Medical Marijuana and the Limits of the Compassionate Use Act: *Ross v. RagingWire Telecommunications*

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Gary Ross suffered a back injury while serving his country in the United States Air Force and treats the continuing pain and spasms with marijuana, pursuant to California's Compassionate Use Act.[1] Due to his ongoing ingestion of marijuana, Ross failed the pre-employment drug test required by RagingWire Telecommunications, Inc., an information technology company.[2] Upon receiving notice of this failure, Ragingwire fired Ross, who had begun work a few days prior. Ross sued the company for discrimination under California's Fair Employment and Housing Act (FEHA)[3] and for wrongful termination in violation of public policy.[4]

The sympathetic facts of Ross's plight—particularly his status as an honored veteran—might have invited the California Supreme Court to look for narrow grounds to uphold his complaint.

But on January 24, 2008, the California Supreme Court rejected Ross's claims, based on a plain-language reading of the Compassionate Use Act. The court reviewed the language of the Compassionate Use Act, which makes no reference to employment, and also made note of the proponents' ballot arguments, which spoke of protecting patients from criminal penalties for marijuana and keeping cancer patients out of jail.[5] The court explained that "[n]o state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law . . . even for medical users. Instead of attempting the impossible . . . California's voters merely exempted medical users and their primary caregivers from criminal liability under two specifically designated state statutes."[6]

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1 Ross v. RagingWire Telecomm., Inc., 174 P.3d 200, 202 (Cal. 2008) (citing CAL. HEALTH & SAFETY CODE § 11362.5 (West 2008), added by initiative, Proposition 215, as approved by voters, General Election (Nov. 5, 1996)).

2 *Id*.

3 CAL. GOV'T CODE § 12900–12996 (West 2008).

4 *Ross*, 174 P.3d at 203.

5 *Id*. at 206.

6 *Id*. at 204 (citing 21 U.S.C. §§ 812, 844(a)); Gonzales v. Raich, 545 U.S. 1, 26–29 (2005);

Given the Compassionate Use Act's "modest objectives and the manner in which it was presented to the voters for adoption," the text of the initiative and the arguments supporting its passage yielded "no reason to conclude the voters intended to speak so broadly, and in a context so far removed from the criminal law, as to require employers to accommodate marijuana use."[7] Thus, the court held that "[n]othing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and duties of employers and employees," and the nondiscrimination requirements of the Fair Employment and Housing Act simply did not apply.[8]

In so holding, the court gave a nod to California's strong tradition of direct democracy, explaining that "the initiative power is strongest when courts give effect to the voters' formally expressed intent, without speculating about how they might have felt concerning subjects on which they were not asked to vote."[9] The court further cited *People v. Galambos*—an earlier California court of appeal decision interpreting the Compassionate Use Act—in which the court observed, "the proponents' ballot arguments reveal a delicate tightrope walk designed to induce voter approval, which we would upset were we to stretch the proposition's limited immunity to cover that which its language does not."[10]

Written by Justice Werdegar, the majority opinion's simple reference to the plain language of the operative law and voters' intent contrasts sharply with Justice Kennard's dissent on the FEHA issue. Justice Kennard first laments that the decision is "conspicuously lacking in compassion,"[11] and then attempts to manufacture a reason to force Ragingwire to employ Ross, relying in large part on the lack of evidence that Ross's job actually was impaired by his marijuana use.[12] The judiciary, of course, is not meant to impose its own views of the wisdom or "compassion" present in a statute. Instead, judges are supposed to interpret and apply the law.[13]

Ross also argued that he was wrongfully terminated in violation of public policy, tethering his claim to the right of medical self-determination.[14] None of the justices agreed, however, and the court

United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491–95 (2001).

7 *Ross*, 174 P.3d at 206–07.

8 *Id*. at 202–04.

9 *Id*. at 207; *see also* People v. Mower, 49 P.3d 1067, 1070 (Cal. 2002) (concluding that the Compassionate Use Act provides only an affirmative defense to a criminal prosecution and the defendant has the burden of proof).

10 128 Cal. Rptr. 2d 844, 848 (Ct. App. 2002).

11 *Ross*, 174 P.3d at 209 (Kennard, J., concurring and dissenting).

12 *Id*. (Kennard, J., concurring and dissenting). The lack of evidence is unsurprising given (1) that the case never made it past the demurrer stage, and (2) the extremely short tenure of Ross's employment. *Id*. at 203.

13 *See* Bonnell v. Med. Bd. of Cal., 82 P.3d 740, 744 (Cal. 2003).

14 *Ross*, 174 P.3d at 208.

unanimously disposed of the claim in short order, holding that:

> [D]efendant has not prevented plaintiff from having access to marijuana. Defendant has only refused to employ plaintiff. To assert that defendant's refusal to employ plaintiff affects his access to marijuana is merely to restate the argument that the Compassionate Use Act gives plaintiff a right to use marijuana free of hindrance or inconvenience, enforceable against third parties. That argument we have already rejected.[15]

Essentially, Ross could not overcome the hurdle that marijuana possession and use violates federal law all of the time,[16] and California law most of the time. He could not claim an overarching right to possession and use that trumps these legislatively-announced public policies.

This article focuses on two aspects of the employment situation presented in *Ross v. Ragingwire*. First, this article discusses the public policies motivating employers to keep their workplaces drug-free, even when faced with an employee using medical marijuana under the Compassionate Use Act. Second, this article explores the language of both the Compassionate Use Act and the Fair Housing and Employment Act and the potential ramifications if the statutes had been combined to create a new cause of action. Finally, this article concludes that the California Supreme Court's decision was more than just a correct application of the Compassionate Use Act's language; the decision furthered justice as well. A contrary result would have conflated a criminal-defense statute into employment law governed by the broad-ranging provisions of FEHA. The effect on California businesses would have been severe, placing employers between the rock of federal and state laws prohibiting drug-use and the hard place of being required to permit employees, potentially impaired by medical marijuana use, to continue in the workplace.

I. PUBLIC POLICY SUPPORTS EMPLOYER EFFORTS TO MAINTAIN A DRUG-FREE WORKPLACE

Employers have numerous reasons to maintain a drug-free workplace. Among them, employers can lose government funding for projects if they permit employees to use illegal drugs. Impaired employees miss more work than their drug-free co-workers and are more likely to make mistakes when they are at work. Employers may become liable for misdeeds

15 *Id*. at 209 (internal citation omitted); *see also id*. at 216 (Kennard, J., concurring and dissenting) (agreeing with the majority on this point).

16 Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 822–823, 872 (2000) (describing Marijuana as a "Schedule I" substance, such that its use or distribution is prohibited unless it is part of a Federal Drug Administration pre-approved research study conforming to stringent storage and record keeping requirements); Wyatt Buchanan, *Pot dispensaries shut in response to federal threat*, S.F. CHRON., Feb. 7, 2008, at B1 (noting the closure of seven medical marijuana dispensaries in San Francisco after the Drug Enforcement Agency notified landlords that they are subject to property seizure and jail time if they continue to allow the sale of marijuana on the premises, following similar notices and closures of dozens of dispensaries in southern California in the summer of 2007).

committed by their drug-using employees. Any one of these scenarios could cause adverse economic consequences to an employer, as well as to the employer's shareholders, employees, or customers if the value of the business suffers. As the Nebraska Supreme Court succinctly explained, a company establishes drug-free workplace rules to "improve work safety, to ensure quality production for customers, and to enhance its reputation in the community by showing that it has taken a visible stand against chemical abuse and the associated detrimental effects."[17]

A. Employers Must Comply with Drug-Free Workplace Statutes

Companies that contract with the State of California or the federal government have special concerns with regard to maintaining a drug-free workplace. All recipients of state funding must comply with California's Drug-Free Workplace Act of 1990, regardless of the monetary value of the contract or grant.[18] These recipients must provide annual certification that their employees are prohibited from using controlled substances, including marijuana, as a prerequisite to their continued receipt of state grants.[19] The Act further requires contractors and grantees to establish a drug-free awareness program to inform employees about the dangers of, and penalties for, drug use and the availability of drug counseling.[20] Each employee must agree to abide by the contractor's or grantee's drug policy as a condition of employment.[21] The employer's penalty for failing to comply is suspension of payments under the contract or grant, termination of the contract or grant, or both. Furthermore, the contractor or grantee may be subject to debarment.[22]

Moreover, California recipients of federal aid must provide a drug-free workplace for employees.[23] Under federal law, employers must notify each employee of the prohibition against using controlled substances, including marijuana, and the penalty for violating the law: The suspension or termination of a particular grant and ultimately, debarment for up to five years from future grants.[24] Both the state and federal Drug-Free Workplace Acts provide that violating the obligations of the Act or making a false

17 Dolan v. Svitak, 527 N.W.2d 621, 626 (Neb. 1995); *see also* Smith v. Zero Defects, Inc., 980 P.2d 545, 550 (Idaho 1999) (an employer has "a right to expect its employees to refrain from conduct that may bring dishonor on the business."); Farm Fresh Dairy, Inc. v. Blackburn, 841 P.2d 1150, 1153 (Okla. 1992) (public policy supports drug testing to promote safety in the workplace).

18 CAL. GOV'T CODE §§ 8350–8387 (West 2008).

19 *Id*. §§ 8351(a), 8355.

20 *Id*. § 8355(b)(2)–(4).

21 *Id*. § 8355(c).

22 *Id*. § 8356(a).

23 41 U.S.C. § 702 (2000).

24 41 U.S.C. §§ 702(a)(1)(A), 702(b) (2000); *see also* 49 U.S.C. § 5331 (2000); 49 C.F.R. § 40.85(a) (2006) (United States Department of Transportation requirements that all public transportation employers test employees for controlled substances, including marijuana); 49 U.S.C. § 20140 (2000) (same for railroad carriers); 49 U.S.C. § 31306 (2000) (same for commercial motor carriers); 49 U.S.C. § 45102 (2000) (same for air carriers, per Federal Aviation Administration regulations).

certification of compliance can result in the contract's suspension or termination, and may result in debarment of the non-complying contractor or grantee.

B. Marijuana Use has an Adverse Impact on Employee Performance

California employers have statutory authorization to remove drug-using employees from the workplace.[25] These employers have legitimate reasons for wanting to do so, even if they are not subject to the federal or state Drug-Free Workplace laws. Employer fears of employee absenteeism, shiftlessness, or malfeasance while under the influence of marijuana, even when recommended for medical purposes, rest on medical studies demonstrating a wide range of impacts that can occur, especially with prolonged ingestion of the drug. While not discounting the potential benefits to patients and recommending further study, American Medical Association studies state that marijuana ingested for medicinal purposes may have the same biological side-effects as marijuana ingested for recreational purposes.[26] Marijuana increases the heart rate, and a person's blood pressure may decrease on standing. Marijuana intoxication can cause "impairment of short-term memory, attention, motor skills, reaction time, and the organization and integration of complex information."[27] Users may experience intensified senses, increased talkativeness, altered perceptions, and time distortion followed by drowsiness and lethargy.[28] "Heavy users may experience apathy, lowered motivation, and impaired cognitive performance."[29]

These effects translate into potential problems in the workplace. People who smoke marijuana frequently, but do not smoke tobacco, have more health problems and miss more days of work than nonsmokers.[30] Many of these extra sick days are due to respiratory illnesses.[31] Marijuana

25 CAL. LAB. CODE § 1025 (West 2008) ("Nothing in [the Alcohol and Drug Rehabilitation] chapter shall be construed to prohibit an employer from refusing to hire, or discharging an employee who, because of the employee's current use of alcohol or drugs, is unable to perform his or her duties, or cannot perform the duties in a manner which would not endanger his or her health or safety or the health or safety of others."); *accord* Lamke v. Sunstate Equip. Co., 387 F. Supp. 2d 1044, 1053 (N.D. Cal. 2004) (Section 1025 "does not express substantial and fundamental public policy against termination of employment").

26 American Medical Association Council on Scientific Affairs, Featured Report: Medical Marijuana (A-01) (2001), http://www.ama-assn.org/ama/pub/category/13625.html (last visited Feb. 21, 2008) [hereinafter AMA Report] (citing Pierri J. Chait, Effects of Smoked Marijuana on Human Performance: A Critical Review, in Marijuana/Cannabinoids: Neurobiology and Neurophysiology 387–424 (A. Bartke & L. Murphy, eds., CRC Press 1992)).

27 *Id*.; W. Hall & N. Solowij, *Adverse Effects of Cannabis*, 352 LANCET 1611–16 (1998).

28 AMA Report, *supra* note 26.

29 *Id*.

30 United States Dep't of Health & Human Servs., Nat'l Insts. of Health, Nat'l Inst. on Drug Abuse, InfoFacts: Marijuana 3 (Apr. 2006), *available at* http://www.drugabuse.gov/PDF/InfoFacts/Marijuana06.pdf (citing Michael R. Polen, et al., *Health Care Use by Frequent Marijuana Smokers Who Do Not Smoke Tobacco*, 158 WEST J. MED 596–601 (1993)).

31 *Id*.

compromises the ability to learn and remember information, so that a user's job performance and intellectual or social skills are more likely to diminish.[32] Other studies associate marijuana smoking with increased absences, tardiness, accidents, workers' compensation claims, and job turnover. For example, "[a] study among postal workers found that employees who tested positive for marijuana on a pre-employment urine drug test had 55 percent more industrial accidents, 85 percent more injuries, and a 75 percent increase in absenteeism compared with those who tested negative for marijuana use."[33] A recent study by the United States Department of Health and Human Services found that, of workers who admitted ingesting marijuana within the past month, 13.1% worked for three or more employers in the past year; 16.1% missed two or more days of work in the past month due to illness or injury; and 16.9% skipped one or more days of work in the past month.[34] For those workers who did not use marijuana in the past month, only 5.2% worked for three or more employers in the past year; 11.2% missed two or more days of work in the past month due to illness or injury; and 8.3% skipped one or more days of work in the past month.[35] The most dramatic findings, therefore, relate to a marijuana user's ability to maintain consistency in his employment, both in staying with one employer for more than a few months and actually showing up for work.

C. Off-Duty Marijuana Use also Affects Employee Performance and is of Legitimate Concern to Employers

Some argue that there is a distinction between on-duty and off-duty marijuana use. In *Ross*, the employee argued that California Health & Safety Code section 11362.785(a), which states, "[n]othing 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

32 *Id*. at 4.

33 *Id*. at 5 (citing Craig Zwerling, et al., *The Efficacy of Preemployment Drug Screening for Marijuana and Cocaine in Predicting Employment Outcome*, 264 JAMA 2639–43 (1990); A.J. Gruber, et al., *Attributes of Long-Term Heavy Cannabis Users: A Case-Control Study*, 33 PSYCHOL. MED. 1415, 1415–22 (2003) (finding that heavy marijuana abusers reported that the drug impaired several important measures of life achievement including cognitive abilities, career status, social life, and physical and mental health)); *see also* Teahan v. Metro-N. Commuter R.R., 80 F.3d 50, 54 (2d Cir. 1996) (noting the link between alcohol and drug use and excessive absenteeism); Willner v. Thornburgh, 928 F.2d 1185, 1192–93 (D.C. Cir. 1991) (citing these and other studies and concluding, "[t]hese studies and others mentioned in the Postal Service report thus confirm what one would expect—an extremely high correlation between a positive result in a pre-employment drug test and subsequent employment problems.").

34 SHARON L. LARSON, ET AL., DEP'T OF HEALTH & HUMAN SERVS., WORKER SUBSTANCE USE AND WORKPLACE POLICIES AND PROGRAMS 62 (2007), *available at* http://oas.samhsa.gov/work2k7/work.pdf (surveying full-time workers from 2002–04). These numbers are very close to the percentages reported by workers who used other illicit drugs, such as heroin, cocaine, and methamphetamines, where the survey found 12.3% worked for three or more employers in the past year; 16.4% missed two or more days of work in the past month due to illness or injury; and 16.3% skipped one or more days of work in the past month. *Id*.

35 *Id*.

employment," means that while employers are not required to accommodate the actual ingestion or storage of marijuana on company premises, employers *are* required to accommodate employees under the influence of marijuana ingested elsewhere.[36] The dissent agreed with this argument.[37] In syllogistic form, the argument goes like this:

1. Employers are not required to accommodate the presence or ingestion of marijuana on company premises.
2. Ross possesses and ingests marijuana at home, not on company premises.
3. Therefore, employers are required to accommodate Ross's marijuana use.

This combines the logical fallacy of negative premises with the fallacy of illicit process of a major term. In formal terms of Aristotelian logic, the premise is the universal negative proposition that "employers *are not* required to accommodate drug use on the premises" from which the dissent infers the contrapositive of that proposition, that "employers *are* required to accommodate drug use off the premises." "By the laws of logic, however, the inference of the contrapositive is invalid where the starting proposition is a universal negative."[38] Compounding this logical error is the invalidity of the major term. In *Logic for Lawyers*, former Third Circuit Court of Appeals Judge Ruggero J. Aldisert cited the following example of the fallacy, which bears a striking resemblance to Ross's argument:

1. Larceny is a crime.
2. Driving under the influence is not larceny.
3. Therefore, driving under the influence is not a crime.[39]

The major term of the premise is "crime," while the major term that follows is "driving." To come to a logical conclusion, the major term must exist in the premise. Similarly, the dissent's major term of "ingesting marijuana at home" does not exist in the premise, in which the major term is "ingesting marijuana at work."

Moreover, the biomedical facts of marijuana use do not allow for such separation between on-duty and off-duty use. While many effects of marijuana dissipate over a short period of time, others—such as respiratory ailments and decreased cognitive ability resulting from prolonged exposure

36 Ross v. RagingWire Telecomm., Inc., 174 P.3d 200, 207–08 (Cal. 2008) (quoting CAL. HEALTH & SAFETY CODE § 11362.785(a) (West 2008)).

37 *Id*. at 209–10 (Kennard, J., concurring and dissenting).

38 Bailey v. Maryland, 294 A.2d 123, 129 n.4 (Md. Ct. Spec. App. 1972); *see also* RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 156–58 (3d ed., National Institute for Trial Advocacy 1997).

39 Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove That the Employer's Action Was Materially Adverse or Ultimate*, 47 U. KAN. L. REV. 333, 364 (1999) (citing RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 153–54 (1990)).

to marijuana—remain concerns over the long term. For example, memory defects may last as long as six weeks after an individual's last use.[40] These effects, particularly on cognitive abilities that may cause lapses in judgment, are a valid concern for employers.[41]

D. A Policy Favoring Drug-Free Workplaces has no Discernable Impact on the Availability of Willing and Able Workers

In his opening brief to the California Supreme Court, Ross argued that an adverse ruling "will deprive the State of California the benefit of thousands of productive workers."[42] Yet under the court's ruling, employers still may choose to permit individuals who use medical marijuana to continue their employment—at least if they are not bound by the various federal or state Drug-Free Workplace Acts. Even after *Ross*, employers are permitted, but not *required* to continue employing medical marijuana-using employees.[43] Moreover, there is no evidence of the number of "productive workers" who are at risk of being fired if employers retain a choice of whether to accommodate medical marijuana use.[44]

The experience of other states belies this fearmongering. The medical marijuana statutes of other states contain explicit provisions that employers need not accommodate the use of medical marijuana by their employees.[45]

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40 Abbie Crites-Leoni, *Medicinal Use of Marijuana: Is the Debate a Smoke Screen for Movement Toward Legalization?*, 19 J. LEGAL MED. 273, 280 (1998) (citing Schwartz, et al., *Short-Term Memory Impairment in Cannabis-Dependent Adolescents*, 143 AM. J. DIS. CHILD. 1214 (1989)).

41 *See* Burger v. Unemployment Comp. Bd. of Review, 801 A.2d 487, 490–91 (Pa. 2002) (noting that where a nurse's aide was fired after acknowledging her use of marijuana every night, "[t]here is no question Claimant could be fired for her drug use; a responsible nursing home cannot be criticized for this," but found her actions did not constitute "willful misconduct" to justify denial of unemployment benefits); *In re* Cahill, 585 A.2d 977, 979 (N.J. Super. Ct. App. Div. 1991) (finding that where a firefighter's current alcoholism and illegal drug use would probably cause injury to himself or to others, an "employer is not required to assume . . . that the employee will limit alcohol and other drug consumption to off-duty hours, or that the effects of drugs will be dissipated by the time work begins," especially because firefighters are "subject to being called to duty when needed").

42 Appellant's Opening Brief at 37, Ross v. RagingWire Telecomm., Inc., 174 P.3d 200 (Cal. 2008) (No. S138130).

43 Similarly, the language in Health & Safety Code section 11362.785(d)—"[n]othing in this article shall require a governmental, private, or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the medical use of marijuana"—does not mean that a health insurance provider is prohibited from reimbursing the cost of medical marijuana. That choice is left in the hands of the insurers. Incidentally, this provision also marks a significant distinction between medical marijuana and prescription drugs lawfully obtained. CAL. HEALTH & SAFETY CODE § 11362.785(d) (West 2007).

44 *See* Brosnahan v. Brown, 651 P.2d 274, 289 (Cal. 1982) (en banc) (upholding Proposition 8 and finding that "petitioners' forecast of judicial and educational chaos is exaggerated and wholly conjectural"); *In re* Estate of Maniscalco, 11 Cal. Rptr. 2d 803, 806 (Ct. App. 1992) (rejecting "unsupported speculation" of "dire consequences" "without statistical or evidentiary basis").

45 *See*, *e.g.*, ALASKA STAT. § 17.37.040(d) (2006) ("Nothing in this chapter requires any accommodation of any medical use of marijuana (1) in any place of employment"); COLO. CONST. art. XVIII, § 14(10)(b) ("Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place."); MONT. CODE ANN. § 50-46-205(2)(b) (2007) ("Nothing in this chapter may be construed to require: (b) an employer to accommodate the medical use of marijuana in any workplace.); NEV. REV. STAT. ANN. § 453A.800 (LexisNexis 2005) ("The provisions of this

Lacking the modifiers of "on the premises" or "during the hours of employment," these statutes plainly permit employers to refrain from hiring medical marijuana users who test positive on pre-employment drug tests, apparently without causing dire consequences.

E. Employers may be Liable for Actions of Impaired Employees

History abounds with cases of employers found liable because their employees were driving vehicles, operating heavy equipment, or otherwise performing tasks made more dangerous by their being under the influence of alcohol or drugs.[46] More recently, however, California courts are even willing to consider bizarre and unforeseeable acts, or brutal, violent, and sexual crimes, as falling within the "scope of employment" to reach the employer's deeper pocket.[47] Facing the expanding specter of liability, employers must be able to cull out job applicants whose alcohol or drug use raises the likelihood of threats to the safety of the workplace, other employees or third parties.[48] "Forcing the employers to retain current drug

chapter do not: 2. Require any employer to accommodate the medical use of marijuana in the workplace."); OR. REV. STAT. § 475.340 (2005) ("Nothing in ORS 475.300 to 475.346 shall be construed to require: (2) An employer to accommodate the medical use of marijuana in any workplace."); WASH. REV. CODE ANN. § 69.51A.060(4) (West 2007) ("Nothing in this chapter requires any accommodation of any medical use of marijuana in any place of employment").

46 *See*, *e.g*., Howell v. Ferry Transp., Inc., 929 So. 2d 226, 227–231 (La. Ct. App. 2006) (holding employer liable for negligent hiring and supervision when employee truck driver caused an accident killing seven people and subsequently tested positive for marijuana); Or v. Edwards, 818 N.E.2d 163, 169 (Mass. App. Ct. 2004) (holding landlord liable for negligent hiring when a stoned and drunk custodian kidnapped, raped, and murdered a five-year-old girl, which the court found to be a foreseeable consequence of the landlord's failure to inquire about the custodian's history of alcohol and drug abuse).

47 *See*, *e.g*., Doe v. Capital Cities, 58 Cal. Rptr. 2d 122, 129–30 (Ct. App. 1996) (aspiring actor could pursue a FEHA sexual harassment claim against ABC/Capital Cities for rape and beating by a casting director); Weeks v. Baker & McKenzie, 74 Cal. Rptr. 2d 510, 514 (Ct. App. 1998) (law firm liable under FEHA for compensatory and punitive damages for partner's sexual harassment of his secretary); *cf*. Mary M. v. City of Los Angeles, 814 P.2d 1341, 1352 (Cal. 1991) (finding it unjust for an employer to disclaim responsibility for injuries occurring in the course of its characteristic activities where a police officer raped a woman he had arrested and placed in his squad car); Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d 358, 362 (Cal. 1995) (finding that an employer may be vicariously liable for the employee's tort—even if it was malicious, willful, or criminal—if the employee's act was an "outgrowth" of his employment, "inherent in the working environment," "typical of or broadly incidental to" the employer's business, or, "in a general way, foreseeable from [his] duties."); *see also* Laura L. Hirschfeld, *Legal Drugs? Not Without Legal Reform: The Impact of Drug Legalization on Employers Under Current Theories of Enterprise Liability*, 7 CORNELL J.L. & PUB. POL'Y 757, 795–99, 805–07 (1998) (citing seminal examples of extreme employee behavior in Bushey v. United States, 398 F.2d 167, 168 (2d Cir. 1968) (a Coast Guard employee on leave, "in the condition for which seamen are famed," turned the valves that controlled the water flow into the drydock where the [ship] was docked, resulting in a flood that caused the ship to list, slide off its blocks and fall against the wall, partially sinking both the ship and the drydock); Rodgers v. Kemper Constr. Co., 124 Cal. Rptr. 143, 143, 146-47 (Ct. App. 1975) (holding the subcontractor vicariously liable for the beer-fueled, brutal beating received by two of the general contractor's employees at the hands of two of the subcontractor's employees.)).

48 *See* Christine Neylon O'Brien, *Facially Neutral No-Rehire Rules and the Americans with Disabilities Act*, 22 HOFSTRA LAB. & EMP. L.J. 114, 115 (2004) ("When substance abuse impairs an employee at work, it negatively impacts the quality of products produced and services performed, and consequently, detracts from the profitability of the business.").

users would close off one of the few methods that modern employers have left to insulate themselves from unlimited liability"[49] for every wrongful act committed by employees. Employers should not be saddled with a work force engaged in drug use that is largely prohibited by law.

II. THE BREADTH OF THE COMPASSIONATE USE ACT AND FEHA COMBINE TO COVER AN EXTREMELY WIDE RANGE OF ACTIVITY

With the *Ross* decision, California employers can breathe a sigh of relief because a contrary result would have had far-ranging implications. There is a huge swath of individuals covered under both the Compassionate Use Act and FEHA, governing situations far removed from this case.

A. The Compassionate Use Act Permits the Use of Marijuana for Virtually Any Malady, as Authorized by "Healers" of All Varieties

Californians voted for Proposition 215, the Compassionate Use Act, based on ballot materials that emphasized the need for seriously ill people to obtain marijuana to relieve symptoms related to AIDS, chemotherapy treatments, and other very serious ailments. The Compassionate Use Act authorized the use of marijuana for these purposes, but it also did a lot more. Ballot literature emphasized that the proposition would allow "seriously and terminally ill patients to legally use marijuana, if, and only if, they have the approval of a licensed physician."[50] But this argument suggested limitations not found in the text of the law. For example, Health & Safety Code section 11362.5 may be read to allow the use of marijuana by patients that are not seriously and terminally ill,[51] and the law contains no requirement that the recommendation come from a licensed physician. For example, in *People v. Spark*,[52] the court opined:

> [T]he voters of California did not intend to limit the compassionate use defense to those patients deemed by a jury to be "seriously ill." As is evidenced by the entirety of the language of subdivision (b)(1)(A) and the language of subdivision (d) of section 11362.5, the question of 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

49 Hirschfeld, *supra* note 47, at 840.

50 CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION, NOVEMBER 5, 1996, *ARGUMENT IN FAVOR OF PROPOSITION 215* at 60**,** *available at* http://library.uchastings.edu/ballot_pdf/1996g.pdf [hereinafter Ballot Pamphlet].

51 CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 2007) provides:

> 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.

(emphasis added).

52 16 Cal. Rptr. 3d 840, 846–47 (Ct. App. 2004).

jurors who might not deem the patient's condition to be sufficiently "serious."[53]

The campaign literature also suggested that marijuana use is appropriate for a limited number of specific diseases: cancer, glaucoma, AIDS, multiple sclerosis, epilepsy, and spinal cord injuries.[54] The primary sponsor of Proposition 215, Dennis Peron's Californians for Compassionate Use, published a brochure stating that marijuana has been shown to "help migraine headaches, relieve menstrual cramps, help overcome insomnia, and mitigate withdrawal from alcohol and other hard drugs."[55] So while the ballot materials and *Ross* focused on the least controversial uses of medical marijuana, the broad language in the actual statute supports a much wider range of illnesses for which marijuana may be approved. For example, in *People v. Jones*,[56] evidence of physician "approval" for marijuana use to combat migraine headaches—the physician's comment, "It might help; go ahead"—was sufficient to raise a defense under the Compassionate Use Act even where the physician disclaimed any intention to "recommend" marijuana use.[57]

Moreover, Proposition 215 does not define the term "physician."[58] This ambiguity could lead to a broad definition if courts employ the dictionary definition of the term.[59] A "physician" may be a person "skilled in the art of healing" regardless of whether that person is a licensed medical doctor.[60] "A wide variety of professionals are skilled in the art of healing,

53 However, there must be *some* physical aspect to the ailment. *See* People v. Trippet, 66 Cal. Rptr. 2d 559, 568–69 (Ct. App. 1997) (noting that the Compassionate Use Act does not protect against prosecution of marijuana use for "spiritual purposes.").

54 Ballot Pamphlet, *supra* note 50, at 62.

55 Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707, 716 (1998), citing Californians for Compassionate Use, Brochure (1996) (internal quotations omitted).

56 4 Cal. Rptr. 3d 916, 918 (Ct. App. 2003).

57 *See* Allison L. Bergstrom, *Medical Use of Marijuana: A Look at Federal & State Responses to California's Compassionate Use Act*, 2 DEPAUL J. HEALTH CARE L. 155, 177 (1997) ("The question remains open as to whether a physician's tacit approval, perhaps through a simple nod in response to a patient's stated intention to use marijuana, would meet the threshold requirement for approval.").

58 *See* CAL. HEALTH & SAFETY CODE § 11362.5 (West 2008). In 2004, the Legislature enacted Section 11362.7(a), which provided a definition for "Attending physician":

> [A]n individual who possesses a license in good standing to practice medicine or osteopathy issued by the Medical Board of California or the Osteopathic Medical Board of California and who has taken responsibility for an aspect of the medical care, treatment, diagnosis, counseling, or referral of a patient and who has conducted a medical examination of that patient before recording in the patient's medical record the physician's assessment of whether the patient has a serious medical condition and whether the medical use of marijuana is appropriate.

Statutes enacted by initiative cannot be amended by the Legislature, however, so this definition must be confined to the registration identification program of that particular code section. *See* Rossi v. Brown, 889 P.2d 557, 561 n.2 (Cal. 1995) ("Once adopted, unless the measure otherwise provides, an initiative statute may be amended or repealed only by a statute approved by the voters.").

59 *See*, *e.g.*, Martin v. Superior Court, 281 Cal. Rptr. 682, 685 (Ct. App. 1991) (using a dictionary to define "law enforcement officer" broadly in Proposition 115).

60 WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 887 (9th ed. 1989); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1367 (3d ed. 1996) ("A person who heals or exerts a healing influence.").

including chiropractors, homeopaths, and a variety of therapists."[61] Alternatively, courts could define "physician" more narrowly, based on other statutes in the Health & Safety Code and the ballot arguments.[62] But the courts have not yet ruled on this question and the ambiguity remains. If physicians other than medical doctors are authorized to recommend marijuana, this may increase the range of conditions for which patients obtain approval to use marijuana to treat their symptoms. While licensed medical practitioners have an affirmative defense under state law,[63] they may be unwilling to prescribe marijuana either because they feel the benefits do not outweigh the risks, or they may fear prosecution under federal drug laws.[64] Alternative healers, on the other hand, may exercise less restraint.[65] Had the California Supreme Court held that Ragingwire must accommodate Ross's marijuana use, the decision would have had consequences far beyond the facts of this case. If an employer must accommodate an employee's medical marijuana use based on a physician's note to treat back spasms and pain, then the employer equally must accommodate an employee's medical marijuana use based on a healer's half-hearted approval (but not recommendation) that the employee "go ahead and try" marijuana for an entire range of ailments that a jury might describe as "not serious."

B. FEHA's Anti-Discrimination Provisions Cover a Wide Range of Physical and Medical Ailments

The California Fair Employment and Housing Act establishes the following civil rights:

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61 Michael Vitiello, *Proposition 215: De Facto Legalization*, 31 U. MICH. J.L. REFORM 707, 719; *see also* CAL. BUS. & PROF. CODE §§ 1000–1058 (West 2008) (regulation of chiropractors); *id*. §§ 2620–2696 (physical therapy).

62 *See* CAL. HEALTH & SAFETY CODE § 11024 (West 2008); Ballot Pamphlet, *supra* note 50, at 50 (specifying "licensed physician").

63 *See* CAL. HEALTH & SAFETY CODE § 11362.5(c) (West 2008).

64 *See* Conant v. McCaffrey, 172 F.R.D. 681, 700 (N.D. Cal. 1997) (concluding that federal officials "may only prosecute physicians who recommend medical marijuana to their patients if the physicians are liable for aiding and abetting or conspiracy."). Subsequently, "the court entered a permanent injunction limiting the government's ability to revoke a physician's DEA registration if he or she recommends medical marijuana based upon a sincere medical judgment . . ." but did not rule on the claim regarding the exclusion of doctors from the Medicare and Medicaid programs." Pearson v. McCaffrey, 139 F. Supp. 2d 113, 116 n.2 (D.D.C. 2001). However, the Department of Justice disagreed:

> [A] practitioner's action of recommending or prescribing Schedule I controlled substances is not consistent with the "public interest" (as that phrase is used in the federal Controlled Substances Act) and will lead to administrative action by the Drug Enforcement Administration (DEA) to revoke the practitioner's registration. DOJ and . . . HHS will send a letter to national, state, and local practitioner associations and licensing boards which states unequivocally that DEA will seek to revoke the DEA registrations of physicians who recommend or prescribe Schedule I controlled substances.

Executive Office of the President, Office of National Drug Control Policy, *The Administration's Response to the Passage of California Proposition 215 and Arizona Proposition 200*, 62 Fed. Reg. 6164 (Feb. 11, 1997).

65 *See* Vitiello, *supra* note 61, at 720–21.

> (a) The opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, *physical disability*, *mental disability*, *medical condition*, marital status, sex, age, or sexual orientation is hereby recognized as and declared to be a civil right.
>
> (b) The opportunity to seek, obtain, and hold housing without discrimination because of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, *disability*, *or any other basis prohibited by Section 51 of the Civil Code* is hereby recognized as and declared to be a civil right.[66]

Civil Code section 51 also prohibits discrimination based on "medical condition,"[67] which is incorporated into the housing discrimination prohibition of Government Code section 12921(b). It is also unlawful, in the employment context, "[f]or an employer, because of the . . . physical disability, mental disability, medical condition . . . to refuse to hire or employ the person . . . ."[68]

The California Legislature intended FEHA to have a very broad scope, even compared to the federal Americans with Disabilities Act of 1990. Section 12926.1 of the California Government Code highlights the difference by declaring:

> 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.[69]

Under the federal Americans with Disabilities Act (ADA), a person can claim the protections of the Act when the disability "substantially limits" a major life activity. An impairment is "substantially limiting" if the person is either "unable to perform a major life activity that the average person in the general population can perform," or is significantly restricted in the condition, manner or duration under which a major life activity can be performed compared to an average person in the general population.[70] By contrast, FEHA requires only that the impairment "limit," rather than *substantially* limit, a major life activity.[71] An impairment limits a major life activity if it "makes the achievement of a major life activity more difficult."[72] FEHA's less stringent standard is intended to provide

66 CAL. GOV'T CODE § 12921 (West 2008) (emphasis added).

67 CAL. CIV. CODE § 51(b) (West 2008).

68 CAL. GOV'T CODE § 12940 (West 2008). *But see* 2 CAL. ADMIN. CODE § 7293.6(d) ("The 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.").

69 CAL. GOV'T CODE § 12926.1(a) (West 2008).

70 29 C.F.R. §1630.2(j); *see also* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 195–196 (2002) (quoting 29 C.F.R. § 1630.2(j)); Fraser v. Goodale, 342 F.3d 1032, 1040 (9th Cir. 2003) (quoting 29 C.F.R. § 1630.2(j)).

71 CAL. GOV'T CODE §12926(k)(1)(B)(i) (West 2008); *see also* Colmenares v. Braemar Country Club, 63 P.3d 220 (Cal. Ct. App. 2003).

72 CAL. GOV'T CODE § 12926(k)(1)(B)(ii) (West 2008).

protection for a significant number of conditions that would not be protected under the ADA, including episodic conditions which lack the permanency to be considered "substantial" under federal law.[73]

Moreover, while the ADA does not cover disabilities that can be remedied by "mitigating factors" such as medication or eyeglasses,[74] FEHA evaluates the impairment without regard to mitigating factors that could be, or actually are, taken.[75] The ADA also requires that an employee's "substantial impairment" is such that an employee cannot perform a broad range or class of jobs as compared to the average person having comparable skills, abilities, and training.[76] Thus, the ADA will not cover an employee's inability to perform a *particular* job.[77] In contrast, FEHA does cover situations where an impairment prevents an employee from performing one particular job.[78] The California Supreme Court has noted FEHA's expansive reach.[79]

The California Legislature recently imported these broad FEHA standards and definitions to each of the thirty-three employment anti-discrimination statutes scattered throughout the California Code.[80] "FEHA's list of prohibited discrimination standards is more extensive than any of the statutes Chapter 788 amends."[81] Moreover, Chapter 788 extends the authority of the Agricultural Labor Relations Board to decertify any labor organization that the Department of Fair Employment and Housing finds to have discriminated based on any standard listed in the FEHA.

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73 *Id*. § 12926.1(c).

74 *See* Sutton v. United Air Lines, 527 U.S. 471, 482 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521 (1999).

75 CAL. GOV'T CODE § 12926.1(c) (West 2008).

76 Sutton, *supra* note 74, at 491–92.

77 *Id*. (emphasis added).

78 As stated in California Government Code section 12926.1(c):

> Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, "working" is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.

See also Jensen v. Wells Fargo Bank, 102 Cal. Rptr 55, 64 (Ct. App. 2000) (quoting § 12926.1(c)); Cripe v. City of San Jose, 261 F.3d 877, 895 (9th Cir. 2001) (quoting § 12926.1(c)).

79 *See* Rojo v. Kliger, 801 P.2d 373, 383 (Cal. 1990) ("While the FEHA conferred certain new rights and created new remedies, its purpose was not to narrow, but to expand the rights and remedies available to victims of discrimination."); Colmenares v. Braemar Country Club, Inc., 63 P.3d 220, 227 (Cal. 2003) (FEHA defines physical disability more broadly than the federal Americans with Disabilities Act.).

80 2004 Cal. Legis. Serv. 4592–610 (West). The affected statutes are: CAL. EDUC. CODE §§ 44100, 44858, 45293, 69958, 87100, 88112 (West Supp. 2008); CAL. GOV'T CODE §§ 19572, 19572.1, 19702, 19704, 19793; CAL. LAB. CODE §§ 1735, 1777.6, 3095 (West Supp. 2008); CAL. MIL. & VET. CODE § 130 (West Supp. 2008); CAL. PUB. UTIL. CODE §§ 25051, 28850, 30750, 50120, 70121, 90300, 95650, 98161, 100303, 101343, 102402, 103403, 120504, 125523 (West Supp. 2008); CAL. UNEMP. INS. CODE § 1256.2 (West Supp. 2008); and CAL. WELF. & INST. CODE §§ 11320.31, 11322.62, 14087.28 (West Supp. 2008).

81 2004 Cal. Stat. 788; Jason L. Eliaser, *Consistency in California's Employment Discrimination Laws: Chapter 788's Dissemination of FEHA Standards*, 36 MCGEORGE L. REV. 871, 873 (2005).

Had the California Supreme Court held that the Compassionate Use Act required accommodation under FEHA, the combination of the broad language in the Compassionate Use Act and the comprehensive reach of FEHA would have placed employers in an untenable position that drafters of these statutes could not have independently have envisioned.

CONCLUSION

Applying the plain language of the Compassionate Use Act, the California Supreme Court properly respected the intent of the voters to permit a large number of patients to use marijuana free from the threat of criminal prosecution, while recognizing that the Act does not stand as a statutory trump card over every other statute and common law duty. Employers who contract with, or receive grants from, the federal and state governments are required to comply with drug-free workplace laws or risk serious penalties, including debarment. All employers are legitimately concerned with the hazards presented by employees who are physically or mentally impaired due to marijuana use, particularly when such impaired employees may cause harm to their co-workers or customers, rendering their employers liable under common law tort theories. Rather than stretching the language of the Compassionate Use Act to cover employment situations never mentioned in the statute or contemplated by the voters, and creating an untenable situation for all California employers, the California Supreme Court's ruling correctly recognizes the limitations of the Act as written.