IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GARY ROSS, Plainiff/Appellant vs. RAGINGWIRE TELECOMMUNICATIONS, INC. Defendant/Respondent	)	No. S138130 [Court of Appeal, Third Appellate District-No. C043392] [Sacramento Superior Court No. 02AS05476]

APELLANT'S OPENING BRIEF

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ISSUES PRESENTED FOR REVIEW

1. Does an employer violate California's Fair Employment and Housing Act (Gov. Code, § 12960 et seq.) by refusing to accommodate and terminating a qualified medical marijuana employee based on the employee's private use of marijuana to treat a disability, which in no way impedes his ability to perform his job?

2. May a qualified medical marijuana patient who does not use marijuana while on the job and whose job performance is unimpaired in any way by his medical use of marijuana at home to treat muscle spasms and chronic back pain have a cause of action for wrongful termination in violation of public policy for being fired for his protected use of marijuana?

STATEMENT OF FACTS

Plaintiff/appellant Gary Ross (hereafter Ross) is a forty-three-year-old veteran of the United States Air Force with two children. (Complaint ¶ 14 [AA 5].) In January of 1983, Ross suffered a back injury while in the Air Force, for which he receives disability benefits. (Complaint ¶¶ 14 & 36 [AA 5 & 10]; *Ross v. RagingWire Telecommunications, Inc.* (2005), 132 Cal.App.4th 590, 33 Cal.Rptr.3d 803, 805 [review granted Nov. 30, 2005].) At first, Ross used conventional pain medications, including muscle relaxants, to treat his muscle spasms and pain. (Complaint ¶ 14 [AA 5]; *Ross, supra*, 33 Cal.Rptr.3d at p. 805.)

After years of unsuccessful treatment with these medicines, Ross's physician recommended marijuana to him as a treatment for his spasms and pain. (Complaint ¶ 14 [AA 5]; *Ross, supra*, 33 Cal.Rptr.3d at p. 805.) Since September of 1999, Ross has heeded his physician's advice, which makes him a "qualified patient" under the Compassionate Use Act. (See Health & Saf. Code, § 11362.5, subd. (d).)

Since becoming a medical marijuana patient in 1999, Ross has worked successfully in the field of computer systems administration, which he learned in the Air Force. (Complaint ¶ 21 [AA 6]; *Ross, supra*, 33 Cal.Rptr.3d at p. 806.) Based on his successful performance with other corpations, defendant/respondent RagingWire Telecommunications, Inc. (hereafter RagingWire) offered Ross a position as Lead Systems Administrator on September 10, 2001. (Complaint ¶ 10 [AA 4]; *Ross, supra*, 33 Cal.Rptr.3d at p. 806.) Ross accepted the position and began work at RagingWire seven days later. (Complaint ¶¶ 10 & 15 [AA 4 & 5]; *Ross, supra*, 33 Cal.Rptr.3d at p. 806.)

Just after RagingWire offered Ross the job, on September 14, 2001, RagingWire asked Ross to take a drug test, which he willingly did. (Complaint ¶¶ 12 & 13 [AA 5]; *Ross, supra*, 33 Cal.Rptr.3d at p. 806.) Ross brought a copy of his physician's written recommendation to use marijuana to the clinic administering the test and he presented it to the clinic before taking the test.

(Complaint ¶ 12 [AA 5]; *Ross, supra*, 33 Cal.Rptr.3d at p. 806.) Not surprisingly, Ross tested positive for marijuana. (Complaint ¶¶ 12 & 13 [AA 5]; *Ross, supra*, 33 Cal.Rptr.3d at p. 806.)

Upon being informed of this, Ross presented another copy of his physician's recommendation to RagingWire's Human Resources Director and he informed the Director that he was a qualified medical marijuana patient. (See Complaint ¶ 17 [AA 5-6].) After confirming this with Ross's physician, RagingWire's Board of Directors met and decided what to do. (See Complaint ¶¶ 18 & 19 [AA 6].) Despite the fact that Ross had performed his job competently and that his off-duty use of medical marijuana would not impair his ability to perform his job in any way (Complaint ¶ 20 [AA 6]; *Ross, supra,* 33 Cal.Rptr.3d at p. 806), RagingWire terminated him "because of his choice of [medical] treatment." (Defendant/Respondent's Answering Brief, filed July 31, 2003 (No. C043392) [hereinafter RAB].) Ross was left jobless as a result of his use of marijuana at home to treat his disability. (See Complaint ¶¶ 18 & 19 [AA 6].)

STATEMENT OF THE CASE

After exhausting his administrative remedies with the Department of Fair Employment and Housing, Ross filed a complaint in the Sacramento County Superior Court on September 11, 2002. (AA 1) The complaint asserts five causes of action: two for employment discrimination, in violation of California's Fair

Employment and Housing Act [hereinafter FEHA] (Gov. Code, § 12900 et seq.); one for wrongful termination in violation of public policy, and two for breach of contract. On January 22, 2003, the Superior Court sustained a demurrer as to all of the causes of action because medical marijuana use is illegal under federal law. (See *Ross, supra*, 33 Cal.Rptr.3d at p. 806.) Ross pressed forward with his claims on appeal.

In the Court of Appeal, Ross contended that his termination for using a medicine that is legal under California law to treat his disability violates California's FEHA and is contrary to the public policy of this State. By published decision, dated September 7, 2005, the Court of Appeal for the Third Appellate District affirmed the Superior Court's holding sustaining the demurrer in its entirely. (*Ross v. RagingWire Telecommunications, Inc.* (2005) 33 Cal.Rptr.3d 803.) Like the Superior Court, the Court of Appeal relied almost exclusively on the illegal status of marijuana under federal law to hold that an employer may terminate, or refuse to hire, a medical marijuana patient for acting in accordance with the Compassionate Use Act. (See *id.* at p. 809.) Even as both parties agreed that federal law did not preempt state law in this area, and without citing any state law authorizing it to resolve Ross's state law claims by applying federal law, the court "declined [Ross's] invitation to hold that only California's marijuana laws apply to his [state law] claims." (*Id.* at p. 810.) That decision became final by

operation of California Rules of Court, rule 24(b)(1) on October 7, 2005. This Court granted Ross's Petition for Review on November 30, 2005.

SUMMARY OF THE ARGUMENT

More than a decade before Congress passed the federal Americans with Disabilities Act [hereinafter ADA] (42 U.S.C. § 12181 et seq.), the California Legislature recognized the problem of arbitrary discrimination against those with disabilities and established a remedy (see Gov. Code, § 12900 et seq.). To promote the entry of disabled people into the workforce and prevent their unjustified exclusion, California law requires employers to accommodate those with disabilities and makes it unlawful to discriminate against them for noneconomic related reasons. Plaintiff Gary Ross is a disabled person entitled to the protections of California's Fair Employment and Housing Act [hereinafter FEHA] (Gov. Code, § 12900 et seq.) and he cannot be made to sacrifice its protections because of his at-home use of medical marijuana, a medicine which has been recognized as legal by the California electorate, to treat his disability. This case is a paradigmatic example of employment discrimination based on disability. The Court of Appeal erred in denying Ross a remedy under this State's anti-discrimination laws.

Nor does it make any difference to Ross's state law claims under the FEHA that the federal government continues to treat medical marijuana use as illegal. No

federal law required, or even authorized, RagingWire to penalize Ross for his medical marijuana use and no state law authorizes our courts to use federal law to resolve Ross's state law claims. California has a long history of affording its citizens greater protection against invidious discrimination than does the federal government. And our federalist system of government encourages this.

This case also must be considered in light of the expressed will of the California voters who passed the Compassionate Use Act in 1996 (Health & Saf. Code, § 11362.5.) In passing that Act, the California electorate rejected the federal government's policy of prohibiting marijuana use in all cases and, instead, they declared the right of qualified individuals to use medical marijuana where such use has been deemed appropriate by a physician. Even before this, the California Constitution recognized a right of "autonomy privacy," which enables individuals to determine the course of their own medical treatment after consulting with their physicians. The Court of Appeal's decision flies in the face of both of these policies. Under California law, medical marijuana patients cannot be forced to choose between their employment and their health.

ARGUMENT

I.

ROSS PROPERLY STATED A CAUSE OF ACTION FOR EMPLOYMENT DISCRIMINATION, IN VIOLATION OF CALIFORNIA'S FAIR EMPLOYMENT AND HOUSING ACT

A. California's Fair Employment and Housing Act

Consistent with its broad objectives of ensuring that individuals with disabilities are not unjustifiably excluded from the workforce and maximizing the contributions of its productive citizens, California's FEHA not only makes it unlawful for an employer to discriminate against persons with disabilities, but it also requires employers to "reasonably accommodate" an applicant or employee's disability unless the employer can show that doing so would entail "undue hardship." (Gov. Code, §§ 12920, 12940, subd. (m); see Gov. Code, § 12940, subd. (a)(1).) To this end, the FEHA provides:

> It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
>
> (a) For an employer, because of . . . physical disability . . . medical condition . . . of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.
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> * * *

> (m) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. . . . [unless] demonstrated by the employer or other covered entity to produce undue hardship to its operation.

(Gov. Code, § 12940, subd. (a) & (m).) The FEHA, thus, sets forth rules to assist disabled persons to enter the economic mainstream and it establishes a framework to assess employment practices that may result in their arbitrary exclusion. The ultimate question in all FEHA cases is whether there is a legitimate business justification for the exclusion of disabled persons. (See also Gov. Code, § 12993, subd. (a) [the FEHA "must be construed liberally for the accomplishment of [its] purposes"]; *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1157 ["our decisions have consistently emphasized the breadth of the FEHA"].)

B. Ross Stated a *Prima Facie* Case of Employment Discrimination under the FEHA

This case involves a straightforward application of the FEHA to one who is disabled with a medical condition. Ross is a qualified individual with a disability, as he suffers from debilitating back pain and muscle spasms, and the Court of Appeal recognized this. (See Complaint ¶ 3 [AA 2]; *Ross, supra,* 33 Cal.Rptr.3d at p. 806; cf. *Livitsantos v. Superior Court* (1992) 2 Cal.4th 744, 747 [allegations of plaintiff's complaint are deemed true for purposes of ruling on a

demurrer].)[1] His requested accommodation is the barest minimum that anyone could ask -- that he not be terminated from employment solely because he uses the medicine he needs to live without muscle spasms and pain while he is at home. In 1996, the California voters expressly authorized the use of marijuana as medicine. (Gov. Code, § 11362.5(d), subd. (a); see also *People v. Mower* (2002) 28 Cal.4th 457, 482 ["As a result of the enactment of section 11362.5(d), the possession and cultivation of marijuana is no more criminal--so long as its conditions are satisfied--than the possession and acquisition of any prescription drug with a physician's prescription."].) Just as it would violate the FEHA to fire an employee who uses insulin or Zoloft, it violates this statute to terminate an employee who uses a medicine deemed legal by the California electorate upon the recommendation of his physician. (Cf. *Howell v. New Haven Board of Education* (D. Conn. 2004) 309 F.Supp.2d 286, 291-292 [holding that teacher's claim that he was excluded from educational field because of his use of medication to treat diabetes sufficient to state a cause of action under the ADA]; *Alvarez v. Fountainhead, Inc.* (N.D. Cal. 1999) 55 F.Supp.2d 1048, 1055 [granting preliminary injunction on finding that failure of pre-school to reasonably accommodate child with asthma by

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[1] Ross does not contend that he is disabled because of his medical marijuana use, as RagingWire construed his allegations in the proceedings below. RAB 6 [quoting Gov. Code § 12926 subds. (i)(5) & (k)(6)] [emphasis added].) Rather, as the Court of Appeal recognized, he suffers from a disabling back condition and is requesting an accommodation of his marijuana use to treat this disability.

administering or allowing child to take albuterol at school constitutes a violation of the ADA].)[2]

C. Federal Law Does Not Displace the Protections of the FEHA

To defeat Ross's state law claims under the FEHA, the Court of Appeal relied on federal law to hold that RagingWire did not have an obligation to accommodate Ross's medical marijuana use because federal law renders this course of medical treatment illegal. (See *Ross, supra,* 33 Cal.Rptr.3d at pp. 809-811 ["as the trial court correctly stated, the dispositive issue is whether plaintiff's use of marijuana is illegal"].) While appealing to those who do not favor the Compassionate Use Act, this approach overstates the significance of federal law to the questions presented and fails to acknowledge the role that state law has to play in our federalist system of government. Under that system, the state and federal sovereigns are independent and entitled to deference in their own spheres, with the states acting as the primary guardians of the health and safety of their citizens. (See *Gonzales v. Oregon* (2006) _U.S. _, 126 S.Ct. 904, 923 ["regulation of health and safety is 'primarily, and historically, a matter of local concern'"] [quoting *Hillsborough County v. Automated Medical Laboratories, Inc.* (1985) 471 U.S.

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[2] Decisions interpreting the ADA are relevant in interpreting the FEHA. (*Finegan v. County of Los Angeles* (2001) 91 Cal.App.4th 1, 7; *McCullah v. Southern Cal. Gas Co.* (2000) 82 Cal.App.4th 495, 499.) The protections of the FEHA, however, exceed those of the ADA (Govt. Code, § 12926.1, subd. (a)), so an employment decision that violates the ADA must, *ipso facto*, violate the FEHA as well.

707, 719]; *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 475 [our federalist system of government allows states "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons"] [quoting *Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 756]; *Farmers Brothers Coffee v. Workers' Compensation Appeals Board* (2005) 133 Cal.App.4th 533, 538 ["Examples of [states'] historical police powers include . . . laws affecting occupational health and safety"] [quoting *De Canas v. Bica* (1976) 424 U.S. 351, 356-357].) Regardless whether the federal government has the authority to regulate medical marijuana use under the Commerce Clause, which the United States Supreme Court has found that it does (*Gonzalez v. Raich* (2005) __ U.S. __ , 125 S.Ct. 2195), such federal regulation does not displace the medical marijuana laws of the states. It is only where there is a "positive conflict" between the state and federal laws that the Supremacy Clause (U.S. Const., art. VI) requires compliance with the federal mandate to the exclusion of the conflicting law of the state. (See 21 U.S.C. § 903.)[3] Otherwise, a citizen of a state must act in

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[3] The "anti-preemption" provision of the federal Controlled Substances Act ["CSA"] (21 U.S.C. § 801 *et seq.*), 21 U.S.C. § 903, provides:

> No provision of the Act shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law, unless there is a positive conflict between that provision of this

accordance with *both* state and federal law. (See, e.g., *Ponzi v. Fessenden* (1922) 258 U.S. 254, 259;[4] see also see also *Gonzales v. Oregon* (2006) __ U.S. __, 126 S.Ct. 904, 912 ["The CSA explicitly contemplates a role for the States in regulating controlled substances, as evidenced by its pre-emption provision."].)

In the proceedings below, RagingWire conceded that there is no positive conflict between state and federal law and that the two systems of law can coexist. It stated as follows:

> Ross's arguments regarding preemption are irrelevant as the trial court did not hold that the ADA or federal criminal law preempts FEHA (see AOB 18-21.) There is no conflict between the Compassionate Use Act and federal criminal law -- Prop. 215 does not seek to limit or

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> subchapter and that State law so that the two cannot consistently stand together.

[4] In *Ponzi, supra,* the United States Supreme Court described the "dual sovereignty" doctrine as follows:

> We live in the jurisdiction of two sovereigns, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfill their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.

(*Ponzi, supra,* 258 U.S. at 259.)

> usurp the CSA. Thus, both federal and state criminal laws apply in this matter.

(RAB 9 [emphasis in original].) While this concession was wise, since no federal statute or regulation requires an employer to retaliate against an employee who uses marijuana at home, RagingWire overlooked that *its* conduct, not Ross's, is at issue here. Under state law, RagingWire had an obligation to accommodate Ross, and no federal law precludes this.

Consider first the federal Drug-Free Workplace Act (41 U.S.C. § 701 et seq.). Federal law is quite clear that this Act does not place any obligation on employers to drug test their employees, much less to fire them for a positive result. (See *Parker v. Atlanta Gas Light Co.* (S.D. Ga. 1993) 818 F.Supp. 345, 347 ["The [Drug-Free Workplace Act] establishes no requirement for drug testing"]; Government-wide Implementation of the Drug-Free Workplace Act of 1988 (Jan. 31, 1989) 54 C.F.R. 4946-01 ["10. Question--Do either the Drug-Free Workplace Act or its implementing regulations published today require contractors or grantees to conduct drug tests of employees? Answer--No."].) Where, by sharp contrast, the federal government does require that employers drug test their employees and discipline them for a positive test result, such as in the regulated field of interstate transportation, it has done so explicitly. (See, e.g., 49 C.F.R. § 40.23(a) [Department of Transportation regulation requiring employers to drug test employees in "safety-sensitive" positions and to remove them from such positions

if they test positive for drugs]; cf. *Oregon, supra,*_U.S. _ 126, S.Ct. at p. 924 ["when Congress wants to regulate medical practice in the given scheme, it does so by explicit language in the statute"].) Simply put, there is no federal law, which conflicts with the proper interpretation and application of state law to this case.

Nor is this result any different when one considers the criminal provisions of the federal Controlled Substances Act (21 U.S.C § 801 et seq.) (hereinafter CSA). Whereas RagingWire contended in the proceedings below that "an employer who ignores the CSA and quietly continues to keep a known marijuana user on its payroll" risks being subject to federal criminal liability as an accomplice (RAB 15), accomplice liability requires far more than this. In order to be an accomplice after-the-fact, one must specifically intend to assist the perpetrator "in order to prevent his apprehension, trial or punishment." (See 18 U.S.C. § 3.) The employment decision by RagingWire, however, makes absolutely no difference to Ross's apprehension, trial or punishment, since no one is pursuing Ross and he is not asking RagingWire to engage in any cover-up. Rather, Ross is merely asking that RagingWire take a neutral stance towards his medical marijuana use and not fire him for its knowledge of this. This falls well short of making it an accomplice, the hyperbole of RagingWire notwithstanding. (Cf. *Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, 635 [rejecting federal government's contention that California physicians who recommend marijuana to their patients are guilty of aiding and

abetting a federal crime, since there was no proof that the physician "associate[d] himself with the venture, that he participate[d] in it as something that he wishe[d] to bring about and that he [sought] by his actions to make it succeed'"] [quotation omitted].)

Likely recognizing the far-fetched nature of RagingWire's proffered justification, the Court of Appeal did not rely on this in reaching its decision; instead, it engaged in some speculation of its own. Rather than cite any federal law that conflicts with Ross's proposed accommodation, the Court of Appeal stretched Ross's claim to its "logical conclusion" and noted that "it could be asserted" by medical marijuana patients that they be permitted to bring their medical marijuana with them to work, "which, under circumstances not entirely speculative, could result in the employer's workplace being subject to a search conducted by federal authorities. . . ." (See *Ross, supra,* 33 Cal.Rptr.3d at pp. 810-811.) Aside from the fact that this *is* entirely speculative and outside of the factual record of this case (see *Conant v Walters* (9th Cir. 2002) 309 F.3d 629, 646 fn.10 (conc. opn. of Kozinski, J.) [noting that federal government generally only prosecutes marijuana cultivation cases involving at least 500 plants grown indoors or 1,000 plant grown outside] [citation omitted]), neither Ross, nor any other medical marijuana patient, is requesting such accommodation for the very simple reason that the California Legislature has already expressly ruled it out. Although not once cited or

mentioned by the Court of Appeal in its published decision, Health and Safety Code section 11362.785 declares: "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 and Safety Code, § 11362.785, subd. (a).) Not only does this suggest that the Legislature expects employers to accommodate medical marijuana use at home while the employee is off-duty, but it provides a definitive response to the Court of Appeal's speculative fears. Ross's request for a reasonable accommodation cannot be rendered unreasonable by transforming it into a demand he did not make and that state law precludes.[5]

D. RagingWire Did Not Even Attempt to Proffer a Legitimate Business Justification to Discriminate Against Medical Marijuana Patients in Employment and There Is None

With federal law not standing as an obstacle to Ross's state law claims under the FEHA, there is no legitimate legal reason to deprive Ross of an opportunity to litigate these claims. RagingWire does not even attempt to proffer a

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[5] The Court of Appeal's observation that Ross's claims are barred by California's Drug-Free Workplace Act (Gov. Code § 8350 *et seq.*) is flawed for this same reason and others. (See *Ross, supra*, 33 Cal.Rptr.3d at p. 811.) Because Ross is not contending that he be permitted to use or possess his medical marijuana at work, the state Drug-Free Workplace Act does not apply to his proposed accommodation. In any event, there is no factual basis to justify the assumption that RagingWire has any contracts with the State, which is necessary to a finding that the employer's interests would be impaired under the Drug-Free Workplace Act.

legitimate business justification for its failure to accommodate Ross; rather, it freely admits that "[i]t discharged Ross because of his choice of [medical] treatment." (RAB 20 [emphasis in original].) The Court of Appeal, for its part, alludes to a statement made by this Court in its sharply divided decision in *Loder v. City of Glendale* (1997) 14 Cal.4th 846, that there are "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." (See *Ross, supra,* 33 Cal.Rptr.3d at p. 808 [quoting *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 865] [emphasis added].) When read in its proper context, however, *Loder* supports, rather than undermines, Ross's position.

In *Loder*, *supra,* this Court expressed its concerns with drug *abuse*, not with medical marijuana *use* pursuant to the recommendation of a physician. Unlike employees who abuse drugs and alcohol for recreational purposes, an employee who uses marijuana for legitimate medical reasons in accordance with the advice of his doctor is not susceptible to the parade of horribles cited in *Loder* -- increased absenteeism, decreased productivity, and greater turnover -- since the

use of a controlled substance under medical supervision is far less likely to lead to addiction and recreational use. Numerous courts, including most recently the United States Supreme Court, have made precisely this distinction. In *Gonzales v. Oregon, supra,* Justice Kennedy observed:

> Viewed in its context, the prescription requirement [of the federal CSA [21 U.S.C. § 801 et seq.] is better understood as a provision that ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. . . . To read prescriptions for assisted suicide as constituting "drug abuse" under the CSA is discordant with the phrase's consistent use throughout the statute, not to mention its ordinary meaning.

*Gonzales v. Oregon, supra,*_ U.S. _,126 S.Ct. at p. 925.[6] In passing the Compassionate Use Act, the voters of California rejected the view that the use of marijuana for medical purposes is tantamount to the abuse of the drug. As a logical matter, workers who tend to their health tend to be *more* productive than others and there is nothing in the record to the contrary. (Cf. *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 434-435 [noting that "employees would in some cases not get

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[6] It bears noting that Judge Scotland, the author of the *Ross* opinion, had previously recognized such a distinction. (See *Bianco, supra*, 93 Cal.App.4th at p.755-756 [conc. and dis. opn. of Scotland, J.] ["compelling defendant to forgo possessing and using the only substance that purportedly has relieved his chronic pain is not justified by the concern that he will possess marijuana for nonmedicinal purposes in the future. Balancing the evils-chronic pain versus the possibility of future possession of marijuana for purposes other than compassionate use-it would be unreasonable to bar defendant from lawfully possessing marijuana for medicinal purposes simply out of concern that he also may possess marijuana for nonmedicinal purposes, a possibility that is adequately addressed by the threat of future criminal prosecution."].)

the health care they need to be productive workers and members of society"]; *Fulk v. Illinois Central Railroad Co.* (7th Cir. 1994) 22 F.3d 120, 126 ["healthy employees are productive employees"]; *National Treasury Employees Union v. Yeutter* (D.C. Cir. 1990) 918 F.2d 968, 974 [holding that government may not drug test employees where there is no demonstrated nexus between drug use and job performance; "the government's legitimate interest in employee drug testing extends no further than its interest in workplace conduct and performance of work responsibilities" "the government has not produced evidence that might establish a relationship between off-the-job drug use and job performance"]; see also *Semore v. Pool* (1990) 217 Cal.App.3d 1087, 1098 [noting that employer's needs cannot be assessed on a demurrer].)[7]

When read in its entirety, this Court's approach in *Loder* is entirely consistent with the position advanced by Ross here. After this Court discussed why drug testing may be appropriate in some cases, it explained how an employer

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[7] Again, a distinction must be made between off-duty and on-the-job medical marijuana use. The California Legislature has made clear that an employer need not accommodate an employee's on-duty drug use, and Ross does not contend otherwise. In considering the reasonableness of employee discipline for drug and alcohol abuse, courts have consistently drawn this very line, since only on-duty use or abuse implicates an employer's legitimate interests. (See *Loder, supra*, 14 Cal.4th at p.908 [conc. and dis. opn. of Mosk, J.] ["After all, a current employee's actual safety record is in all likelihood a much better predictor of future safety performance than is the off-the-job drug use tested by urinalysis"]; *National Treasury Employees Union, supra,* 918 F.2d at 974 [rejecting "unsupported connection between off-duty drug use and government efficiency"].)

should handle the results of these tests. This Court did not condone the automatic termination of an applicant or employee who tests positive for drugs, but, instead, emphasized that pre-employment drug testing is legal "so long as . . . (2) the applicant or employee is permitted to 'submit independent medical opinions for consideration' before the applicant is disqualified based upon the results of the examination. . . ." (*Loder, supra*, 14 Cal.4th at p. 865 [citing Cal. Code Regs., tit. 2, § 7294.0, subd.(d)].) *Loder*, thus, reaffirms Ross's position that a doctor's reasoned medical judgment is relevant to, and must be considered by an employer when making an employment decision based on the results of a drug test. He only asks that he be treated like others who use medication on the advice of their doctor to treat their disabilities at home.

E. Affording Employees Additional Protections from Discrimination under the FEHA to Those under the ADA Comports with the Will of the California Legislature and Our Federalist System of Government

1. Federal Law Cannot Be Used to Resolve Ross's Claims under the FEHA

While it may have seemed novel to the Court of Appeal that California provides protections under the FEHA that exceed those found in the federal Americans with Disabilities Act of 1990 [hereinafter ADA] (42 U.S.C. § 12181 *et seq.*), such vigilant protection of the disabled by the California Legislature is consistent with this State's history of being a pioneer in the field of anti-discrimination law. California's FEHA precedes the federal ADA by more than a

decade and, unlike federal law, it expressly provides protection from discrimination based on marital status, ancestry, and sexual orientation. (See Gov. Code, § 12940, subd. (a); Labor Code, § 1102.1; *City of Moorpark, supra,* 18 Cal.4th at p. 1160.) When, in 1999, the United States Supreme Court narrowly interpreted the ADA to preclude disability discrimination claims where the employee had successfully mitigated his disability through treatment (*Sutton v. United Air Lines, Inc.* (1999) 527 U.S. 471), the California Legislature amended the FEHA the following year to provide as follows: "The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (Public Law 101-336). Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections." (Govt. Code, § 12926.1, subd. (a); cf. *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344 [holding that the FEHA requires greater accommodation of disabilities than does the ADA]; *Diaz v. Federal Express Corp.* (C.D. Cal. 2005) 373 F.Supp.2d 1034 [holding that the FEHA's definition of "disability" is broader that ADA's definition].) This case cries out for the application of these additional protections.

California has also provided protections to its workers even where there could be no question that they were violating federal law. One example highly

germane to this case is that California forbids employers from using a conviction for marijuana possession as a basis for employment decisions. (See Labor Code, §§ 432.7 & 432.8.) Labor Code sections 432.7 and 432.8 provide that an employer may not "utilize, as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment" an applicant's conviction for marijuana possession. (See Labor Code, §§ 432.7 & 432.8.) Like medical marijuana use, marijuana possession is illegal under federal law, but California law prohibits employment discrimination on this basis.

Another illustration is found in California's workers' compensation laws. Under these laws, undocumented aliens are entitled to workers' compensation benefits under state law, despite the fact that their very presence in California is illegal under federal law. (*Farmers Brothers Coffee v. Workers' Compensation Appeals Board* (2005) 133 Cal.App.4th 533; accord *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833.) Rejecting a nearly identical claim as that made by RagingWire here, the court in *Farmers Brothers Coffee, supra,* affirmed the award of benefits to an undocumented alien by the State's Workers' Compensation Appeals Board. The employer contended that, by including a reference to the phrase "unlawfully employed" in defining an "employee" entitled to workers' compensation benefits, the Legislature intended to exclude illegal aliens. (*Id.* at p.

542.) The court noted the absence of any reference to federal law in the state statute and rejected the employer's attempt to incorporate federal immigration law into the state statute, reasoning as follows:

> Petitioner suggests that by including the phrase *unlawfully employed*, the Legislature intended to exclude *illegal* employees from the definition [of those entitled to receive workers' compensation benefits]. . . .
>
> There is no language in the statute to indicate that the Legislature intended "unlawfully employed" to have such a complex meaning or to incorporate federal immigration law, and our task in construing the statute is simply "to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted. . . ."
>
> * * *
>
> In California, as in Pennsylvania, the Legislature establishes public policy. (*Forman v. Chicago Title Ins. Co.* (1995) 32 Cal.App.4th 998, 1020, 38 Cal.Rptr.2d 790.) Once it has done so, the courts may not simply fashion a policy more to their liking. (*Ibid*; Cal. Const., art. III, § 3.) We therefore decline petitioner's suggestion that we insert such a policy into the statute.

(*Id.* at pp. 542-543 [quoting Code Civ. Proc., § 1858.) The Court of Appeal here made the same mistake as did the lower court in *Farmers Brothers Coffee* -- it incorporated federal law into a state regulatory scheme without any direction from the legislative branch that it do so. Indeed, in the FEHA, not only is such direction lacking, but, to the contrary, the Legislature amended the statute to make clear that its protections are "independent" and "in addition to" those found under federal law. (Govt. Code, § 12926.1, subd. (a).)

2. This Court Has Established That State Courts Do Not Enforce the Federal Criminal Law

Furthermore, as a general matter, state courts are not authorized to enforce the federal criminal law. More than 130 years ago, this Court held that "[t]he State tribunals have no power to punish crimes against the laws of the United States *as such*. The same act may, in some instances, be an offense against the laws of both, and it is only an offense against the State laws that it can be punished by the State, in any event." (*People v. Kelly* (1869) 38 Cal. 145, 150 [emphasis in original]; see also Penal Code, § 777 ["Every person is liable to punishment by the laws of this State, for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States"].) Applying this well-established precedent to a medical marijuana case, the court held in *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, that a state court could not punish a qualified medical marijuana patient for violating a probation condition that he comply with all state *and federal* laws. (*Tilehkooh, supra,* 113 Cal.App.4th at pp. 1445-1447.) The court explained as follows:

> The People have misunderstood the role that the federal law plays in the state system. The California courts long ago recognized that state courts do not enforce the federal criminal statutes. [quotation omitted] (*People v. Kelly* (1869) 38 Cal. 145, 150 [emphasis in original]; see also *People v. Grosofsky* (1946) 73 Cal.App.2d 15, 17-18.)
>
> Since the state does not punish a violation of the federal law "as such," it can only reach conduct subject to the federal criminal law by

> incorporating the conduct into the state law. The People do not claim they are enforcing a federal criminal sanction attached to the federal marijuana law. Rather, they seek to enforce the state sanction of probation revocation which is solely a creature of state law. (PC § 1203.2.) The state cannot do indirectly what it cannot do directly. That is what it seeks to do in revoking probation when it cannot punish the defendant under the criminal law.
>
> * * * *
>
> California courts do not enforce the federal marijuana possession laws when defendants prosecuted for marijuana possession have a qualified immunity under section 11362.5. Similarly, California courts should not enforce federal marijuana law for probationers who qualify for the immunity provided by section 11362.5 (Health and Safety Code). The court held to the contrary in *People v. Bianco* [(2001) 93 Cal.App.4th 748, 753], a case which preceded *Mower* and did not consider the fact that what was being enforced was state and not federal law.

(*Id.* at pp. 1445-1447.) As in *Farmers Brothers Coffee, supra*, the *Tilehkooh* court declined an invitation to incorporate federal law into state law, absent any direction from the Legislature that it do so. (See also *Mower, supra,* 28 Cal.4th at p. 465 fn.2 ["federal law has no bearing upon the question[] presented, which involve[s] state law alone"])The same result is warranted here, notwithstanding the Court of Appeal's failure to cite its *own* decision in *Tilehkooh* or this Court's decision in *Kelly.*

3. The Tenth Amendment to the United States Constitution Would Prevent the Federal Government from Requiring State Courts to Enforce Federal Law

If the federal government *had* sought to require California courts to enforce federal marijuana policy, which it has not, such "commandeering" of our state

courts would violate the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (U.S. Const. amend. X; see *Printz v. United States* (1997) 521 U.S. 898, 930-31; cf. *Conant v Walters* (9th Cir. 2002) 309 F.3d 629, 646-47 [conc. opn. of Kozinski, J.] [holding that that federal government's threatened punishment of California doctors for recommending medical marijuana to their patients violates the Tenth Amendment, since state courts would be required to enforce federal drug policy if no doctors issued medical marijuana recommendations to their patients]; see also S.B. 420, Section 1(e) (Sept. 11, 2003) [noting that California's Compassionate Use Act was enacted "pursuant to the powers reserved to the State of California and its people under the Tenth Amendment to the United States Constitution"]; *Hayden v. Keane* (S.D.N.Y. 2001) 154 F.Supp.2d 610, 615 [noting that federal agency's attempt to nullify bail decisions of state court by issuing parole violation warrant on eve of bail hearing would undermine state autonomy and violate principles of federalism].) History and federalism counsel against the Court of Appeal's approach. (Cf. *United States v. Oakland Cannabis Buyers' Coop.* (2001) 532 U.S. 483, 502, 121 S.Ct. 1711 [Stevens, J. concurring] ["courts [must], whenever possible, . . . avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a state have chosen to serve as a laboratory in

the trial of novel social and economic experiments without risk to the rest of the country"].)

II.

ROSS PROPERLY STATED A CAUSE OF ACTION FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY THROUGH HIS ALLEGATIONS THAT HE WAS FIRED FOR USING MEDICAL MARIJUANA WHILE OFF-DUTY IN ACCORDANCE WITH CALIFORNIA LAW

A. The Common Law Tort of Wrongful Termination in Violation of Public Policy

Although employers have broad discretion to determine whom they employ, that discretion is not unlimited -- they cannot make demands of their employees that violate public policy. (See *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 665; *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 178-79; *Soules v. Cadam, Inc.* (1991) 2 Cal.App.4th 390, 401.) To ensure against this, California courts have established a common law remedy, which protects against employers violating public polices that meet the following requirements:

> First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be "public" in the sense that it "inures to the benefit of the public" rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be "fundamental" and "substantial."[8]

[8] Together, "fundamental" and "substantial" are indistinguishable and constitute only a single requirement. (*Stevenson, supra,* 16 Cal.4th at p.890 fn.4.)

(*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889-890.) A common example of a wrongful discharge claim involves situations where an employer retaliates against an employee for exercising (or refusing to waive) a statutory or constitutional right or privilege. (See *Turner v. Anaheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1256 [fns. omitted].) The tort is designed to advance society's interest in fostering a stable job market, in which its most important policies are safeguarded. (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 453 [quotation omitted].)

B. It Is The Public Policy of California That Employers Not Terminate Persons with Disabilities or Medical Conditions Who Use Marijuana Upon The Recommendation of Their Physician

1. California's Fair Housing and Employment Act Forbids Arbitrary Discrimination against Persons with Disabilities and Medical Conditions

Here, RagingWire's conduct violates public policies found in at least three statutory and constitutional provisions. *First,* there is the FEHA, which establishes this State's policy against arbitrary discrimination based on medical condition or disability. Enacted in 1980, the FEHA was designed to ensure that individuals who are able to contribute to California's economy are not unjustifiably excluded from the labor force. In particular, Section 12920 of the Government Code provides as follows:

> It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national

> origin, ancestry, *physical disability*, mental disability, *medical condition*, marital status, sex, age, or sexual orientation.
>
> It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interest of employees, employers, and the public in general.

(Gov. Code, § 12920 [emphasis added]; see also Gov. Code, § 12940, subd. (a) & (m) [making it an unlawful employment practice to discriminate against persons with disabilities on this basis]; accord *Stevenson, supra*, 16 Cal.4th at p. 891.) Standing alone, this prohibition on discrimination against persons with disabilities and medical conditions provides the statutory basis for a common law action for wrongful termination in violation of public policy.

2. The State and Federal Constitutions Ensure the Right to Determine the Course of One's Own Medical Treatment

The FEHA, however, does not stand alone and is joined by other constitutional and statutory provisions which recognize the right of individuals to determine the course of their own medical treatment without discrimination. Section 1 of the California Constitution, for instance, provides for the right of medical self-determination by individuals after consultation with their physicians. (*Riese v. St. Mary's Hospital & Medical Center* (1987) 209 Cal.App.3d 1303, 1317-1318 [holding that right of competent adult to refuse medical treatment is grounded in both the common law and the state constitutional right of privacy];

Conservatorship of Drabick (1988) 200 Cal.App.3d 185, 206-208 & fn.20 [same; "Allowing persons to determine their own medical treatment is an important way in which society respects persons as individuals"]; *Keyhea v. Rushen* (1986) 178 Cal.App.3d 526, 540 [same]; cf. *Cobbs v. Grant* (1972) 8 Cal.3d 229, 244 ["a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment"]; *Bouvia v. Superior Court* (1986) 179 Cal.App.3d 1127, 1137 ["the right to refuse medical treatment is basic and fundamental" and is "recognized as a part of the right to privacy protected by both the state and federal constitutions" "its exercise requires no one's approval," even if the patient is neither terminally ill or imminently dying]; accord *Bartling v. Superior Court* (1984) 163 Cal.App.3d 186, 194-195; see also *Cruzan v. Director, Missouri Dept. of Health* (1990) 497 U.S. 261, 270, 110 S.Ct. 2841 [holding that right to refuse medical treatment is analyzed as a Fourteenth Amendment liberty interest]; Health & Saf. Code, § 7186 ["[t]he Legislature finds that adult persons have the fundamental right to control the decisions relating to the rendering of their own medical care"].) This right prevents employers from coercing their employees to undergo a particular medical regimen; for instance, it is illegal to require an employee to enroll in an alcohol treatment program upon threat of termination. (See *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 456-463 [holding that employee stated claims for violation of

privacy and wrongful termination in violation of public policy based on allegations that his employer fired him for refusing to enter inpatient alcohol treatment program].) In *Pettus, supra,* the court described this right as follows:

> Pettus [the employee] had an "autonomy privacy" interest in making intimate personal decisions about an appropriate course of medical treatment for his disabling stress condition, without undue intrusion or interference from his employer. (Citations)
>
> * * *
>
> [W]e are aware of no law or policy which suggests that a person forfeits his or her right of medical self-determination by entering into an employment relationship. . . . Indeed, it would be unprecedented for this court to hold that an employer may dictate to an employee the course of medical treatment he or she must follow, under pain of termination, with respect to a nonoccupational illness or injury. It is, thus, eminently reasonable for employees to expect that their employers will respect--i.e., not attempt to coerce or otherwise interfere with--their decisions about their own health care, including those which relate to drug or alcohol treatment.

(*Id.* at pp. 458-459.) In short, both the state and federal Constitutions prevent employers from attempting to substitute their own opinions about what is best for the health of their employees for the medical judgment of their physicians.

3. The Compassionate Use Act Declares the Right of Qualified Patients to Use Marijuana for Medical Purposes

Then, there is the Compassionate Use Act, which is a specific application of the right to determine the course of one's medical treatment in accordance with the advice of one's physician. Approved by fifty-seven percent of the California electorate in 1996, the Compassionate Use Act declares the right of seriously ill

persons to use marijuana for medical reasons. (Health & Saf. Code, § 11362.5(b)(1)(A).) In breaking with the federal government's prohibition of marijuana use for all purposes, "The People of the State of California [declared] that the purposes of the Compassionate Use Act of 1996 are as follows:"

> (A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.
>
> (B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.
>
> (C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

(Health & Saf. Code, § 11362.5 subd. (b)(1).) The California voters, thus, have declared as the public policy of this State the right of qualified patients to use marijuana for medical purposes and they have instructed the State to provide for a means of supplying this medicine to the persons who need it. (See also Health & Saf. Code, § 11362.775 [establishing collectives and cooperatives as preferred distribution systems for medical marijuana and providing additional protections for qualified patients].) Retaliating against employees for exercising this right violates this public policy. (See also Labor Code, §§ 432.7 & 432.8 [forbidding

employment decisions based on an employee or applicant's conviction for marijuana possession]; Lewis L. Maltby & Bernard J. Dushman, *Whose Life Is It Anyway -- Employer Control of Off-Duty Behavior*, 13 ST. LOUIS U. PUB. L. REV. 645, 658 ["The growing practice of employers attempting to control off-duty behavior constitutes a serious threat to personal privacy and autonomy"].)

Nor does it make any difference to the state common law tort of wrongful termination in violation of public policy that no statute expressly provides for a cause of action for terminating qualified medical marijuana patients, as the Court of Appeal reasoned below. (*Ross, supra,* 33 Cal.Rptr.3d at pp. 812-813.) The wrongful discharge tort is fundamentally a creature of the common law and does not require an express prohibition on employment discrimination by statute. (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 898.) Rather, the public policy protected by the common law tort need only be, in the words of this Court, "tethered to fundamental policies that are delineated in constitutional or statutory provisions. . . ." (*Stevenson, supra,* 16 Cal.4th at 889.)[9] To this end, the FEHA

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[9] In *Stevenson, supra,* this Court explained:

> [T]he statute is used to establish the common law claim, and in both instances the purposes underlying the statute are relevant, but in neither instance can it be said that the statute "created" the common law claim or that a legislative intention to "create" a common law claim is essential or even relevant.

states that discrimination on the basis of one's disability or medical condition is against the public policy of this State (Gov. Code, § 12920) and the Compassionate Use Act expressly provides that its purpose is to ensure the right of seriously ill Californians to use marijuana for medical purposes (Health & Saf. Code, § 11362.5, subd.(b)(1)(A)). These statutes amply supply the public policy for the common law tort of wrongful discharge. (Cf. *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143 [holding that employment discrimination based on disability can form basis for wrongful discharge tort]; *Stevenson, supra*, 16 Cal.4th at pp. 896-890 [same for age discrimination]; *Rojo v. Kliger* (1990) 52 Cal.3d 65 [same for sex discrimination]; *Kovatch v. California Casualty Management Co.* (1998) 65 Cal.App.4th 1256 [same for discrimination based on sexual orientation]; *Semore v. Pool* (1990) 217 Cal.App.3d 1087, 1098 [same for refusing to take drug test because retaliation on this basis violates state right to privacy]; *see also* Jeffrey Tanenbaum, *Marijuana in the Workplace The Impact of Proposition 215*, CALIFORNIA EMPLOYMENT LAW REPORTER (Dec. 1996) at p. 2 [stating that employers who discharge employees for medical marijuana usage run "a serious risk of a claim for tortious violation of public policy"].)[10]

(*Id.* at p.898.)

[10] As a general matter, when a legislative provision protects a class of persons for engaging in certain conduct, but it does not provide for a civil remedy for a

C. The Public Policy Against Employment Discrimination on the Basis of Using Marijuana to Treat a Disability or Medical Condition Is Fundamental, Well-Established, And Inures to The Benefit of The Public

Ross also meets the other elements of the wrongful discharge tort. *First*, the public policy against discrimination on the basis of one's use of medication to treat a disability is fundamental, as evidenced by its inclusion in no less than three constitutional and statutory provisions. Like age, race, and sex discrimination, discrimination based on one's status as a medical marijuana patient "violates the basic principle that each person should be judged on the basis of individual merit, rather than by reference to group stereotypes." (See *Stevenson, supra*, 16 Cal.4th at p. 896; cf. *Ross, supra*, 33 Cal.Rptr.3d at p. 805 [assuming without empirical justification that medical marijuana patients, like drug abusers, have higher rates of absenteeism and tardiness, and lower productivity].) Such discrimination, also like these vices, can "attack the individual's sense of self-worth" (see *Stevenson, supra*,

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violation, the court may accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action, if such remedy is needed to assure the effectiveness of the legislative provision. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1018.) Such is most assuredly the case here, as medical marijuana patients will be relegated to second-class citizens if they are not permitted to work. The Court of Appeal got it backwards when it required a statute to expressly provide for the tort of wrongful termination, rather than seeking to determine whether such public policy is expressed in any statute and, if so, whether such statute preempts the common law tort. (See *Stevenson, supra,* 16 Cal.4th at pp. 899-903 [California's FEHA does not preempt common law tort for wrongful termination in violation of public policy premised on public policy against age discrimination expressed in the FEHA].)

16 Cal.4th at p. 896; accord *City of Moorpark, supra,* 18 Cal.4th at p. 1160), which explains why the Legislature grouped discrimination on the basis of disability and medical condition with discrimination on the basis of race and sex in the FEHA and declared all four types of discrimination to be against public policy. (See Gov. Code, § 12920; cf. *Stevenson, supra*, 16 Cal.4th at p. 896 [finding that the Legislature recognized age discrimination to be "comparable in important ways to sex and race discrimination by declaring all three to be against public policy and by encompassing all three within the same broad prohibition."]; see also *City of Moorpark, supra,* 18 Cal.4th at p. 1159 ["the FEHA is just one expression of a much broader policy against disability discrimination that appears in a variety of legislative enactments"]; Gov. Code, § 19230, subd. (a) [declaring state policy to encourage disabled persons to participate in the social and economic life of the state].) No less than these other forms of invidious discrimination, arbitrary discrimination based on one's status as a qualified medical marijuana patient is fundamentally at odds with the public policy expressed in the FEHA. This is underscored by the California electorate's willingness to take the unprecedented step of breaking with federal drug policy and declaring the right of seriously ill persons to obtain and use marijuana for medical purposes.

Nor can RagingWire claim that it was unaware of the public policy against discrimination for using medical marijuana to treat a disability when its Board of

Directors met and decided to discharge Ross. (See Complaint ¶ 19 [AA 6] ["It is believed that RAGINGWIRE's Board of Directors met and discussed Plaintiff's employment status" before firing him].) The statutory prohibition on discrimination based on disability in the FEHA dates back to 1974 and the Compassionate Use Act is nearly a decade old. (See *City of Moorpark, supra,* 18 Cal.4th at p. 1160.) The latter statutory provision had been in effect for nearly five years when RagingWire terminated Ross, yet it took a person in the field of employment law only a month after its passage to report that employers who discharge employees for medical marijuana usage run "a serious risk of a claim for tortious violation of public policy." (Jeffrey Tanenbaum, *Marijuana in the Workplace The Impact of Proposition 215*, CALIFORNIA EMPLOYMENT LAW REPORTER (Dec. 1996) at p. 2.) RagingWire was well-aware of the public policy at issue, but deliberately chose to ignore it.

Lastly, whereas recognition of the wrongful discharge tort under these circumstances will cost employers nothing, failure to recognize the tort will deprive the State of California the benefit of thousands of productive workers. The California Legislature explicitly recognized in the FEHA that employment discrimination based on disability or medical condition "deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interest of employees, employers, and the

public in general." (Gov. Code, § 12920; cf. *Stevenson, supra,* 16 Cal.4th at p. 896 [noting that age discrimination "deprive[es] the society at large of the benefit of valuable human resources"].) The arbitrary exclusion of productive members of our workforce will be felt by us all. (Cf. *Stevenson, supra,* 16 Cal.4th at p. 896 ["manpower should be used to its fullest extent"] [quoting Unempl. Ins. Code, section 2070]; see also *Semore v. Pool* (1990) 217 Cal.App.3d 1087, 1097 [holding that employee's assertion of the right to privacy in refusing to take drug test inures to the benefit of society].)

D. The Court of Appeals Erred in Narrowly Viewing the Compassionate Use Act Solely as a Defense to State Criminal Sanctions

To overcome Ross's common law claim for wrongful termination in violation of public policy, the Court of Appeal rejected Ross's claim under the FEHA and glossed over the Compassionate Use Act's first statement of purpose to view it as conferring only a defense to state *criminal* sanctions. (*Ross, supra,* 33 Cal.Rptr.3d at pp. 821-813 ["Because an employer's decision not to employ someone who is violating federal criminal laws is not a criminal sanction imposed by the state, it does not violate the Compassionate Use Act."].) The Compassionate Use Act, however, on its face, does more than this. It expressly declares at its outset the right of seriously ill Californians to obtain and use marijuana for medical purposes in appropriate circumstances. (Health & Saf. Code, § 11362.5, subd.(b)(1)(A).) Moreover, it "encourage[s] the federal and state

governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (Health & Saf. Code, § 11362.5, subd.(b)(1)(C).) Both of these provisions describe protections beyond a mere defense to state criminal sanctions. Terminating Ross for doing precisely what the voters not only describe as a "right" but actively "encourage[]" violates the public policy of this State and the Court of Appeal erred in reading subdivision Health & Saf. Code §11362.5, subd. (b)(1)(A) out of the Compassionate Use Act.[11]

Further support for Ross's public policy claim can be found in the November 5, 1996, General Election Ballot Materials regarding Proposition 215. (Cf. *People v. Mower, supra,* 28 Cal.4th at pp.473, 475 & 482 [repeatedly referring to such materials in arriving at decision and noting that such materials are important to determine the intent of the voters]; accord *In re Lance W.*, (1985) 37 Cal.3d 873, 886-890.) Like this Court did in *Mower*, the ballot pamphlet arguments in favor of Proposition 215 analogized a medical marijuana recommendation to a prescription. (See Ballot Pamp., Gen. Elec. (Nov. 5, 1996) Argument in Favor of Proposition 215, p. 60 ["IF DOCTORS CAN PRESCRIBE MORPHINE, WHY NOT MARIJUANA? Today, physicians are allowed to

[11] This Court's decision in *People v. Mower, supra,* is not to the contrary. In *Mower*, this Court was called upon to describe the appropriate procedure by which to assert a medical marijuana defense in a criminal case. Neither party in that criminal case raised the issue of the applicability of the Compassionate Use Act to civil cases and this Court did not reach out to decide this.

prescribe powerful drugs like morphine and codeine. It doesn't make sense that they cannot prescribe marijuana, too."] [Capitalized in original].) Just as it would violate public policy to discriminate against prescription medication users on this basis alone (see *supra* [citing cases]), it violates such public policy to discriminate against qualified medical marijuana patients.

Lastly, the Legislature has recognized that this State's medical marijuana laws are not limited to a defense to criminal sanctions. Although not once mentioned by the Court of Appeal in its published decision, the Legislature enacted the Medical Marijuana Program Act in 2003 (Health & Saf. Code, § 11362.7 *et seq.*), which, among its other non-criminal provisions, provides: "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 and Safety Code, § 11362.785, subd. (a).) This provision implies that employers *are* required to accommodate medical marijuana use outside working hours. If California's medical marijuana laws did not confer any civil benefit on medical marijuana patients, the Legislature would not have deemed it necessary to enact such provision and courts should "not presume that the Legislature performs idle acts." (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22; see also *People v. Craft* (1986) 41 Cal.3d 554, 560 [courts do not presume that the Legislature performs idle acts, nor do they construe statutory provisions so as to

render them superfluous].) Both the Legislature and the People of California have expressed their view that an employer cannot legally fire a medical marijuana patient simply for taking their medicine. The common law tort of wrongful discharge is designed to protect against this.

CONCLUSION

Seeming to disagree with the policy choice made by the voters of this State, the Court of Appeal has given employers carte blanche to discriminate against qualified medical marijuana patients who exercise the right promised to them by the Compassionate Use Act. If this right is to be ascribed the meaning intended by the California voters, qualified medical marijuana patients cannot be relegated to second-class citizens by being made to suffer the loss of their homes and their jobs. The FEHA provides a remedy for such discrimination on the basis of disability and there is no legal basis or business reason to exclude Ross from its protections. A decision in favor of Ross is needed to restore the right of disabled persons to determine the course of their medical treatment without discrimination.

Dated: February 7, 2006

Respectfully submitted,

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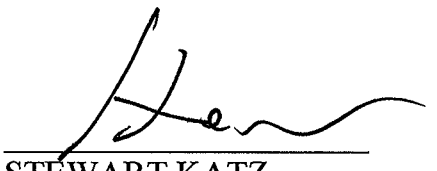
CERTIFICATE OF WORD COUNT

The text of this brief consists of 10,416 words as counted by the Microsoft Word processing program used to generate the brief.

Dated: February 7, 2006



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PROOF OF SERVICE

I, the undersigned, declare that I am over 18 years of age, and not a party to or interested in the within entitled cause. I am an employee of the Law Office of Stewart Katz, and my business address is 555 University Ave, Suite 270, Sacramento, CA 95825.

On February 7, 2006, I served the attached APPELLANT'S OPENING BRIEF to the People in this matter by mailing a true copy to the following addresses:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. February 7, 2006 at Sacramento, California.

Victoria L. Burau

Victoria L. Burau