

**MARIJUANA**

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Arbitrator**



# OVERVIEW

- Nearly 40 states have legalized MJ to some degree – either for recreational use or for some limited medical purposes – see list NHTSA
- Attitudes toward MJ are clearly changing and continue to evolve as time goes on
- Lots of those are in the materials but it is still illegal under federal law and in many states, just having it gets you in trouble. Illegal federally.
- The question is – does it get you fired?



# MJ unlawful under federal law

- Even though states legalize it, EE can still get fired for its use, unless there is a JC provision in CBA. If at will, law not prohibit ER from firing EE who tests + in violation of policy
- *Coats v. Dish Network, LLC*, 350 P.3d 849, 2015 CO 44 (2015).
- *Lambdin v Marriott Resorts*, 16-00004 HG-KJM, U.S. Dist. LEXIS 149570, (D. Haw. 2017)
- *Casias v Wal-Mart*, 695 F.3d 428 (6<sup>th</sup> Cir. 2012)

# MCA 16-12-108, subd. 5

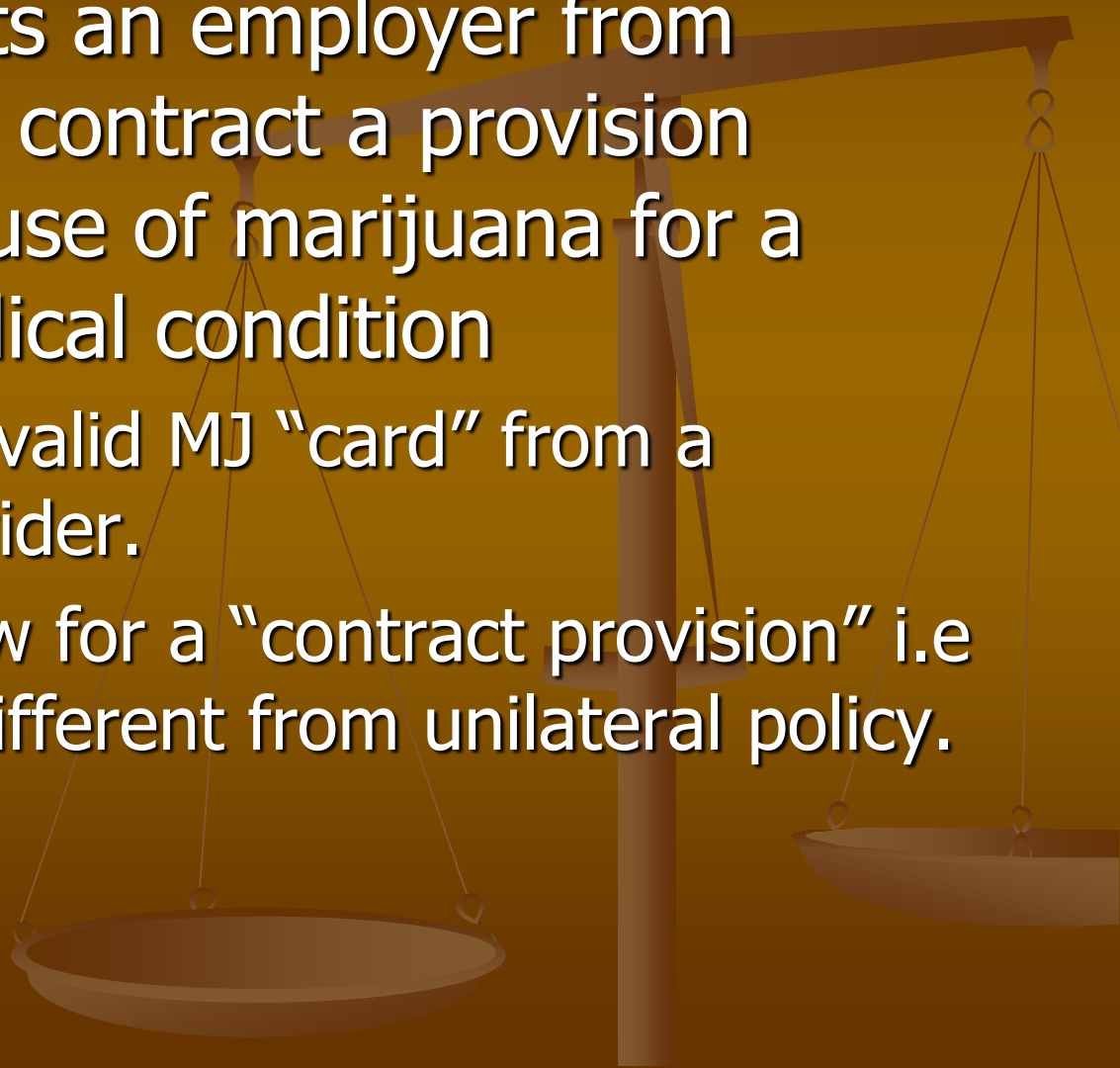
- The statute sets forth the rules with regard to employment:
  - Nothing requires an employer to permit or accommodate conduct otherwise allowed
    - ER does not have to accommodate a user of MJ
  - Nothing prohibits an ER from disciplining an employee for violation of a drug policy or for working while intoxicated by marijuana
    - Make sure of what your policy says

# MCA 16-12-108, subd. 5

- Nothing prevents 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 drug policy or intoxication by marijuana.
  - You can use it but if impaired at work, in violation of an ER policy an EE can be disciplined

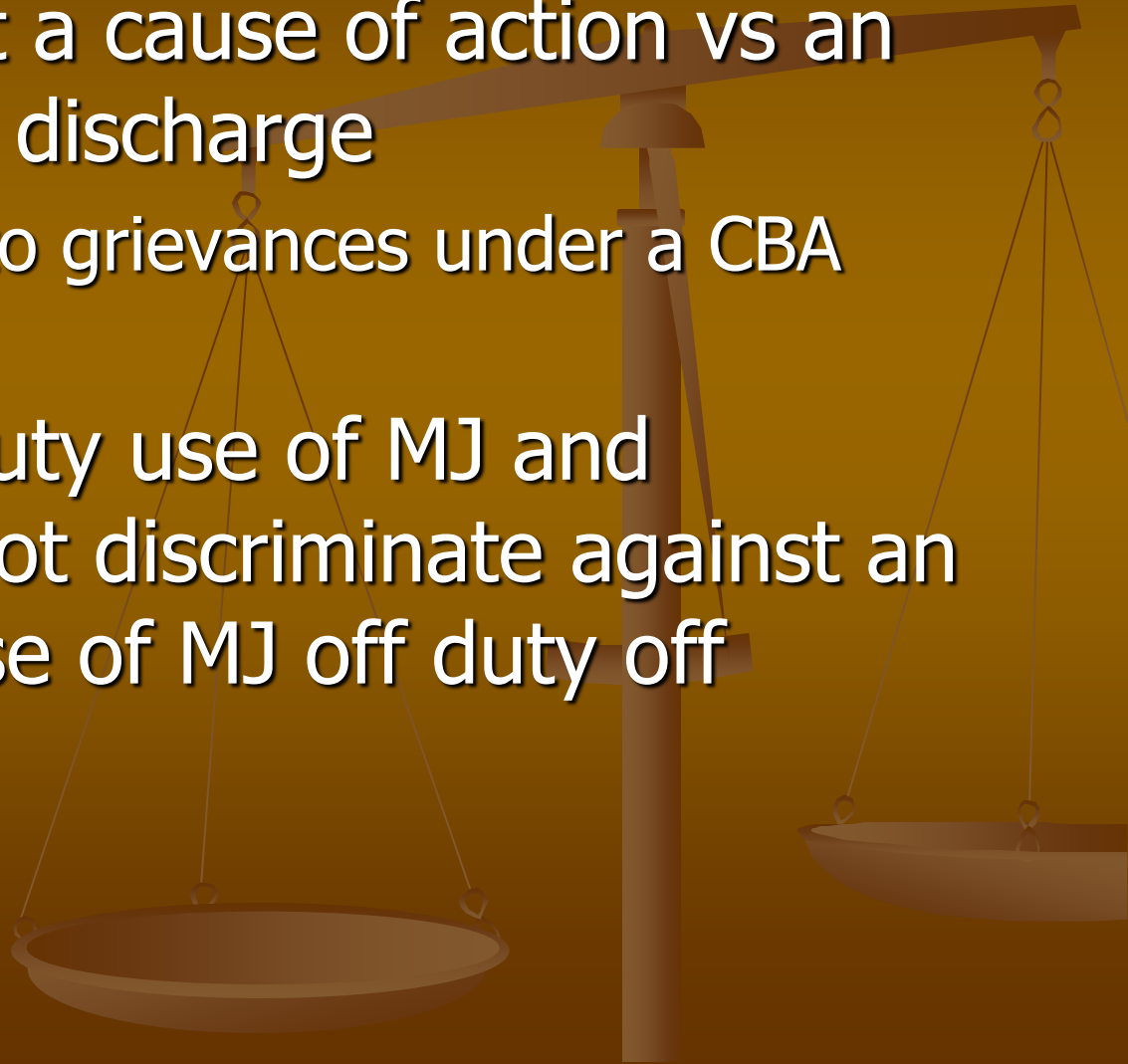
# MCA 16-12-108, subd. 5

- Nothing prohibits an employer from including in any contract a provision prohibiting the use of marijuana for a debilitating medical condition
  - May apply to a valid MJ “card” from a healthcare provider.
  - Appears to allow for a “contract provision” i.e CBA. May be different from unilateral policy.



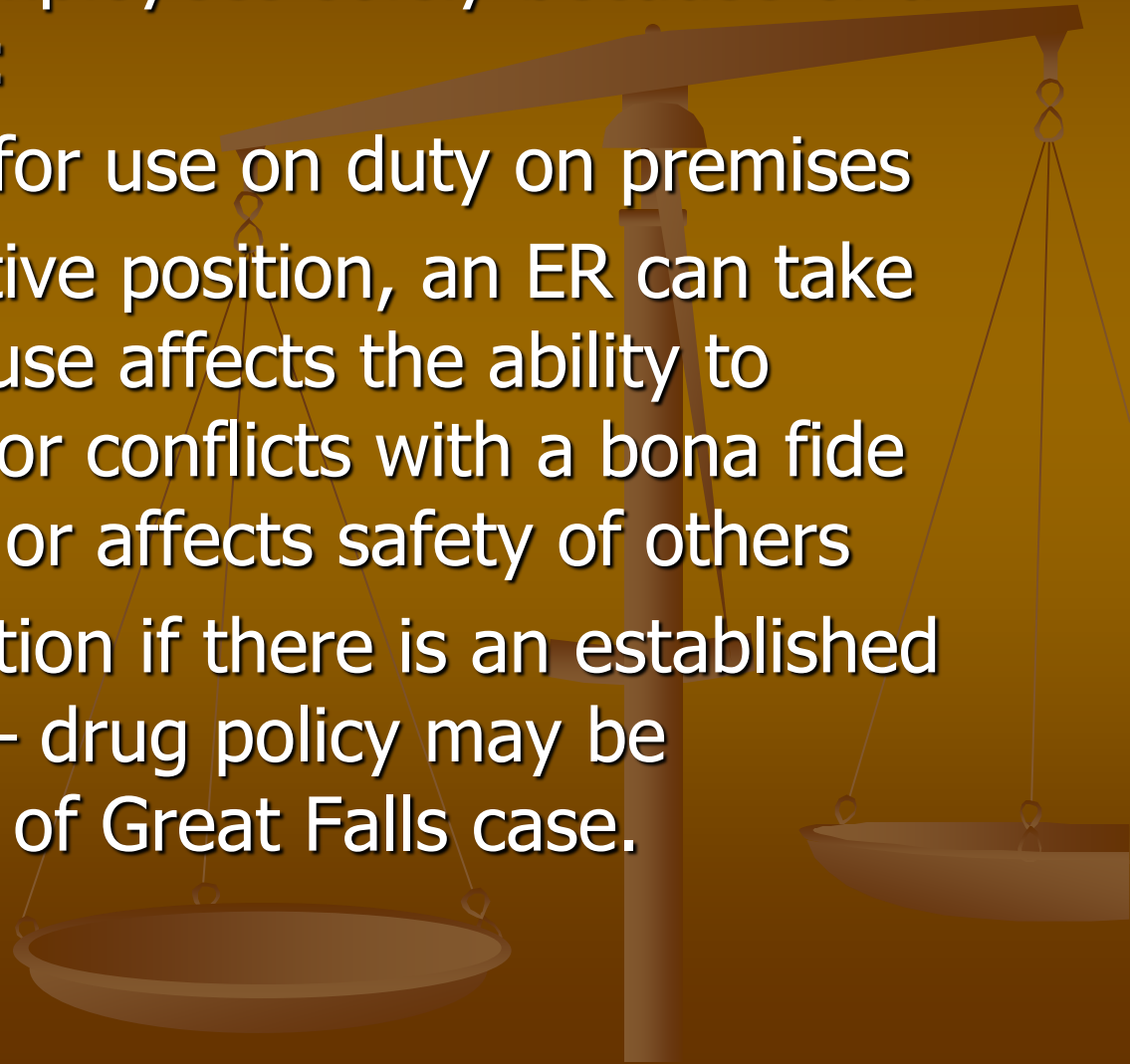
# MCA 16-12-108, subd. 5

- Does not permit a cause of action vs an ER for wrongful discharge
  - May not apply to grievances under a CBA however
- Law allows of duty use of MJ and employers cannot discriminate against an employee for use of MJ off duty off premises



# MCA 16-12-108, subd. 5

- ER's cannot refuse to hire or take adverse action against employees solely because of a positive test but:
- Can take action for use on duty on premises
- If a safety sensitive position, an ER can take action if the MJ use affects the ability to perform the job or conflicts with a bona fide job requirement or affects safety of others
- ER's can take action if there is an established policy or a CBA – drug policy may be negotiable. City of Great Falls case.



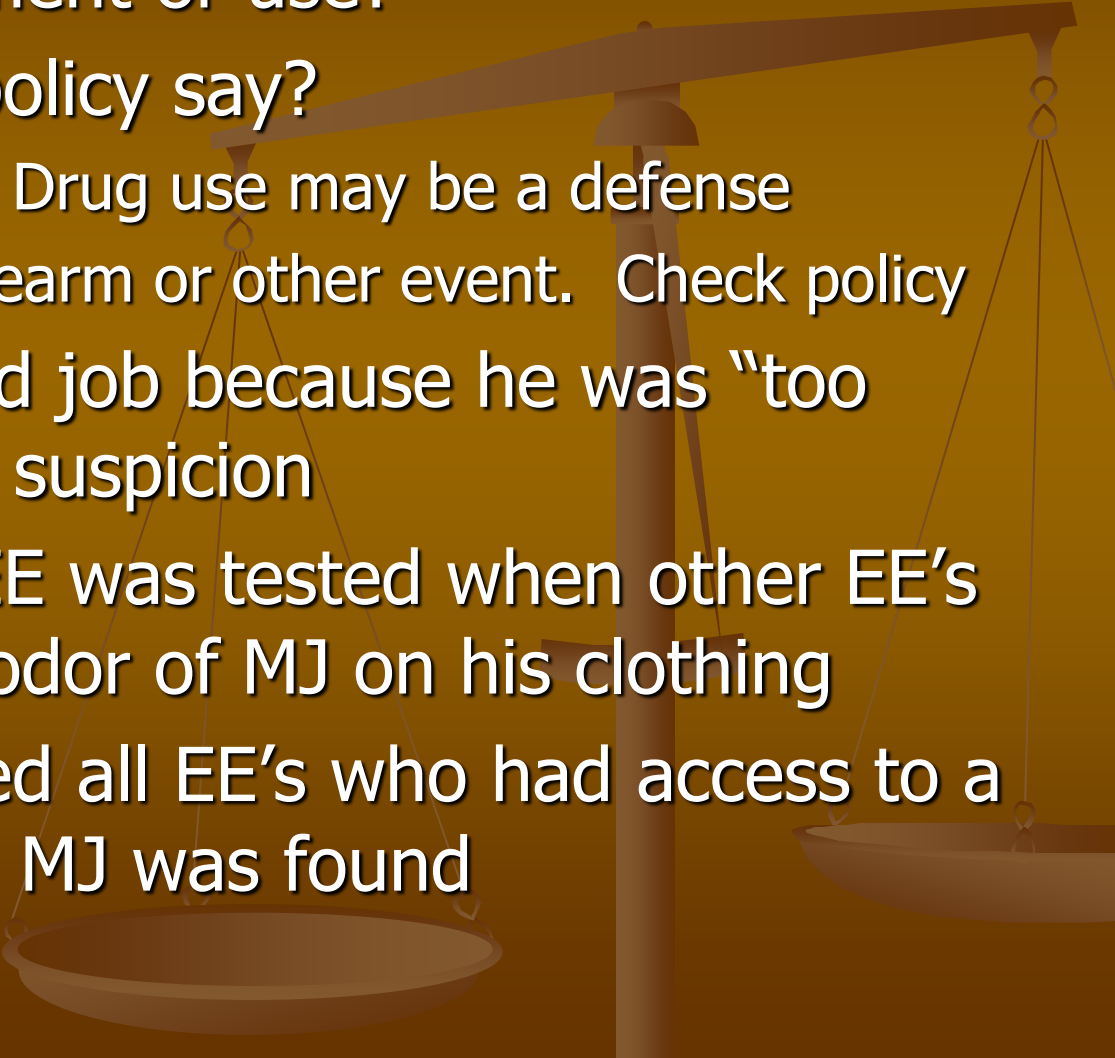


# WHEN IS TESTING PERMISSIBLE

## ■ SAFETY SENSITIVE POSITIONS

- NTEU v Von Raab – safety sensitive testing is permissible
- What constitutes a “safety sensitive position” may be a fact question for an arbitrator – unless there is an agreement by the parties.
- Is a mandatory subject of bargaining
- Probably still safety sensitive even if not acting in that capacity at the time of the test

# Reasonable suspicion

- Also a fact question – what evidence was there of impairment or use?
  - What does ER policy say?
    - Post WC claim? Drug use may be a defense
    - Discharge of firearm or other event. Check policy
  - UPS - EE refused job because he was “too sick” – No reas. suspicion
  - Lane County - EE was tested when other EE’s smelled strong odor of MJ on his clothing
  - Ocala Fla - tested all EE’s who had access to a vehicle in which MJ was found
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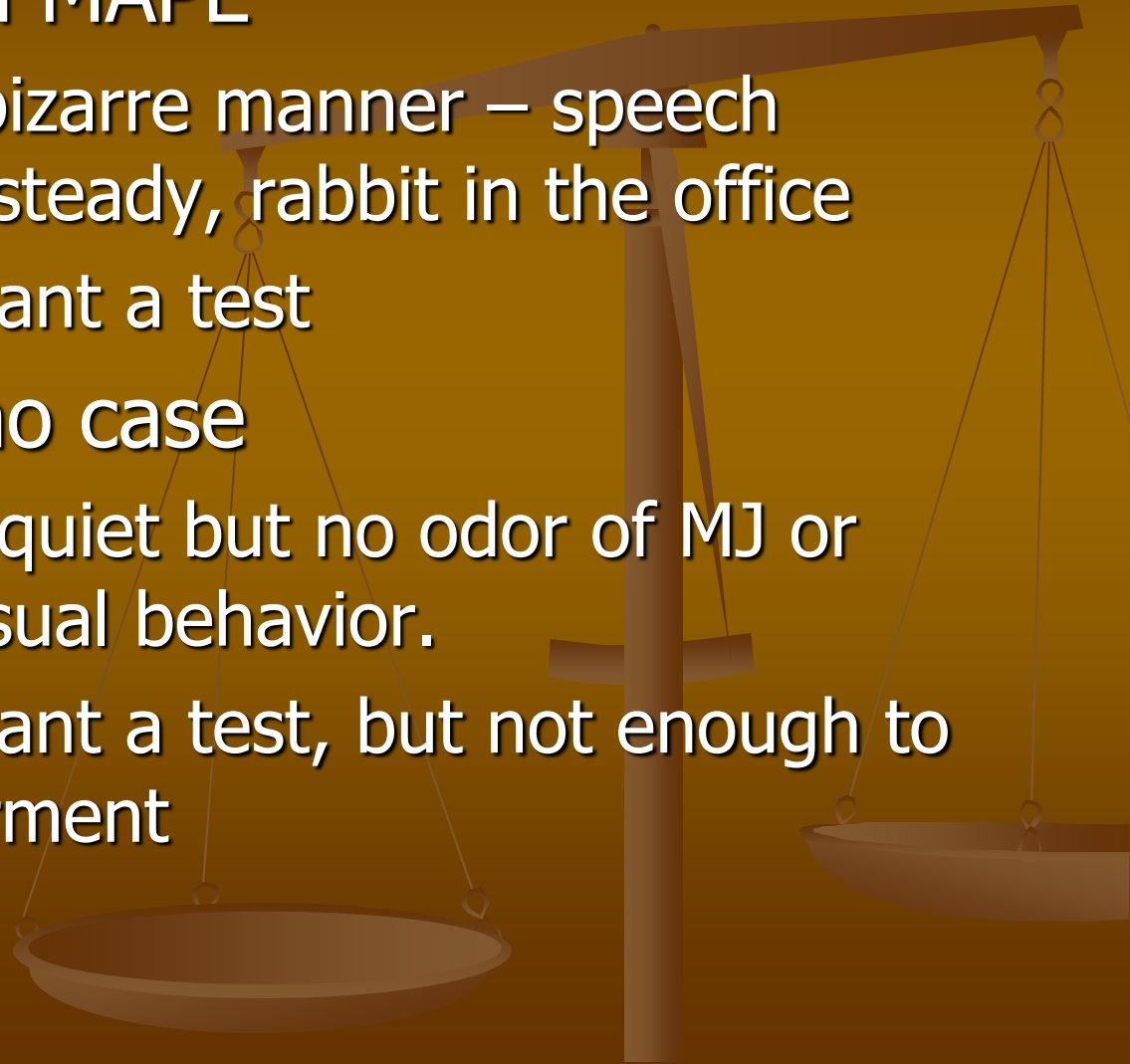


# Reasonable suspicion

- Arbitrators are not requiring employers to have evidence supporting a criminal indictment. Nor do they seek evidence beyond a reasonable doubt. They do not even look for a preponderance of the evidence .... All they want to know is that the employer has some rational grounds for testing the employee." *Warehouse Distribution Centers*, 90 LA 979 (Weiss, 1987)

# REASONABLE SUSPICION

- State of MN and MAPE
  - EE was acting bizarre manner – speech slurred, gait unsteady, rabbit in the office
  - Enough to warrant a test
- Hard Rock casino case
  - EE was usually quiet but no odor of MJ or other truly unusual behavior.
  - Enough to warrant a test, but not enough to establish impairment



# Random testing – most controversial

- Pre-emptive deterrent to drug use
- This is more difficult to do and usually is reserved only for safety sensitive positions unless there is an agreement otherwise. Von Raab case allowed it for armed EE's
- Elkouri - requires showing of special need. 8<sup>th</sup> Ed at 16.2 A
- State laws vary for public employment - Elkouri
  - AZ viol'd 4<sup>th</sup> Amend. Firefighters Odd safety sensitive
  - FLA & OR– same result juvenile worker

# Random testing Private sector

- Focus is not usually on 4<sup>th</sup> Amendment and whether the test is an unreasonable search and seizure but rather whether there is a compelling need for the test in the particular circumstances
- Cases go both ways – some arbs. Uphold the right in order to ensure a drug free workplace. Others find that privacy interests outweigh the ER's need to provide drug free workplace and balance the two interests
- Very fact specific cases – may depend on how safety sensitive the job is

# Weingarten rights and drug testing

- [If] a drug test is part of a broader investigation, Weingarten attaches to an “interview” whose sole purpose is to conduct a drug test. *Safeway Stores*, 303 NLRB 989 (1991).
- *Manhattan Beer Distributors*, 362 NLRB 1731 (2015). ER’s need to conduct drug test cannot come at the expense of the reasonable time it takes to secure a union rep.

# Weingarten rights and drug testing

- *Fed. Bureau of Prisons and AFGF* 2023 BL 97203, 2023 LA 20 (West 2023) EE reinstated where ER violated Weingarten rights when it didn't permit U rep to enter the room where a breathalyzer test was conducted.
- Also, found that ER prevented the U from seeing the result and provided no written proof of the result and any possible irregularities in the test process



# What is “impaired/under influence?”

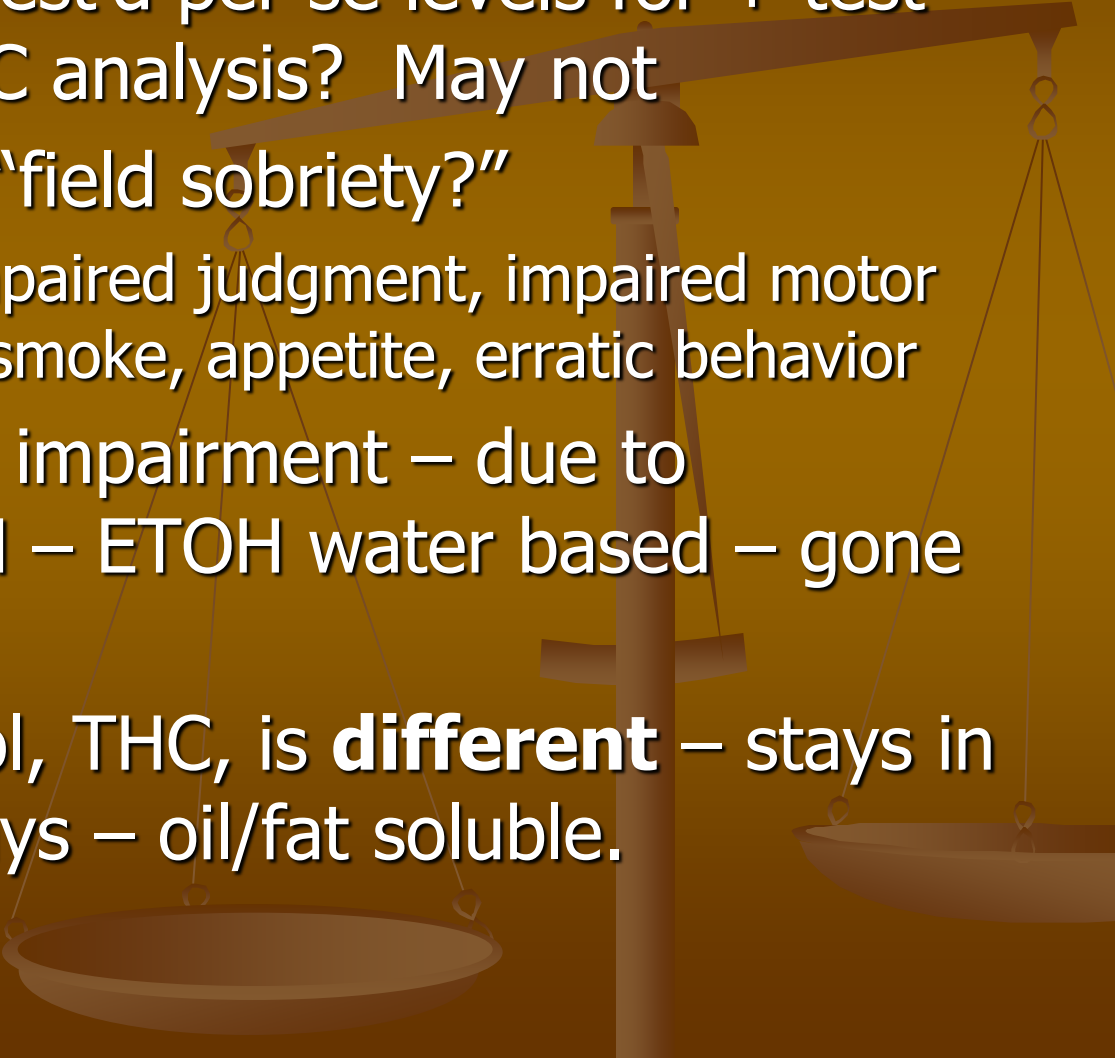
- Positive test for THC may not be enough
- There is currently no reliable test to determine if an individual is currently impaired by THC ... there is no consensus on the level of THC at which an individual is ‘impaired.’” *Heightened Scrutiny for Medical Marijuana at Work*, 45 ABA J. Lab. & Emp. L., Spring 2017.

# Impaired/Under the influence?

- Is there a cutoff in the CBA? If so, then + test may be enough. 2023 LA 522 (Greenbaum) Firefighter had notice of policy and cannot benefit from his own lack of curiosity
- If not, may need corroborative evidence
  - Hard Rock checklist 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



# What is “Impaired?”

- BL – not completely clear with MJ/THC
  - Some states have est'd per se levels for + test – do they apply to JC analysis? May not
  - What evidence of “field sobriety?”
    - Slurred speech, impaired judgment, impaired motor skills, smell of MJ smoke, appetite, erratic behavior
  - ETOH : .08 BAC = impairment – due to chemistry of ETOH – ETOH water based – gone in 24-36 hours.
  - Tetrahydrocannabinol, THC, is **different** – stays in system for 30+ days – oil/fat soluble.
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# What is “Impaired?”

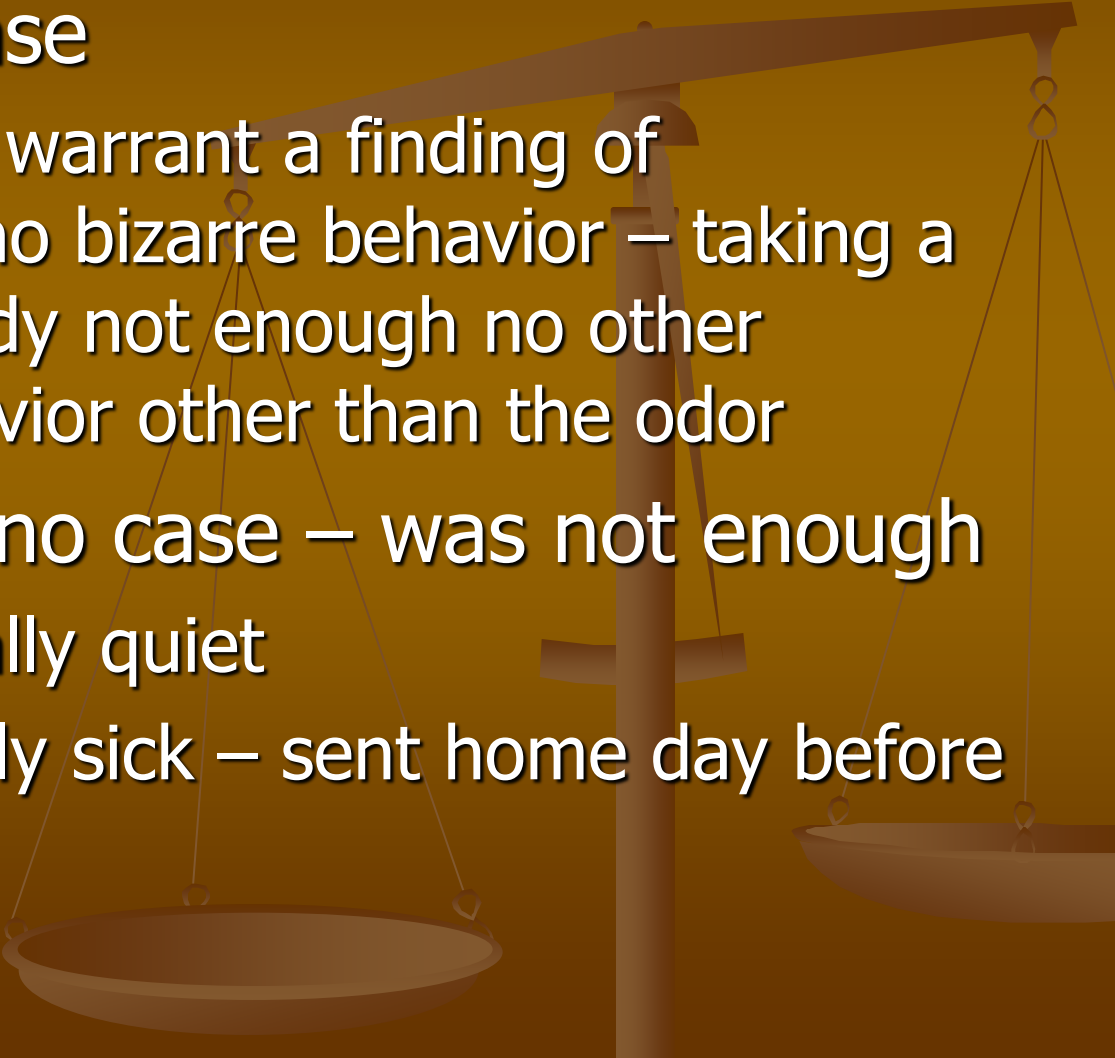
- What is NOT clear is whether there is general consensus in the scientific community as to what level of THC = impairment
- No standard method for detection of impairment
- Appears to be some consensus that 50 ng/mL = + TEST – but does that = impaired?
- BL – the question is whether an ER can set a level and enforce it – I think they can BUT have to justify it under JC analysis – why that level? What science supports it? So far, it's unclear

# What is impaired?

- Other issue is whether the presence of a certain level = impairment that justifies **discharge** – THAT'S a question for arbitrators – THC can last in the blood long after the impairing effects of it have worn off – see cases discussed below
- ER's need to show that a certain level really does = impairment and that that level of THC in this particular position is JC for discharge
- May need some expert evidence on that, i.e. what was the level, how would that affect ability to do job, compelling reason for discharge

# Impairment

- The main questions : Is there a “defined cut off” for the level of THC that the ER says constitutes a positive test and therefor grounds for discipline or discharge? Why is it at that level? What’s the science?
- Second, if the person is above that level of ng/mL, does that necessarily mean that a person is impaired and unable or unfit to perform their job? That will 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?
- There may also need to be a discussion of how and why the position is or is not safety sensitive.
- Be prepared to justify the cut off level and to explain in lay terms why that level is important to an arbitrator.

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- State of MN MAPE
    - was enough to find impairment - bizarre
  - Lane County case
    - Not enough to warrant a finding of impairment – no bizarre behavior – taking a handful of candy not enough no other observed behavior other than the odor
  - Hard Rock Casino case – was not enough
    - EE was unusually quiet
    - Was legitimately sick – sent home day before

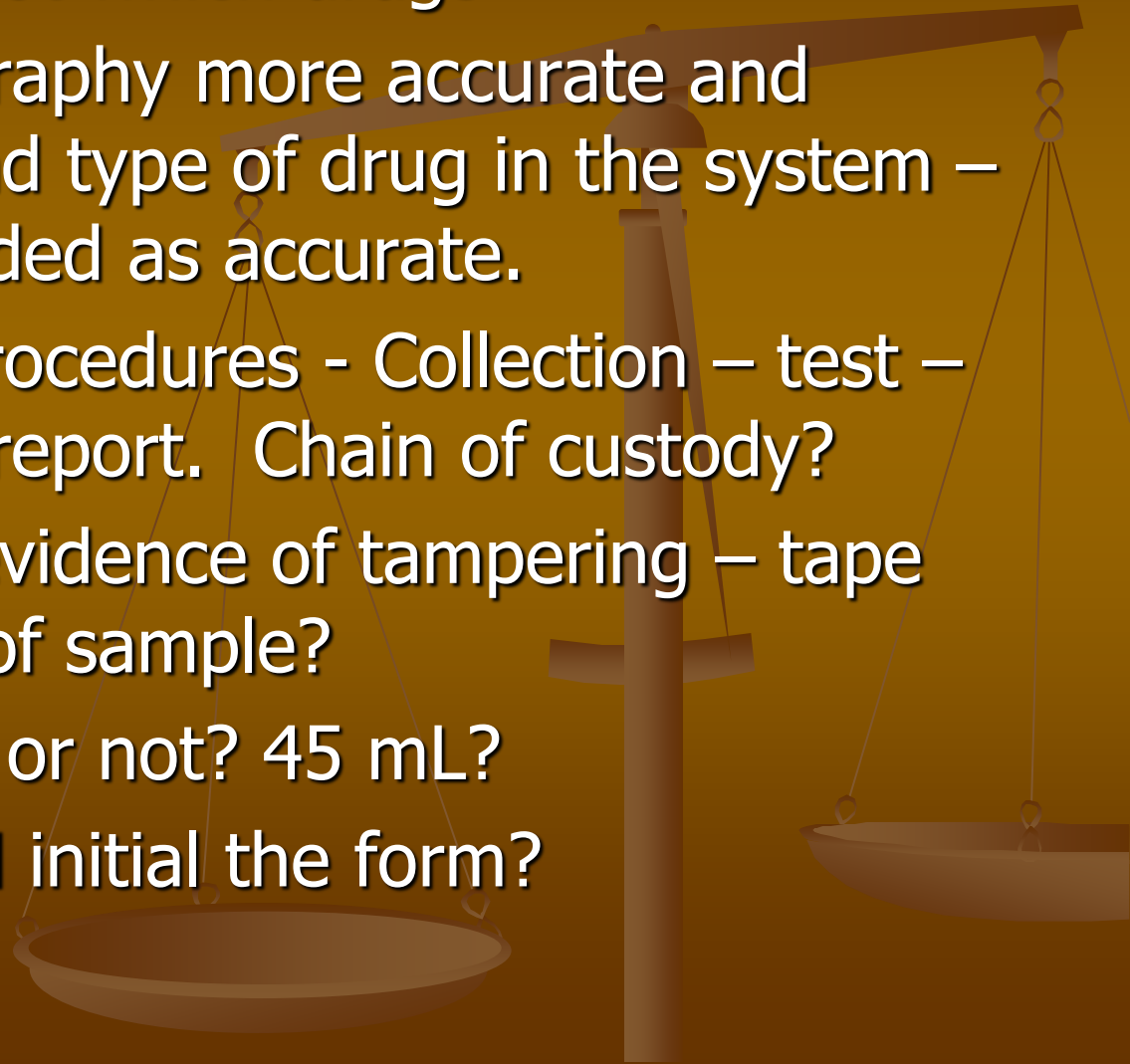
# ZERO TOLERANCE POLICIES

- Elkouri find these “problematic” - arbitrators find these policies to be problematic at best, because they run squarely into the issue of a showing of need by the ER but also because they run contrary to the notion of just cause. Each case depends on its own set of facts
- See, *Gov’t EEs v FLRA* – if CBA specifically treats drug addiction as an illness that language may nullify a 0 tolerance policy
- But cf *Spangler Candy and IBT 20*, 2023 BL 133234, 2023 LA 57 (Cornelius 2023) EE discharged for violation of 0 tolerance policy against use or possession of nicotine products when vape pen fell out of his pocket



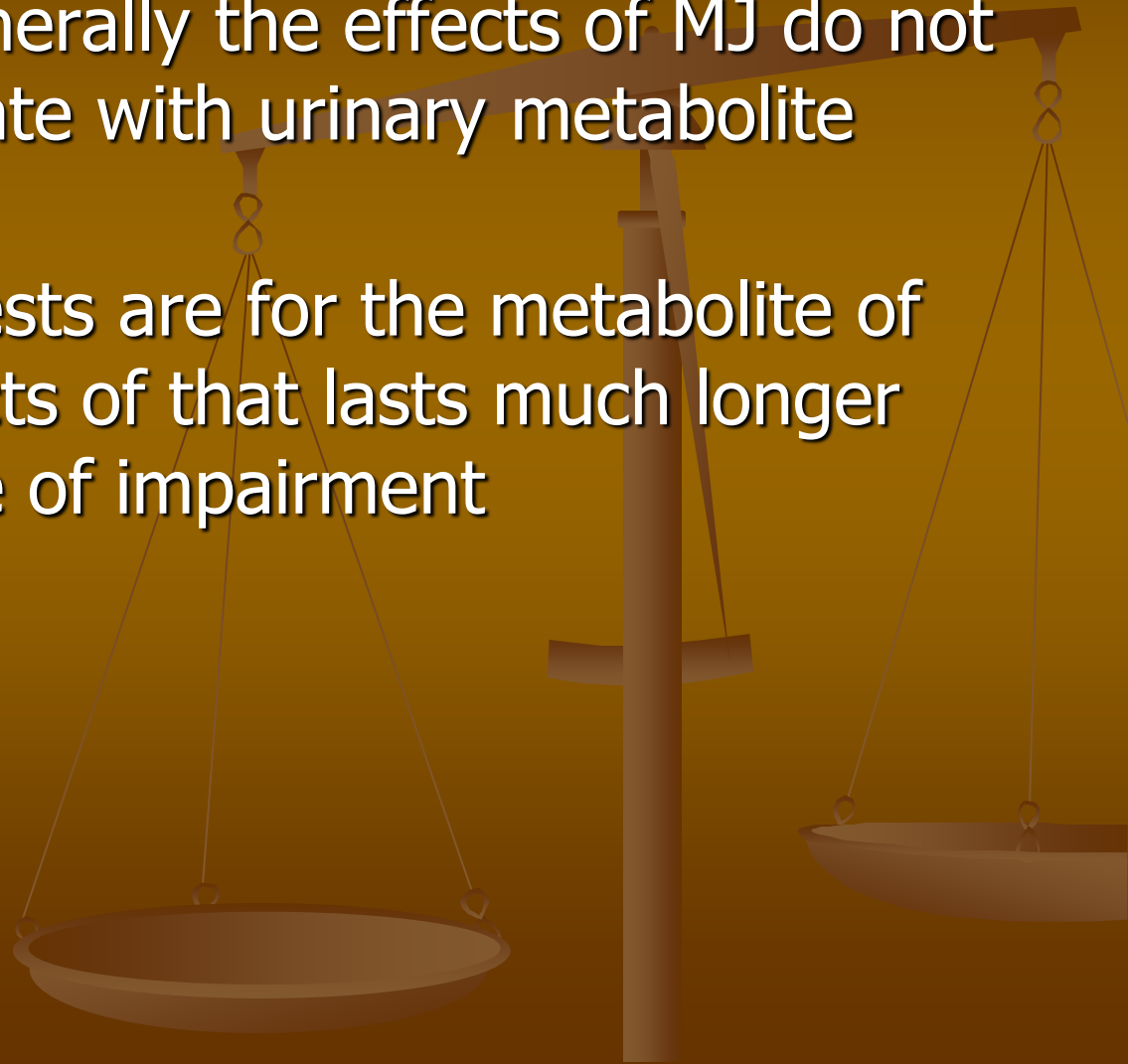
# Primer on testing procedures

- EMIT test usually not used – can tell if drugs in system but not which drugs
- Gas chromatography more accurate and detects level and type of drug in the system – generally regarded as accurate.
- Make sure of procedures - Collection – test – confirmation – report. Chain of custody?
- ID'd PT? Any evidence of tampering – tape across the top of sample?
- Urine observed or not? 45 mL?
- Did EE sign and initial the form?



# Testing procedures

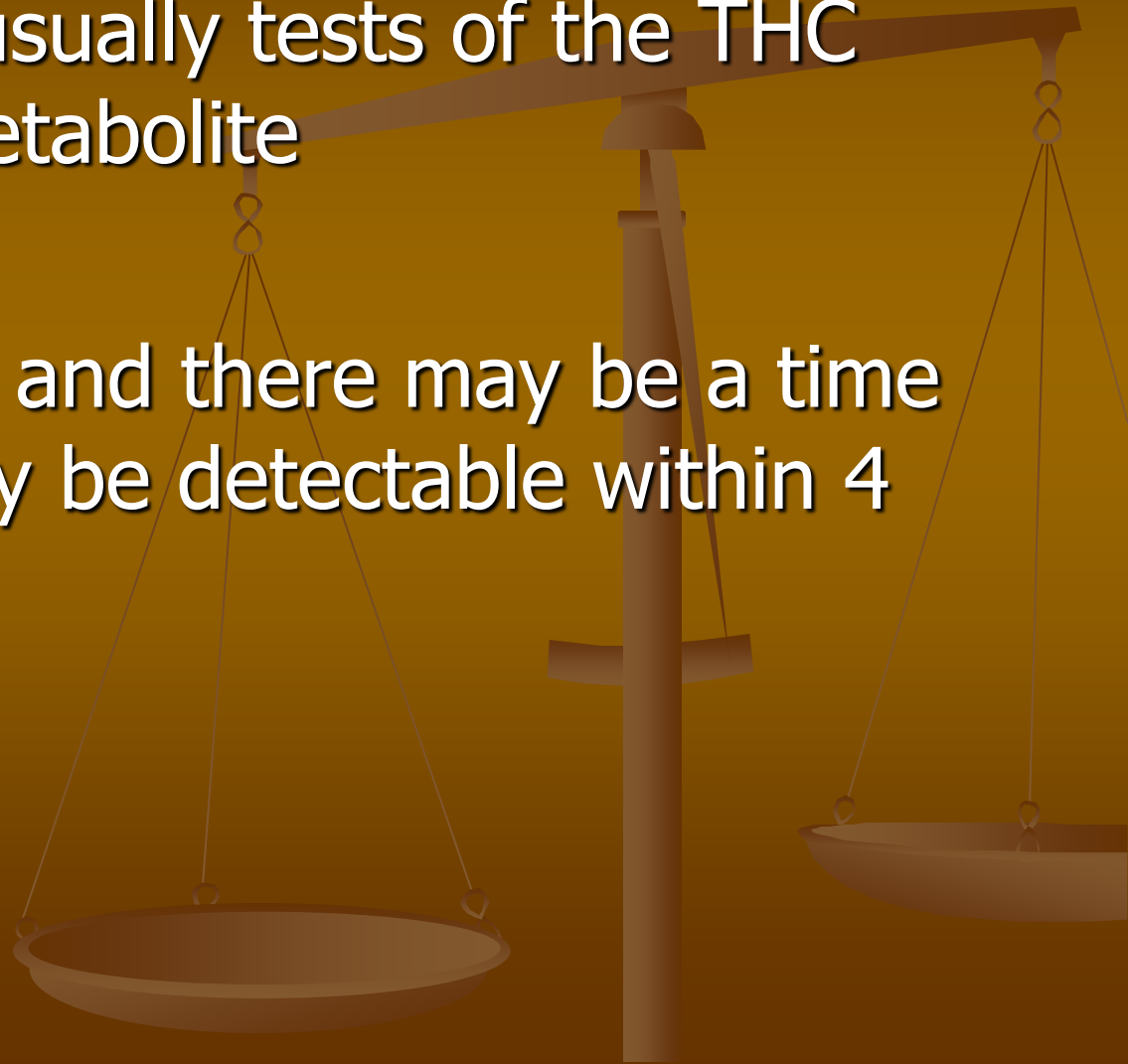
- If Urine test – Generally the effects of MJ do not necessarily correlate with urinary metabolite levels
- As noted, these tests are for the metabolite of THC and the effects of that lasts much longer than any evidence of impairment



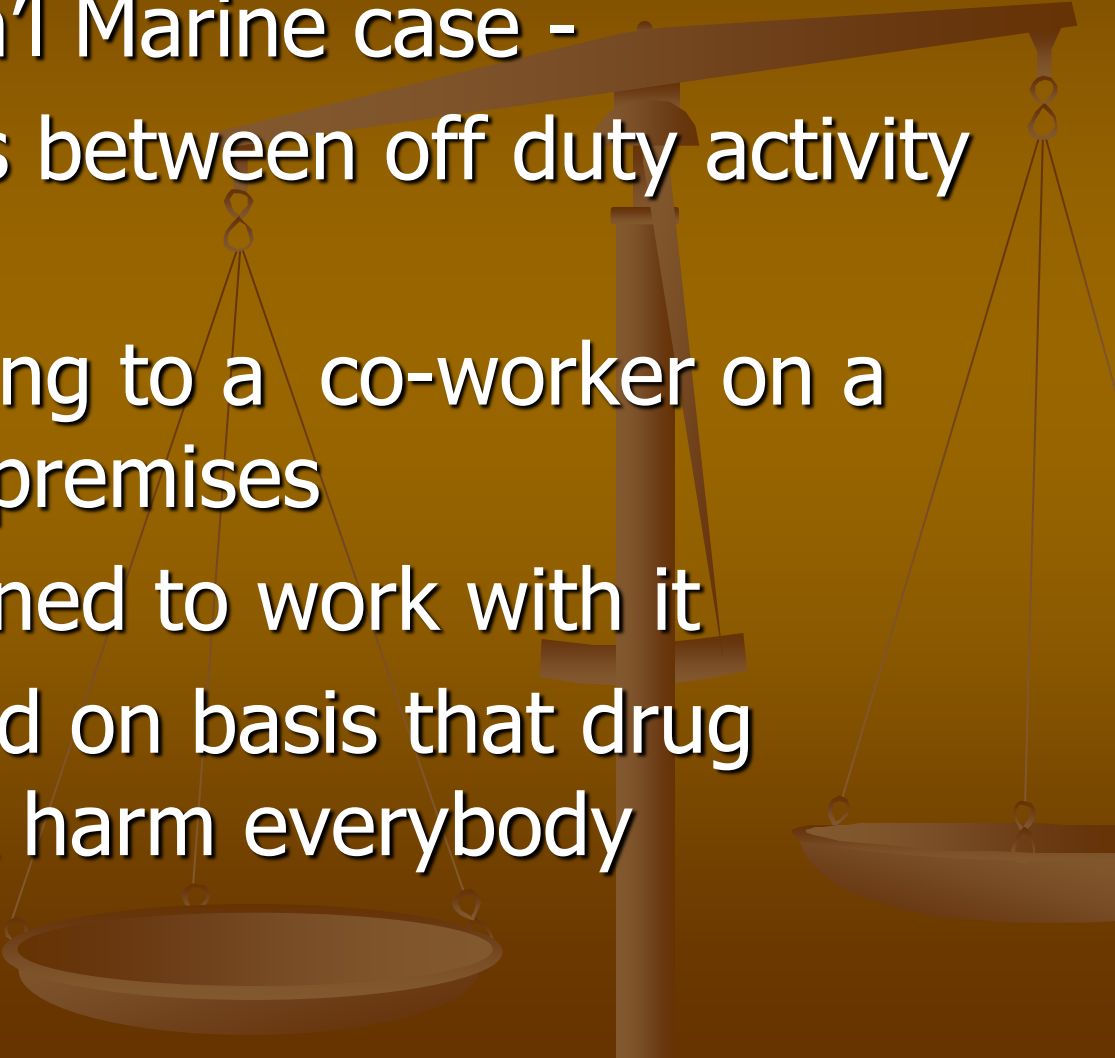


# Testing procedures

- If blood test – usually tests of the THC itself not the metabolite
- No per se limits and there may be a time issue – may only be detectable within 4 hours or so.



# OFF DUTY SELLING OF MARIJUANA

- American Comm'l Marine case -
  - Must be a nexus between off duty activity and work
  - The EE was selling to a co-worker on a lunch break off premises
  - Co-worker returned to work with it
  - Discharge upheld on basis that drug pushers at work harm everybody
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# Off-duty selling of marijuana

- Indiana Bell telephone FN 17
- Same result – the EE was caught selling drugs to a co-worker off duty. On those facts there was a nexus
- CF – See Elkouri 6<sup>th</sup> Ed where off duty drug sales were not considered per se violations of the ER's policy
- Depend on the facts

# A + test not always = discharge or impairment – see FNs 14 & 15

- Orange County – Arb. Smith ruled that a + test does not always = JC for discharge
  - Were some mitigating facts that were not reported
- Several arbitrators referenced in materials have ruled that “under the influence” as measured by a pre-set limit may create a presumption of impairment but that may be rebuttable
- Kahn decision dealt with ETOH but could be applied to THC – does 50 ng/mL always = impairment? It may not especially if time has elapsed between ingestion and the test.

# Arbitral responses



- Standard JC principles still apply
  - Can EE be sent to EAP – especially in light of policies that may require it
  - Is termination for a 1<sup>st</sup> offense too harsh?
- State laws do not always govern the result – alcohol is legal too but use of it on the job is probably going to get the EE in deep trouble.
- Being drunk or stoned on the job will too. Smoking MJ on the job = FHA – not stray too far from common sense

# Arbitral responses – card not always enough

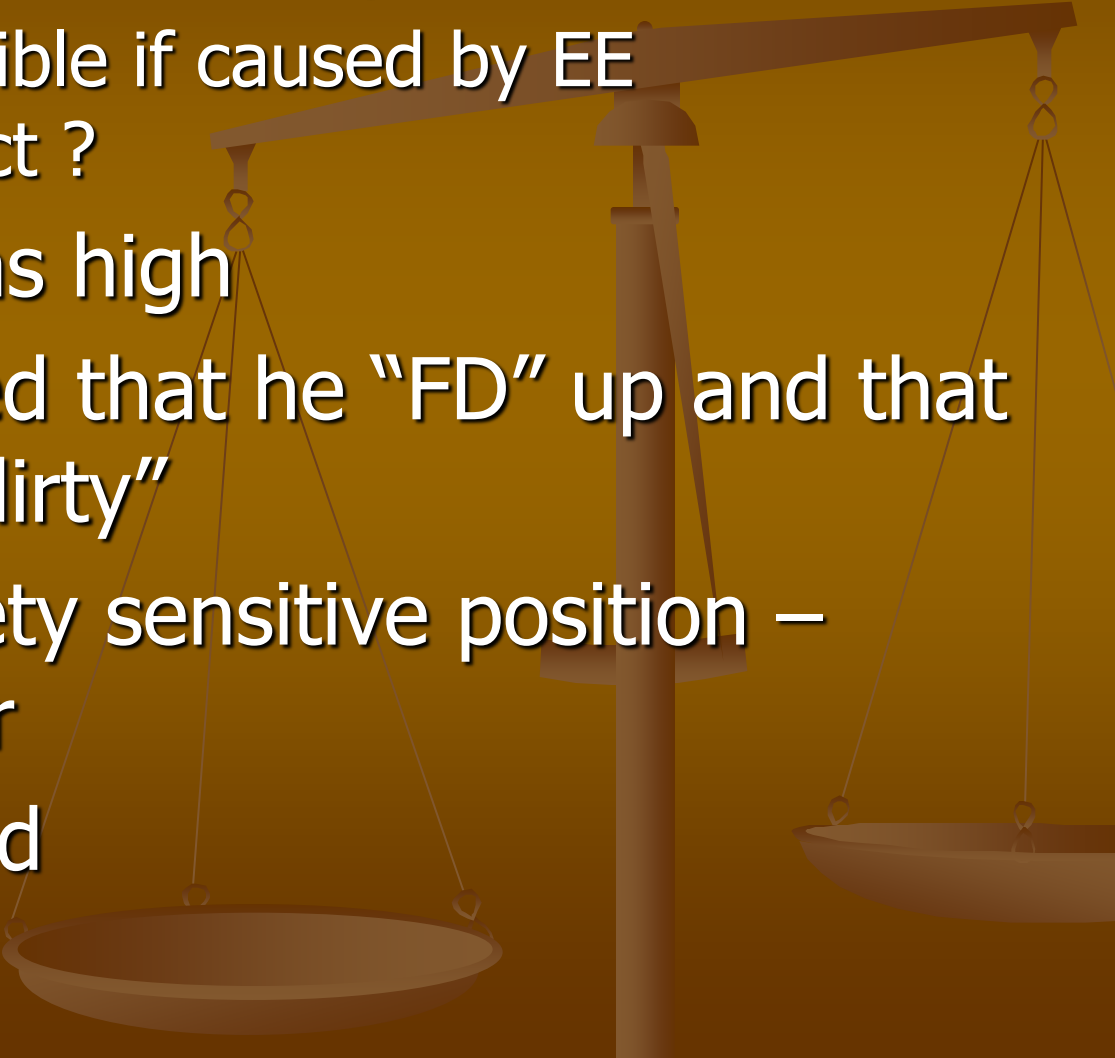
- ER and UAW – Brodsky 2012
  - EE acting erratically and tested was apparently fraudulent – temp not right
  - Card = permission to buy but not use at work
  - Card was false – he got a second one later
  - Discharge upheld – was impaired and then lied about it
  - Main factor was that EE was seen acting erratically and that he lied about the card

# UE and ER – Dunn 2016

- EE had a MJ card for pain in his knee
- Was a rule to advise ER if had a MJ card
- Was a mishap at work – EE tested +
  - 1. Had not told ER
  - 2. MJ not bought from licensed dispensary
    - Might have been harder if MJ from licensed dispensary
- Removal upheld pending proof that EE was “clean”

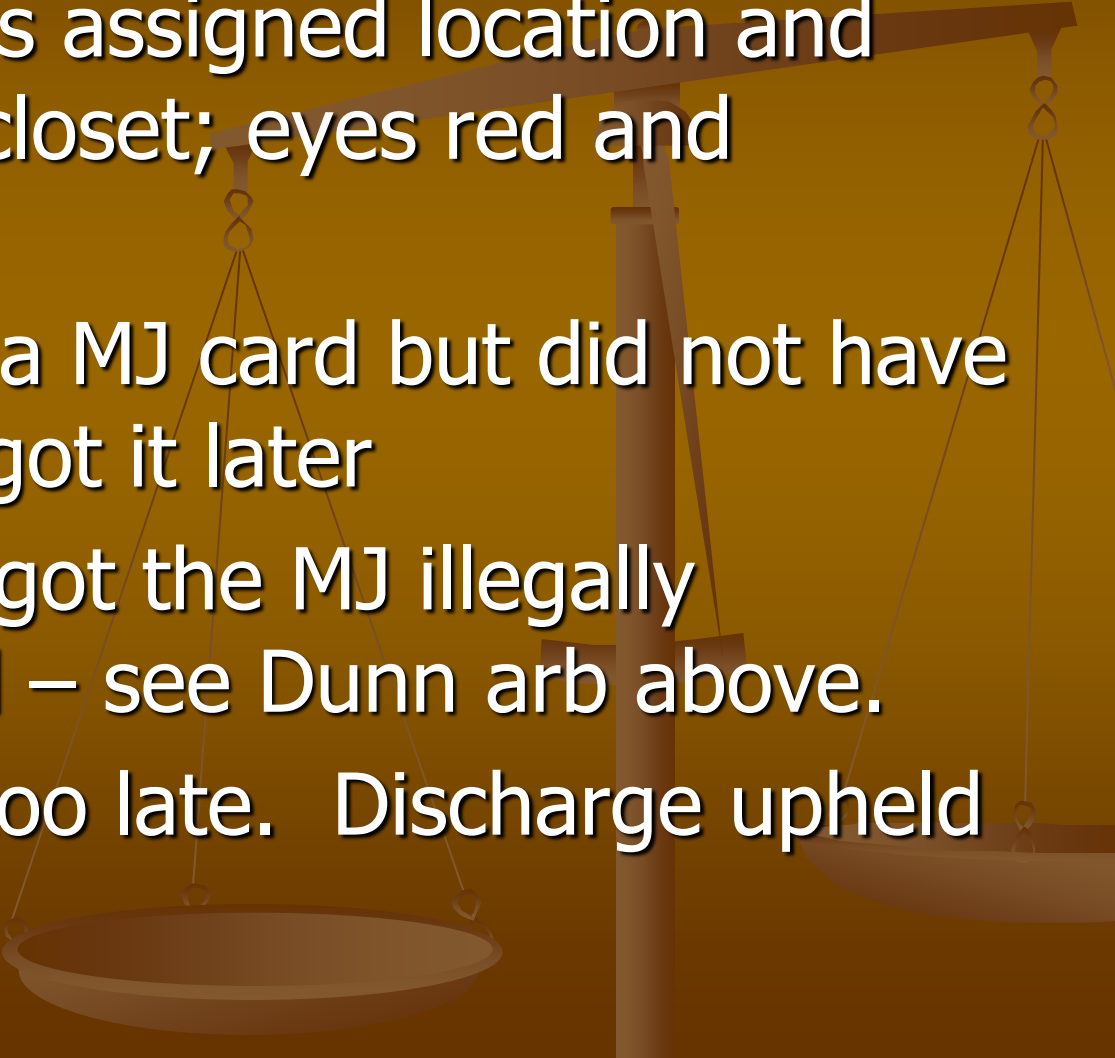


# Wellington and UAW (2016)

- EE tested + after a mishap at work
    - Testing permissible if caused by EE negligence – fact ?
  - Level of THC was high
  - EE acknowledged that he “FD” up and that he would test “dirty”
  - EE was in a safety sensitive position – significant factor
  - Discharge upheld
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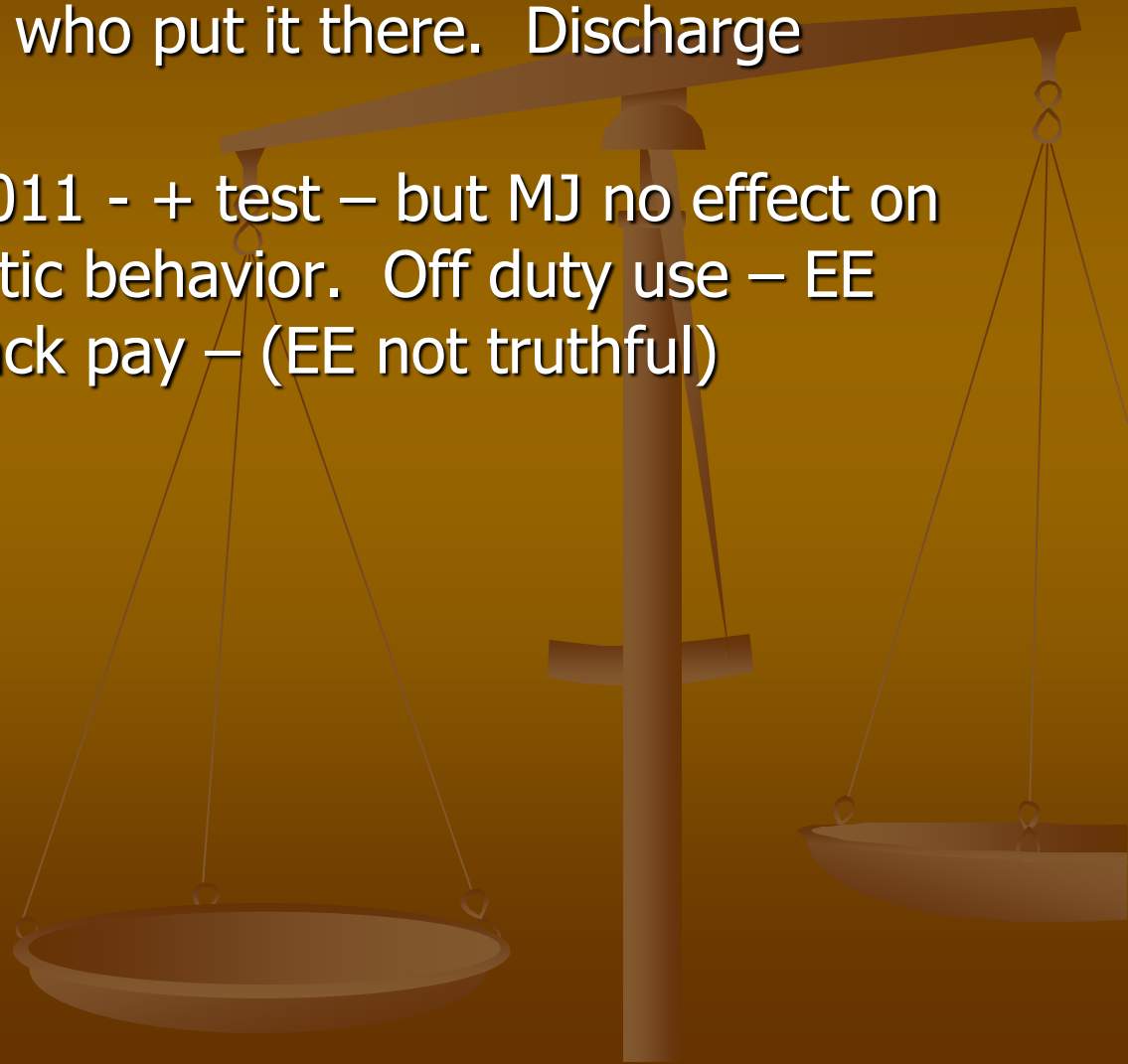


# Teamsters and (School District) (2012)

- EE was not in his assigned location and was found in a closet; eyes red and smelled of MJ
  - Was eligible for a MJ card but did not have it at the time – got it later
  - EE admitted he got the MJ illegally through a friend – see Dunn arb above.
  - Ruled too little too late. Discharge upheld
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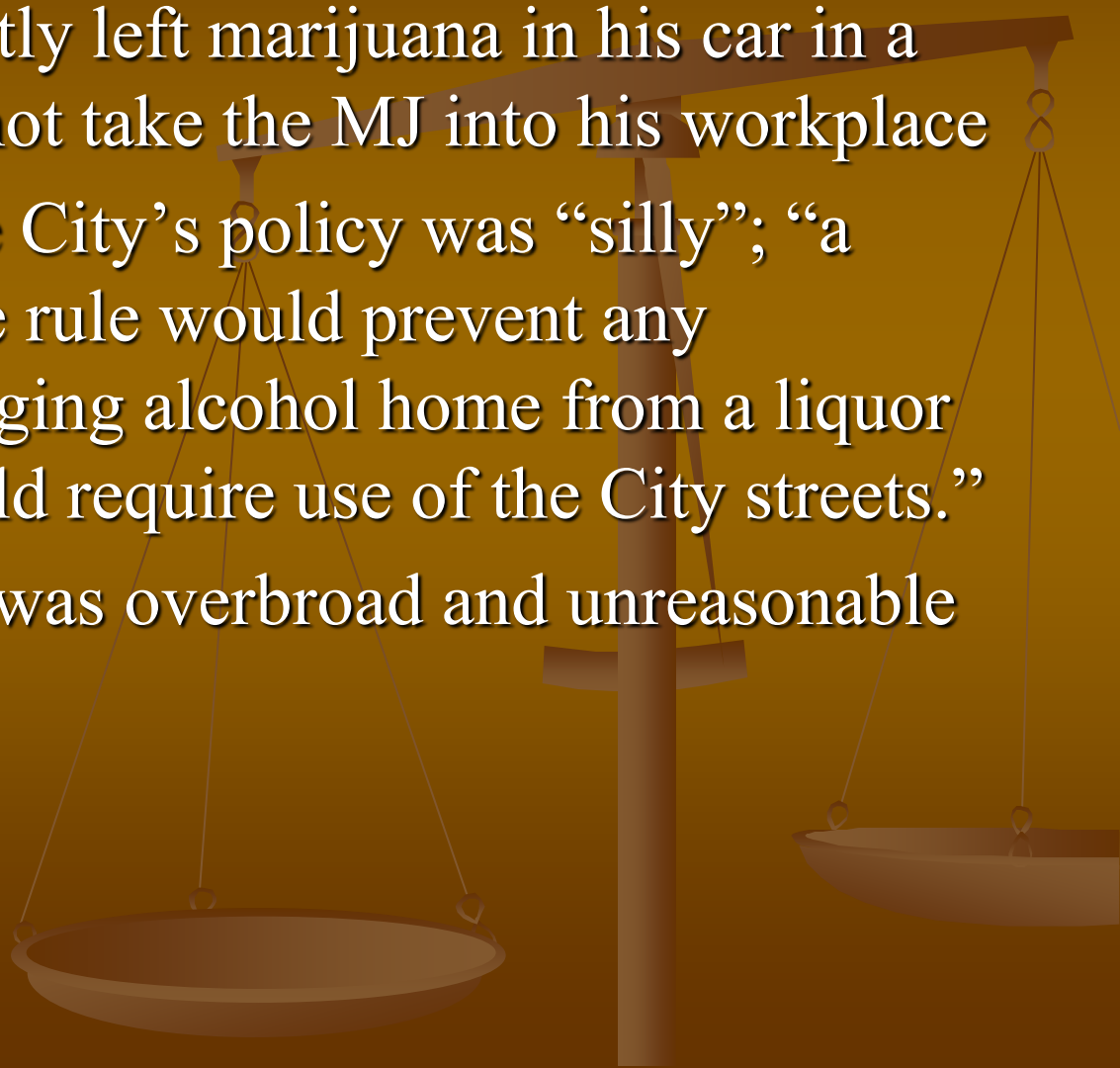
# Monterey County- Solana County & Portland

- Monterey County - EE had a MJ card. MJ found in his desk but not clear who put it there. Discharge O/turned
- Solana County –2011 - + test – but MJ no effect on business. No erratic behavior. Off duty use – EE reinstated W/O back pay – (EE not truthful)



# City of Portland – 123 LA 1444 (Gaba 2007)

- Grievant inadvertently left marijuana in his car in a parking lot; he did not take the MJ into his workplace
- Arbitrator found the City's policy was "silly"; "a literal reading of the rule would prevent any employee from bringing alcohol home from a liquor store since this would require use of the City streets."
- As such, the policy was overbroad and unreasonable



# Freightliner case

- Reviewing Court O/turned a decision reinstating an EE – also in Oregon – where the EE tested + for MJ.
- Ruled the Arb. ignored clear language in the CBA – and that was significant – who tested +
- The policy was *in the parties' CBA* and called for discipline if “under the influence.”
- They had agreed to a cut-off and for the consequences upon a + test.
- Decision failed to “draw essence” from CBA

# Other arbitral and court cases

- Zurn case – 135 LA 319 EE was reinstated after a work accident and who tested at 116 ng/mL, 30 years experience
  - This case is a stark example of the difficulty in defining under the influence vs impairment
- Temple Inland case – again clear *CBA* language calling for possible termination - not a unilateral policy but in the CBA, Like Freightliner

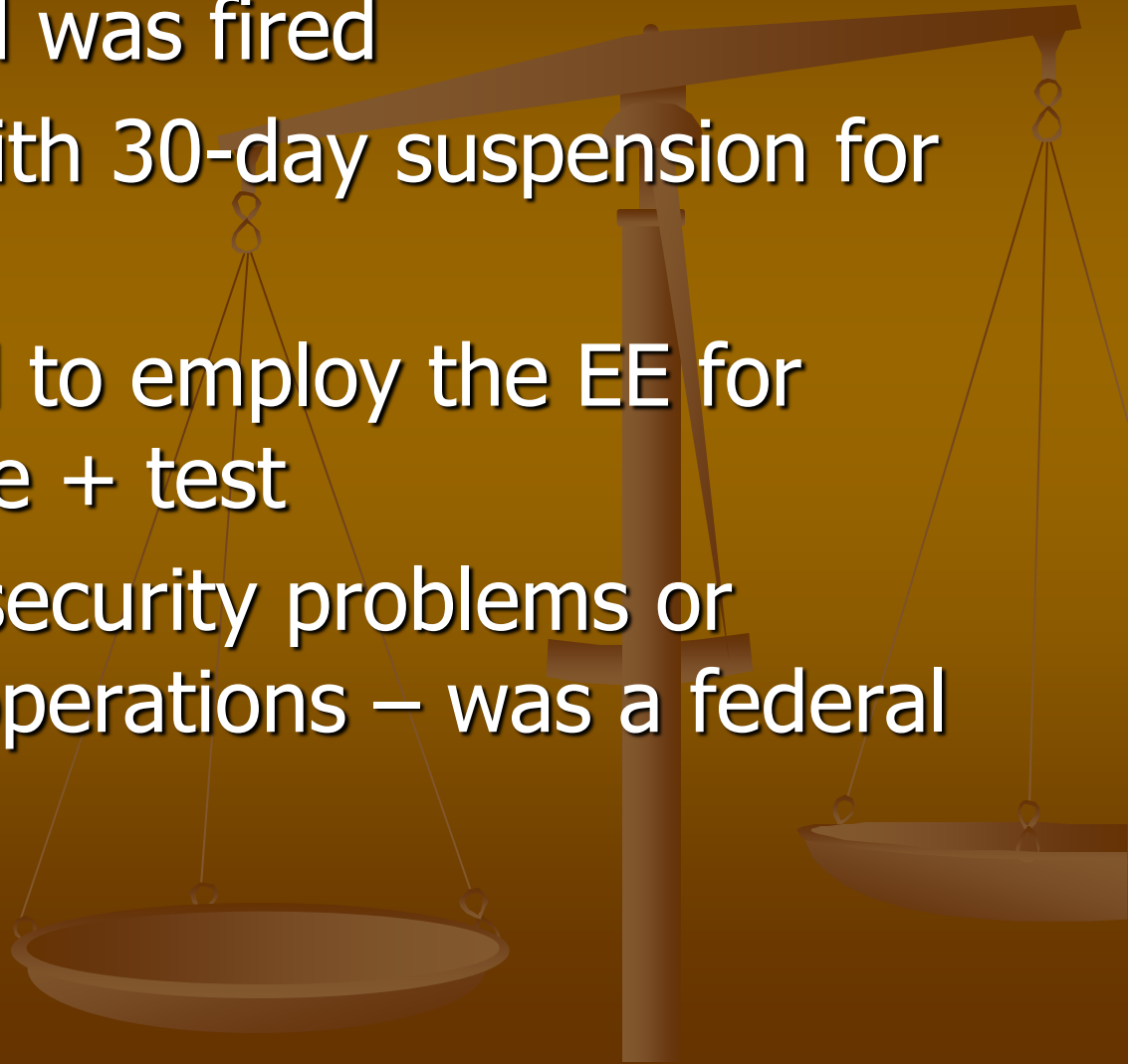
## King Soopers, 131 LA 459 (Sass 2012)

- EE tested positive on a hair test. EE reinstated since test showed past but not recent use
- Off duty use of MJ, even though illegal was like alcohol. Off duty use W/O showing of impairment had little evidentiary consequence. No nexus. Enforcing federal law is not the ER's job



# Dep't of Justice and AFGGE

- EE tested + and was fired
- EE reinstated with 30-day suspension for misconduct
- Agency contend to employ the EE for months after the + test
- No showing of security problems or impairment of operations – was a federal prison



# Lane County OR case

- What does the policy actually say?
  - Lane County case – OR – rec use of MJ is legal – policy said: “Nothing in State law requires the ER to accommodate the use of MJ in the workplace.”  
IOWs’ you can’t smoke it on the job – simple enough
  - Next para.: “nothing prohibits use of a drug taken under the supervision of a MD where its use does not present a safety hazard or impair the operation.”
  - EE smelled of MJ – was tested – reas. suspicion OK
  - No evidence of impairment. Not safety sensitive
  - His response – use it every day for prostate cancer
  - BL – don’t say “can’t” but then say “can.”

# The Albuquerque post office case

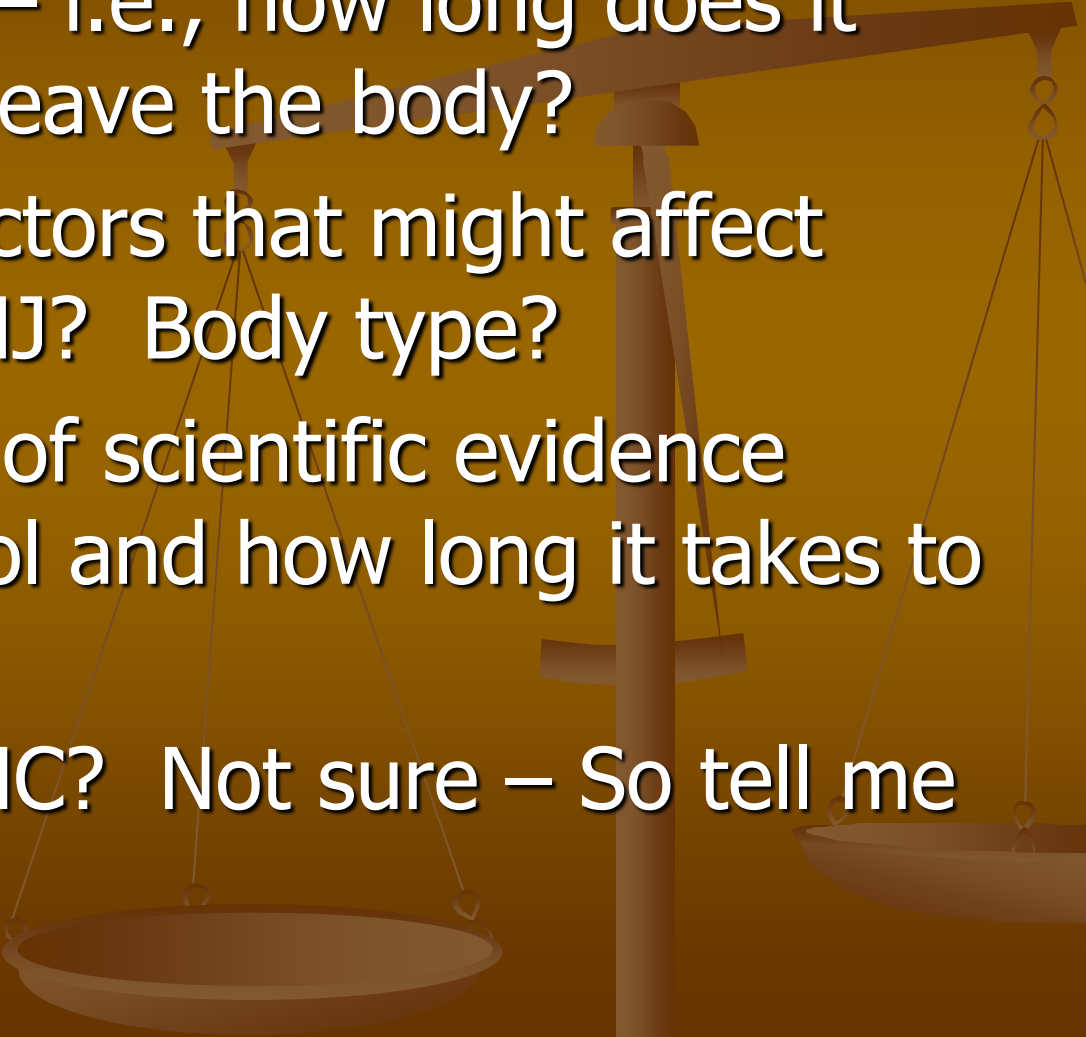
- Similar in that EE had a medical card for use of MJ
- Not safety sensitive – EE was a mechanic but did not drive vehicles. EE self reported the use of MJ.
- Policy allowed EE to stay on duty where MD recommends use of MJ and it does not adversely affect performance – MD had not done so in this case but policy req'd the ER to ask – and they had not
- No evid. of use or possession on duty
- Significantly, the terms of the policy provided that “where there is evidence of a medical reason for the use of a drug, the test counts as a negative test.”
- Rules used dealt with use etc. **“on duty.”** 0 evid!

# The Santa Fe post office case

- EE had a good record. Was a driver and a safety sensitive position
- EE delivered to federal prison – security measures
- Dog hit on a pipe he claimed that he found on the route! Fired for under the influence while on duty.
  - Vehicle searched, nothing found. Passed field sobriety test
- Also, they lost the pipe – it was never formally tested
- Tested him. Above 50 ng/mL.
- EE admitted using MJ 10 days earlier in CO where it was legal. Test consistent with that. 0 evid. o/wise
- Element of off duty conduct as well – there was no showing of impairment.

# The Santa Fe post office case

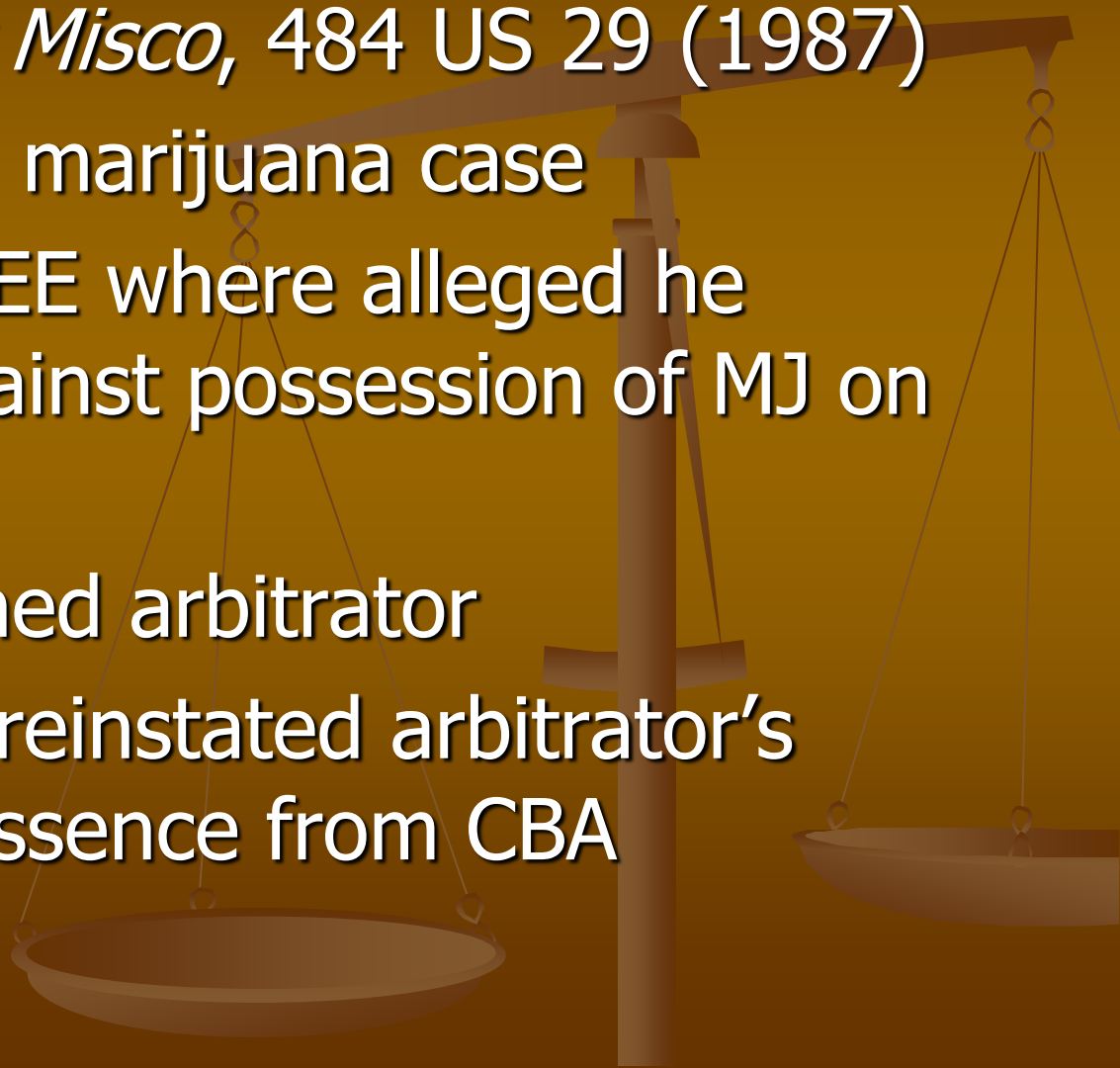
- EE was reinstated
- Lack of proof of use on duty – which was an element of the ER's case.
  - Have to prove it! Mere suspicion is not enough.
- Lack of proof of what was in the pipe and lack of proof of impairment even though was in a safety sensitive position.
  - If you have the smoking gun – FCS bring it!
- EE's lack of forthrightness did cost him but the crux of ER's case was that he used MJ *on* duty. He claimed he used it *off* duty. That coupled with the lack of the pipe and no evidence of impairment = reinstatement

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- There was no evidence of the metabolic absorption rate – i.e., how long does it take for THC to leave the body?
  - What are the factors that might affect that? Type of MJ? Body type?
  - There is a body of scientific evidence regarding alcohol and how long it takes to leave the body
  - What is it for THC? Not sure – So tell me



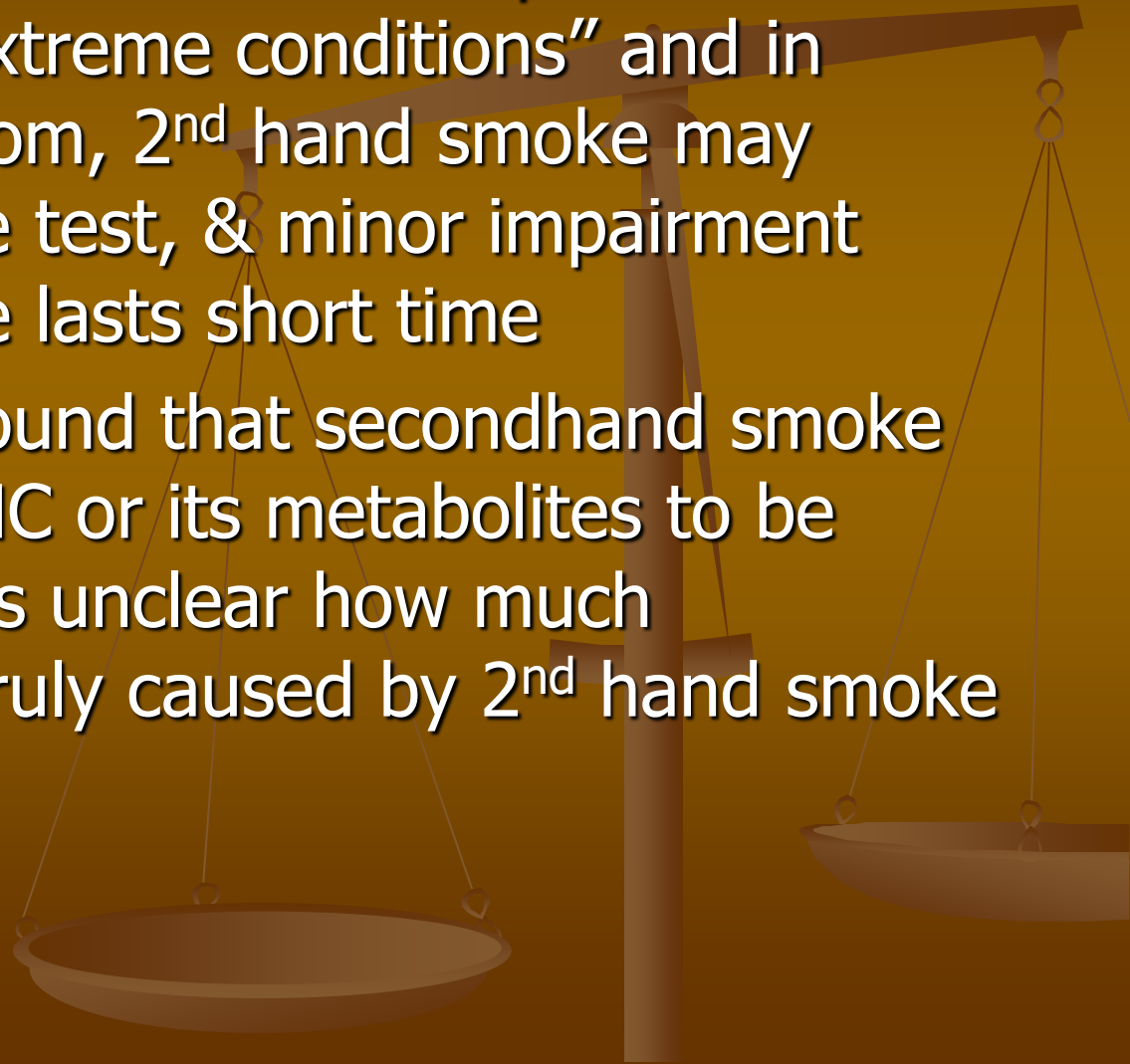
# PUBLIC POLICY

- *Paperworkers v Misco*, 484 US 29 (1987)
- Was originally a marijuana case
- Arb. reinstated EE where alleged he violated rule against possession of MJ on ER's premises
- 5<sup>th</sup> Cir. Overturned arbitrator
- Supreme Court reinstated arbitrator's award – drew essence from CBA



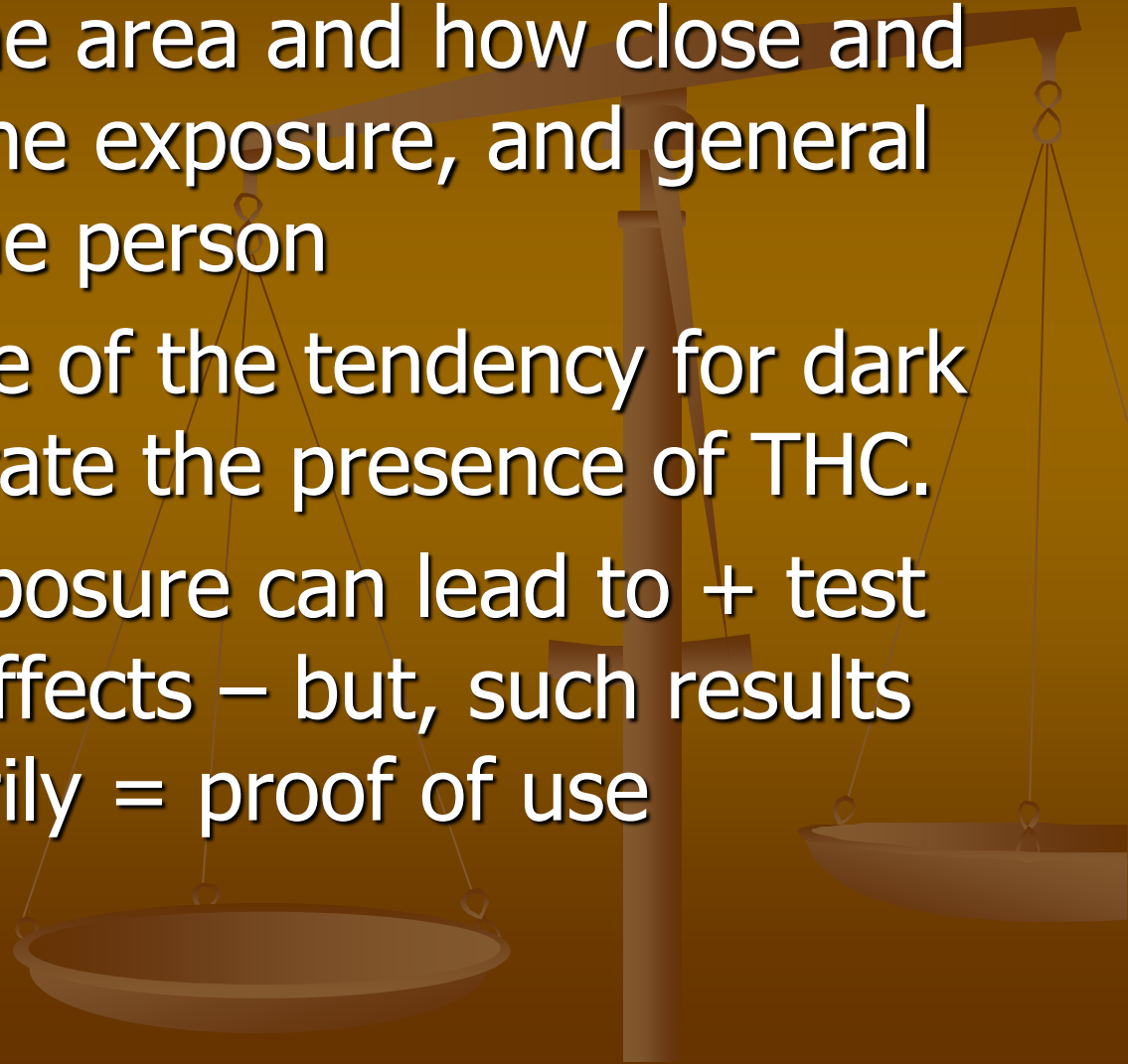
# 2<sup>nd</sup> hand smoke?

- Journal of Drug and Alcohol Dependence – found under “extreme conditions” and in unventilated room, 2<sup>nd</sup> hand smoke may cause a positive test, & minor impairment where exposure lasts short time
- Some studies found that secondhand smoke can result in THC or its metabolites to be present, but it is unclear how much impairment is truly caused by 2<sup>nd</sup> hand smoke



# 2<sup>nd</sup> hand smoke?

- May depend on the strength of the MJ, Ventilation of the area and how close and how long was the exposure, and general physiology of the person
- If hair, be aware of the tendency for dark hair to concentrate the presence of THC.
- Secondhand exposure can lead to + test and impairing effects – but, such results do not necessarily = proof of use



# 2<sup>nd</sup> Hand Smoke

- This may be an issue requiring an expert in individual cases.
- There is no universal threshold that can differentiate between those who have actively smoked marijuana and are intoxicated, those who have actively smoked marijuana in the past and those who have been exposed to second-hand smoke.

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5741419/>

- Not always possible to tell.

# Efforts to rebut + test results

- *US Steel* 133 LA 907 (2014). EE claimed exposure to 2<sup>nd</sup> hand smoke, but union failed to provide rebuttal testimony that the test took that into account. Unclear if the result would have been different if it had.
  - Was a LCA and EE agreed to remain drug free
  - He was bald at re-test – used underarm hair
- *US Steel* 134 LA 1196 (2014) Negative test 1 month later insufficient to rebut 1<sup>st</sup> + test, where there no problems found in the chain of custody or the testing procedures.

# MJ mixed in with other drugs?

- Our scope is not to discuss other “harder” drugs but what if the MJ is found mixed in with others
- Be prepared to discuss how THC interacts with other drugs – whether they are “legal” or not
- EE may be taking prescribed meds and also has ingested THC – upon a + test how might that affect them?

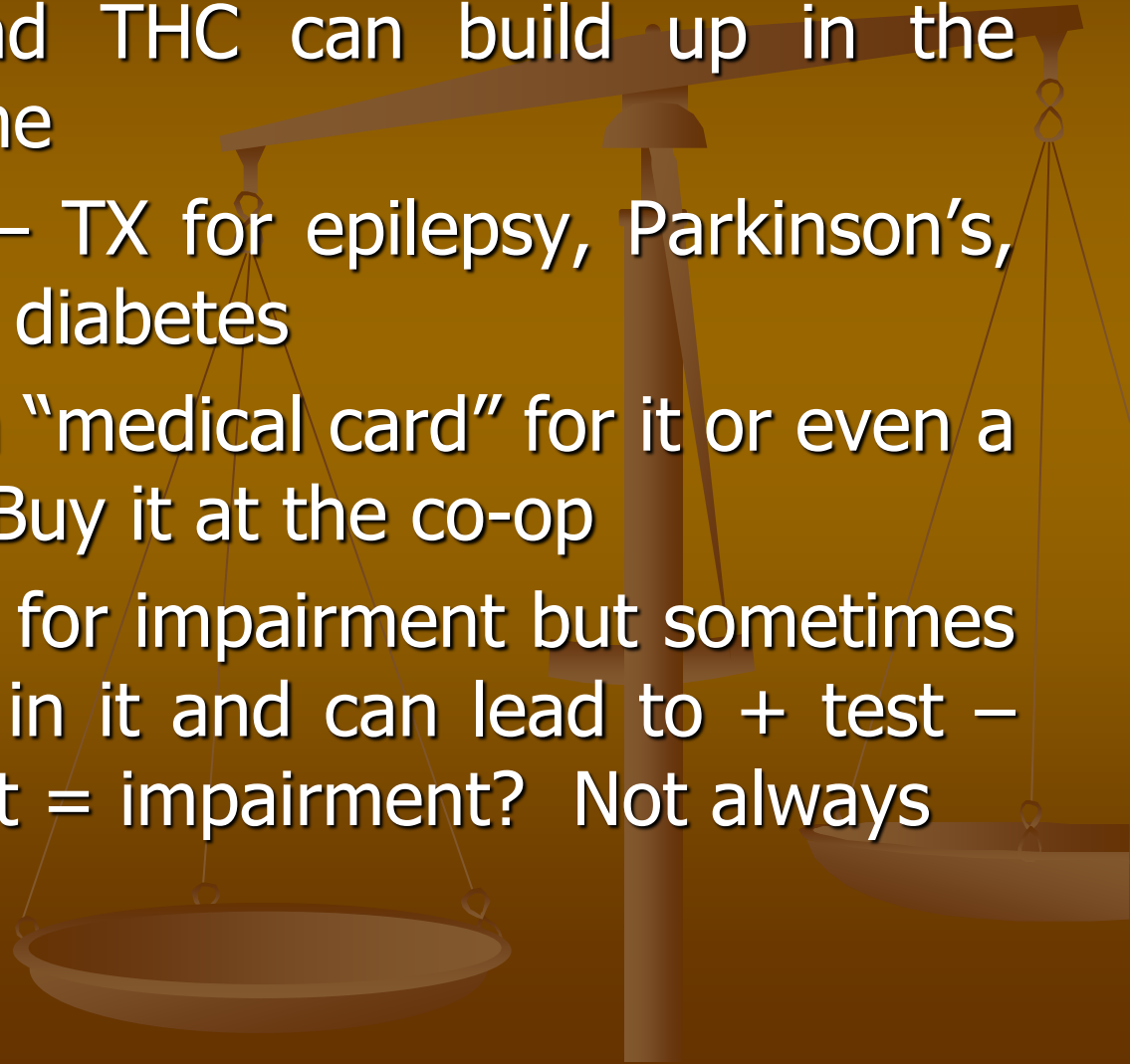


# CBD OIL

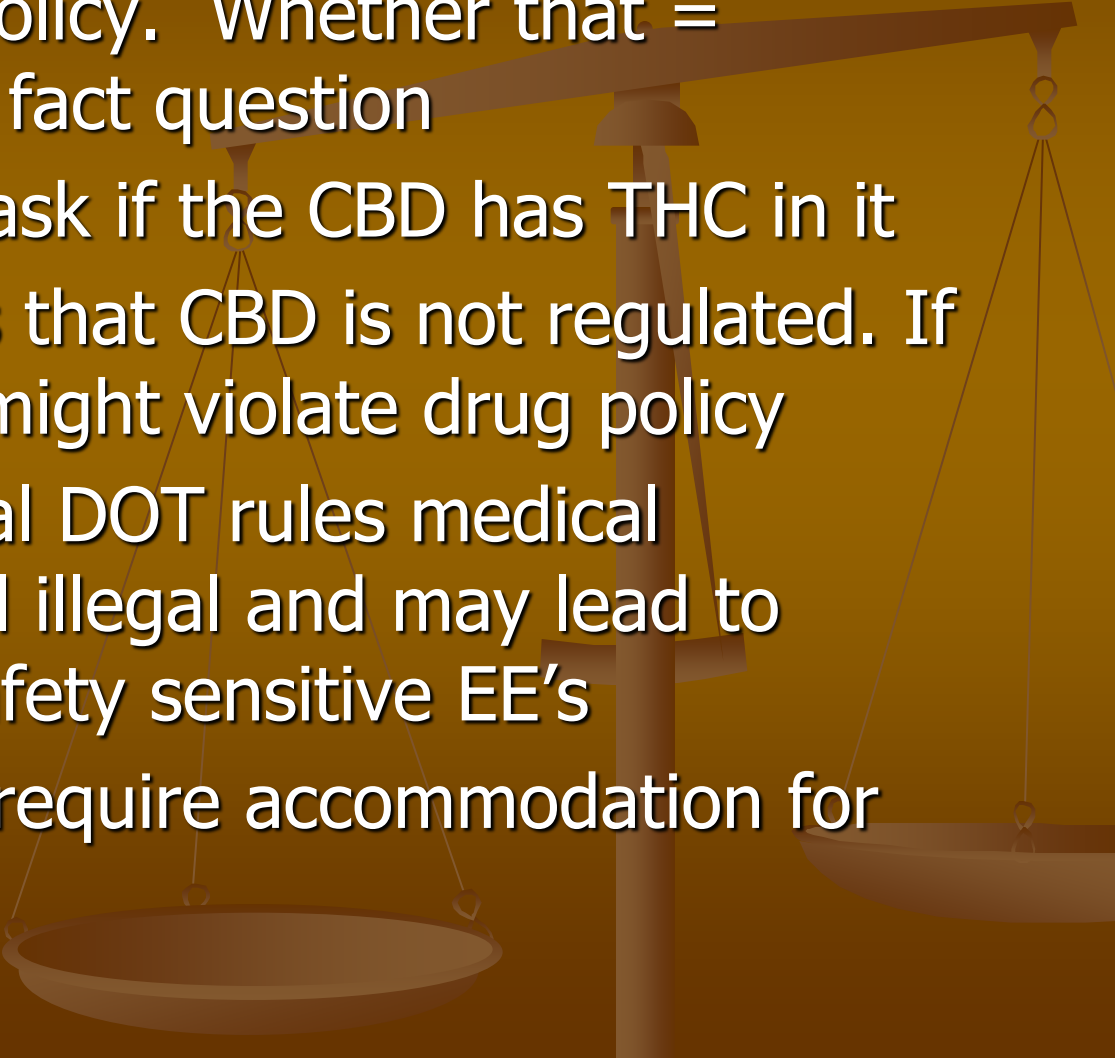
- USED FOR MEDICINAL PURPOSES AND IS NOT ILLEGAL UNDER FEEL LAW
- CBD DOES NOT CAUSE A "HIGH" BUT DOES COME FROM THE HEMP PLANT.
- NOT MUCH LITERATURE YET BUT BE CAREFUL THAT IT MIGHT CONTAIN SOME THC – SOME INSTANCES WHERE IT HAS THAT HAS CAUSED + TESTS.

# The CBD – cannabidiol issue

- Pure CBA does not contain THC; some types do though, and THC can build up in the system over time
- Sold as an oil – TX for epilepsy, Parkinson's, anxiety MS and diabetes
- May not need a “medical card” for it or even a doctor's note. Buy it at the co-op
- Usually, no risk for impairment but sometimes THC shows up in it and can lead to + test – Quare does that = impairment? Not always



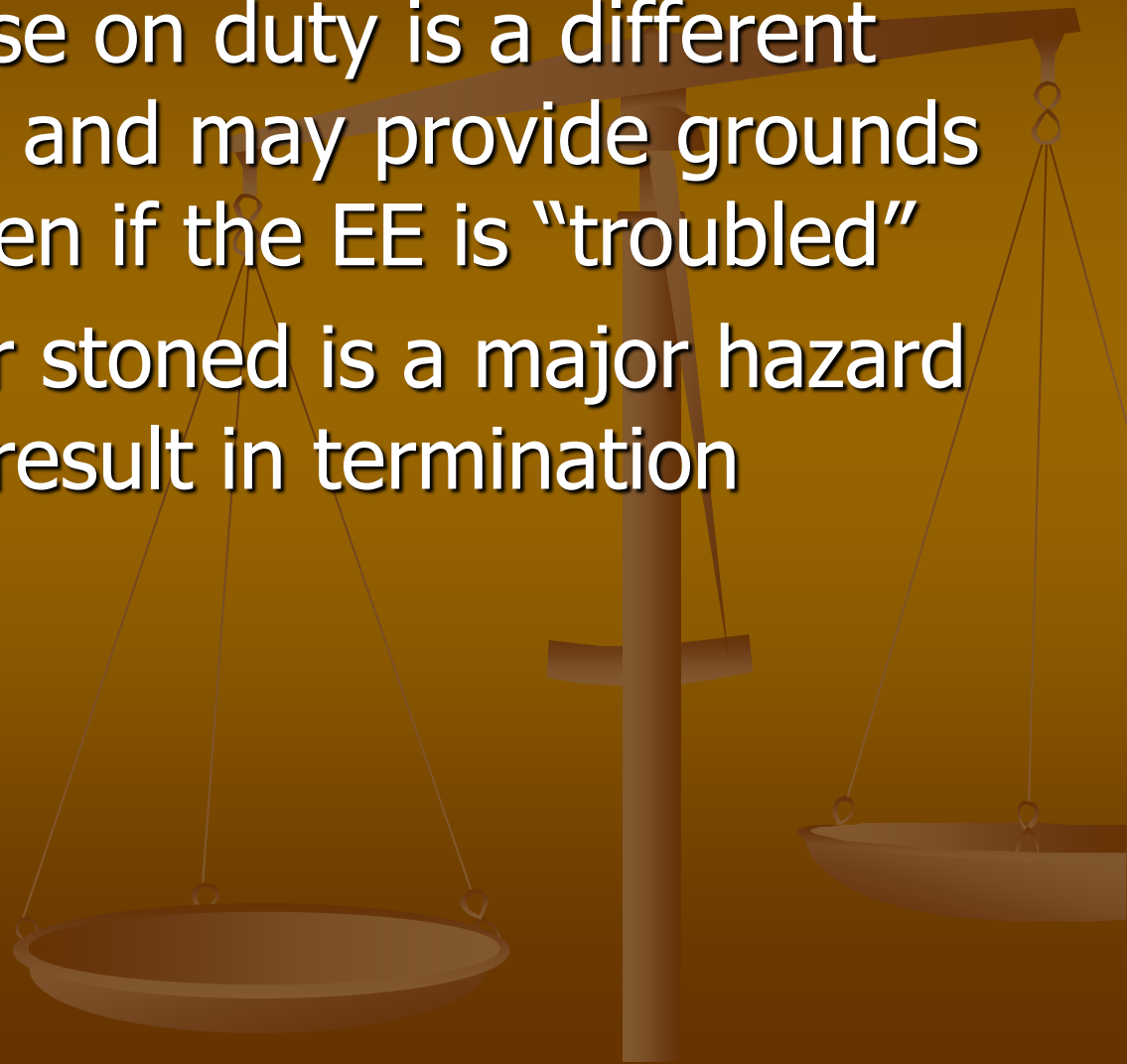
# Some takeaways from the CBD issue

- 1. Some CBD may contain THC & might violate a drug policy. Whether that = impairment is a fact question
  - 2. EE's should ask if the CBD has THC in it
  - 3. ER's tell EE's that CBD is not regulated. If THC is there it might violate drug policy
  - 4. Under federal DOT rules medical marijuana is still illegal and may lead to discharge for safety sensitive EE's
  - 5. Some states require accommodation for medical MJ use
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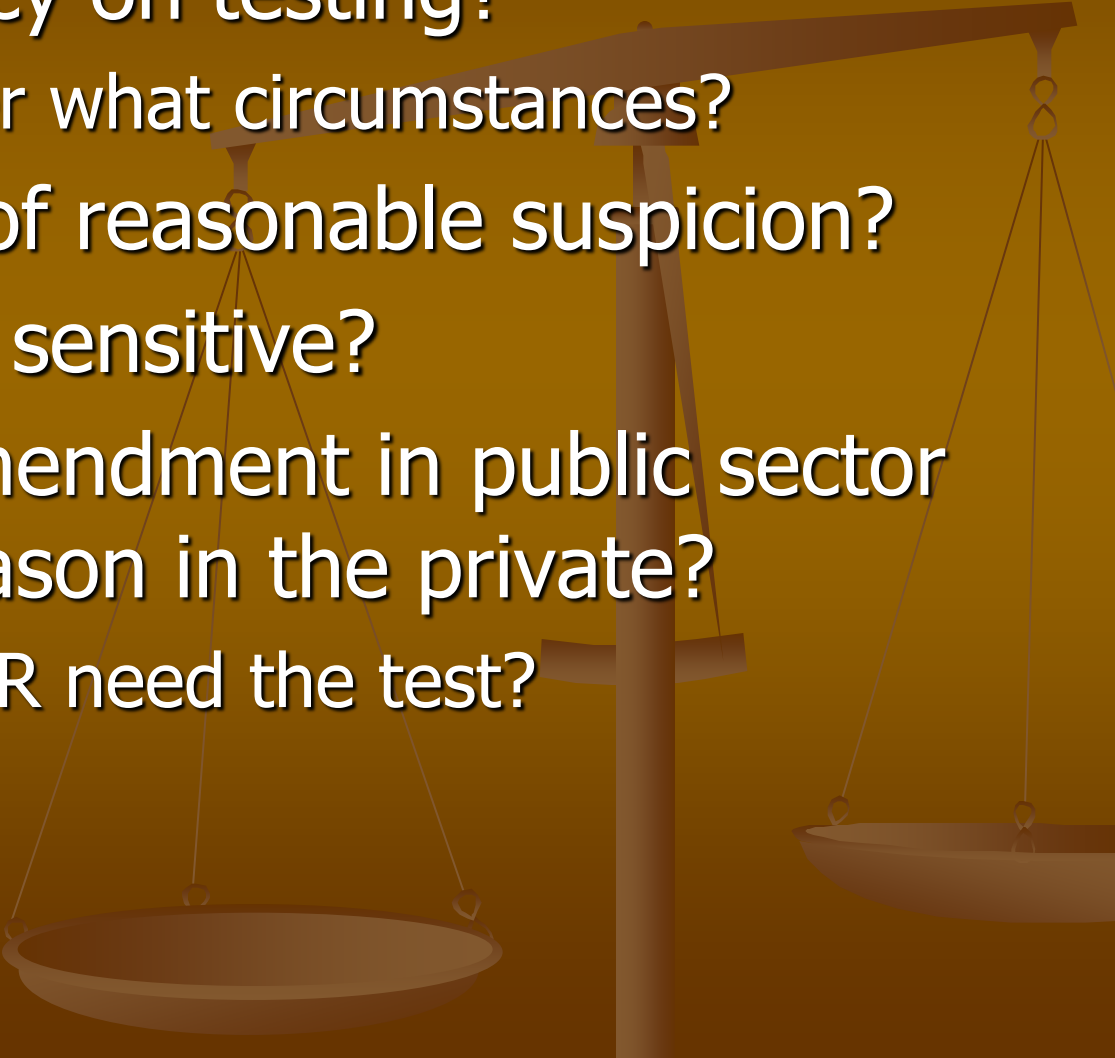
# Troubled employees – Common Law of the Workplace

- Might be a defense in some cases if ER knows of the problems and does nothing to assist, especially if there is an EAP program
- Union bears BOP on these issues
  - Did the ER know?
  - What is the EE's HX? Have they been treated before?
  - Not all arbitrators buy into this – see Common Law of the Workplace at section 6.37
  - Some use Std. JC and impose discipline if impaired
  - Others may allow EE to seek rehab as a condition of reinstatement if elements are present

- Possession or use on duty is a different level of analysis and may provide grounds for discipline even if the EE is “troubled”
- Driving drunk or stoned is a major hazard and might well result in termination



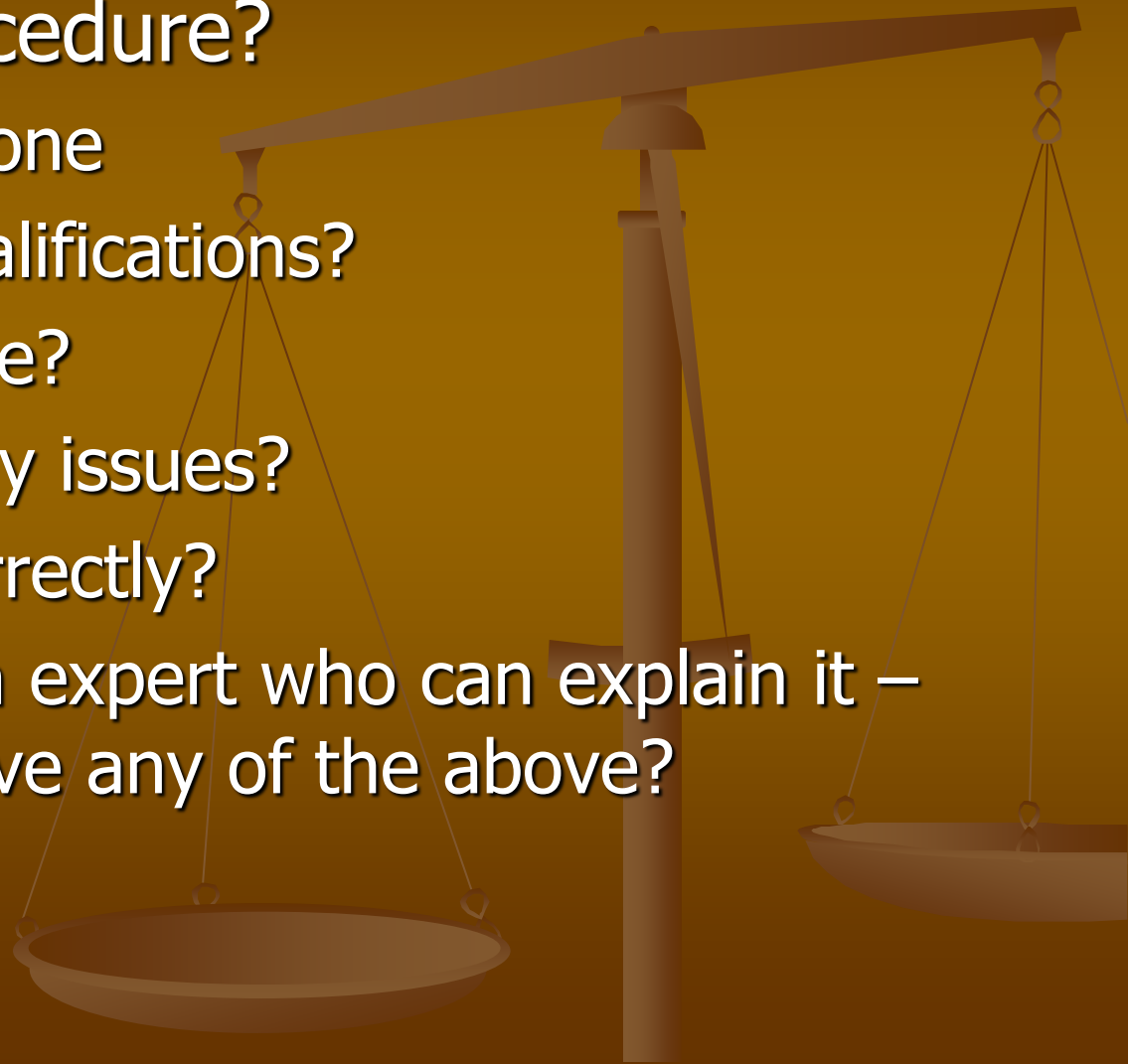
# CONCLUSION

- What is the policy on testing?
    - When and under what circumstances?
  - What evidence of reasonable suspicion?
  - Is the EE safety sensitive?
  - Random? 4<sup>th</sup> Amendment in public sector
    - compelling reason in the private?
    - Why does the ER need the test?
- 

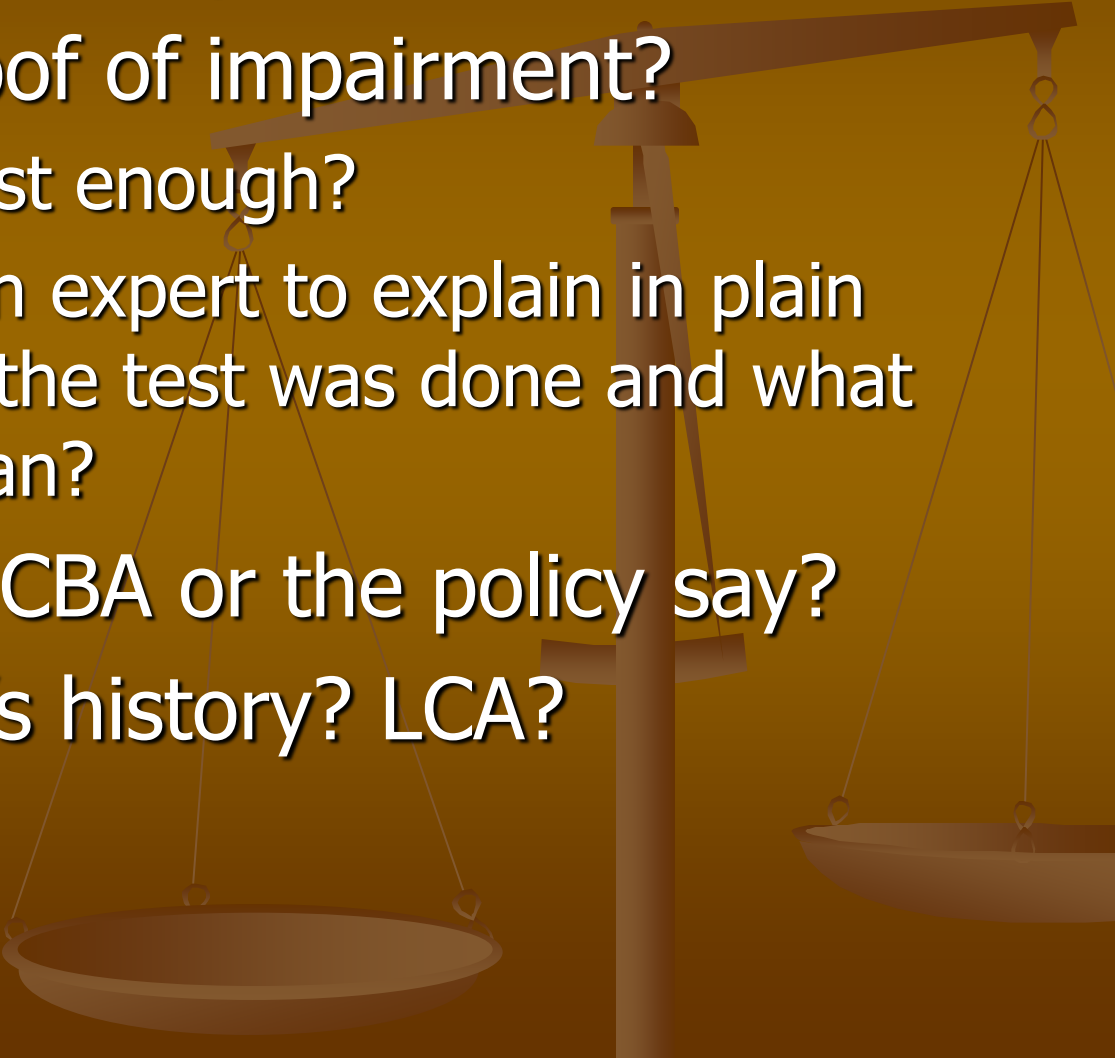


# CONCLUSION

- The testing procedure?
  - Where was it done
  - Who did it? Qualifications?
  - How was it done?
  - Chain of custody issues?
  - Was it done correctly?
  - Do you have an expert who can explain it – prove or disprove any of the above?



# CONCLUSION

- What is the proof of presence?
  - What is the proof of impairment?
    - Is a positive test enough?
    - Do you have an expert to explain in plain language how the test was done and what the results mean?
  - What does the CBA or the policy say?
  - What is the EE's history? LCA?
- 

# CONCLUSION

- Arbitrators may not understand the science or the testing procedures
- Get an expert if there is any doubt as to the test or the results
- Look at the evidence of “impairment” as discussed above.

