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JESSE EWING c/o JOSEPH D ELFORD SSN: 034-48-7664 Claimant VALLEY TRANSPORTATION AUTHORITY Account No: 000-0000 Employer	Case No. 1459749

CLAMANT EWING'S WRITTEN ARGUMENT IN SUPPORT OF APPEAL OF BOARD'S DENIAL OF UNEMPLOYMENT INSURANCE BENEFITS

INTRODUCTION

At the January 12, 2005, hearing of this matter, Administrative Law Judge J. Toni Aversa requested that claimant Jesse Ewing ("Ewing") submit a post-hearing brief addressing the novel legal question presented -- whether a qualified medical marijuana patient commits "willful misconduct" requiring the denial of his unemployment insurance benefits when he uses marijuana for medical use in his off-time on the advice of his

physician. Ewing contends that the Compassionate Use Act (Cal. Health & Safety Code § 11362.5), which was passed by fifty-seven percent of the California electorate, forbids a state agency from denying unemployment benefits to a qualified patient who exercises his statutory right to use marijuana medicinally. His legal argument is as follows.

STATEMENT OF FACTS

Ewing is a qualified medical marijuana patient who uses marijuana on the advice of his physician to treat glaucoma and back pain caused by a workplace injury. Until August 13, 2004, Ewing had been an employee with Santa Clara Valley Transportation Authority ("VTA" or "employer") for more than fourteen years. On or around that date, he was terminated for testing positive for a detectable level of marijuana metabolites in his system. Weeks later, the Unemployment Insurance Appeals Board denied him unemployment benefits.

LEGAL STANDARDS

California Unemployment Insurance Code section 1256 provides: "An individual is disqualified for unemployment compensation benefits if the director finds that he or she left his or her most recent work voluntarily without good cause or that he or she has been discharged for misconduct connected with his or her most recent work." Title 22 of the California Code of Regulations, section 1256-30(b) defines "discharge for misconduct" as follows:

> (b) Elements of Misconduct. Misconduct connected with his or her most recent work exists for an individual's discharge if all of the following elements are present:
>
> (1) The claimant owes a material duty to the employer under the contract of employment.
>
> (2) There is a substantial breach of that duty.

(3) The breach is a willful or wanton disregard of that duty.

(4) The breach disregards the employer's interests and injures or tends to injure the employer's interests.

Furthermore, section 1256-30(d) provides that "[a] claimant's participation in illegal or criminal actions while away from the place of employment usually is not connected with the work and is not misconduct."

ARGUMENT

I. Ewing Does Not Owe A Duty To His Employer To Avoid Exercising His Statutory Right To Use Marijuana As Medicine While Off-Duty

Without giving any serious consideration to the Compassionate Use Act, the VTA contends that Ewing owed it a duty not to abstain from using marijuana to treat his glaucoma and chronic back pain, since he signed a Return-to-Work-Agreement ("RTWA") in 2001 which required him to complete a drug rehabilitation program and to abstain from alcohol and drugs. The RTWA, however, also incorporates within its terms the Santa Clara Valley Transportation Authority Drug and Alcohol Policy for Non-Safety Sensitive Employees ("Policy"), which states as follows:

> **C. Legal Drugs**
>
> The misuse of legal drugs while on duty is prohibited. The appropriate use of legally prescribed drugs and non-prescription drugs is not prohibited. A legally prescribed drug is a drug for which an individual has a prescription from a physician for use in the course of medical treatment.

(Policy at 2). By analogy, this would apply to Ewing's legal use of medical marijuana pursuant to a physician's recommendation, thereby suggesting that his appropriate off-duty use of it is not prohibited. In addition, with respect to alcohol, from which Ewing agreed to abstain, the VTA tested him under the RTWA only for its use only while on

duty. The VTA, thus, not only had a written policy authorizing the use of physician-approved medication while off-duty, but its practice confirms that, for legal drugs, abstinence was only required while on duty.

Indeed, the VTA did not terminate Ewing simply for using medical marijuana, but, rather, because it conducted its own inquiry and concluded that his physician's recommendation was not valid. The Compassionate Use Act, however, provides "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 ... any ... illness for which marijuana provides relief." (Health & Safety Code § 11362.5(b)(1)(A)). This language forbids the second-guessing of a treating physician's recommendation. (See *People v. Spark,* 121 Cal.App.4th 259, 16 Cal.Rptr.3d 840, 846-47 (2004) ["Whether the medical use of marijuana is appropriate for a patient's illness is a determination to be made by a physician. A physician's determination on this medical issue is not to be second-guessed by jurors who might not deem the patient's condition to be sufficiently 'serious.'"]; *People v. Wright*, 121 Cal.App.4th 1356, 18 Cal.Rptr.3d 220, 227 (2004) [same].)

In any event, the duty claimed by the employer conflicts with the public policy of this State. The Compassionate Use Act ensures the right of persons like Ewing to use marijuana medicinally. Requiring employees to surrender this right in their private life as a condition of employment conflicts with this law and, therefore, is void for violating public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090, 4 Cal.Rptr.2d 874; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 665, 254 Cal.Rptr. 211;

Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167, 178-79, 164 Cal.Rptr. 839; *Soules v. Cadam, Inc.* (1991) 2 Cal.pp.4th 390, 401, 3 Cal.Rptr.2d 6; see also *Semore v. Pool* (1990) 217 Cal.App.3d 1087, 1098, 266 Cal.Rptr. 280 (holding that an employee fired for refusing to take drug test may maintain tort action for wrongful discharge in violation of public policy against the employer because the termination violates the right to privacy); *Gould v. Maryland Sound Industries* (1995) 31 Cal.App.4th 1137, 1147-48 (same where employee was fired so the employer could avoid paying accrued commissions and vacation pay); Jeffrey Tanenbaum, *Marijuana in the Workplace The Impact of Proposition 215*, CALIFORNIA EMPLOYMENT LAW REPORTER (Dec. 1996) at 2 (stating that employers who discharge employees for medical marijuana usage run "a serious risk of a claim for tortious violation of public policy"). An employee cannot owe his employer a duty to sacrifice his health as a term of employment.

II. Ewing Did Not Willfully Disregard A Known Duty To His Employer

To the extent Ewing owed any duty to VTA not to use marijuana medicinally, he did not willfully or wantonly breach it. VTA gave mixed signals to Ewing whether he must fully abstain from marijuana use, or whether he must only refrain from smoking it or otherwise being under its influence while he was on the job. In addition to the above examples, Jacqueline Adams, VTA's Substance Abuse Control Program Manager ("Adams"), testified that she is not charged with enforcing drug policies for what employees do in their off-time. VTA did not have *any* policy with respect to medical marijuana use, which explains why it did not notify Ewing before his drug test that he must inform VTA of his having obtained a physician's recommendation. An employee cannot willfully breach a non-existent duty, which was never communicated to him.

Nor, as a more general matter, can an employee ever be said to willfully breach a duty owed to his employer when he takes legal medication on the advice of a physician. Mr. Ewing testified that the vicodin and other prescription medication he was using before he obtained a medical marijuana recommendation to treat his chronic back pain upset his stomach and that his use of medical marijuana not only allowed him to stop taking these narcotic medications but it improved his overall health. It is not a willful breach of an employment condition to safeguard one's health.

III. Ewing's Use Of Medical Marijuana Did Not Injure Or Tend To Injure His Employer's Interests

Finally, Ewing's use of medical marijuana in the evenings after work did not harm his employer's interests in any way. Mr. Ewing worked in a non-safety sensitive position, so his employer was not subject to any applicable federal regulations requiring that he be terminated for off-duty marijuana use. Although Mr. Ewing drove a company vehicle from time to time, his positive test result for having a detectable level of marijuana metabolites in his system in no way affected his ability to drive -- aside from the fact that Ms. Adams testified that the marijuana test employed by the company reveals marijuana in an employee's system for as long as six months after it was last ingested, numerous studies have shown that the presence of such small levels of marijuana metabolites in one's system do not impair one's ability to operate a motor vehicle. (See Hendrik Robbe and James O'Hanlon, "Marijuana and Actual Driving Performance," NHTSA Report #DOT-HS-808-078 (1994); A. Smiley, "Marijuana: On-road and driving simulator studies," Alcohol, Drugs and Driving: Abstracts and Reviews 2#3-4: 15-30 (1986); United Kingdom Department of Transport, Cannabis and Driving: A Review of the Literature and Commentary [available online at

http://www.dft.gov.uk/stellent/groups/dft_rdsafety/documents/page/dft_rdsafety_504567.hcsp].)[1] To the extent that the VTA was actually concerned about driving safety, it could have taken measures short of firing him, such as scrutinizing him carefully every time he took the wheel,[2] asked another employee to drive the vehicle for him, or, at the barest minimum, making clear that he must abstain from medical marijuana use after his single positive drug test. Instead, the VTA viewed the drug test as an excuse to eliminate Ewing's position.[3] The voters of California made a public policy decision that seriously ill Californians have the right to use marijuana for medical purposes where that use has been approved by a physician. Absent a demonstrable public health or safety concern, no employer has a legitimate interest in impeding the health of its employees by absolutely forbidding them from exercising the right promised to them.

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[1] Ewing requests that this tribunal take judicial notice of these scientific studies.

[2] At the January 12, 2005, hearing, the ALJ asked whether the employer must be concerned about being held subject to negligence per se for permitting Ewing to operate a motor vehicle after testing positive for having marijuana metabolites in his system. Evidence Code section 669(a) codifies the common law rule for negligence per se as requiring the violation of a stature, regulation, or ordinance which proximately causes the type of harm sought to be prevented by the rule. Ewing did not violate any statute, regulation or ordinance, so the doctrine of negligence per se would not apply. Ewing's violation of company policy would not change this. As the court stated in *Fireman's Fund Insurance Co. v. Security Pacific National Bank* (1978) 85 Cal.App.3d 797, 829,"[w]hile in some situations violation of a company rule may be used as evidence of breach of duty, it cannot be used to establish the existence of such a duty when contrary to both statutory and common law." To hold all medical marijuana users strictly liable for accidents involving them as drivers simply for having detectable levels of marijuana metabolites in their system would directly conflict with the Compassionate Use Act.

[3] To this end, Ewing's supervisor Flagg testified that no one was hired to replace Ewing.

CONCLUSION

To effectuate the intent of the voters of California who voted in favor of the Compassionate Use Act, this Board should grant unemployment benefits to Ewing.

DATED: January 21, 2005

Respectfully submitted,

By _____
JOSEPH D. ELFORD

Counsel for Claimant
JESSE EWING

PROOF OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to this action. My business address is 861A, San Francisco, CA 94117. On January 21, 2005, I served the within document(s):

CLAMANT EWING'S WRITTEN ARGUMENT IN SUPPORT OF APPEAL OF BOARD'S DENIAL OF UNEMPLOYMENT INSURANCE BENEFITS

via first-class upon:

Peter Lim
Claims Analyst
Santa Clara Valley Transportation Authority
Risk Management Department
3331 North First Street, Bldg. C-2
San Jose, CA 95134-1906

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on this __ day of January, 2005, in San Francisco, California.

_____
Joseph D. Elford