

Senate Commerce Committee

Aaron Jones 271-2609

HB 82-FN, relative to employment protection for participants in the therapeutic cannabis program.

Hearing Date: April 2, 2024

Time Opened: 10:33 a.m.

Time Closed: 11:22 a.m.

Members of the Committee Present: Senators Gannon, Ricciardi, Innis, Soucy and Chandley

Members of the Committee Absent : None

Bill Analysis: This bill prohibits an employer from refusing to hire, or terminating the employment of a qualified patient of the New Hampshire therapeutic cannabis program solely on the basis of a positive drug test.

Sponsors:

Rep. Vail

Rep. Grossman

Rep. W. Thomas

Rep. Newell

Rep. Seibert

Who supports the bill: Representative Suzanne Vail, Representative Brian Seaworth, Representative Wendy Thomas, Representative David Meuse, Representative Brian Sullivan, Representative Timothy Horrigan, Representative Heath Howard, Representative Ellen Read, Hayden Smith, Janet Lucas, Matt Simon (GraniteLeaf Cannabis)

Who opposes the bill: Representative Yury Polozov, Aubrey Freedman, Dave Juvet (BIA), Andrea Chatfield (HR State Council), Elizabeth Sargent (NH Association of Chiefs of Police & NH Sheriff's Association), Julie Smith, Curtis Howland, Daniel Richardson, Paul Dean, David Croft, Quentin Estey, Patrick Sullivan, Tara Tucker, Tad Dionne, Vinnie Baiocchetti

Who is neutral on the bill: Michael Holt (DHHS), Danielle Albert (DOL), John Garrigan (DOL)

Summary of testimony presented in support:

Representative Suzanne Vail

- Representative Vail provided the Committee with a handout with suggested changes, employment protections offered in other states, and a copy of the *Paine v. Ride-Away* decision.

- In the *Paine v. Ride-Away* decision, it was found that an individual had been released from their job because they were a patient in the therapeutic cannabis program.
- Currently, Title 126 provides protections to patients in the program.
- This bill would help a patient get beyond the interview process where they could be asked if they are in the program, which could be used as one last chance to discriminate against them.
- Current participants have to make determinations, and they might not apply to jobs due to the stigma of being part of the program.
- Individuals seek treatment because they would like to avoid costly medications, such as steroids, antidepressants, tranquilizers, and sleeping pills.
- Representative Vail did not want to force an individual to give up their job because they have cancer and they need to use therapeutic cannabis.
- **Senator Ricciardi** said businesses who have truck drivers have a lot of liability. While this bill was well intended, she expressed concerns over its vagueness. She asked how New Hampshire state employees working for federal contracts would be dealt with because cannabis is not recognized federally.
 - **Representative Vail** said in the suggested amendment, they have added language to address these concerns. The new language would be “It shall be deemed that an employee being impaired by cannabis products while on duty is an undue hardship upon the employer. It shall be deemed an undue hardship upon an employer to require an employer to do any act that would put the employer in violation of federal law or cause it to lose a federal contract or funding.”
- **Senator Gannon** asked if a worker would receive workers’ compensation if an employer could not accommodate them.
 - **Representative Vail** said accommodations are made on a case-by-case basis for any disability. As an employer, a urine test could be required. An individual could be taking opioids or valium, and they would be cleared if it were a prescription. This bill would give individuals the same protections that are given to traditional methods.

Representative Brian Seaworth

- Representative Seaworth sponsored the amendment that passed the House.
- This bill would make it illegal to fire someone with a medical cannabis card.
- In the *Paine v. Ride-Away* decision, the issue was not about medical cannabis use. Instead, it was the disability that needed to be accommodated. The New Hampshire Supreme Court remanded the case to the lower courts because the wrong issue was looked at.
- A majority of the Committee supported basing the language of the bill on the court ruling.

- Since the introduction of therapeutic cannabis, **Senator Gannon** said it has not been treated like a medicine. If an individual receives a prescription from a doctor, they can go into a dispensary and they can get what they want.
 - **Representative Seaworth** said these issues were why the bill came forward. If an employee is prescribed opioids, it could be removed from a drug test. An employee, who has some level of opioids in their system, might not be able to do part of their job until their medication has been reduced or finished. Since cannabis can be prescribed by a doctor, they wanted to treat it similar to other medications that can be prescribed.
- **Senator Gannon** said they could wait for an opioid to dissipate, but THC could stay in an individual's system longer depending on the potency. He felt cannabis was being used like a medicine, but it was not a medicine.
 - **Representative Seaworth** said the vagueness of the language was intentional. Determinations of reasonableness have to be done on a case-by-case basis. Issues might depend on the employer, conditions, and level of usage. These issues have to be solved by the federal government.

Representative Wendy Thomas

- The goal of patients in the therapeutic cannabis program is to allow them to use cannabis to control their symptoms, so they can return to their jobs.
- An individual can test positive for cannabis 13 to 30 days after ingestion. After 6 hours, THC begins to wear off.
- Representative Thomas said it is unfair to penalize people who are using cannabis as a medicine in a responsible manner.
- Dosages are based on metabolism because cannabis is a plant. Dosages are reduced until an individual has found their correct dosage; therefore, Representative Thomas said equating inebriation to the percentage of THC was not correct.
- An individual would not be protected if they are inebriated at work or if they are driving while under the influence. Instead, this bill would protect individuals in a legal program who use their medication responsibly.

Representative Brian Sullivan

- Guardrails are established in Title 10, which is the use of cannabis for therapeutic purposes statute.
- Once the Committee delved into the statute, Representative Sullivan said they were comfortable with how it was dealt with in the workplace.
 - In RSA 126-X:3, Section 2, it states "Nothing in this chapter shall exempt any person from arrest or prosecution for: (a) Being under the influence of cannabis while: (1) Operating a motor vehicle, commercial vehicle, boat, vessel, or any other vehicle propelled or drawn by power other than muscular power".

- The statute also states an individual cannot be under the influence “(2) In his or her place of employment, without the written permission of the employer; or (3) Operating heavy machinery or handling a dangerous instrumentality.”
- Smoking or vaporization of cannabis in any public place is prohibited, including “(1) A public bus or other public vehicle; or (2) Any public park, public beach, or public field. (d) The possession of cannabis in any of the following: (1) The building and grounds of any preschool, elementary, or secondary school, which are located in an area designated as a drug free zone; or (2) A place of employment, without the written permission of the employer; or (3) Any correctional facility; or (4) Any public recreation center or youth center; or (5) Any law enforcement facility.”
- Since all of these issues are addressed, the Legislature had to worry about reasonable accommodations.
- Representative Sullivan hoped the suggested amendment offered by Representative Vail addressed the concerns of law enforcement.
- Based on the *Paine v. Ride-Away* decision, the state must accommodate individuals who have a therapeutic cannabis card. This bill would put into statute what has already been determined, so no one would have to go to court to preserve their rights.

Representative Heath Howard

- This bill would provide necessary protections to patients that are certified under the therapeutic cannabis program.
- Individuals who use other prescriptions, such as opioids, have certain protections. While there are certain jobs they cannot hold, they understand their limitations.
- This bill would provide employers with flexibility, so there is no undue burden placed on them by continuing an individual’s employment.
- After seeing the effects of the opioid crisis, Representative Howard said many individuals are trying to avoid using an addictive and deadly substance.

Summary of testimony presented in opposition:

Aubrey Freedman

- Mr. Freedman supported the decriminalization of cannabis for recreational and therapeutic uses; however, he said no one had a right to a job that an employer did not want to give to them.
- Mr. Freedman said there were liability issues, so he understood why businesses would want to be extra careful.
- When a business gets insurance, drug testing could be part of the requirements. If they do not do drug testing, they might not have insurance or it could be more expensive.

- Mr. Freedman said this bill did not solve the problem; however, he had two solutions.
 - First, the federal requirements that civilian employees have to do mandatory testing could be nullified.
 - Second, companies could test only certain employees if their positions are more safety sensitive, such as driving or operating heavy equipment.

Dave Juvet, Senior Vice President, Business and Industry Association, and Andrea Chatfield, Attorney, on behalf of HR State Council

- Mr. Juvet said a group of advisors who specialize in employment law have identified concerns. In addition, the Board of Directors recommended the BIA oppose this bill.
- Attorney Chatfield recommended the bill be Inexpedient to Legislate.
- Existing law already offers protections and provides an established framework.
- RSA 275 is not equipped to handle the nuisances of what is a reasonable accommodation and undue hardship. Additionally, Attorney Chatfield did not see where there was a provision in this statute that addressed violations.
- Under this bill, employers would be required to determine impairment. There is no meaningful way to measure impairment unless it is obvious, which can create safety risks.
- The *Paine v. Ride-Away* case clarified that the use of therapeutic cannabis could be a reasonable accommodation, and employers should treat the use of cannabis similar to other medication.
- If an employee says they are taking therapeutic cannabis, they are asking for a reasonable accommodation. Under existing law, the parties would engage in an interactive process that is guided by federal guidelines, regulations, and state and federal level case decisions.
- Under RSA 354-A, the Human Rights Commission looks at issues of reasonable accommodations and undue hardships. The Commission has a legal process where employees can file a charge and they can go through the investigation process.
- The types of medical conditions that qualify a person to receive therapeutic cannabis are serious, and they are likely to be considered disabilities. In the *Paine v. Ride-Away* case, for example, the individual suffered from PTSD.
- If therapeutic cannabis continues to be expanded, Attorney Chatfield said it could cover conditions that are not necessarily disabilities and they would be entitled to reasonable accommodations.
- RSA 275 is applicable to small employers whereas RSA 354-A is applicable to employers with 6 or more employees. There are no exemptions in RSA 275, so an employer would have to offer reasonable accommodations for therapeutic cannabis, even if they do not have to accommodate for any other disability.
- This bill would be inconsistent with the therapeutic cannabis statute, RSA 126-X, which specifies that employers do not have to allow an individual to be under

the influence in the workplace. This is different from impairment, which is harder to measure.

- It is against federal law to illicit information on a disability during the pre-employment stage. There has been a trend among employers to not do drug testing pre-employment unless it is a safety sensitive position. If employers are doing pre-employment drug testing, cannabis is often excluded from the drug panel.

Elizabeth Sargent, on behalf of New Hampshire Association of Chiefs of Police and New Hampshire Sheriff's Association

- From a law enforcement perspective, Ms. Sargent reminded the Committee that cannabis is a Schedule I drug.
- Ms. Sargent provided the Committee with a proposed amendment, which said “This section shall not apply to employers, positions or responsibilities where the use of cannabis is otherwise prohibited by statute, administrative rule, licensure, certification or regulation for applicants and/or individuals during the course of employment. Furthermore, this section shall not apply in cases where this limitation conflicts with the employer's obligations under federal law or regulations, or to fulfill a state or federal contract, certification or licensing obligation.”

Neutral Information Presented:

Danielle Albert, Deputy Commissioner, and John Garrigan, New Hampshire Department of Labor

- The Department said the bill created a requirement that employers provide reasonable accommodations to an employee who benefits from the presumption.
- From a regulatory and technical standpoint, the Department does not typically make an assessment of a reasonable accommodation and its application. Consequently, there is no infrastructure in other areas of labor law for reference.