DAZED AND CONFUSED:

AN EMPLOYER'S PERSPECTIVE ON THE NOT-ENTIRELY-CUT-AND-DRIED RULES OF MEDICAL MARIJUANA IN THE WORKPLACE

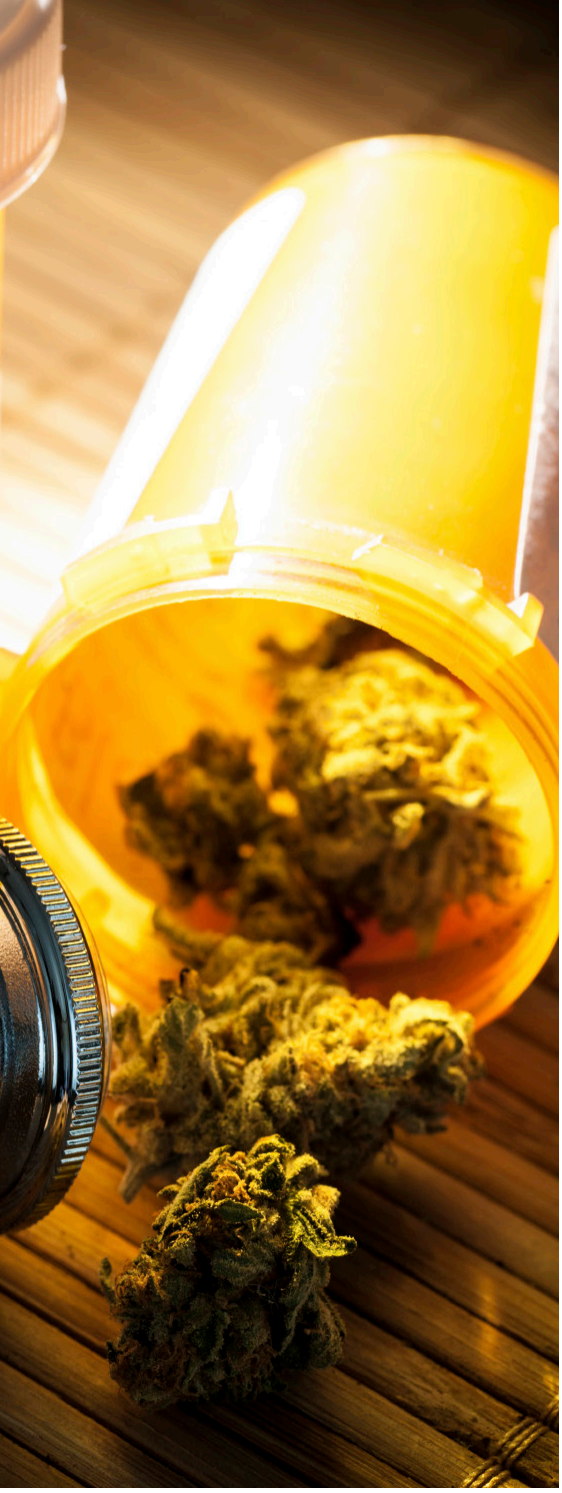
BY JACQUELYN LELEU, ESQ.

It's 6:30 p.m. on a Friday and a client calls with a problem. The company has received the results from a random drug test, conducted earlier that week, and one of its long-time employees tested positive for marijuana. When the HR department informed the employee of the results of the test, the employee explained that she has been using marijuana for medical reasons for the past four years and produced a valid medical marijuana registry card.

The client now asks you — in light of the company's zero-tolerance drug policy, can the company fire the employee?

After cancelling your dinner plans, you sit down at your computer and pull up the language of section 453A.800 of the Nevada Revised Statutes (NRS), noting that it was recently amended and that the provisions of the revised section became effective April 1, 2014. As you begin reading through the statute (starting at NRS 453A.800(2)), the first thing you notice is that an employer is not required to allow the medical use of marijuana in the workplace. "Great," you think to yourself. Despite the fact that medical marijuana use is legal, an employer still has the right to create its own workplace-conduct rules, and can prohibit medical marijuana users from smoking marijuana or consuming ingestible marijuana products while on company property. However, this does not answer your client's question, so you read on.

Subsection (3) of NRS 453A.800 states that an employer is not required to modify the job or working conditions of a person who engages in the medical use of marijuana, if the job and working conditions are based upon the reasonable business purposes of the employer. Although the language of this subsection is somewhat murky, you understand it to mean that, as long as there is a business reason for structuring a job a particular way, and for why certain working conditions exist, an employer is not



obligated to modify the job or working conditions when faced with an employee who uses medical marijuana.

Continuing on with your review, you notice that the statute is not solely pro-employer. The Legislature has also provided employees with some measure of protection as it relates to their right to use medical marijuana. The second half of NRS 453A.800(3) states that employers must attempt to make reasonable accommodations for the medical needs of an employee who holds a valid registry identification card and uses marijuana for medical purposes, provided that such reasonable accommodation would not (1) pose a threat of harm or danger to persons or property, (2) impose an undue hardship on the employer or (3) prohibit the employee from fulfilling his or her job responsibilities. So, what does this mean? What kinds of accommodations are employers obligated to make? What qualifies as an undue hardship?

Unfortunately, the statute does not provide any guidance on these issues and, because the statute is so new, it has not yet been subject to any court interpretation. In thinking this through, you recall that the Americans with Disabilities Act of 1990 (ADA) requires employers to provide reasonable accommodation to employees with disabilities, unless doing so would cause undue hardship. (42 USC § 12112(b)(5)(A)). Because the ADA contains language similar to the language in Section 453A.800(3), maybe you can look at the law surrounding reasonable accommodation and undue hardship, under the ADA, in order to find some guidance on how to best interpret Nevada's statute. Of course, you recognize that the ADA is a federal statute and that (1) marijuana use is still illegal under federal law and (2) any interpretation relating to that statutory language would not be binding in a Nevada court, but you have to start somewhere. Delving in the ADA, you see that, although the phrase "reasonable accommodation" is not specifically defined in the statute, it is described as follows:

The term 'reasonable accommodation' may include:

a. Making existing facilities, used by employees, readily accessible to, and usable by, individuals with disabilities; and
b. Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters and other similar accommodations for individuals with disabilities.

(42 USC § 12111(9)).

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As for "undue hardship," the ADA defines it as an action requiring significant difficulty or expense, when considered in light of several enumerated factors. (*Id*. § 12111(10)(A)).

Those factors include, but are not necessarily limited to:

a. The nature and cost of the accommodation needed;
b. The overall financial resources of the facility making the reasonable accommodation, the number of persons employed at this facility, the effect on expenses and resources of the facility;
c. The overall financial resources, size, number of employees, and type and location of the employer's facilities (if the facility involved in the reasonable accommodation is part of a larger entity);
d. The employer's type of operation, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; and
e. The accommodation's impact on the facility's operation. (*Id*).

The Americans with Disabilities Act of 1990 (ADA) requires employers to provide reasonable accommodation to employees with disabilities, unless doing so would cause undue hardship.

Now, going back to your earlier question, what does this mean, and are you any closer to figuring out whether your client can terminate its employee for failing a random drug test, when that employee has a valid medical marijuana registry card? Well, the first thing you need to determine is whether or not the modification of an existing policy (here, the zero tolerance policy), qualifies as a reasonable accommodation. Under the ADA, the answer is yes, so long as the employer suffers no undue hardship. (See *US Airways, Inc. v. Barnett*, 535 U.S., 122 S. Ct. 1516, 1521 (2002)). Assuming a Nevada court would make the same determination, you go back to consider the preceding language of NRS 453A.800(3) and wonder whether the existence of a drug-free workplace is a working condition that the client is not required to modify. While you could certainly argue that it is and that the client has a reasonable business purpose for creating such a workplace condition, will a Nevada court agree? Since you just don't know, you continue with your analysis and consider the exceptions to an employer's obligation to provide reasonable accommodation. Specifically, whether the accommodation will (1) pose a threat of harm or danger to persons or property, (2) impose an undue hardship on the employer or (3) prohibit the employee from fulfilling his or her job responsibilities.

You already know that none of your client's employees operate heavy machinery or engage in any operations that, if the employee were under the influence, could result in harm to another person or property. Therefore, the first exception to the obligation to provide reasonable accommodation is inapplicable. You can also assume that, since this issue involves a long-time employee who has been using marijuana for the past four years, she is able to fulfill her job responsibilities, notwithstanding her use of marijuana, so the third exception is inapplicable. Therefore, you are left with determining whether or not the company would suffer an undue hardship by making an exception to its zero-tolerance policy as a reasonable accommodation.

Thinking through what you know about this client, you recall that a major portion of its business is derived from federal contracts, and that the client is obligated to comply with the Drug Free Workplace Act of 1988, which requires the client to prohibit its employees from engaging in the unlawful manufacture, distribution, dispensing, possession or use of any controlled substance. Because marijuana is still designated a Schedule I (illegal) controlled substance under the federal Controlled Substance Act, if the client makes an exception to its zero-tolerance policy, will its federal contracts be in jeopardy? Maybe. If so, you could argue that the accommodation would be an undue hardship on your client. If not, what about an employer's obligation to ensure a safe work environment under NRS 618? If the employee showed up impaired one day, would the client be liable if an accident occurred because of the employee's impairment?

With all these questions and scenarios running through your head, you realize that there is no clear-cut answer to your client's question and that only time will tell how the courts will interpret the provisions of NRS 453A.800. At the very least, you recognize the importance of making sure that employers review their policies and practices relating to drug testing and medical marijuana, and train their supervisors and other management personnel to recognize potential issues. Furthermore, if an employer wants to take adverse action against an employee because of his or her off-duty marijuana use, and the employee has a valid medical marijuana registry card, the employer should tread lightly and immediately seek counsel, as navigating this new law can be tricky. ■

JACQUELYN LELEU is a partner in McDonald Carano Wilson LLP's Las Vegas office. Her practice includes advising and representing employers in a broad range of employment law matters, including wrongful termination, wage and hour, harassment and discrimination litigation, as well as claims related to other statutory and common laws pertaining to the employment relationship.