by marijuana while working. See above for the general arbitral rules on testing, and the determination of impairment. This may be the crux of many cases.
- Safety-sensitive positions: Employers can take action against employees whose marijuana use affects their ability to perform job duties or the safety of others.
- Bona fide occupational qualifications: Employers can take action if marijuana use conflicts with a job requirement.
- Established policies: Employers can take action based on established substance abuse or alcohol programs, professional contracts, or collective bargaining agreements.
- Nonprofit employers: Nonprofits that discourage marijuana use can take action against employees who use marijuana.

3. Drug Testing:

- Lawful product: Marijuana is now a "lawful product," which impacts workplace drug testing policies, particularly regarding off-duty use.
- Limited testing: Montana law limits the categories of employees who can be subjected to employer drug testing.
- Medical Marijuana: The law may not apply to medical marijuana patients with valid cards, as they may be protected under Montana's medical marijuana laws.

WHEN IS TESTING PERMISSIBLE?

SAFETY SENSITIVE POSITIONS: Reacting to several major disasters where drugs or marijuana were involved, Congress enacted the Omnibus Transportation Employee Testing Act of 1991 (OTETA), 49 U.S.C. 31306. There was opposition to the law based on the claim that the tests were an invasion of personal privacy, but the U.S. Supreme Court decision in *National Treasury Employees Union v. Von Raab*[2] effectively decided that at least for safety sensitive positions, the tests were valid. The Court upheld the U.S. Customs Service urinalysis drug test for employees applying for promotions or positions involving drug interdiction and requiring the employee to carry a firearm. Thus, for safety sensitive positions it is relatively clear that drug testing is permissible. See also, *O'Connor v Ortega*, 408 U.S. 709 (1987) holding that individuals do not lose their 4th Amendment rights merely because they work for the government

What constitutes a safety sensitive position is a fact issue for an arbitrator to decide. If there is an agreement between the parties that defines certain positions as safety sensitive, then the arbitrator is generally compelled to follow that agreement.

For example, as in *Von Raab*, a person permitted to carry a firearm is certainly a safety sensitive position. What if the person is on light duty in a desk position, but still tests positive? That might be an open question, but if they are still licensed to carry, in my view they are still "safety sensitive" and subject to testing.

It is also clear though that the NLRB has ruled that the topic of drug testing in the workplace is a mandatory subject of bargaining and that the employer must bargain with the union before a drug testing policy can be implemented.

REASONABLE SUSPICION TESTING

What constitutes "reasonable suspicion" continues to be a thorny issue and one that will depend on the facts of each case. Some employers have policies regarding testing after certain work-related incidents, such as the discharge of a firearm or other work-related accidents. In these circumstances it is likely that the requirement of a test will be upheld. See, e.g. *McLaren, Regional Medical Center*, 120 LA 1579 (Daniel 2004).

The question is what constitutes "reasonable" under the facts of each case. Reasonable suspicion is a bit like probable cause in a criminal setting. It is not enough to prove guilt of the infraction or offense under any level of proof but is enough to warrant further investigation.

Each case will very much depend on its own unique facts. Here are some examples:

See, *United Parcel Service*, 126 LA 1088 (Draznin 2009) where the arbitrator found that the employer did not have reasonable suspicion to administer a drug test where the employee refused a job assignment because he claimed he was "too sick to do it." There the labor agreement defined "reasonable cause" for a test, as "an employee's observable action, appearance or conduct that clearly indicates the need for a fitness for duty medical evaluation." Based on that definition, the arbitrator found that the mere statement about being too sick did not rise to that level.

[2] 489 U.S. 656 (1989).

In one other case, *AFSCME and Lane County, Oregon*, 136 LA 585 (Jacobs 2016) the managers smelled a strong odor of marijuana on an employee's clothes during a meeting and requested that he be tested. In that case there was no objection to the test itself, but it was clear that the odor was enough to provide reasonable suspicion for the test.

See also, *Kellogg Co*., *and Bakery and Confection Workers*, 135 LA 676 (Erbs 2015) where the arbitrator upheld the test based on observations by coworkers that the employee seemed impaired. He ruled that these individuals did not need to be trained in observation of drug impaired people.

In *State of Minnesota, DNR and Minnesota Association of Professional Employees,* (unpublished) (Jacobs 2022) the employee was charged with being under the influence while at work. The evidence showed that the employee engaged in truly bizarre behavior when he arrived at a DNR office. Talking gibberish, making no sense at all, bringing a rabbit into the office, letting the rabbit loose and then chasing it all over the office, under desks and chairs and otherwise simply being a general nuisance. Several co-workers testified that this was indeed very unusual behavior for the employee and that they all suspected that he was "on something," His eyes were also observed to be bloodshot and glassy and his speech was slurred and his gait unsteady. On those facts, there was both reasonable suspicion to have him tested and consequently evidence to support that he was indeed on something that day.

In *Hard Rock Casino and UNITEHERE Local 1,* FMCS CASE # 24113-01079 (Jacobs 2024) the employee was observed simply being quiet while doing set up for serving at a restaurant. Some observers found him to be unusually calm and slow and that his eyes were bloodshot and glassy. Others observed his face to be pale while others said his face was flushed. The employee was cooperative and made no particular erratic or unusual gestures or comments that night although one person said he was murmuring to himself during a meeting at which he was writing things down about the evening's specials.

It was a thin case to be sure, but there was at least enough to warrant a test. The test was positive for marijuana use. The policy and the parties' agreement was that a positive test was not enough to warrant a finding of impairment or being under the influence, which was the operative language in the employer's policy. The parties agreed that the positive test alone, in a state where recreational use was legal, was not enough to warrant a finding that the employee was "under the influence" of marijuana that night. That determination had to be based on the observations of his supervisors and co-workers.

On that record there was insufficient evidence to show that in that there were inconsistencies in the observations – e.g. the "pale" versus "flushed" face references. There was also clear evidence that the employee was simply feeling ill with the flu that night. That claim was corroborated by a co-worker's testimony who clearly testified that the grievant complained of being sick, but was otherwise able to perform the essential functions of the job without any problems, the fact that he took a Dayquil pill to combat the effects of the cold/flu he was suffering from that very night on the presence of a security person and, significantly that he had been sent home the night before after complaining of feeling sick.

The grievant also freely admitted using marijuana the night before his shift to get some sleep after being sent home sick. It was also significant that his shift started at 4:00 p.m. and that the last marijuana use was at 11:00 p.m. the night before – a span of some 17 hours. It was clears the effects of the one joint would not have lasted until 4:00 p.m. the following day even though the THC would clearly still be present.

Reasonable suspicion need not be individualized in all cases. In *City of Ocala, Florida*, 132 LA 494 (Terrill 2013) 19 firefighters were all tested where they had access to a vehicle on which narcotics were found missing. On that record, the City was dealing with multiple suspects and needed to conduct the test. One can reasonably imagine such a scenario arising in a law enforcement setting where drugs are found to be missing from an evidence room.

Thus, the question of reasonable suspicion is a different analysis from the question of whether someone is under the influence or impaired. What constitutes reasonable suspicion will be based on each individual record and the arbitrator will have to make an independent determination of whether reasonable suspicion existed for the test. Obviously, if the test turns out to be positive, that can be a factor in determining whether the test itself was based on reasonable suspicion, especially in cases where there is some evidence of impairment or unusual behavior by the employee.

RANDOM TESTING - THE MOST CONTROVERSIAL

Random testing is somewhat different and involves random testing of employees as a deterrent to any drug use and to send a clear message to employees that drug use is strictly prohibited. Even Elkouri notes that "not surprisingly, random testing is the most controversial of all methods of testing employees for drugs. Courts have upheld random drug testing by public employers only where the employee is in a safety sensitive position or public integrity sensitive job. See, *National Treasury Employees Union v. Von Raab, supra,* where the Court permitted drug testing for state employees that required direct involvement with drug interdiction and carrying weapons. See also, *Skinner v Railway Labor Executive's Ass'n*, 489 U.S. 602, 130 LRRM 2857 (1989) upholding suspicionless testing of train crew members involved in accidents. Some might say that where there is an actual mishap that comes close to a reasonable suspicion test, but on that record, it was considered random. See, Elkouri 8th Ed at page 16-9.

It is clear that there must be a showing of a "special need" justifying the test on a random basis. See, generally Elkouri 8th Ed. at Section 16.2.A.ii and fn 49 and the cases and authorities cited therein. Many federal circuit courts have grappled with the question of whether a random test violates the 4th Amendment's prohibition against unlawful search and seizure.

The Courts have held generally that unless the public employer can demonstrate a compelling need, random testing may well constitute an unlawful search and seizure in violation of the 4th Amendment.

PUBLIC SECTOR EMPLOYERS - Some states, cited by Elkouri, have dealt with this issue for public employees. Elkouri notes that random testing of civil service public employees has been upheld in Kentucky and Michigan, see Elkouri 8th Ed at page 16.10. In Arizona however, random testing was found to violate the 4th Amendment rights of firefighters. See, *Petersen v City of Mesa*, 83 P.3d 35 (Ariz. 2004). See also, *Wenzel v Bankhead*, 351 F.Supp. 1316 (N.D. Fla. 2004), where the Court also found the testing of a juvenile justice employee who worked in an administrative office to be unconstitutional. The employee was not in any sort of safety sensitive position; and *Lanier v City of Woodburn*, OR, U.S. District Court LEXIS 29463 (OR 2005), where the Court struck down pre-employment drug testing for a library page whose job was mostly administrative, but involved some contact with children.

Each state may be somewhat different, but for safety sensitive positions, it is likely that an arbitrator will uphold the testing. It may also depend to some degree on what that particular state's law is with regard to marijuana. Is it legal for recreational use? For medical use only? It is too early to tell if those state laws may impact arbitral decisions, but as the public's attitudes toward marijuana change, it is possible that it might have some impact.

PRIVATE SECTOR EMPLOYERS - For private sector cases, arbitrators may not be as concerned about whether a unilaterally adopted random testing policy is a violation of the 4th Amendment or is an unfair labor practice, but rather whether it is reasonable under the circumstances.

Some arbitrators have refused to uphold discharges of employees who test positive pursuant to a unilaterally adopted random policy unless the employer can establish a compelling reason for the discharge. See e.g., *Armstrong Air Conditioning,* 99 LA 533 (Harlan). Others balance the need for a drug free workplace against the privacy interests of the employee and the need to prove just cause for the discharge. See generally Elkouri, 8th Ed. at Section 16.2.A.ii, page 16-11 to 13. See also, *Casias v Wal Mart*, 695 F.3d 428 (6th Cir. 2012) discussed below.

The result will depend on the facts and circumstances of each case. If there is evidence that the employee is in a safety sensitive position, such as a refinery or other workplace that involves the use of dangerous chemicals or equipment, there is a greater likelihood that the testing will be upheld. That though depends on the facts.

WHAT IS "IMPAIRED" FOR MARIJUANA USE?

A positive test for the presence of THC may not be enough.

Parties are now recognizing that the mere presence of THC may not be enough to warrant discipline, especially cases where there is no agreed upon cutoff level of THC in a person's system. Employer's may need to show actual filed sobriety types of impairment, such as bizarre behavior, speech and gait issues, etc.[3]

As noted above, THC can last in a person's system for weeks after the last use, but the impairing effects generally do not. when there is observable evidence of "impairment" the test may be required under a reasonable suspicion analysis. The remaining question is what constitutes sufficient presence of marijuana in an individual's system to warrant a finding that the person is "impaired" or "under the influence" to warrant discipline. The answer is that it is not completely clear.

With alcohol, there is a commonality regarding what makes a person appear to be intoxicated, glassy eyes, slurred speech, loss of motor coordination as well as other factors are all things that make a person appear to be drunk. The use of illegal drugs is more difficult to detect. Further, observation of drug usage may not be as obvious as in alcohol cases.

While it is generally widely accepted that a level of .08% BAC is sufficient to warrant a DUI charge in most states there appears to be no well-defined standard for determining the level of THC in a person's system to constitute true "impairment."

Several states have however established *per se* levels of THC to constitute impaired driving. See, *https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf.* I did not find anything in Montana that establishes a statutory cut off level for THC testing that results in a traffic offense for operating under the influence, like .08 blood alcohol.

The operative chemical in marijuana is called "tetrahydrocannabinol," usually referred to as THC. It can be measured to determine its presence in the body just like alcohol can. Here however lies one of the issues: THC is not the same as alcohol. It reacts differently in the body; it metabolizes differently and its impairing impact is different. Unlike the 0.08 blood-alcohol level that's widely accepted as indicative of drunken driving, establishing a credible level for THC has been elusive.

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[3] In *Hard Rock Casino*, FMCS #24113-01079 (Jacobs 2024) the Employer had a checklist, that included observations of "Walking, Standing, Movements, Eyes, Face Breath, Speech, Appearance Behavior, Actions Appetite and whether there was the presence of drugs or alcohol on or near the person." Supervisors were expected to fill this form out to establish reasonable suspicion of the test and to support their finding that the person was "under the influence of marijuana while at work." In that case there were inconsistencies in the forms but there was still enough to at least warrant the test itself.

There is some consensus that the presence of 50 ng/mL (nanograms per milliliter) constitutes a "positive test" for the presence of THC is the system. However, there is no standardized methodology to determine impairment from THC. A positive test of 50 ng/mL does not necessarily equal impairment as THC can last in the system up to several weeks, depending on length of time between use and the test, physiology of the individual and the concentration of THC in whatever is being ingested. It is important to note that some MJ is stronger than others and that this too can be a factor in the concentration of THC or its metabolite that is eventually detectable. See also, discussion of secondhand smoke below.

In the study cited above, the NHTSA outlines the chemical differences in the way in which alcohol is absorbed and eliminated from the body versus how THC reacts. It is a different process. Alcohol is water soluble while THC is fat soluble and this stays in the human system for longer periods. As the NHTSA observed, "THC can be detected for up to 30 days post ingestion. (Citation omitted). [W]hile THC can be detected in the blood long after ingestion, the acute psychoactive effects of marijuana ingestion last for mere hours, not weeks or months." See, NHTSA paper, supra, at page 4 and citations to peer reviewed studies listed therein.

Certainly, an employer may decide by policy that a certain level is the threshold, but that may run into the requirement to show just cause for discipline. Some of this difficulty is based on the nature of the drug itself, and how long it stays in the system and how long it results in a reduction of reflexes, judgment or other motor functions to constitute "impaired." It may also depend on the nature of the person's employment and whether the employee is in a safety sensitive position or not.

The scope of this paper is not intended to be a complete analysis of the medical and chemical research done on this subject. Suffice it to say that there is not general agreement on the impairing effects of marijuana on things like driving. Neither is there an apparent general consensus on the amount of THC or how long it has been in the system to result in "impairment."

There are studies that quite literally go all over the place in attempting to determine the appropriate level for a person to be considered impaired. The scope of this discussion will not attempt to divine what that level is or the science behind those various studies.

Testing for the presence of drugs requires a certain scientific process be used and that chain of custody be maintained of the sample.[4] Employers must be able to establish the testing procedures complied with federal standards and that there was no break in the chain of custody. For example, where it was shown that the technician failed to split the original specimen into two samples at the time of collection and took a portion of the sample and shipped it to the confirmation lab, the arbitrator ruled that the failure to split the specimen in accordance with Department of Transportation regulations rendered the test invalid.[5]

They may also need to establish that whatever the employer considers a "positive test" and one that is over a prescribed limit is recognized as "impairing." That too will depend entirely on the facts of each case.

As noted above, we will not discuss in any detail the testing procedures other than to state that the employer should be prepared to establish, and the union should be prepared to defend against, the findings of the testing, how the test was done and the chain of custody issues, if any.

[4] *Delaware Co*., 104 LA 845 (Gorman 1993). Discussing the issue of chain of custody.
[5] *Mail Contractors of America, American Postal Workers Union*, 122 LA 1488 (Hoffman, 2006).

As noted, THC operates differently from alcohol and other drugs and there are studies that show that one can have THC in the blood stream even though any impairing effects of it have long worn off and the person is fully capable of performing most tasks. It is also apparent that detection times vary depending on a number of factors such as a person's body type, i.e. fat content, and the amount of chronic use of cannabis to name a few.[6]

The main questions are thus: what is the "defined cut off" for the level of THC that the employer says constitutes a positive test and therefor grounds for discipline or discharge? Second, even if the person is above that defined cutoff level of ng/mL, does that necessarily mean that a person is impaired and unable or unfit to perform their tasks? That appears to be based on the facts of each case, the level of THC found, and the type of job at issue, i.e. is it safety sensitive or not?

Parties should be prepared to justify the cut off level and to explain in lay terms why that level is important to an arbitrator. There should also be a discussion of how and why the position is or is not a safety sensitive position.

This will of course depend on each set of facts and while some positions may be "obviously" safety sensitive, others may not.

In the *Hard Rock Casino* case referenced above, FMCS # 24113-01079 (Jacobs 2024) the parties stipulated that there was a positive test that showed the presence of THC the grievant's system after there was reasonable suspicion to have him tested.

Significantly though, they also stipulated that the test itself did not establish that the employee was "under the influence of marijuana" while at work, which was the operative language in the employers policy and the basis of the termination. The determination of whether the employee was "unde the influence had to be based on the observations of his supervisors and co-workers on the evening in question. On that record, based solely on the mere fact that the employee was unusually quiet and calm and that his eyes were bloodshot and perhaps glassy along with a few other observations, there was insufficient evidence to establish that the employee was truly under the influence of anything. He claimed that he suffered from the flu that night and took a Dayquil to combat the symptoms. He also admitted that he had smoked marijuana to get a better night's sleep some 17 hours before coming to work, but that he no longer felt the effects of the THC – which on that record was credible.

Each case may now have to be based on more than a positive test – since THC lasts in the system for weeks or months. There may have to also be evidence of unusual, erratic or bizarre speech gait or other behavior to establish impairment. See also, *AFSCME #75 and Lane County Oregon,* 136 LA 585 (Jacobs 2016) where there was a positive test, but insufficient evidence of impairment to warrant a finding that the employee was impaired or under the influence of marijuana.

ZERO-TOLERANCE POLICIES

Many employers have adopted so-called zero tolerance policies that state that any employee who tests positive for the presence of THC will be terminated. Simply stated, Elkouri, and many arbitrators find these policies to be problematic at best, not only because they run squarely into the issue of a showing of need by the employer, but also because they run contrary to the very notion of just cause. Each case must thus depend on its own set of facts and what the actual policy is.

[6] http://norml.org/news/2006/02/23/marijuana-detection-time-shorter-than-previously-assumed. This study showed that as of 2006, the detection times were different from what had been previously assumed.

Elkouri notes as follows: "arbitrators generally do not allow zero-tolerance polices to overcome just cause requirements." Elkouri 8th Ed at Section 16.2.A.iii, page 16-15. However, if the facts warrant discharge due to the nature of the employment, an arbitrator's determination to uphold a discharge due to a positive drug test will be enforced. See, *CITCO Asphalt Refinery v Local 2-991*, 385 F.3d 809, 175 LRRM 3057 (3rd Cir. 2004).

Elkouri also notes that "an employer may not institute a "zero-tolerance" policy in contravention of a collective bargaining agreement that views drug or alcohol addiction as an illness and provides for subject employees to enroll in rehabilitation and treatment programs. See, *Gov't Employees v FLRA,* 470 F.3d 376 180 LRRM 3282 (D.C. Cir. 2006).

A PRIMER ON TESTING PROCEDURES

Arbitrator George Roumell in his well-researched and excellent discussion of the topic of drug testing, provides the following information:[7] "There are two drug tests – the Enzyme Multiplied Immunoassay Technique ("EMIT") test and the gas chromatography (GC/MS) test. The EMIT test is a screening test that is simple and inexpensive. The employer and/or laboratory set a threshold by which the sample is either deemed "positive" or "negative" for the presence of drugs. The EMIT system is highly sensitive in detecting relatively small amounts of drugs, it cannot specify which drugs. Because of this, it is generally accepted in the arbitrator community that a positive EMIT result is not grounds for discipline or discharge by itself. Therefore, major laboratories have also adopted this view, and will only issue a report that drugs are present if it has been detected by a screening test and a confirmatory test.[8]

The U.S. Supreme Court has also favorably referred to this two-step procedure in *Skinner v Railway Labor Executives' Association*, 489 US 602, 109 S.Ct. 1402 (1989). Where an employee is given two tests, and one shows positive and the other negative, arbitrators may not uphold termination.[9]

The GC/MS technique is the confirmatory test that is "considered to be one of the most accurate analytic methods for identifying drugs in body fluids."[10] The initials stand for gas chromatography in conjunction with mass spectrometry. Each drug has a molecular fingerprint that can be identified by comparison with the laboratory's library of standard patterns.

The general procedure for an employee's drug test begins when the employee is sent to the testing facility. There are standards that a testing facility must maintain in order to provide the proper balance between the employee's due process and privacy rights and to ensure the integrity of the sample. The employee is provided a drug screen kit to collect a sample of his or her urine in the privacy of a bathroom. When the employee returns with the sample, the technician will begin the procedure to prepare the sample for testing, in the presence of the employee. The sample must be at least 45 mL of urine.[11] There is a temperature gauge on the sample container that records whether the sample is within 90 to 100 degrees Fahrenheit range required.[12] The technician must then examine for signs of tampering.[13] All of this must be done in the employee's presence, who must then sign off on the certification statement.

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[7] Excerpted from Drug and Alcohol testing by George Roumell, 2006, submitted to the Labor Arbitration Institute. Many thanks to Mr. Darrell Steinberg of the Aramark Co., for sharing his insights and a few of the cited cases herein as well.
[8] John Bourdeau, *Employment Testing Manual*, 12-15 (Warren Gorham & Lamont, 1998).
[9] *Southern Cal. Rapid Transit Dist.,* 101 LA 10 (Gentile, 1991).
[10] John Bourdeau, *Employment Testing Manual*, 12-20 (Warren Gorham & Lamont, 1998).
[11] 49 CFR Part 40.65(a).
[12] 49 CFR Part 40.65(b) (1).
[13] 49 CFR Part 40.65(c).

When procedures are not set forth or are ambiguously stated in an employee handbook, contract, collective bargaining agreement, federal regulation, or any other type of binding writing, the procedure and test must be "reasonably reliable to decide [the grievant's] employment fate."[14]"

One of the other issues is the requirement of proof that a certain level of THC in one's system equates with impairment. Usually the cutoff – however that is defined – is expressed in terms of nanograms per milliliter, ng/mL. Some studies that indicate that 50 ng/mL is a positive test.[15] That may not be universally agreed upon however and it may well be crucial to establish by medical testimony or other evidence that the cutoff proves actual impairment. There is also considerable debate about how long THC remains in the system and how long it remains an impairing substance.[16]

WHAT ABOUT OFF DUTY CONDUCT IN USING OR SELLING ILLEGAL DRUGS?

1. *American Commercial Marine Services, Jeffboat Division, Company*, 1996 BNA LA Supp. 101366, (Berman 1996),

The arbitrator summarized the need to establish a nexus between off duty conduct and the job. As noted above, just cause is still required and simply because the employee is found to be using marijuana off duty, does not establish the nexus. The employer needs to show more than that they don't like the use of marijuana. In this case the employee sold illegal drugs to a co-worker off duty during a lunch break.

Not every act of employee misconduct warrants discipline. For many reasons, ranging from the absence of due process to disparate treatment to overreaching or inappropriate punishment, an arbitrator may vacate a disciplinary discharge. Even where off-duty and off-premises misconduct has been proven, just cause will not lie unless a connection or nexus between the misconduct and the discharged employee's job has been established. As professors Elkouri and Elkouri note:

It is well established in arbitration that activity that is engaged in by any employee off the job and off the employer's property is not properly subject to regulation by the employer unless some reasonable connection or "nexus" exists between the activity and the employment. Many arbitrators have recognized the applicability of this rule to drug and drug-related activity."[17]

The arbitrator found the necessary nexus to the work since the co-worker immediately returned to work. The arbitrator ruled that "in the capacity of a drug dealer, the employee is a very real and corrupting danger to the Employer and other employees. A distinction needs to be drawn between the user and seller of illicit drugs. … The dealer who pursues his illicit dealings among his fellow employees is a corrupting influence in the workplace. There is a clear nexus to the interests of the Employer when a drug dealer is working among its employees." The discharge was upheld.[18]

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

[15] https://www.mayomedicallaboratories.com/test-info/drug-book/marijuana.html.

[16] https://www.ndci.org/sites/default/files/ndci/THC_Detection_Window_0.pdf. This is but one of many studies found on the Internet discussing this subject. As noted, in an individual case, it might be crucial to provide medical testimony or other evidence to establish that the level found constituted an impairment and that the cut off established by the employer was reasonable under the circumstances. See, also, https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf. There is also research to support the claim, still under some debate, that THC does not cause the impairment for operating a motor vehicle that alcohol does. See NHTSA, Drug and Alcohol Crash Risk, Traffic Safety Risk, NHTSA Feb. 2015. (The February 2015 study is cited in https://blog.caranddriver.com/marijuana-doesnt-pose-significant-risk-in-car-crashes-nhtsa-says/. While Car and Driver articles are not generally regarded as peer reviewed medically sound research this article cited to several articles that impacted this discussion in terms of how impairing THC really is.

[17] Elkouri and Elkouri, *Resolving Drug Issues*, BNA Books, at page 216 (1993)

[18] See also, *Indiana Bell Telephone*, 93 LA 981, 988 (Goldstein 1989) for a similar result and analysis. Cf, Elkouri, *Resolving Drug Issues*, at 6th Ed. At 220-21, for a discussion of other rulings where drug activity is not considered a per se ipso facto detriment to the workplace.

DOES A POSITIVE TEST ALWAYS = JUST CAUSE? ALSO, DOES HAVING A MEDICAL CARD ALWAYS EXONERATE THE EMPLOYEE? SOME ARBITRAL RESPONSES

Arbitrator Roumell in his article referenced above, notes that a positive test, i.e. one that is over some pre-determined limit, such as 50 Ng/ml, does not always mean that a person is "impaired," nor does it always mean that just cause exists for discipline/discharge. He cites *Orange County FL, International Association of Firefighters*, 123 LA 1464 (Smith, 2007) where there were mitigating circumstances presented that the medical review officer who conducted the test failed to report to upper management.

Further, as discussed above, many arbitrators have ruled that "being under the influence" of drugs or alcohol in the workplace is in itself ambiguous. While a test may conclude there is alcohol or drugs in an employee's system, it only creates a presumption that the employee was under the influence.[19] In one case, Arbitrator Kahn explains that the presumption is rebuttable and further notes the need for specifics due to an individual's unique tolerance for alcohol.[20] Noting the police sobriety tests can provide actual evidence of how a person acts, Arbitrator Kahn required "concrete evidence to establish that [the employee] was indeed 'under the influence' when he reported for work."[21]

While his decision dealt with alcohol, it appears that his analysis could easily apply to marijuana as well. Thus, while a person might well test at or above 50 ng/mL, that creates the presumption, but may not completely carry the day absent any evidence of conduct that would support the conclusion that the employee was indeed "impaired."

Some arbitrators have noted that the current trend in company policies is to offer an Employee Assistance Program, EAP, or rehabilitation on the first offense.[22] See also, *The Common law of the Workplace*, in the chapter entitled *The Troubled Employee*, infra. In many cases, the parties' contract acknowledges that drug and alcohol use may derive from a disease and that the disease may be properly treated through rehabilitation, including a program offered by the employer.[23] In fact, the mere existence of a generally corrective discipline policy may find that discharge for a first offense of being under the influence at work may be "unduly harsh."[24]

Keep in mind that the standard for discipline remains whether there is "just cause" for the discipline and that traditional concepts still apply. Thus, even though there are differing state laws regarding the use of marijuana, those laws are not the basis for the analysis. Like alcohol, the mere fact that a substance is legal, even for recreational use, does not excuse use of it on the job or coming to work intoxicated. The question in some cases boils down to what the employer's policy is and the underlying facts regarding impairment.

As the cases cited indicate, sometimes having a marijuana card from a licensed professional is strong evidence that the employee should not be fired. That does not always end the story however. Use or possession *on duty* is still a serious, probably terminable, offense whether it is legal in the state or not, as the cases cited below show. A survey of cases involving employees who hold a marijuana card do not always exonerate employees who test positive for marijuana. Some of these cases are "old" in the sense that they pre-date the current national change toward marijuana, but they can still be instructive.

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[19] 76 LA 1005 (Kahn, 1980).
[20] *Id*.
[21] *Id*.
[22] *U.S. Steel Corp., Granite City Works, Local 1899*, 124 LA 978 (Das, 2007).
[23] *Id*.
[24] See, e.g., *Domtar Industries and United Steelworkers Local 13-1327*, 124 LA 902 (Shieber, 2007).

SOME MORE ARBITRAL RESPONSES

Keep in mind that just cause rules still apply for any discipline based on marijuana use or sale. Clearly, common sense rules apply and if an employee is found to be using it on duty that will generally result in discharge – similar to alcohol or any other controlled substance. Some of the cited cases are now a little dated given the change in attitude toward marijuana, but their analysis is still valid in my view.

1. **(*Unnamed Employer) and United Automobile, Aerospace and Agricultural Implement Workers of America***, 2012 BNA LA Supp. 149225 (Brodsky 2012).

An employee was tested because he was acting erratically. The employee was tested for this behavior and his test had the wrong temperature, which implied that his test was fraudulent. The employee took another test that was positive for marijuana. He had a marijuana card, but it was not valid for the time frame when the test was administered and the incident occurred. It thus appeared that he got it later in order to bolster his claim of reinstatement. In fact, he admitted that he had initially submitted a falsified card to the Human Resources people at the time of his discharge.

The arbitrator found significant that the employee was reported to be acting erratically by a co-worker and that it was suspicious that the first test was the wrong temperature. This was simple analysis for the Arbitrator. The fact that the employee was acting erratically at work and then the tainted testing led to his discharge. The marijuana card had no effect mitigating the fraudulent test.

First, even if the grievant has permission to legally purchase/possess marijuana, it does not mean he has permission to report for work under its influence. Alcohol is a legal substance, but it does not mean an employee can come to work drunk. The relevant Company Drug and Alcohol Policy and the statement in the Employee Handbook govern how employees who are under reasonable suspicion of being under the influence of drugs or alcohol are treated.

Second, in the instant case, the grievant admitted that he presented a falsified medical marijuana card to Human Resources after his discharge in an attempt to save his job. While this was post-discharge conduct and there is no evidence that the Employer raised this fact in the grievance procedure, the grievant's admission of falsification after his discharge might have bearing with regard to a remedy for the grievant, since he has now admitted to an untrustworthy act.

The discharge was upheld on the basis that he failed the drug test and then lied about various things later, including submitting a false card and tainting the original urine test.

2. ***United Electrical, Radio and Machine (UE), and (Unnamed Employer),*** 2016 BNA LA Supp. 200631 (Dunn 2016).

The employee had a marijuana card for pain in his knee and had tried other opioid medications without success. The employer's rule was that if a person is on any sort of medication like that, they are to report it to their supervisor, even if they have a legal prescription for it. He had not complied with that rule and did not advise his employer of the card before being tested.

The employee tested positive for an accident at work and it was only then that he told HR that he had a medical marijuana card. There were two issues. First, he did not tell HR about the card before having a test, and second, he did not buy marijuana from a licensed dispensary.

The arbitrator sustained the discipline ruled that the company had cause to remove him from work and not allow him to return until he tested clean for drugs and alcohol because the marijuana was not purchased from a licensed dispensary. Because of this, there was no compliance with the card, which required that the marijuana be purchased from a licensed location, and because there could well be problems with the purity of the marijuana itself.

The arbitrator discussed the risks in buying marijuana "off the street." It could possibly be tainted with other drugs and may not be of the requisite purity and strength that medical marijuana would be subjected to at a licensed dispensary.

The issue of the employee telling the employer about the marijuana card is something of a conundrum for the employee. If an employee tells HR that they have a marijuana card then they might be tested. If they don't, then the employee is wrong for not disclosing the use of a marijuana card.

The arbitrator stated as follows:

> "The fundamental problem … is [not] that the grievant … tested positive for marijuana, … because he had lawfully purchased and consumed medical marijuana pursuant to his doctor's prescription, but rather because he was smoking marijuana recreationally with and as provided by his friends, or smoking marijuana which he had purchased illegally 'on the street'... By smoking marijuana obtained illegally off the street, rather than at a licensed dispensary, the grievant did not possess any reliable information that the marijuana he was smoking was free of adulterants. Marijuana purchased off the street can be laced with a number of chemicals to enhance its high - or worse, adulterants which could generate an addiction to the unknown chemicals added to the weed. Indeed, that is one of the arguments for legalizing the sale of marijuana through licensed and regulated dispensaries, to eliminate the risk of black-market marijuana laced with more addictive substances or other contaminants." " Slip op at page 5.

3. ***Wellington Industries and UAW Local 174*****,** 136 BNA LA 1024, (McDonald 2016)

The employee damaged equipment at work. The employer allowed drug testing when there is possession of drugs or the employee's admitted use of drugs, when an employee appears unable to complete his or her job, or an employee is injured or damaged company equipment.

If damage to equipment is deemed to be caused by a machine failure, the employee may not be sent for the employee drug testing. However, if damage to the equipment was the result of the employee's carelessness or inattentiveness or negligence, or failure to follow plant rules, drug testing is then warranted. This of course is a fact question that may ultimately have to be decided by an arbitrator in the face of a challenge to the validity of requiring the test itself.

The arbitrator ruled that the employer complied with its policy regarding the reasonableness of the test since there was damage to a piece of equipment. There was also evidence that it was due to the carelessness and inattentiveness of the employee. The next question was whether that was caused by the marijuana. The arbitrator found that the level of marijuana in the employee's system was "high," 300 Ng/ml. His testimony that he felt "OK" was self-serving and too subjective to be credible.

The employer argued that it has been consistently held that a medical marijuana card is not a defense to a positive drug test and that having a medical card, even for valid medical reasons (the employee had been diagnosed with cancer and used marijuana to relieve some of the symptoms of the disease and side effects of the drugs), did not negate the employer's drug free workplace policy.[25]

From the testimony received from a number of witnesses, it appears that the grievant was well aware that he was in some difficulty. He told some employees he "f**ked up," "made a mistake," and that "it slipped my mind that the tool was not removed before recycling the press."

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[25] The arbitrator cited *Casias v Wal-Mart*, 764 F. Supp 2d 914 (Western Dist. Michigan 2011, aff'd, 695 F. 3d. 428 (6th Cir 2012) where the Court held that a medical marijuana card is not a defense to disciplinary action taken by an employer for failure of a drug test. In *Casias*, the court distinguished private employment and that of state action. The court observed that the purpose of Michigan's Medical Marijuana Act was to protect medical marijuana users from state action which, "only confirms that it was not meant to regulate private employment." It is important to note that *Casias* did not involve a labor arbitration and was used to support the decision that the Michigan law did not apply to private sector employers.

Further, on Monday morning when the employee and members of management discussed the subject of testing, the employee admitted that if he were tested, he would "test dirty."

The arbitrator concluded that there is no need to debate whether the Company had discretion to send employees for drug testing or whether the "observed behavior" in the employer's policy is to be followed. The "observed behavior" language had been in place in the Collective Bargaining Agreement since 2005 and has remained a standard through three negotiated Collective Bargaining Agreements. Certainly, based upon the "observed behavior" of what occurred.

It was also significant that the arbitrator found that the employee held a safety-sensitive position, and that there were clearly sufficient facts that had been observed to justify sending the grievant for a drug screening." The discharge was upheld.

4. ***Teamsters and (Unnamed School District),*** 2012 BNA LA Supp. 148941 (Lille 2012)

The grievant worked as a custodian in a School District for approximately 14 years. On April 1, 2011, the grievant did not arrive in the kitchen as assigned. The manager began to search the school for the grievant and found him in a closet. His eyes were red and the co-worker reported that the employee's clothes and the custodial closet smelled of marijuana.

The grievant admitted to being a marijuana user and he used marijuana for pain related to a work-related shoulder injury. He was eligible for a medical marijuana card, but did not get it until after he was discharged.

The arbitrator ruled: "However, the fact remains that the grievant used marijuana. The carboxyl metabolite proves he did so at some point in the weeks prior to his discharge. Moreover, the grievant himself admitted at the time of the test and again at the arbitration hearing that he used marijuana. He also testified he was a routine user and characterized himself as a "closet smoker." The fact that he regularly used marijuana is not in dispute."

Further, the supervisor testified that on the day of the test the grievant was acting "spacey" and had red eyes and that his speech and behavior were not normal. She also testified she smelled marijuana when she spoke with the grievant, and that she was familiar with the smell of marijuana. Her testimony is given significant credibility because, as the grievant himself testified, he could think of no reason why she would lie. She had nothing against the grievant and in fact, they got along well.

Moreover, the principal and assistant principal also spoke with the grievant and in fact, drove him to the medical center, and the principal drove the grievant home while the assistant principal drove the grievant's car. Both believed the grievant to be under the influence of marijuana, noting his speech and mannerisms and appearance. This testimony was also credited as credible and persuasive.

Finally, the grievant himself testified that he used marijuana and that he obtained it illegally through a friend. This too was found to be significant, see above, for the discussion regarding whether the marijuana was purchased legally through a licensed dispensary. The employee stated he did not obtain a medical marijuana card either before or after his discharge, and the physician's statement was not obtained until approximately one month after his discharge." This undermined any possible defense to the use of marijuana and appeared to be a post hoc attempt at justifying the conduct for which the employee was fired.

The general trend here appears to be that the employee must show that there is a valid medical card and that a licensed medical professional has supported the use. Remember that marijuana cannot be "prescribed," but it can be recommended and used under the supervision of a medical professional.

Second, the marijuana must be purchased from a licensed dispensary, not "off the street" to ensure that it is appropriate for the recommended use. See, *United Electrical, Radio and Machine (UE), and (Unnamed Employer),* 2016 BNA LA Supp. 200631 (Dunn 2016)., supra.

Lastly, the mere fact of a valid card may not always provide a valid defense against a positive test. Some states specifically provide for that and employer policies, especially in the private sector, may well be enough to warrant discipline for a positive test. As noted throughout this discussion though there must be adequate just cause to support any discipline even where there is a positive test.

As noted above, Montana law, MCA 16-12-108 subd 5 does not prohibit an employer from including in any contract a provision prohibiting the use of marijuana for a debilitating medical condition. That appears to allow an employer to negotiate a provision in a CBA regarding medical cards but does not address a unilateral policy directly as I read the statute.

5. ***IBT #20 and Spangler Company*** 2023 BL 133234, 2023 BNA LA 57 (Cornelius 2023) the arbitrator upheld a discharge where the company had a zero tolerance policy against illegal drugs and the employee had a vape pen which fell from his pocket while on premises. The pen contained THC and the employee tested positive for THC the following day.

6. ***Olympia School District and IBT #252,*** 2023 BL 202479, 2023 BNA LA 149 (Latsch 2023) the arbitrator upheld a discharge where the grievant was found to be using marijuana while working in his office adjacent to a YMCA summer camp located in the school gymnasium.

CASES WHERE HAVING A MJ CARD OR WHERE LEGAL USE MAY HAVE BEEN A SIGNIFICANT FACTOR IN OVERTURNING DISCIPLINE BASED ON A POSITIVE TEST

There are other cases where having a medical card for marijuana was found to be a valid defense. These cases too though, as always, depend on their own unique facts.

In ***Monterey County and SEIU #817*****,** 123 LA 677, 681 (Staudohar 2007), the arbitrator set aside a discharge where the employee who had been on leave for some time and returned to work, who had a medical marijuana card, was discharged because some marijuana was found in his desk. Though the central point of the analysis was the fact that it was not clear who was responsible for placing the marijuana in the desk, the arbitrator stated that the medical marijuana card "provided a 'viable defense' for medical usage" and that the employee would not likely have been convicted of any crime.

In a subsequent case in ***County of Solana and SEIU #1021*****,** 128 LA 1702 (Staudohar 2011), the arbitrator concluded that the use of marijuana had no effect on the employer's business and relied on the longevity of the employee and lack of previous discipline plus an attempt at rehabilitation as the basis for setting aside the discharge.

The use was off-duty and there was no evidence of impairment or "acting erratically" as in other cases and thus no evidence of on duty use or actual impairment while on duty.

The employee was reinstated without back pay, for reasons other than the off duty use of marijuana. (The employee was less than truthful during the investigation and that was found to be a significant issue in the arbitrator's decision). The employee was also required to show drug rehabilitation and clean test upon return.

In Oregon, which has a Medical Marijuana Act, the arbitrator in ***City of Portland and Laborers #483*****,** 123 LA 1444 (Gaba 2007), recognized that Oregon had a "very lenient approach to marijuana", set aside the discharge of an employee who tested positive for marijuana. The marijuana was found in the employee's car and the arbitrator found that it had been left there inadvertently.

The arbitrator stated that the employer's policy was "silly" in that the rule was overbroad and would have literally prevented an employee from bringing home a 6-pack of beer. See also, ***AFSCME and Lane County, Oregon***, 136 LA 585 (Jacobs 2016) discussed further below.

Monterey County, County of Solana and *City of Portland* all involved non-federal public employers. However, the decisions of the State Supreme Courts for the proposition that the respective state medical marijuana statutes do not apply to employers might well also exempt state, county and city public employers.

There are several basic principles in dealing with issues where the employee tests positive for marijuana and has a medical marijuana card or certificate issued by the state involved. For example, if the policy states that an employee will be terminated for testing positive unless there is a legal justification then the issue becomes one of notice.

In ***Freightliner and Teamsters Local 305*****,** 336 F.Supp.2d 1118, (D. Crt. OR 2004) the Court overturned an arbitrator's decision, also from Oregon, that had reinstated an employee who had tested positive for marijuana. See also, *Paperworkers v Misco*, infra. It is important that the decision draw its essence from the labor agreement.

The Court held that the arbitrator ignored clear language in the collective bargaining agreement and had exceeded his authority. The arbitrator ruled too that the employee could not be deemed to be under the influence because he had obtained a prescription under the Oregon Medical Marijuana Act and that his ruling did not draw its essence from the labor agreement.

Significantly, the drug policy was *expressly incorporated into the parties' collective bargaining agreement.* Thus, the parties had agreed, as a matter of contract, that being under the influence was a disciplinable matter and effectively agreed that the cutoff point prescribed by the employer meant "under the influence." In contrast to the CBA language, the arbitrator found that it was not. Further, there was also no stated exception to that general rule as there was in the *Lane County* case, supra.

The rule as provided in the parties' labor agreement in *Freightliner* was as follows:

> Reporting for duty or working under the influence of any drug or alcohol (whether or not legally intoxicated) is specifically prohibited and will be cause for suspension without pay or discharge, depending on the circumstances. See, 336 F.Supp. 2d at 1121.[26]

The arbitrator did not base the analysis on whether the degree of discipline was reasonable, but instead ignored that clear language. The import of these decisions is thus to be aware of what the policy actually is.

Further, ***Zurn Industries*** *LLC*, 132 LA 734 (Orlando 2013), the arbitrator set aside a discharge of an employee who, following an accident, was tested for drugs and tested positive for marijuana on the grounds that there was no proof that the employee was impaired. In *Zurn*, the policy provided in part that the "workplace be free from influence of illegal drugs or being under the influence of illegal drugs and the use that adversely affects the employee's work performance." Though the policy provided that "employees in sensitive positions found to have violated this policy shall be terminated immediately," Arbitrator Orlando stated that the lack of proof that the employee was impaired indicated there was no violation of the policy.

When there is notice of testing of a post-accident drug test and the policy calling for discharge which has been followed if the employee fails the test, then the employer has sustained discharges.[27] Of course, the issue is whether the policy is unilaterally adopted or has been negotiated.

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[26] The CBA also defined the level of ng/ml that constituted "under the influence;" a factor not found in many CBA's.

[27] *In re Biolab, Inc. (Adrian, MI)*, 114 LA 279 (Brodsky, 2000).

In a later case**, *Zurn Industries*** 135 LA 319 (Miles 2015) the arbitrator overturned a discharge and reduced it to a 30- day suspension. He indicated that the finding of 116 ng/ml in the report for the grievant was "pretty high" and indicated consumption within a day or two of the test. He noted that the employee acknowledged that use in Pennsylvania was illegal, but had 30 years of experience with the employer.

The employer used an expert who typically testified on behalf of employers and who testified that traces of MJ do not stay in the urine for 30 days. He further testified that blood tests are not standard protocols for MJ testing. The Union apparently did not rebut this testimony and there remains some doubt as to its accuracy.

In ***Temple Inland, Inc.***, 126 LA 856 (Wheeler 2009) in a probable cause test, a positive test was held to be grounds for termination because of the clear provisions of the collective bargaining agreement so providing.

Whether the policy is negotiated or unilaterally implemented, whether the language for termination is mandatory or is based on language "may be subject to termination," is determinative as to the leeway an arbitrator may have in reviewing the matter. Likewise, the failure to follow contractual procedures in regard to drug testing can be the basis for setting aside discipline.[28]

King Soopers, Inc. and IUOE # 1, 131 LA 459 (Sass 2012). The arbitrator reinstated the employee where there was a hair test that showed the presence of marijuana in the employee's system. The arbitrator found that generally the employer used a urine test, but used hair here. That showed only that the employee had used marijuana in the past but said nothing about recent use. See discussion above regarding hair testing. There is a body of research that indicates hair testing may be inherently discriminatory since darker curly hair tends to retain THC in greater concentrations than others shades of brown, blond or red hair.

The arbitrator found that off duty use, without any showing of impairment on the job, was not much different than off duty alcohol use that did not affect the employees work performance. He found too that that the hair test did not show with any degree of reasonable probability that the employee had illegal drugs in his system at the time of the accident which led to the test in the first place. Finally, the mere fact that marijuana is still illegal under federal law was of little significance.[29]

Dep't of Justice, and AFGE #10, 135 LA 185 (2015). The employee tested positive and was fired for egregious misconduct. The arbitrator ruled that his misconduct was not as egregious as the employer claimed and reinstated the grievant subject to the 30-day suspension.

The agency had also continued to employee the grievant for several months after the positive test. The arbitrator also found that the positive test did not impair the prison's security or impair its operations. Id at 191. He also ruled that the union had failed to raise the question of the validity of the test during the hearing and was prohibited from doing so later.

Moral of that story – raise any issues with respect to the test or the other issues regarding testing at the hearing in a timely fashion.

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[28] *Double Bonus Coal Co. Mine No. 65*, CCH-LAAP 13-2 Arb P 5893 (Hornberger, 2012).

[29] Note that in 2005 in Boston there was a case where the arbitrator found that hair testing is inherently discriminatory since Black employees' hair texture make it more susceptible to testing positive. It may also be easy to "cheat" by using a specific type of aloe based shampoo. See, https://www.bostonglobe.com/metro/2016/09/08/court-decide-police-department-controversial-hair-test/PV7fsMGZrY8wc9HHv4oVTO/story.html.

In concluding this section on medical marijuana statutes, it must be emphasized that the arbitrator's duty is to interpret the contract, and generally not to pass judgment on state or federal law. The arbitrator has no jurisdiction to declare a state statute or voter-passed constitutional amendment to be invalid.[30] Nevertheless, "just cause" is the standard to be applied and the applicable statutes can and perhaps should be considered in marijuana-related cases.

AFSCME #75 and Lane County Oregon, 136 LA 585 (Jacobs 2016) the employer, who was in a state where use of marijuana was legal, had a drug free policy that at one point said that nothing in the state's new marijuana law required an employer to accommodate the medical use of marijuana in the workplace. Seemed simple enough, but the policy went beyond that.

In the very next paragraph though, the policy said, "Nothing in this procedure is intended to prohibit the use of a drug taken under supervision by a licensed health care professional, where its use is consistent with its prescribed use and does not present a safety hazard or otherwise adversely impact an employee's performance or [the employer's] operations."[31]

The employee was suspected of using marijuana since supervisors smelled it on his clothes. He tested positive for THC and admitted that he was taking medically recommended marijuana to counteract the effects of chemotherapy. He had prostate cancer and the drugs caused serious side effects that the marijuana helped to alleviate.

The policy itself provided the grounds to reinstate him since there was no evidence whatsoever of impairment of any kind and he was not in a safety sensitive position. It should be noted that if the employee had been in a safety sensitive position the result might have been different.

Hard Rock Casino, FMCS CASE # 24113-01079 (Jacobs 2024). Discussed above. The parties stipulated that the mere fact of in positive test did not control the result since the employee used marijuana in in state where recreational use at home was legal. The question was whether the employee was "under the influence of Marijuana while at work." The test was only cited as corroborative evidence to back up the observations of the employee on the night he came to work.

The employee was in server at in restaurant and was observed to be unusually quiet and calm on the night in question . There was no evidence of use or possession while at work. The sole evidence was that he was acting unusual although there was no evidence of anything truly bizarre or disquieting about the employee's behavior.

Further there was significant evidence that the employee was simply feeling ill with flu-like symptoms and was just not feeling well.

Based on the overall record, while there was sufficient evidence to support a test based on reasonable suspicion, there was not enough to warrant discharge.

State of Minnesota and MAPE – (unpublished Minnesota case) (Jacobs 2022) discussed above. There the employee engaged in very unusual and somewhat bizarre behavior that was found to warrant discipline for being under the influence. See discussion above regarding reasonable suspicion testing.

The employee was discharged for smelling of alcohol and having glassy eyes and slurred speech. His explanation was cogent and plausible however and the supervisor who reported these matters did not testify. That was found to be insufficient evidence to warrant discharge or to determine definitively that the employee was under the influence.

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[30] *Wilmington City School District*, 130 LA 1063, 1071 (Szuter, 2012).

[31] Marijuana cannot be formally "prescribed" by physicians and can only be recommended, since it remains illegal under federal law.

While this case was about alcohol and marijuana, it serves as a guide to make sure there is foficer evidence of impairment to warrant discipline. 3

Unpublished decision in the federal sector[32]: In an unpublished case, that demonstrates some of the issues that can arise now with marijuana use – especially for medical reasons, an employee was under the care of a licensed physician who recommended marijuana for a medical condition. The employee self-reported the use to his supervisor who then had him tested. The test showed the presence of THC that was consistent with the medical use as the employee had reported. The employee was not in a safety sensitive position and there was no evidence of use or possession while on duty.

The employer fired him for being under the influence at work. The policy was again inconsistent with that and allowed the employee to remain at work if he was using marijuana per an MD's recommendation and there was no evidence of possession or use on duty and where the employee was not a safety risk. All of those factors applied in the employee's favor.

Significantly, the terms of the employer's policy in that case said, "where there is evidence of a medical reason for the use of a drug, the test counts as a negative test**.**" Under a just cause analysis, I ruled that the policy must thus be applied as it is written and that the test in this instance had to "be counted as a negative test." Under those facts, the discharge was overturned.

In another unpublished federal sector case, the employee was found to have a pipe that allegedly contained marijuana residue in it while at work. The employee was in a federal prison facility delivering items there when a drug sniffing dog "hit" on him. After a search, the pipe was found in his pocket. There was however no evidence of impairment at that time.

He was tested and THC was found in his system, whereupon he acknowledged that he had smoked marijuana a few days before – in a state where it was legal to do so recreationally. The employee was reinstated since there was a lack of evidence that he was actually impaired as of the time he was at work and no "hard" evidence that he used the pipe to smoke marijuana while on duty. (Had there been the result might again have been very different).

Further, the employer was unable to find the pipe again for testing and there was no hard evidence that it actually contained marijuana, even though the officers thought that's what it contained – although they did not testify at the hearing.

Based on this paucity of evidence, the result seemed clear enough and the employee was reinstated under a traditional just cause analysis and the lack of evidence by the employer.

Public policy – In *Paperworkers v Misco*, 484 US 29 (1987) the US Supreme Court upheld an arbitrator's decision where the employee had not violated a rule against possession of marijuana on the employer's premises. The 5th Circuit overturned the arbitrator' award on public policy grounds, but that was reversed by the Supreme Court, holding that the award "drew its essence from the CBA." Misco has frequently been cited for the proposition that an arbitral award may be overturned as violative of public policy but it is important to remember that it arose out of a marijuana related incident.

[32] While the following two cases cannot be cited formally, they provide guidance as to the type of evidence and arguments each side have, or to defend against in a marijuana case.

Secondhand smoke? Maybe, but conditions have to be extreme.

There is some science and precedent for the proposition that under the right conditions secondhand smoke can cause a possible positive test. In a recent article published in the Journal of Drug and Alcohol Dependence,[33] there is research potentially supporting the claim that under "extreme conditions" in an unventilated area, secondhand smoke can cause "positive effects" in the first few hours in some cases high enough to test positive for workplace or commercial testing programs.

There have been studies regarding whether exposure to secondhand smoke can result in the presence of THC or its metabolite in a person in close proximity to second hand MJ smoke. There is evidence of some 15 studies which found that 4 hours of exposure can result in 20 ng/mL and others found concentrations as high as 28 ng/mL.

It may also depend on how well ventilated the area was when the smoke was present. See, *Passive inhalation of marijuana smoke: urinalysis and room air levels of delta-9-tetrahydrocannabinol. Cone EJ, Johnson RE, Darwin WD, Yousefnejad D, Mell LD, Paul BD, Mitchell J, J Anal Toxicology 1987 May-Jun; 11(3):89-96*. See also, Non-smoker exposure to secondhand cannabis smoke. Urine screening and confirmation results. *Cone EJ, Bigelow GE, Herrmann ES, Mitchell JM, LoDico C, Flegel R, Vandrey R, Journal of Analytical Toxicology 2015 Jan-Feb; 39(1):1-12.*

Some efforts to rebut finding of a positive test - not always successful.

In *US Steel and USW 1014,* 133 LA 907 (Bethel 2014) there was a positive test and the union failed to produce any evidence to rebut the employer's expert witness testimony that the testing cutoff was designed to account for the effects of passive inhalation.

The discharge was upheld where the employee was subject to a last chance agreement and had to remain drug free. He tested positive on a sample of underarm hair.

There the employee alleged that he did not smoke pot, but others around him did. The union failed to provide any rebuttal testimony to the employer's evidence that the testing procedures took that into account. It is of course unclear if the result upholding the discharge would have been different if they had.

It is relatively clear though that the conditions do have to be "extreme," i.e. a lot of exposure and in close proximity to the employee for an extended period of time.

It is important in these cases to consult an expert with the right credentials to prove/disprove the test results and demonstrate to an arbitrator what you are trying to prove or disprove. Here the Union did not provide any expert testimony to refute the testimony of the employer's expert that the test was designed to take into account the effects of passive smoke.

See also, ***US Steel and USW #4134,*** 134 LA 1196 (Das 2014), where efforts at rebuttal were also unsuccessful. Hair sample was sent to Psychemedics, a renowned lab for drug testing and the arbitrator found no issues with the sample or chain of custody.

The evidence of a negative sample taken a month later from underarm hair was found not to be persuasive as to the results closer in time to the first sample.

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[33] https://www.drugandalcoholdependence.com/article/S0376-8716%2815%2900160-X/abstract. Researchers found that under extreme conditions in an unventilated room exposure to secondhand cannabis can produce detectable amounts of THC in blood and urine as well as minor increases in heart rate, mild sedative effects and impaired performance on certain tests requiring psychomotor ability and working memory.

What if marijuana is found mixed in with other drugs?

This may well happen since most drug testing facilities will test for a wide range of drugs and chemicals. The result in such cases may well depend on the chemistry and science of how marijuana reacts in conjunction with other drugs, such as alcohol, methamphetamines cocaine or other drugs.

The science of this is beyond the scope of this discussion, but advocates should be prepared to discuss how the combination of drugs is or is not "worse" than ingestion of marijuana alone. Moreover, was the marijuana ingested in conjunction with prescription drugs? Might that result in impairment if there is evidence of both drugs in the system? In some cases, marijuana may be the least of the problems and the other drugs may well be far more powerful and dangerous and impairing than marijuana alone.

See the discussion above about the need to purchase any legal marijuana from a licensed dispensary to avoid tainting. In the cases where that was an issue the arbitrators seemed to be very concerned about it.

CBD OIL – CANNABIDIOL

Recently CBD oil, or cannabidiol, has been showing up to treat a variety of conditions. CBD is not illegal under federal law, since hemp, which is one of its sources, is not illegal under federal law. However while CBD oil is not supposed to contain THC, sometimes it does, especially if it is not obtained from a source that is reliable or certified. This product out there that is sold as having little or no THC, which is the operative chemical in MJ that causes the "high."

Apparently too, there is no way to differentiate between the THC found in marijuana and that found in CBD. Many CBD products also claim to not have any THC in them, but some do at very low levels.

CBD and THC are both found in the marijuana plant and have the same chemical formula, but there is a difference in the chemical properties and the way they affect the body. THC is the main psychoactive compound in Marijuana and what makes people feel "high." And can result in impaired reaction time and judgment.

CBD on the other hand does not cause the "high," but apparently shows up on a drug test as the same substance as THC.[34]

There is very little yet in the literature regarding positive tests where the employee took CBD oil versus testing positive for marijuana use, but we can expect that cases will arise where the employee contends that they never used marijuana, but instead took legal CBD oils for various purposes. The question may still boil down to impairment and whether there is adequate evidence that the employee was impaired, just as there may be with alcohol or any other substances, prohibited or not by law.

Pure CBD generally does not contain THC; but some types do though, and THC can build up in the system over time. It is typically sold as an oil and can be used for a variety of medical conditions, such as epilepsy, Parkinson's, anxiety, MS and even diabetes.

A person may not need a "medical card" for it or even a doctor's note. You can even buy it over the counter in many states at a drug store or co-op.

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[34] As a side note, the US Supreme Court recently accepted a case filed by a truck driver who used CBD oil that was advertised as not having any THC in it. It turns out that it did and he failed a mandatory drug test a few weeks later. See, *Horn v Medical Marijuana, Inc, dba Dixie Elixirs,* 22-349 (2nd Circuit) https://law.justia.com/cases/federal/appellate-courts/ca2/22-349/22-349-2023-08-21.html

Usually, there is little risk for impairment, but sometimes, THC shows up in it and can lead to a positive test. Be careful where and from whom you buy these products as they do have THC in them at low level which can, over time, lead to positive test results and thus might violate a drug policy. Whether that equals impairment is a fact question.

Some takeaways: Employees should ask if the CBD has THC in it. Be careful if you're not sure.

Employers should warn and inform their employees in the drug and alcohol policy that that some CBD is not regulated and that if THC is there, it might violate drug policy.

Under federal DOT rules medical marijuana is still illegal and may lead to discharge for safety sensitive employees.

VII. THE TROUBLED EMPLOYEE

Professor St. Antoine in his work, *The Common Law of the Workplace*, BNA Books 2005 at sections 6.24 - 6.29, discusses the notion of a "troubled employee." This can, in some circumstances, provide a defense to sometimes very serious behavior. It is not a panacea, but is worth a look by both sides in a discipline case. This can be a successful defense *if* the facts are just right and I have seen this work in cases of assault, drug/alcohol addiction or mental illness.

St. Antoine defines a "troubled employee" as one who is addicted to drugs or alcohol or has a serious mental illness. See Section 6.24. If the union can establish that the employee was troubled, within the definition and that the employer was aware of this, they may be able to successfully defend against serious discipline or discharge by referring to the notion of a troubled employee and argue that the employer should have provided some assistance rather than disciplining the employee.

The union bears the burden of proof on these issues. First, it must show that the employee is truly "troubled' and meets the definition. St. Antione provides as follows: "An employee who takes drugs or drinks to excess is not necessarily a troubled employee. … The fact that the employee is addicted must be established since the critical underpinning of any special treatment for the troubled employee is that the employee was not responsible for misconduct." Id. at 6.24 and page 239.

St. Antoine notes though that simply being stressed is not enough to qualify, nor is the occasional use of drugs or alcohol. Unions will likely need a medical diagnosis of some sort to meet the burden of showing that the employee was "troubled." St. Antoine notes that alcoholism and drug addiction have long been considered illnesses and some state laws provide for allowance of treatment before termination. See, St. Antoine at Section 6.25, page 241. See also, Section 42 USC 1211 exempting any employee who currently engages in illegal use of drugs. The question may be whether use of legal marijuana constitutes an illegal use of drugs. The ADA however does not govern the results in arbitration. The CBA and the just cause analysis do.

St, Antoine notes that there is a vast difference of opinion among arbitrators as to what to do with troubled employees. See Section 6.37, page 247. He notes that many arbitrators afford no special consideration to troubled employees and apply standard just cause analyses to any discipline issued. The question of whether they are troubled does not apparently enter the picture.

Others require that if the employee is truly troubled, and the union has met its burden of proof in that regard that the employee be treated in a non-disciplinary way. (Some state laws require that employees be afforded the chance to go to rehab if there is evidence that their behavior is due to addiction. This may well be a reflection of those types of laws.)

Addiction itself should not be grounds for discipline if there is no evidence of impairment at work. See, St. Antoine at section 6.25, page 242. Some arbitrators will impose a non-disciplinary remedy, such as re-assignment or EAP.

Note that the employer may be able to show that absence of addiction is necessary for the employee to continue in any capacity, but should be prepared to show that there are no other positions the employee could perform while they undergo treatment.

Possession or use on the job of drugs or alcohol may well provide a separate basis for discipline. If the employee is impaired or is unsafe due to drug or alcohol use that too might result in a different analysis. Different facts may yield a different result but, if the addiction or mental illness is shown to exist by a medical diagnosis and was the cause of the employee's actions for which they are being disciplined the union may be able to successfully argue for a lesser penalty than discharge.

As noted above, if there is use on the job or the job itself requires absence of addiction or drug use that may be a factor in the employer's favor, but the union can still argue that the employee should be allowed to seek treatment before being discharged.

These cases will be very fact specific, but pay careful attention to the policy and whether it allows the use of that drug and under what circumstances.

CONCLUSION

At the end of the day, just cause still applies to any case involving marijuana use. There will be questions about the use of the test – was it random or for reasonable suspicion – and there will be fact questions regarding that issue.

As in any other drug case, there will be questions regarding the chain of custody, the testing process and the accuracy of the test. There will also be questions regarding the appropriate cutoff and whether even a "positive" test will still be considered impairment. Further, there will be questions about whether even a positive test will rise to the level of just cause for discharge.

Finally, as a possible defense to such a case, a union might well raise the question, discussed by Professor St. Antoine, regarding the troubled employee and whether rehabilitation and/or EAP might be a way to save the job of an employee who has tested positive for marijuana.

As always, the result depends on the facts.