No. S138130

IN THE

SUPREME COURT OF CALIFORNIA

Gary Ross,

Plaintiff/Petitioner,

vs.

RagingWire Telecommunications, Inc.,

Defendant/Respondent.

After a Decision By the Court of Appeal
Third Appellate District
Case No. C043392

REPSONDENT'S ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS - CONT'D

Page(s)

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES - CONT'D

Page(s)

Federal Cases - Cont'd

State Cases

TABLE OF AUTHORITIES - CONT'D

Page(s)

State Cases - Cont'd

TABLE OF AUTHORITIES - CONT'D

Page(s)

State Cases - Cont'd

TABLE OF AUTHORITIES - CONT'D

Page(s)

State Cases - Cont'd

Federal Statutes

State Statutes

TABLE OF AUTHORITIES - CONT'D

Page(s)

State Statutes - Cont'd

State Regulations

Other Authorities

I. SUMMARY OF ARGUMENT

RagingWire Telecommunications, Inc. ("RagingWire" or "Respondent") respectfully urges this Court to affirm the judgment of the courts below. Plaintiff/Petitioner Gary Ross failed a routine, pre-employment drug test because he tested positive for the active ingredient in marijuana. RagingWire rescinded its job offer. Ross then sued RagingWire, seeking compensation for RagingWire's alleged failure to accommodate his use of marijuana as a treatment for an alleged disability.

Ross's primary argument is his smoking marijuana is lawful under The Compassionate Use Act, Proposition 215, and therefore should be permitted as a "reasonable accommodation" of a disability under the Fair Employment and Housing Act (FEHA). As a result, Ross contends, RagingWire should not have denied him employment based on his testing positive for marijuana metabolites.

Ross is wrong. RagingWire lawfully tested Ross for the presence of marijuana in his system. Having tested positive, RagingWire legitimately denied Ross employment because marijuana use is not countenanced by FEHA or public policy.

As the trial court and Court of Appeal noted, the dispositive issue is whether Ross's use of marijuana is an "illegal" activity. The illegality of marijuana use is significant because the concept of "reasonable

accommodation" under FEHA has never been extended to unlawful conduct. Similarly, unlawful conduct should not be the basis for a claim of wrongful termination in violation of public policy.

Ross's arguments fail because marijuana is illegal in every state in the Union, for medicinal purposes or otherwise, despite California voters' approval of the Compassionate Use Act. Marijuana possession, use, distribution, etc. remains entirely illegal under federal law *and* even under California law except under very limited circumstances addressed by Proposition 215. Under this Court's decision in *Loder v. City of Glendale* (1997) 14 Cal.4th 846 (hereafter *Loder*), businesses are free to test applicants for illegal drugs, including marijuana. In fact, California's Drug Free Workplace Act requires employers contracting with the state to ensure marijuana is not used in the workplace.

This Court held in *People v. Mower* (2002) 28 Cal.4th 457 (hereafter *Mower*), that Proposition 215 merely provides a limited immunity from prosecution for specific marijuana offenses. As the Court of Appeal wrote in *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1547 fn. 8 (hereafter *Trippet*) "Proposition 215 did not change the medical use of marijuana from a crime to a 'right.'" Therefore, the Compassionate Use Act does not affect FEHA, nor does it guarantee employment rights, alter settled drug testing law in this state, or serve as the basis for a wrongful-termination-in-violation-of-public-policy claim.

The Legislature has had since 1997 to amend the Compassionate Use Act, FEHA, the Drug Free Workplace Act and other laws to protect individuals from the consequences of positive drug tests due to marijuana use authorized under Proposition 215. The Legislature amended FEHA's disability discrimination provisions in 2000 and added to Proposition 215 in 2003, passing the Medical Marijuana Program Act. In fact, the Court of Appeal issued its decision below in September 2005 and, as of this writing, the Legislature has not sought to overturn it. As the Court of Appeal below recognized, extending Proposition 215's protections to the workplace requires consideration of a number of legal and practical issues. This Court ordinarily refuses to add provisions to statutes, including FEHA. Because of the numerous considerations attendant to authorizing "medical marijuana" use as a reasonable accommodation under FEHA, this Court should leave the matter to the legislative process.

Ross's arguments are without merit, and the judgment should be affirmed.

II. STATEMENT OF FACTS

On or about September 10, 2001, Respondent RagingWire Telecommunications, Inc. ("RagingWire" or "Respondent") offered Petitioner Gary Ross a job as a Lead Systems Administrator (Complaint

¶ 10).[1] As a prerequisite to employment, RagingWire required Ross to submit to a drug test (Complaint ¶ 12). Before doing so, Ross informed the clinician performing the drug test that he smokes marijuana pursuant to a doctor's prescription/recommendation (Complaint ¶ 13).

Ross alleges that the marijuana was prescribed to manage the pain he suffers as a result of a back injury he sustained in 1983 (Complaint ¶ 14). In September 1999, Ross began smoking marijuana pursuant to a physician's prescription/recommendation and California's Compassionate Use Act of 1996 (Complaint ¶ 14). Ross alleges that neither his marijuana use nor alleged disability precludes his performance of the essential functions of his position (Complaint ¶ 20).

On September 17, 2001, before the results of the drug test became available, Ross began working for RagingWire (Complaint ¶ 15). That week, the third-party clinic that administered the test telephoned Ross and informed him that he had tested positive for Tetrahydrocannabinol (THC), the active ingredient in marijuana (Complaint ¶ 15).

On September 20, 2001, RagingWire suspended Ross due to the failed drug test (Complaint ¶ 16). At that time, Ross provided a copy of his physician's prescription/recommendation and explained to RagingWire's Human Resource Director that he took marijuana for medical purposes

[1] The Complaint is included with the Appellant's Appendix below at pp. 1-12.

(Complaint ¶ 17). RagingWire discharged Ross on September 25, 2001 for failing the drug test (Complaint ¶ 19).

III. ARGUMENT

A. STANDARD OF REVIEW

A demurrer tests the legal sufficiency of the Complaint. The well-pleaded facts are accepted as true. (*Livitsanos v. Superior Court (Continental Culture Specialists, Inc.)* (1992) 2 Cal.4th 744, 747.) However, the Court may ignore legal conclusions asserted in the Complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) This Court reviews an order sustaining a demurrer *de novo*. The Court exercises its "independent judgment about whether the complaint states a cause of action as a matter of law." (*Montclair Parkowners Ass'n. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

Leave to amend may be denied where, as here, the Complaint cannot be amended to state a viable cause of action. (*Lawrence v. Bank of America* (1985) 163 Cal.App.3d 431, 436.) The Plaintiff has the burden of establishing there is a "reasonable possibility" that the defect in the Complaint can be cured by amendment; if the Plaintiff fails to carry his burden, the Court affirms the lower court's ruling. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1175; *Blank v. Kirwan, supra,* 39 Cal.3d at p. 318; *Heckendorn v. San Marino* (1986) 42 Cal.3d

481, 489 ["a trial court does not abuse its discretion by sustaining a general demurrer without leave to amend if it appears from the complaint that under applicable substantive law there is no reasonable possibility that an amendment could cure the complaint's defect"].)

B. PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION UNDER THE FAIR EMPLOYMENT AND HOUSING ACT.

1. RagingWire Lawfully Rescinded Ross's Job Offer Because He Failed a Pre-Employment Drug Test by Testing Positive for Marijuana, an Illegal Controlled Substance.

In a disparate treatment case brought under the Fair Employment and Housing Act (FEHA), Gov. Code section 12900 *et seq.*, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. The employer then must offer a legitimate nondiscriminatory reason for the adverse employment decision. Finally, the plaintiff bears the burden of proving the employer's proffered reason was pretextual. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 353.) This familiar "shifting burdens" analysis equally applies to cases alleging disability discrimination under FEHA. (*See, e.g., Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236.)

Assuming *arguendo* Ross could make out a prima facie case under FEHA, RagingWire's decision to rescind Ross's job offer based on his drug

test results was a legitimate, non-discriminatory business reason for denying employment to Ross.

a) Pre-Employment Testing for Unlawful Controlled Substances is Lawful.

Under California law, an employer may refuse employment to an applicant who fails a pre-employment drug test. (*Loder, supra,* 14 Cal.4th at p. 900 [holding properly administered applicant drug testing is lawful]; *Pilkington Barnes Hind v. Superior Court (Visbal)* (1998) 66 Cal.App.4th 28, 31-32 [employee who admittedly used marijuana could be terminated for failing a pre-employment drug test, even though the test was administered a few days after the employee began working].)

"Nothing in the FEHA, or any other California statute, purports to prohibit, or place general limitations upon, employer-mandated drug testing." (*Loder*, *supra*, 14 Cal.4th at p. 865.) Similarly, neither the state nor the federal constitution prohibits pre-employment drug testing. (*Id.* at p. 900.)[2] The Americans with Disabilities Act specifically permits pre-employment drug testing, as do the regulations implementing the state's Fair Employment and Housing Act. (*Id.* at p. 864-865; 42 U.S.C. § 12114(d); Cal. Code Regs., tit. 2, § 7294.0 subd. (d); *see also Buckley v.*

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[2] Ross does not challenge the validity of the regulations implementing the Fair Employment and Housing Act, regulations that have not changed since the passage of the Compassionate Use Act or the later-enacted Medical Marijuana Program Act, SB 420, Stats. 2003 ch. 875, codified at Health &. Safety Code section 11362.765.

Consolidated Edison Co. (2nd Cir. 1998) 155 F.3d 150, 154-155 [testing for illegal use of drugs is not discriminatory within the meaning of the Americans with Disabilities Act].)[3]

Notably, Ross does not challenge RagingWire's drug testing policy or procedures. Ross instead contends his positive drug test result was an improper ground for termination because he was entitled to use marijuana under California's Compassionate Use Act of 1996 (Health & Saf. Code § 11362.5; "Compassionate Use Act" or "Prop. 215").

As explained further below, Ross's arguments fail because RagingWire's testing him for illegal drug use is lawful, marijuana use remains an "illegal" activity, and FEHA has never been construed to require employers to ignore the legality of conduct in the name of "reasonable accommodation."

b) Businesses Have a Legitimate and Substantial Business Interest in Ensuring Prospective Employees Do Not Use Illegal Drugs.

Ross implies in his brief that a pre-employment program testing for marijuana use must relate to business needs. (AOB § I.D, at p. 16.) As the Court recognized in *Loder*, employment testing for controlled substances

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[3] Courts properly consider decisions under the federal Americans with Disabilities Act when interpreting analogous provisions of the Fair Employment and Housing Act. (*See, e.g., Hastings v. Dep't of Corr.* (2003) 110 Cal.App.4th 963, 973 & fn.12.)

helps businesses avoid the well-documented costs associated with substance abuse in the workplace. The relatively minor intrusion into a prospective employee's privacy is reasonable given the substantial need for employers to evaluate potential employees.

> In light of the well-documented problems that are associated with the abuse of drugs and alcohol by employees--increased absenteeism, diminished productivity, greater health costs, increased safety problems and potential liability to third parties, and more frequent turnover, an employer, private or public, clearly has a legitimate (i.e., constitutionally permissible) interest in ascertaining whether persons to be employed in any position currently are abusing drugs or alcohol.

(*Loder, supra,* 14 Cal.4th at p. 882-883 [footnote omitted].) The Court noted, "the employer is seeking information that is relevant to its hiring decision and that it legitimately may ascertain" and that Ms. Loder "cites no authority indicating that an employer may not reject a job applicant if it lawfully discovers that the applicant currently is using illegal drugs or engaging in excessive consumption of alcohol." (*Id.* at p. 883 fn. 15.)

The Court in *Loder* recognized that employers must be able to make hiring decisions based on drug tests precisely because it has no information on which to make a more particularized decision. Employers can directly evaluate a current employee's job performance and therefore develop a particularized need before resorting to drug testing. (*Loder, supra,* 14 Cal.4th at p. 883.) But with job applicants, "an employer has not had a similar opportunity to observe the applicant over a period of time" and

therefore "an employer has a greater need for, and interest in, conducting suspicionless drug testing of job applicants than it does in conducting such testing of current employees." (*Id.*) It is precisely because the employer cannot make a particularized determination that pre-employment testing is permissible. To rule that employers must make such a particularized showing would run directly counter to the very logic of the *Loder* decision.

Ross's attempts to distinguish *Loder* fail for the same reason. Ross argues that *Loder* does not preclude his claim because the *Loder* decision "expressed its concern with drug *abuse,* not with medical marijuana use." (AOB at p. 17 [emphasis in original].) But again, *Loder* recognized that employers have no information to evaluate whether an applicant's abuse would affect job performance, so it permits employers to screen for use of substances likely to be abused. And under *Loder* and FEHA regulations, employers are entitled to make employment decisions based on drug-test results without any separate showing of a likelihood of "abuse." (*Loder, supra,* 14 Cal.4th at p. 883; Cal. Code regs. tit. 2 § 7294.0 subd. (d).)

Ross tries to bolster his argument by claiming that medical marijuana does not have a potential for abuse where it is taken under a doctor's supervision. (AOB 17-18.) This argument is incorrect on two counts. First, there is nothing in the Compassionate Use Act that requires ongoing "supervision" of marijuana users. It merely requires an oral

recommendation from a doctor, with no need to formally prescribe or monitor that use. (Health & Saf. Code § 11362.5.)

Second, the fact that a drug is prescribed does not change its potential for abuse. Marijuana is a "Schedule I" controlled substance under both federal and state law, indicating that it has "a high potential for abuse." (Health & Saf. Code § 11054; 21 U.S.C. § 812(b); Uniform Controlled Substances Act § 203.) Whether or not an applicant is using marijuana on a doctor's recommendation or not, it remains under law a substance with a high potential for abuse, the exact type of substance for which *Loder* permits employers to screen.

c) Marijuana Use Is "Illegal."

Notwithstanding the Compassionate Use Act, possession of marijuana remains a crime in all parts of the nation, whether used under a doctor's recommendation or not. The federal Controlled Substances Act (CSA) prohibits its possession, distribution, and cultivation. (21 U.S.C. § 801 *et seq.*) As a "Schedule I" controlled substance, it "has no currently accepted medical use in treatment in the United States." (21 U.S.C. § 812(b)(1).)

Possession of marijuana is punishable by up to one year in prison, increasing to two or three years for subsequent offenses. (21 U.S.C. § 844.) There is no medical necessity exception to the Controlled Substance Act.

(*United States v. Oakland Cannabis Buyers' Coop. et al.* (2001) 532 U.S. 483, 491 [a medical necessity exception for marijuana is at odds with the terms of the Controlled Substance Act]; *People v. Bianco* (2001) 93 Cal.App.4th 748, 753 (hereafter *Bianco*) [while California may exempt certain individuals from criminal prosecution, marijuana is still illegal under federal law].) Congress can and has regulated even purely intrastate production and distribution of marijuana. (*Gonzalez v. Raich* (2005) 545 U.S. ___, [125 S. Ct. 2195] ["[t]he CSA is a valid exercise of federal power"].)

Because marijuana use violates the CSA, it is illegal in *every* state in the Union. "Federal law is law in a state as much as laws passed by the state Legislature." (*Howlett v. Rose* (1990) 496 U.S. 356, 380 [110 S.Ct. 2430].) In *People v. Bianco*, this Court made clear that:

> The possession of marijuana is a crime under the laws of the United States. Even though state law may allow for the prescription or recommendation of medicinal marijuana within its borders, to do so is still a violation of federal law under the Controlled Substance Act.

(*Bianco*, *supra*, 93 Cal.App.4th at p. 753 [citations omitted].)

Thus, "California's Compassionate Use Act of 1996 does not trump federal law outlawing possession of marijuana." (*Bianco*, *supra*, 93 Cal.App.4th at p. at 755.) Ross does not dispute this premise; he recognizes that "a citizen of a state must act in accordance with *both* state and federal law." (AOB 12-13 [emphasis in original], *citing Ponzi v.*

Fessenden (1922) 258 U.S. 254, 259 [42 S.Ct. 309].) Ross therefore concedes that his marijuana use, whether for medical purposes or not, is a crime under federal law. (AOB 11, 14.)

Ross argues that his own criminal activity is not really relevant to the case because it is RagingWire's conduct, "not Ross's" that is at issue. (AOB 13.) But Ross's conduct *is* at issue. Whether Ross' conduct – i.e. his criminal use of marijuana – is protected under the FEHA is precisely the issue this Court must address.

In sum, any claim of "disparate treatment" by Ross must fail. RagingWire's applicant drug testing program is a legitimate business function. Therefore, RagingWire had a legitimate, non-pretextual business reason to test Ross for the presence of illegal drugs in his system. Marijuana is an illegal drug. Ross tested positive for marijuana.

2. FEHA Does Not Require Employers to "Reasonably" Accommodate Illegal Conduct.

Ross has apparently accepted that FEHA does not protect marijuana users as a class of individuals.[4] Ross now claims that RagingWire violated

[4] Ross's Complaint alleged that FEHA directly protected marijuana users from discrimination (Complaint ¶ 28). That was his primary argument in his opening brief below (See Appellant's Opening Brief in the Court of Appeal, Case No. C043392, filed May 30, 2003, pp. 27-29). Ross has since stepped back from that assertion, and now argues only that employers must reasonably accommodate marijuana use, rather that failure to hire a marijuana user is itself discriminatory.

FEHA by refusing to waive its drug testing requirement and allow his marijuana use as a "reasonable accommodation" of his alleged disability. But the fact remains that possessing marijuana for any reason remains a federal crime, and the California Legislature has made it the clear policy of California that employers should not be placed in the untenable position of having to accommodate potential employees engaging in this criminal activity. Ross's position, if adopted, would also run directly counter to established law on what constitutes a reasonable accommodation and would require the Court to make wide-ranging public policy choices that should be left to the legislative gauntlet. The law does not require employers to accommodate illegal conduct.

a) FEHA's Reasonable Accommodation Requirement.

Under FEHA, an employer must provide an employee with a *reasonable* accommodation if it would enable an employee to perform the essential functions of the job. (*See* Gov. Code § 12940 subds. (a)(1) and (b).) "It is also unlawful, and separately actionable under FEHA, for an employer 'to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee' unless the accommodation would cause 'undue hardship' to the employer." (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1222 (hereafter *Raine*) [quoting Gov. Code § 12940 subd. (m)].)

In evaluating whether or not a request is "reasonable," courts analyze whether or not the request is reasonable *on its face*, i.e., ordinarily or in the run of cases. (*U.S. Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 401 (hereafter *Barnett*) [request for disability-exception to company seniority program was unreasonable; disability discrimination statutes do not demand action "beyond the realm of reasonableness"].)

b) FEHA Does Not Protect Illegal Drug Use as a "Reasonable Accommodation"

Illegal drug use does not constitute a mental or physical disability under the FEHA. The definition of mental and physical disability "does not include... psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs." (Gov. Code § 12926 subds. (i)(5) and (k)(6).)

The Fair Employment and Housing Commission (FEHC)'s regulations similarly provide that illegal drug use is not a mental or physical disability. (Cal. Code Regs., tit. 2 § 7293.6 subds. (b) ["'Disability' does not include...Psychoactive substance use disorders resulting from current illegal use of drugs"] and (d) ["[t]he unlawful use of controlled substances or other drugs shall not be deemed, in and of itself, to constitute a physical disability or a mental disability"].) This Court "give[s] substantial weight to the FEHC's construction of the statutes under which it operates." (*Colmenares v. Braemar Country Club, Inc.* (2003) 29

Cal.4th 1019, 1029 [*quoting Kelly v. Methodist Hospital of So. California* (2000) 22 Cal.4th 1108, 1118].)

"In interpreting a statute where the language is clear, courts must follow its plain meaning." (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003.) Thus, where, as here, a statute's language is unambiguous, the statute must be construed to mean what it says.

> The court's role in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining the Legislature's intent, a court looks first to the words of the statute. It is the language of the statute itself that has successfully braved the legislative gauntlet.
>
> When looking to the words of the statute, a court gives the language its usual, ordinary meaning. If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.

(*Pratt v. Vencor, Inc.* (2003) 105 Cal.App.4th 905, 909-910 (hereafter *Pratt*) [citations and quotation marks omitted].)

(1) Permitting Employees to Engage in Illegal Activity Is Not a Reasonable Accommodation.

Employers have no obligation to accommodate illegal activity; such a proposition is not reasonable on its face. (*See Barnett, supra,* 535 U.S. at p. 401-402 [courts analyze whether an accommodation request is reasonable *on its face*, i.e., ordinarily or in the run of cases].)

The U.S. Supreme Court's decision in *Barnett* is relevant to the analysis here. The FEHA and the ADA share the same definition of "reasonable accommodation" and both define the term through the same list of examples of what constitutes a reasonable accommodation. (*Compare* Gov. Code § 12925 subd. (n) *with* 42 U.S.C. § 12111(9).) Where FEHA and the ADA have parallel provisions, California courts look to the ADA for guidance in interpreting the FEHA. (*See Raine, supra,* 135 Cal.App.4th at p. 1224-25 & fn.6; *Hastings v. Dep't of Corrections* (2003) 110 Cal.App.4th 963, 973 fn. 12 ["[w]here as here, the particular provision in question in the FEHA is similar to the one in the ADA, the courts have looked to decisions and regulations interpreting the ADA to guide construction and application of FEHA"]; *Prilliman v. United Airlines, Inc.* (1997) 53 Cal.App.4th 935, 948; *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 812.)

Interpreting the same language from the ADA as is found in the FEHA, federal courts have consistently ruled that employers have no obligation to accommodate illegal activity, including illegal drug use. "[E]mployers need not make any reasonable accommodations for employees who are illegal drug users and alcoholics." (*Den Hartog v. Wasatch Academy* (10th Cir. 1997) 129 F.3d 1076, 1086.) In fact, employers are not required to accommodate any illegal conduct. "[W]e do not think it is a reasonably required accommodation to overlook infractions

of law." (*Despears v. Milwaukee County* (7th Cir. 1995) 63 F.3d 635, 637; *Bailey v. Georgia-Pacific Corp.* (D. Me. 2001) 176 F. Supp. 2d 3, 11; *see also Pernice v. City of Chicago* (7th Cir. 2001) 237 F.3d 783 [terminating the plaintiff's employment for possessing illegal drugs did not violate the ADA]; *Zenor v. El Paso Healthcare System, Ltd.* (5th Cir. 1999) 176 F.3d 847, 853 ["federal law does not proscribe an employer's firing someone who currently uses illegal drugs, regardless of whether or not that drug could otherwise be considered a disability"]; *Newland v. Dalton* (9th Cir. 1996) 81 F.3d 904 [terminating plaintiff for illegal misconduct associated with alcoholism was not a violation of the Rehabilitation Act]; *Collings v. Longview Fibre Co.* (9th Cir. 1995) 63 F.3d 828, 834-835 [employees discharged for drug-related offenses not protected under the ADA].) Moreover, as stated above, California employers freely and lawfully may test applicants for illegal drug use and bar them from employment. (*Loder, supra*, 14 Cal.4th at p. 865.)

Ross argues that the FEHA should be read to require employers to accommodate conduct that remains criminal because state law ignores federal crimes in two other contexts – asking employees about prior marijuana use and providing workers' compensation to undocumented workers. (AOB 20-23.) Neither of these arguments is accurate.

Ross first argues that California law bars employment discrimination based on marijuana convictions, citing Labor Code section 432.8. (AOB

21-22.) But Ross misread or misunderstood the statute. California employers freely *can* ask job applicants about marijuana-related convictions with the narrow *exception* of *misdemeanor* convictions that are more than *two years old.* (*See* Lab. Code § 432.8.) The statute permits employers to ask about misdemeanor convictions that are less than two years old and all felony convictions. The Legislature recognizes employers' interest in asking about more *recent* convictions for misdemeanors or felonies because they tend to show recent *use*.

And the Legislature has reinforced its view that employers can refuse employment to current marijuana users with the Drug-Free Workplace Act. That law seeks to eliminate workplace use of any federally controlled substance by state government contractors, and the Medical Marijuana Program Act, which expressly relieves employers of any obligation to accommodate marijuana use in the workplace. (*See* Gov. Code § 8350 [controlled substances under the California's drug-free workplace act are those defined under federal law]; Health & Saf. Code § 11362.785.)

Ross next argues that California law entitles undocumented workers to workers' compensation benefits, even though their presence in California is illegal under federal law. (AOB 22-23.) But in the workers' compensation context, the Legislature specifically and expressly stated that a worker is entitled to workers' compensation regardless of his or her

immigration status or the fact that he or she is "unlawfully employed." (*See* Lab. Code §§ 1171.5, 3351 subd. (a).)[5]

Thus, where the Legislature wishes to extend protections to workers despite contrary federal law, it expressly says so. Here, the Legislature has never said employers should disregard federal *drug* crimes when evaluating potential employees, and therefore the Court should not add such a provision. (*Farmers Brothers Coffee v. Workers' Compensation Appeals Board* (2005) 133 Cal.App.4th 533 [refusing to narrow the plain meaning of "unlawfully employed" when no such narrowing was intended by the Legislature]; *see also Reno v. Flores* (1993) 507 U.S. 292, 315 [courts "are not a Legislature charged with formulating public policy"]; *Green v. Ralee*

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[5] Ross also mischaracterizes the case on which he relies. *Farmers Brothers Coffee v. Workers' Compensation Appeals Board* (2005) 133 Cal.App.4th 533, did not address the general question of whether "unlawfully employed" workers are entitled to compensation or not. Rather it dealt with a much more subtle issue, whether "unlawful workers" included all employees working illegally or only those where the employer knowingly hired an undocumented worker. (*Id.* at p. 542 ["Petitioner contends that *unlawfully employed* must mean only that the *employer* is guilty of hiring the worker in violation of federal law. [citation] When it is the *employee* who has violated the law by using fraudulent documents, petitioner reasons, he or she cannot be considered as coming within the definition set forth in section 3351, subdivision (a)"].) The court ruled that the term included all unlawfully employed workers, regardless of whether the employer knew of their illegal status. (*Id.* at p. 543.) The court therefore gave the term its plain meaning and refused to imbue it with some kind of subtle meaning not intended by the Legislature. The same is true here. The Legislature stated that illegal drug use is not covered by FEHA. (Gov. Code § 12926; Cal. Code Regs., tit. 2 § 7296.0 subd. (d).) The plain meaning of the language governs – illegal means illegal under *any* applicable law, including federal law.

Engineering Co. (1998) 19 Cal.4th 66, 71 (hereafter *Green*) ["the Legislature, and not the courts, is vested with the responsibility to declare the public policy of the state"]; *Steven S. v. Deborah D.* (2005) 127 Cal.App.4th 319, 326.)

In sum, no court has ever held that employers cannot enforce drug testing policies on the ground that the illegal drug use ameliorates the pain of its user. Courts have repeatedly ruled that such conduct is not protected and that employers are not required to accommodate it. This Court should decline Ross's invitation to be the first Court to rule otherwise.

(2) The Legislature Has Not Required Employers to Accommodate Medical Marijuana Use.

In 2003, long after RagingWire refused employment to Ross, the Legislature passed the Medical Marijuana Program Act, expanding and clarifying the Compassionate Use Act. (*See* Stats. 2003, ch. 875 (S.B. 420) § 1; codified in Health & Saf. Code §§ 11362.7 through 11362.83.) In it, the Legislature provided that: "Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment." (Health & Saf. Code § 11362.785.)

By enacting this provision, the state Legislature made it clear that employers should not be placed between the conflicting state and federal

views on marijuana, that employers still have the right to require their employees to obey both state and federal law. The Senate analysis of the bill states its purpose: to "[r]estrict[] the use of medical marijuana in workplaces." (Senate Rules Committee, Rep. on Sen. Bill 420 (Sept. 13, 2003) p. 6.) To suggest, as Ross does, that the section is meant to require employers to accommodate marijuana use outside the workplace, even if that use affects the employee during working hours, would be to turn a law that rejects marijuana accommodation by employers and turn it into a law that requires it. The Legislature also would have had to overrule *Loder*, which permits employers to test for marijuana ingestion outside the workplace regardless of whether the employee actually is under its influence at the time of the test.

Ross's proposed reading of Health & Safety Code section 11362.785 would violate the meaning of the statutory language itself. Ross suggests that this Court should interpret the term "use" as merely ingesting marijuana in the workplace, that if the employee ingests it outside the workplace, he or she is not "using" marijuana even if the employee remains under its influence. Contrary to Ross's argument, "using" is broader than "possession." Both federal and state law hold that using or being under the influence of a controlled substance is not covered as a disability. (*See* 42 U.S.C. § 12114; Cal. Code Regs., tit. 2 § 7293.6 subds. (b) and (d).)

Ross's suggested reading would lead to an illogical result that directly contradicts the very reasons the Legislature adopted section 11362.785. The Legislature obviously intended the section to protect *employers* from having to accommodate marijuana use in the workplace. Yet Ross would have this very act require employers to do just that. Under Ross's proposed reading, an employee could ingest marijuana on the street outside of his employer's property, producing the very hallucinogenic effects that make the drug a "well-documented" workplace problem (*See Loder, supra,* 14 Cal.4th at p. 882-883), as long as he didn't actually smoke or eat the marijuana inside the plant gates. Rather than protecting the employer as the Legislature intended, the provision would now impose new requirements on the employer. That is clearly outside of the intentions of the Legislature, and the Courts do not make such broad public policy changes when the Legislature has refused to do so. (*Reno v. Flores, supra,* 507 U.S. at p. 315 [courts "are not a Legislature charged with formulating public policy"]; *Green, supra,* 19 Cal.4th at p. 71 ["the Legislature, and not the courts, is vested with the responsibility to declare the public policy of the state"]; *Steven S. v. Deborah D., supra,* 127 Cal.App.4th at p. 326.)

C. AS DRAFTED, THE COMPASSIONATE USE ACT HAS NO EFFECT ON EMPLOYMENT LAW.

Ross's entire argument boils down to his dissatisfaction with the scope of the Compassionate Use Act and the Medical Marijuana Program

Act and a desire for this Court to expand them. Yet there is nothing in Proposition 215 to suggest that the Compassionate Use Act has anything at all to do with employment law. And when the Legislature moved to clarify the Compassionate Use Act with the Medical Marijuana Program Act, it protected employers from having to accommodate illegal activity rather than requiring them to accommodate it. These provisions simply cannot support Ross's argument.

1. As a Voter-Passed Initiative, the Compassionate Use Act is Interpreted Narrowly.

General statutory construction principles "apply as much to initiative statutes as to those enacted by the Legislature." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) Where a statute's language is unambiguous, the statute must be construed to mean what it says. (*Pratt, supra*, 105 Cal.App.4th at p. 910; *People v. Superior Court (Gary)* (2000) 85 Cal.App.4th 207, 213.) "The judicial function is simply to ascertain and declare what is in terms or substance contained in the statute, not to insert what has been omitted, or omit what has been inserted..." (*Pratt, supra*, 105 Cal.App.4th at p. 910 [citations omitted].)

2. The Compassionate Use Act Simply Decriminalized Marijuana Possession For Medical Use; It Did Not Change California Employment Law.

In 1996, California voters approved Proposition 215, a statutory change to California law that simply decriminalized the medical use of

marijuana. Contrary to Ross's contentions in his Opening Brief, the act stopped there; it did not make far-ranging policy changes to the law.

In passing Proposition 215, the voters faced a limited question, whether to decriminalize marijuana possession for medical use. The Attorney General's summary of the proposition communicated as much, stating that the initiative:

> Exempts patients and defined caregivers who possess or cultivate marijuana for medical treatment recommended by a physician from criminal laws which otherwise prohibit possession or cultivation of marijuana.
>
> Provides physicians who recommend use of marijuana for medical treatment shall not be punished or denied any right or privilege.
>
> Declares that measure not be construed to supersede prohibitions of conduct endangering others or to condone diversion of marijuana for non-medical purposes.

(Att'y General's Official Summary, Prop. 215.)[6] It does not state that the initiative would have any effect on employment law, housing law or anything else other than decriminalizing marijuana possession when used at a doctor's recommendation.

The text of the statute itself is likewise limited. The act simply changes one section of California's Uniform Controlled Substances Act:

> Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical

[6] Available online at vote96.ss.ca.gov/bp/215.htm.

> purposes of the patient upon the written or oral recommendation or approval of a physician.

(Health & Saf. Code § 11362.5 subd. (d).) The statute does not refer to, much less make fundamental public policy changes to, FEHA, the Labor Code, or any right or obligation connected with employment.

Ross argues that the Court of Appeal improperly read the Compassionate Use Act narrowly because the purpose of the act was to establish a right to use marijuana for medical purposes. (AOB 38-39.) While the Compassionate Use Act adopted a policy that marijuana should be available a medical treatment where appropriate, it clearly established the limits of that availability. Ross's argument in essence would mean that the Compassionate Use Act had a greater effect on employment law than it did on criminal law.

This Court held in *People v. Mower*, the Compassionate Use Act in no way limited the ability of law enforcement to arrest people for marijuana possession. (*Mower, supra,* 28 Cal.4th at p. 475.) The person possessing the marijuana has the burden to establish that he or she is covered by the Act; it is not the obligation of law enforcement to prove that the marijuana was not being used medically. (*Id.* at p. 475.) Even the ballot pamphlet for Proposition 215 made this clear: "[p]olice officers can still arrest anyone for marijuana offenses." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), p. 61.)

The Courts of Appeal similarly interpret Prop. 215 narrowly. For example, in *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 772-773, the Court observed:

> the Compassionate Use Act is a narrowly drafted statute designed to allow a qualified patient and his or her primary caregiver to possess and cultivate marijuana for the patient's personal use despite the penal laws that outlaw these two acts for all others. Further, the enactment of the Compassionate Use Act did not alter the other statutory prohibitions related to marijuana, including those that bar the transportation, possession for sale, and sale of marijuana. When the people of this state passed this act, they declined to decriminalize marijuana on a wholesale basis. As a result, the courts have consistently resisted attempts by advocates of medical marijuana to broaden the scope of these limited specific exceptions. We have repeatedly directed the proponents of this approach back to the Legislature and the citizenry to address their perceived shortcomings with this law.

Even though this Court in *Mower* and the courts of appeal have ruled that the Compassionate Use Act should be read narrowly in the very area it was designed to address, criminal law enforcement, Ross invites the Court to turn around and read the law very broadly in an area that it never addressed, employment law. The Court should decline that invitation.

3. Whether to Expand FEHA to Require Employers to Accommodate Medical Marijuana Use Is a Public Policy Question for the Legislature, Not the Courts.

This Court should not adopt Ross's view of Prop. 215, which would extend to the workplace an initiative that was narrowly drawn to address only two sections of the Penal Code. The Court repeatedly has cautioned

against legislating from the bench. The various competing interests Ross's arguments implicate should be considered and, if appropriate, addressed by the Legislature.

a) The Courts Leave Public Policy Choices to the Legislature and the People.

As has been observed above, "the Legislature, and not the courts, is vested with the responsibility to declare the public policy of the state." (*Green, supra,* 19 Cal.4th at p. 71.) Thus,

> The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function.

(*Steven S. v. Deborah D., supra,* 127 Cal.App.4th at p. 326 [citations and quotation marks omitted].)

Moreover, this Court recognizes that in "the construction of a statute ... the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted ... ." (*People v. Leal* (2004) 33 Cal. 4th 999, 1008.) The Court does not, "under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used." (*Id.*) This Court has fully applied this principle to the FEHA. (*See Carrisales v. Department of Corrections* (1999) 21 Cal.4th

1132, 1140 ["[o]ur role here is to interpret the statute, not to establish policy. The latter role is for the Legislature"].)

Ross would have this Court violate the fundamental separation of the legislative and judicial functions, long recognized by this Court, and determine complex public policy questions on the interaction between state and federal marijuana laws. As the Court of Appeal observed, Ross's position "raises significant issues of public policy that should be decided by the Legislature, or by the electorate via initiative, rather than by the courts." (*Ross v. RagingWire Telecommunications, Inc.* (2005) 132 Cal.App.4th 590, 602.) Ross's remedy lies not with the Court, but with the Legislature or the people.

"It is assumed that the Legislature has in mind existing laws when it passes a statute. . . . 'The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended.'" (*Bailey v. Superior Court (Sears Roebuck & Co.)* (1977) 19 Cal.3d 970, 978 fn.10.) Similarly, "the Legislature is presumed to have had knowledge of existing domestic judicial decisions and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them." (*Id.*)

The Legislature plainly has accepted *Loder*'s holding that it is lawful for employers to refuse employment based on the results of pre-

employment tests for illegal drugs. The Legislature passed comprehensive legislation in 2000 amending FEHA.[7] Even though these amendments passed long after *Loder* was decided (1997) and Proposition 215 was enacted (1996), the Legislature did not abrogate *Loder* to exempt marijuana from testing, nor did the Legislature address this Court's pronouncement that "[n]othing in the FEHA, or any other California statute, purports to prohibit, or place general limitations upon, employer-mandated drug testing." (*Loder*, *supra,* 14 Cal.4th at p. 865.)

Similarly, when the Legislature passed the Medical Marijuana Program Act in 2003, the Legislature did not amend FEHA or impose any new restrictions on drug testing. (*See* Health & Saf. Code §§ 11362.7 through 11362.83.) Thus, despite many opportunities over ten years, the Legislature has elected not to expand Prop. 215's protections to prohibit denial of employment based on failing a drug test for cannabis metabolites.

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[7] In 1999, the United States Supreme Court issued a trilogy of decisions interpreting "disability" narrowly under the Americans with Disabilities Act. (*Sutton v. United Airlines* (1999) 527 U.S. 471 [119 S.Ct. 2139]; *Murphy v. United Parcel Serv.* (1999) 527 U.S. 516 [119 S.Ct. 2133]; *Albertson's Inc. v. Kirkingburg* (1999) 527 U.S. 555 [119 S.Ct. 2162].) In 2000, the Legislature passed the Prudence Kay Poppink Act, which changed FEHA to ensure these federal court decisions were not applied to FEHA. (Prudence Kay Poppink Act, AB 2222, Stats. 2000, ch. 1049, § 5.5, codified in Gov. Code § 12926 subds. ((i)(1)(A) and (k)(1)(B)(i).)

b) The Court Should Refuse to Extend the Compassionate Use Act to the Employment Context, Given the Wide-Ranging Policy Implications That Such an Expansion Would Entail.

Adopting Ross's position here would require this Court to address a number of foreseeable and unforeseeable policy consequences. For example, if employers are required to accommodate medical marijuana use, presumably landlords would be required to accommodate it as well, since FEHA imposes the same reasonable-accommodation requirement on landlords as it does on employers. (*See* Gov. Code § 12927 subd. (c)(1); *Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1592.)

Yet under current law, a landlord is entitled to evict a tenant that uses a property for any "unlawful purpose." (Civ. Code § 1161.) Marijuana possession is a federal crime (21 U.S.C. § 844) and landlords that knowingly accommodate marijuana possession and use on their properties are therefore knowingly accommodating criminal activity. Does the Compassionate Use Act amend Civil Code section 1161 to require landlords to knowingly accommodate criminal activity?

Worse, landlords that do accommodate medical marijuana use by their tenants risk having their rental properties seized by federal authorities. Federal forfeiture law permits authorities to seize real property used in connection with any controlled-substance crime that is punishable by more

than a year in prison. (21 U.S.C. § 881(a)(7).) Federal law makes marijuana possession punishable by two years in prison for a second offense. (21 U.S.C. § 844.) If the tenant stores enough marijuana to constitute possession with the intent to distribute under federal law, he or she faces a possible ten year prison term for the first offense. (21 U.S.C. § 841(b).) Landlords that know their tenants are using property for illegal marijuana use risk forfeiture under this provision. (*United States v. 141st Street Corp. by Hersh* (2nd Cir. 1990) 911 F.2d 870, 880-881 (hereafter *141st Street Corp.*) [41 unit apartment building seized from landlord that knew illegal drug activity was taking place in 15 of the units]; *Taylor v. Cisneros* (3d Cir. 1996) 102 F.3d 1334, 1342.) Did the voters intend the Compassionate Use Act to require landlords to risk forfeiting their rental properties in order to accommodate medical marijuana use?

The answers to these questions is "no." The Legislature has elected not to change current employment or housing law. The state cannot insulate employers and landlords from federal enforcement actions. Only the Legislature or the people have the power to make such a broad public policy change imposing such a serious obligation on employers and landlords. Neither the Legislature nor the people have elected to do so, and this Court should respect that choice.

4. Plaintiff/Appellant's Federalism Arguments Are Irrelevant.

Ross makes several arguments about federalism in an attempt to somehow establish his claim. But these arguments are irrelevant here. RagingWire does not contend that federal law: (i) somehow preempts FEHA; or (ii) requires the state to enforce federal criminal law. Indeed, the only reason that federal law is relevant at all is because employers do not have to accommodate *illegal* activity, and under state law, the term "illegal" includes actions prohibited under federal law.

a) RagingWire Does Not Contend That Federal Law Preempts FEHA.

Ross spends a large section of his opening brief arguing that because federal law does not preempt state laws permitting medical marijuana use, the state is free to require employers to accommodate medical marijuana use. (AOB 10-16.) But RagingWire has never argued that Ross's case is doomed because federal law prohibits such an accommodation. Rather, RagingWire's argument is simply that state law does not require it.

Ross argues that the appellate court's concerns over his suggested interpretation are unfounded. On the contrary, they are quite well-founded. The Court of Appeal stated that Ross's proposed interpretation of the Compassionate Use Act would require employers to accommodate

marijuana possession in the workplace and thereby subject themselves to federal law enforcement actions and investigations. (*Ross v. RagingWire Telecommunications, Inc., supra,* 132 Cal.App.4th at p. 602.) Ross argues that this concern lacks merit because Health and Safety Code section 11362.785 already makes it illegal to bring medical marijuana to work. (AOB 15-16.)

This provision does not address the Court of Appeal's concern for two reasons. First, a technical reading of that section does not support Ross's position because Health & Safety Code section 11362.785 protects employers from accommodating employee "*use*" not "*possession.*" Under California law, possession of a drug and use of that drug are entirely separate concepts. It is illegal to "use" certain narcotics, but marijuana "use" is not a crime, only "possession" is. (*Compare* Health & Saf. Code § 11550 *with* §§ 11057-11059). Section 11362.785 does not, given a technical reading, prevent an employee from *possessing* medical marijuana on an employer's premises, as long as he or she does not use it. Second, even if the statute were interpreted to prohibit possession of marijuana in the workplace, it does not mean that federal authorities will still not subject employers to federal subpoenas, search warrants or other intrusions while investigating employees or their marijuana suppliers under federal drug laws. (*See, e.g.*, Hume, *DEA Raids Medical Marijuana Store*, Sacramento Bee (April 20, 2006), p. B.1, http://www.sacbee.com/content/

breakingnews/story/14245267p-15063507c.html> [discussing federal Drug Enforcement Administration's April 2006 raid of "medical marijuana" dispensary in downtown Sacramento, California].)

And, as argued above, knowingly accommodating this activity would subject employers, as property owners, to civil forfeiture under federal law. (*See* 21 U.S.C. § 881(a); *141st Street Corp., supra,* 911 F.2d at p. 880-881; *Taylor v. Cisneros, supra,* 102 F.3d at p. 1342.) The California voters and Legislature simply did not indent to subject employers to civil seizures or other federal intrusions when they adopted the Compassionate Use Act and the Medical Marijuana Program Act.

b) This Case Does Not Involve State Enforcement of Federal Criminal Laws.

Ross makes the observation that the federal government cannot force states to enforce federal criminal law. (AOB 24-27.) This is also irrelevant to this case. RagingWire is not asking the state, or even the federal government, to enforce any criminal law. This case is about a private employer's choice to exclude Ross from employment, not about criminal liability under either system of government. Permitting RagingWire to exercise its rights under *Loder* and FEHA to screen its employees for illegal drug use simply has nothing to do with the federalism principles that preclude the federal government from undue intrusion into the provinces of state governments.

D. ROSS CANNOT ALLEGE A COMMON LAW CLAIM FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY

Ross argues that his wrongful termination claim states a cause of action because California has a fundamental public policy preventing employers from refusing employment to medical marijuana users. (AOB 28.) On the contrary, California has no such public policy and has expressly taken steps to ensure that employers do not have to accommodate marijuana use.

To establish a *prima facie* case of wrongful discharge in violation of public policy, Ross must demonstrate that his termination, under the circumstances alleged in his Complaint (i.e., positive drug test for marijuana), violated "fundamental principles of public policy." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170; *see also Stevenson v. Superior Court (Huntington Memorial Hospital)* (1997) 16 Cal.4th 880, 889 (hereafter *Stevenson*).) The primary rationale for requiring that a public policy be substantial and fundamental is "to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees they discharge." (*Stevenson, supra,* 16 Cal.4th at p. 889.)

Wrongful termination claims under *Tameny* are limited to those finding support in an important public policy based on a statutory, regulatory, or constitutional provision. (*Green, supra,* 19 Cal.4th at p. 79; *Gantt v. Sentry Ins.* (1992) 1 Cal.4th 1083, 1095 [public policy in question

must be "rooted or tethered" to polices delineated in a specific constitution or statutory provision].) Moreover, the public policy violated by the employment termination must be "one about which reasonable persons can have little disagreement, and which is firmly established at the time of discharge." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 668 (hereafter *Foley*).)

Here, Ross claims he was wrongfully discharged in violation of public policy for "exercising his right under [the Compassionate Use Act] to properly utilize medical marijuana for the treatment of chronic pain." (Complaint ¶ 32, AOB 30-31). Ross identifies three possible sources for the "public policy" – FEHA's protections from disability discrimination, a patient's right to determine the course of his own medical treatment, and the Compassionate Use Act. (AOB § II.B.1-3.) No *Tameny* claim will lie in this case under these or any other statutory provision.

1. There is No "Firmly Established" Public Policy Closely Tethered to a Statute or Constitutional Provision Supporting Ross's *Tameny* Claim.

When RagingWire refused continued employment to Ross, there was no public policy that meets the standard for a *Tameny* claim. Marijuana is illegal under federal law whether authorized by Prop. 215 or not. Therefore, it is impossible to argue Prop. 215 evinces a policy that is "one about which reasonable persons can have little disagreement" or was

"firmly established" in 2001. (*Foley*, *supra,* 47 Cal.3d at p. 668.) Indeed, as the Court of Appeal observed in 2001, "reasonable persons may disagree about whether the federal prohibition is a good policy." (*Bianco*, *supra,* 93 Cal.App.4th at p. 753; *see also* Harris, *F.D.A. Dismisses Medical Benefit from Marijuana*, New York Times (April 21, 2006), p.A-1, <http://www.nytimes.com/2006/04/21/health/21marijuana.html> [reporting FDA findings rejecting medical efficacy of marijuana].)

Further, Proposition 215 made no mention of employment law in any of its materials, and the California Legislature has since passed legislation expressly stating that employers do not have to accommodate medical marijuana use at the workplace. (Health & Saf. Code § 11362.785.) The Fair Employment and Housing Commission's regulations continue to provide that illegal drug use is not a mental or physical disability, the validity of which Ross does not challenge. (Cal. Code Regs., tit. 2 § 7293.6 subds. (b) and (d).) These regulations have remained unchanged since the electorate passed the Compassionate Use Act.

a) The California Drug Free Workplace Act Evinces a Public Policy *Against* Marijuana Use.

California public policy does *not* require employers to accommodate marijuana use. In fact, California's own Drug Free Workplace Act of 1990

requires state contractors to ensure workplaces are free from the "unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance." (Gov. Code § 8351 subd. (a).) "Controlled substance" under the act is defined as "a controlled substance in schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C. § 812, et seq.)." (*Id.*)

California law therefore provides that drugs deemed illegal *under federal law* cannot be used by employees of state contractors. The state's "public policy" could not be to the contrary for non-state contractors.

b) FEHA Does Not Establish A Public Policy Requiring Employers to Accommodate Marijuana Use.

Ross argues that his wrongful termination claim lies because California has a fundamental public policy against discrimination based on a mental or physical disability. Yet Ross admits that he is not asking this Court to rule that medical marijuana use itself is a mental or physical disability. "*Ross does not contend that he is disabled because of his medical marijuana use*...Rather...he suffers from a disabling back condition and is requesting an accommodation of his marijuana use to treat this disability." (AOB 9, fn.1 [emphasis added].)

As argued above, unlawful drug use should not be a form of reasonable accommodation under FEHA. Moreover, as this Court said in

Loder, nothing in FEHA protects employees or applicants who are current illegal drug users. (*Loder*, *supra*, 14 Cal.4th at p. 865.)

Therefore, to the extent Ross's FEHA claim fails, his *Tameny* claim based on FEHA must be barred as well. (*See Nelson v. United Technologies* (1999) 74 Cal.App.4th 597, 613 fn.4 [holding FEHA and public policy claim identical and both failed where employer did not violate FEHA]; *Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 632 [no claim for wrongful termination in violation of public policy where plaintiff failed to raise triable issue on FEHA claim]; *Jennings v. Maralle* (1994) 8 Cal.4th 121 [employer cannot be held liable for wrongful termination in violation of public policy where employer's conduct was not covered by FEHA].)

c) A Patient's Right to Control Treatment Decisions Does Not Permit the Use of Illegal Drugs.

Ross argues that California has a fundamental public policy requiring employers to accommodate medical marijuana use by their employees because patients have a right to determine the course of their own medical treatment, and employers cannot coerce employees to adopt a particular medical treatment on threat of termination. (AOB 29-31.)

But "[t]here is no fundamental state or federal constitutional right to use drugs of unproven efficacy, and the traditional rational basis test is

appropriate in evaluating restrictions on such drug use. While the majority of California voters undoubtedly believe that marijuana has legitimate medical uses, there remains a vigorous debate on this point." (*Bianco, supra,* 93 Cal.App.4th at p. 754 [internal citation omitted]; s*ee also Trippet, supra,* 56 Cal.App.4th at p. 1547 fn. 8 ["Proposition 215 did not change the medical use of marijuana from a crime to a 'right'"]; *Rutherford v. United States* (10th Cir. 1980) 616 F.2d 455, 457 ["[i]t is apparent...that the decision by the patient whether to have a treatment or not is a protected right, but his selection of a particular treatment, or at least a medication, is within the area of government interest in protecting public health"]; *Carnohan v. United States* (9th Cir. 1980) 616 F.2d 1120, 1122 [holding cancer patient could not seek a declaratory judgment entitling him to use a particular, non-approved drug for his illness]; *United States v. Osburn* (C.D. Cal., April 15, 2003, No. 02-939) 2003 U.S. Dist. Lexis 8607 at * 5-6.)

Ross's reliance on *Pettus v. Cole* (1996) 49 Cal.App.4th 402 is misplaced because RagingWire did not attempt to coerce Ross into adopting a particular medical treatment. In *Pettus*, the employer, Du Pont, threatened to terminate Mr. Pettus if he did not enroll in a thirty-day inpatient alcohol treatment program. (*Id.* at p. 423-24.) Here, RagingWire is not trying to dictate medical treatment at all, much less a particular treatment. It is simply requiring its prospective employees to pass test for

the use of illegal drugs. Any and all legal medical treatments remain open to Ross, he simply does not have the right to drugs declared illegal by the federal government.

d) The Compassionate Use Act Did Not Establish a Fundamental Public Policy Requiring Employers to Accommodate Illegal Marijuana Use.

Ross's final argument for a relevant "fundamental public policy" to support his *Tameny* claim is to turn back to the Compassionate Use Act. Ross argues that the Compassionate Use Act's policy statement established the grounds for this wrongful termination claim. (AOB 35.)

To support a Tameny claim, a "public policy" must be "(1) delineated in either constitutional or statutory provisions; (2) 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) substantial and fundamental." (*City of Moorpark v. Superior Court (Dillon)* (1998) 18 Cal.4th 1143, 1159.)

The Compassionate Use Act does not evince a public policy that satisfies the above test. First, nothing in the text or intent of Prop. 215 applies to private employers. Rather, the Compassionate Use Act protects marijuana users from state action in the form of criminal prosecution. Where a law limits state action and does not apply to private entities, it is not a proper basis for a "public policy" claim. (*Grinzi v. San Diego*

Hospice Corp. (2004) 120 Cal.App.4th 72, 77 [First Amendment does not support public policy claim because it does not apply to private employers].)

Second, nothing about the Compassionate Use Act protects or even pertains to employment rights. Thus, this case is on all fours with *Sullivan v. Delta Air Lines, Inc.* (1997) 58 Cal.App.4th 938 (hereafter *Sullivan*). In *Sullivan*, an employee sued for wrongful termination in violation of the public policy found in Labor Code Section 1025 of the Alcohol and Drug Rehabilitation Act (ADRA), which requires every private employer regularly employing twenty-five or more employees to reasonably accommodate any employee who wishes to voluntarily enter and participate in an alcohol or drug rehabilitation program. (*See* Lab. Code § 1025; *Sullivan, supra,* 58 Cal.App.4th at p. 944.) The court held that nothing in the statutory language of the ADRA clearly prohibited conduct by an employer. Therefore, the policy underlying the ADRA's prohibition of discrimination based on voluntary participation in a rehabilitation program did not support a common law tortious discharge claim. (*Sullivan, supra,* 58 Cal.App.4th at p. 944.)

Further, the *Sullivan* court noted that discrimination against drug and alcohol users was not on par with other FEHA protected classifications:

> An employee's voluntary participation in an alcohol or drug rehabilitation program does not reflect an immutable characteristic like race, gender or age. Rehabilitation

> involves an employee's positive choice to overcome an addiction, whereas the Supreme Court has emphasized that race, gender and age deserve special protection precisely because they are not the products of free choice.

(*Sullivan, supra,* 58 Cal.App.4th at p. 946-947 [citations omitted].)

Here, as in *Sullivan*, the Compassionate Use Act does not prohibit conduct by an employer; it does not address employment rights at all. Moreover, as in *Sullivan*, RagingWire did not discharge Ross for immutable characteristics – rather it discharged Ross because he tested positive for current use of an illegal controlled substance.

In *People v. Trippet*, the Court of Appeal observed, "evidence of the voters' intent compels the conclusion that, as a general matter, Proposition 215 does not exempt the transportation of marijuana allegedly used or to be used for medical purposes from prosecution under section 11360." (*Trippet, supra,* 6 Cal.App.4th at p. 1550.) Thus, Prop. 215 did not exonerate an individual's transportation of marijuana purportedly for medicinal purposes.

The Court in *Trippet* refused to accept the defendant's "rather candid invitation to interpret the statute as a sort of 'open sesame' regarding the possession, transportation and sale of marijuana in this state. To hold as she effectively urges would be tantamount to suggesting that the proposition's drafters and proponents were cynically trying to 'put one

over' on the voters and that the latter were not perceptive enough to discern as much." (*Id.* at p. 1546.)

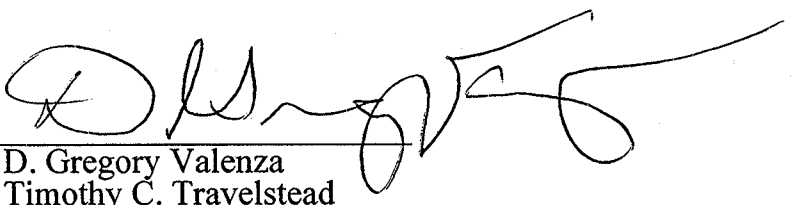
Expansion of Prop. 215 to the employment context without express Legislative or voter consent would be contrary to the clear intent of the voters when the initiative was passed. This Court should not accept Ross's invitation to do so.

IV. CONCLUSION

For all the foregoing reasons, Respondent RagingWire Telecommunications respectfully requests this Court to affirm the judgment of the Court of Appeal.

Respectfully submitted,

Date: April 21, 2006 JACKSON LEWIS LLP

By 

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[Cal. R. Ct. 14(c)(1)]

Counsel for Defendant/Respondent RagingWire Telecommunications, Inc. certifies this brief is 9,570 words, according to the word count of the computer program used to prepare this brief.

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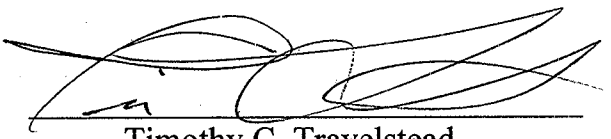

Timothy C. Travelstead

PROOF OF SERVICE

Gary Ross v. RagingWire Telecommunications, Inc.
California Supreme Court Case No. S138130

I, Yvette Pruitt, declare that I am employed with the law firm of Jackson Lewis LLP, whose address is 199 Fremont Street, 10th Floor, San Francisco, California 94105; I am over the age of eighteen (18) years and am not a party to this action.

On April 21, 2006, I served the attached **REPSONDENT'S ANSWERING BRIEF** in this action by placing a true and correct copy thereof, enclosed in a sealed envelope addressed as follows:

Mr. Stewart Katz, Esq.
The Law Office of Stewart Katz
555 University Avenue, Suite #270
Sacramento, California 95825
Phone: (916) 444-5678
Fax: (916) 444-3364

Joseph D. Elford, Esq.
AMERICANS FOR SAFE ACCESS
1322 Webster Street #208
Oakland, CA 94612

Attorneys for Plaintiff/Petitioner Gary Ross

[X] **BY MAIL**: United States Postal Service by placing sealed envelopes with the postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California.

[ ] BY HAND DELIVERY: I caused such envelope to be delivered by hand to the above address (via Western Messenger).

[ ] BY OVERNIGHT DELIVERY: I caused such envelope to be delivered to the above address within 24 hours by overnight delivery service (via Overnite Express).

[ ] BY FACSIMILE: I caused such documents to be transmitted by facsimile from our fax number (415) 394-0401 to the fax number indicated above.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct; executed on April 21, 2006, at San Francisco, California.

Yvette Pruitt