

FLEXIBLE OR DYSFUNCTIONAL? HRM PRACTICES IN A STARTUP

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Mark had to meet with his fellow co-owners of Columns Communications to discuss an important matter. One of his best employees, Brian, a graphic designer, was very likely smoking marijuana during his lunch breaks. Other employees were uncomfortable with this and one of them--Bruce--had complained to Mark. Even though Brian worked directly for Mark, all owners should be involved in the decision. Should Mark try to convince his co-owners Jim and Barry to fire Brian? Or would it be better to work with Brian?

“Why aren’t you doing anything about this, Mark?” Bruce looked flustered, his hands were clenched by his sides, and he was breathing forcefully.

“Bruce, come on, Brian does great work. You know he does great work. Our readers love his graphics. We get great comments on his work. Do you know how hard it is to find a graphic designer who gets work in right, the first time, every time, and on time? He’s not doing anything that hurts anyone.” Even as he offered the argument, Mark knew it was not going to help.

“It’s every. Single. Day, Mark. Do you know what he’s doing, right now? I walked by his desk on the way to get a coffee. He’s staring at the ceiling, giggling to himself, munching Cheetos. He stinks, that whole part of the office reeks of pot. He’s baked. He’s stoned every single day, and you just put up with it.” Bruce’s voice raised with each sentence.

“Look, it’s not every day, and he usually doesn’t smell. I can go talk to him and see if we can get him to dial it back a bit,” Mark offered.

“Seriously, Mark? That’s your answer? Let’s just brush this aside and do nothing? Look, I’m bringing this to you because Brian works for you, but clearly, I can see

I need to take this to Barry. It's not okay, it's not something we should just put up with. It's AGAINST THE LAW and you are asking each of us to just ignore it?"

"Alright, I hear you Bruce. I'll bring Barry and Jim in on this and see how we should proceed. I can't promise we'll do what you're asking, but I can promise the three of us will come to a path forwards we can sustain," Mark offered helpfully.

"Fine... Finally!" Bruce stormed out of Mark's office, slamming the door as he walked out.

COLUMNS COMMUNICATION

Mark Litton (Mark) was the creative director of Columns Communication (Columns) and one of three owner-managers for the small startup. Columns was a digital media company, with a home office in Austin, Texas. The company was built as a contemporary news platform and managed an array of digital print and video media publications, primarily focused on changes in technology.

The company was initially formed when Mark and a long-time collaborator, James Hart (Jim), raised seed funding to launch Columns. They found five large investors. Four of the investors remained silent partners with minimal involvement in the day-to-day operations of the organization. Mark, Jim, and another investor, Barry Suttle (Barry) each carried a 20% stake in the firm and were each involved in the daily operations.

Mark handled the creative side of the firm. He managed a team of ten to twelve writers (or content creators for video productions), an editor, a copy editor, and a graphic designer (Brian Cuthbert). Most of the writers worked as contractors and were paid per publication. The writers and content creators largely worked remotely at places of their choosing. The two editors and graphic designers worked with Mark at the firm's home office in Austin, TX.

Jim handled the technical side of the business. His team of four handled the website design, hardware configurations, and other technical aspects of maintaining a digital platform. Everyone in Jim's area worked out of the Austin headquarters.

Barry managed the business operations of Columns. This included two salespersons whose advertising sales made up the bulk of Column's revenues, and an account manager who handled their small number of subscribers. He also managed Bruce Harmon (Bruce). He was their accountant on staff, keeping track of the books. Everyone in Barry's group also worked at the Austin headquarters.

The firm was a young one, having launched just over a year ago. Revenue growth had been reasonable, but slower than anticipated. Customer engagement was also growing with regular gains in readership and viewership metrics. If revenue did not pick up, they were going to run into financial problems, but, at least for now, growing revenue was a higher priority than reducing costs.

The Columns team prided themselves on having a non-traditional working environment. Most of the Austin-based workforce set their own work schedules. Meetings were usually a mix of in-house and video conference and most employees maintained a very relaxed attire. The general office philosophy was to work how you want but get results.

BACKGROUND

And that was the essence of the Brian and Bruce conflict. Brian was the firm's lone graphic designer. He was the primary person responsible for creating graphic content for the firm's web presence. That ranged from logo and visual work for the websites themselves to custom art creations for individual articles and video essays.

Mark had been impressed with Brian since his interview. In general, Brian just understood what others wanted. Anyone could ask Brian for a design, describe what they vaguely had in mind, and Brian would just get it done. It did not matter if it was a rush job or a bizarre one-time request, Brian would do it. There was virtually never a need for rework and his work always came in when you needed it.

But Brian had a unique way of going about his work. On a typical day, Brian would come into the office sometime between 10:00 and 11:00 AM. By noon, he would grab his tablet and leave for a walk. He would return to the office around 2:00 PM most days, sometimes later, but and he would stay in the office until 9:00 or 10:00 at night. Brian's creative walks were the thing that set Bruce, and some of the other employees, off. No one ever asked him directly, but it was common knowledge that Brian had quite an enthusiasm for marijuana. The general office theory was that Brian's walks were really a chance to head out to a nearby park where he would smoke pot for a while, draw for a while, and eventually return to the office.

Bruce wasn't wrong. This happened nearly every day Brian came to work. Brian was often obviously impaired on his return to the office. He primarily kept to himself after he came back to the office, but there were times where the smell of his clothing made it very clear what he had been doing.

Bruce also was not alone in his dissatisfaction, although he was certainly the most direct in his disappointment. Everyone in the business group had expressed their concerns at one time or another. Most of the people in Jim's group made jokes, but

none had ever directly expressed their dissatisfaction with Brian's extracurricular activities or his smell and behaviors. Mark's two editors generally shrugged it off but were not enthusiastic supporters of Brian's approach to his job. The writers, who all worked remotely, generally found it amusing.

MARIJUANA AND THE WORKPLACE

The cannabis policy landscape has drastically shifted, particularly since 1996 when California became the first state to pass a statute legalizing the use of medical marijuana (California Compassionate Use Act, 1996). Furthermore, starting in 2012, the legalization of marijuana for recreational use in some states has contributed to an even more complicated legal landscape. To date, 33 states and the District of Columbia have legalized cannabis for the treatment of medical conditions, and 11 states and the District of Columbia have legalized cannabis for recreational use (Procon.org, 2020). Consequently, these changes in statutory policy have changed cannabis use patterns, perceived levels of risk (NASEM, 2017), and public support for legalization (Daniller, 2019).

Based on the 2018 National Survey on Drug Use and Health, there were 43.5 million past year marijuana users aged 12 or older or 15.9 percent of the population (SAHMSA, 2018). Therefore, "the percentage of the population in 2018 who used marijuana was higher than the percentages from 2002 to 2017" (SAHMSA, 2018; pg.13). Furthermore, less than one third of people in the 2018 survey (30.6 percent) perceived great risk of harm from weekly marijuana use. Additionally, according to a Pew Research Center survey, "two-thirds of Americans say the use of marijuana should be legal, reflecting a steady increase over the past decade, [and] . . . [t]he share of U.S. adults who oppose legalization has fallen from 52% in 2010 to 32% today." Moreover, "an overwhelming majority of U.S. adults (91%) say marijuana should be legal either for medical and recreational use (59%) or that it should be legal just for medical use (32%)" with only 8 percent preferring to keep marijuana illegal in all circumstances (Daniller, 2019).

Nevertheless, despite these extensive changes in public opinion, statutory policy at the state level, and "the rapid rise in the use of cannabis both for medical purposes and for recreational use,"(NASEM, 2017) marijuana ("cannabis") (Hudak, 2016) is still classified as a Schedule I controlled substance under the Controlled Substances Act ("CSA") (Controlled Substances Act, 1970). Therefore, under federal law, the drug has "no currently accepted medical use in treatment," (21 U.S.C. §§ 812(b)(1), (c)(10)) and "there is a lack of accepted safety for use of the drug . . . under medical supervision" (21 U.S.C. §§ 812(b)(1)(B)).

In accordance with this federal policy, many of the same states that have enacted statutes legalizing marijuana use still allow employers to maintain zero-tolerance drug policies. Consequently, some courts have found that employees are not

protected against discharge due to their off-duty use of medical marijuana” (Hickox, 2011). These inconsistencies not only create a dilemma for employees, but also produce compliance difficulties for employers.

Survey of State Law

In the following states and the District of Columbia, which have legalized cannabis for medical use, there is the aforementioned, direct conflict between federal and state law: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Washington, Washington D.C., and West Virginia (PROCON.org, 2020).

In addition, the following states, and the District of Columbia, have legalized cannabis for both medical and recreational use: Alaska, California, Colorado, District of Columbia, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington. Generally, in these states, “marijuana use and possession is still regulated, but people are not criminally or civilly punished under state law” (Menchaca, 2020).

In both groups in which use of cannabis has been legalized for medical and/or recreational use, one would expect that a person abiding by the law (possessing an amount that doesn’t exceed what is legally allowed and/or registering with the appropriate authorities, in the case of legalized medical use), would not be subject to adverse employment actions as a result of that use, especially when both recreational and medical uses are allowed. However, this expectation does not ring true. In fact, from both a statutory and common law perspective, in many states, inconsistencies between cannabis legalization and employee protections, especially for medical marijuana users, still exist (Ross v. Raging Wire Telecommunications, Inc., 2008; Brandon Coats v. Dish Network, LLC, 2015; Garcia v. Tractor Supply Co. (2016); Emerald Steel Fabricators v. Bureau of Labor and Industry, 2010; Florida Title XXIX, 2019; Ohio Revenue Code, 2016; Washington Revenue Code (2019). For example, in *Brandon Coats v. Dish Network, LLC, 2015 CO 44* (2015), the Colorado Supreme Court held that employees who engage in medical marijuana use under Colorado's Medical Marijuana Amendment, Colo. Const. art. XVIII, § 14, are not protected from wrongful discharge under Colo. Rev. Stat. § 24-34-402.5 (2014) due to the United States Constitution’s Supremacy Clause. Also, an example of a statutory inconsistency exists in Ohio Rev Code § 3796.28 (2016), which states that nothing in the statute regarding the Medical Marijuana Control Program does any of the following:

- Requires an employer to permit or accommodate an employee's use, possession, or distribution of medical marijuana;
- Prohibits an employer from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because of that person's use, possession, or distribution of medical marijuana;
- Prohibits an employer from establishing and enforcing a drug testing policy, drug-free workplace policy, or zero-tolerance drug policy.

Excluded from the previously discussed groups are Alabama, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Mississippi, Nebraska, South Carolina, South Dakota, Tennessee, Texas, Virginia, Wisconsin, and Wyoming. These states have not legalized cannabis for medical or recreational use although a few of these jurisdictions allow marijuana derived products to be used for medical purposes. For example, The Texas Compassionate-Use Act allows very limited legal use of low-THC (less than .5 percent) cannabis oil to be prescribed by licensed physicians to patients with intractable epilepsy, seizure disorders, multiple sclerosis, spasticity, amyotrophic lateral sclerosis, autism, terminal cancer, or an incurable neurodegenerative disease (Texas Compassionate Use Program, 2015). In these states, marijuana use is illegal. There is no conflict between federal law and state law; therefore, employees are not legally protected against discharge due to their use of marijuana in these jurisdictions. Nevertheless, despite the unequivocal illegality of marijuana use in these states, the actual legal enforcement landscape is convoluted.

Enforcement

First, during his testimony to the Senate Appropriations subcommittee on April 10, 2019, United States Attorney General William Barr said, “I am accepting the Cole Memorandum for now, but I have generally left it up to the U.S. Attorneys in each state to determine what the best approach is in that state . . . I haven’t heard any complaints from the states that have legalized marijuana (Sommerset, 2019).” The Cole Memorandum, penned by James M. Cole, Deputy Attorney General, in 2013, provided guidance regarding marijuana enforcement under the Controlled Substances Act to all U.S. Attorneys (Memorandum for All United States Attorneys, 2013). The document indicated that Department attorneys and law enforcement should “focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these [following] priorities, regardless of state law (Memorandum for All United States Attorneys, 2013. Pg.2)” –

- Preventing the distribution of marijuana to minors;

- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property (Memorandum for All United States Attorneys, 2013. Pp. 1-2).

To summarize, the memo essentially emphasized that the Justice Department has generally left the enforcement of “lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above (Memorandum for All United States Attorneys, 2013. P. 2).”

Second, the enforcement landscape in Texas is also in flux. The 2018 Farm Bill legalized the commercial production of hemp; therefore, to align Texas law with this new federal policy, on June 10, 2019, House Bill 1325, was signed into law by Governor Greg Abbott (Texas Department of Agriculture, 2019). The bill authorized “the production, manufacture, retail sale, and inspection of industrial hemp crops and products in Texas (Texas Department of Agriculture, 2019).” Therefore, although “marijuana and hemp are often indistinguishable by look or smell because they both come from the cannabis plant,” hemp is now legal (Menchaca, 2020),” but Texas law still allows prosecutors to press criminal charges, often resulting in fines of more than \$1,000 and jail time, against recreational users of marijuana (Menchaca, 2020). However, the difference between hemp and marijuana “amounts to how much of the psychoactive compound THC, tetrahydrocannabinol, they contain (Menchaca, 2020).” Marijuana contains a THC concentration of more than .3 percent, while a plant with less than .3 percent of THC (including cannabidiol (CBD), a nonpsychoactive compound of cannabis) is considered hemp (Menchaca, 2020). Consequently, “prosecutors and state crime labs have dropped hundreds of pending marijuana charges and declined to pursue new ones because they don’t have the resources to detect a substance’s precise THC content (Menchaca, 2020).” Furthermore, the

Texas Department of Public Safety “ordered its officers not to arrest people but to issue citations if possible in misdemeanor marijuana possession cases (Menchaca, 2020).”

Finally, earlier this year, the Austin City Council voted unanimously to end most arrest and fines and ban spending city funds on testing for possession of small amounts of marijuana, but Austin’s police chief later said that his officers would still issue tickets and/or arrest people. However, due to the city council’s resolution, these actions come with no penalty.

THE MEETING

Mark would have to meet with Jim and Barry to come up with a response to Bruce’s complaint. Mark was not looking forward to this meeting, and he was pretty sure it would be a difficult one. To put himself at ease, Mark tried to predict Jim’s and Barry’s responses.

Jim generally hated rules and policies for work. If anything, Jim would probably support Brian and want to fire Bruce to keep things relaxed at Columns. Barry, however, would almost certainly want to fire Brian. Barry would see this as a risk assessment problem. Brian was engaged in illegal behavior. While it was not happening “on the job,” it was clearly overlapping his work. Barry would see this as a legal risk and one best served to just separate from.

Mark really wanted to avoid firing Brian, and he also did not want to ask Brian to change his behaviors. Mark’s approach to management had always been to avoid conflict and to focus on getting the work done. To Mark, people should work how they want if it does not adversely affect the company. Mark realized now, though, that this was clearly a problem and it was affecting worker morale at the very least. He would have to do something – and soon.