

No. 83768-6

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

JANE ROE,

Petitioner,

v.

TELETECH CUSTOMER CARE
MANAGEMENT (COLORADO) LLC,

Respondent.

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AMICUS CURIAE BRIEF OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
IDENTITY AND INTEREST OF AMICUS	1
ISSUE ADDRESSED BY AMICUS	2
INTRODUCTION	2
ARGUMENT	4
I. EMPLOYERS MUST COMPLY WITH DRUG- FREE WORKPLACE RULES	4
II. MARIJUANA USE HAS AN ADVERSE IMPACT ON EMPLOYEE PERFORMANCE	6
III. OFF-DUTY MARIJUANA USE ALSO AFFECTS EMPLOYEE PERFORMANCE AND IS OF LEGITIMATE CONCERN TO EMPLOYERS	11
IV. EMPLOYERS MAY BE LIABLE FOR ACTIONS OF IMPAIRED EMPLOYEES	16
CONCLUSION	19

TABLE OF AUTHORITIES

	Page
Cases	
<i>Bailey v. State of Maryland</i> , 294 A.2d 123 (Md. Ct. Spec. App. 1972)	12
<i>Burger v. Unemployment Comp. Bd. of Review</i> , 801 A.2d 487 (Pa. 2002)	15
<i>Burns Bros., Inc. v. Employment Div.</i> , 890 P.2d 423 (Or. 1995)	15
<i>Chesterman v. Barmon</i> , 753 P.2d 404 (Or. 1988)	17
<i>Doe Parents No. 1 v. Dep't of Educ.</i> , 58 P.3d 545 (Haw. 2002)	17
<i>Dolan v. Svitak</i> , 527 N.W.2d 621 (Neb. 1995)	6
<i>Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industry</i> , 348 Or. 159 (2010)	1
<i>Farm Fresh Dairy, Inc. v. Blackburn</i> , 841 P.2d 1150 (Okla. 1992)	6
<i>Freightliner, LLC v. Teamsters Local 305</i> , 336 F. Supp. 2d 1118 (D. Or. 2004)	13-14
<i>Howell v. Ferry Transp., Inc.</i> , 929 So. 2d 226 (La. Ct. App. 2006)	16
<i>In re Cahill</i> , 585 A.2d 977 (N.J. Super. Ct. App. Div. 1991)	15
<i>Ira S. Bushey & Sons, Inc. v. United States</i> , 398 F.2d 167 (2d Cir. 1968)	16
<i>Lisa M. v. Henry Mayo Newhall Mem'l Hosp.</i> , 907 P.2d 358 (Cal. 1995)	17

	Page
<i>Or v. Edwards</i> , 818 N.E.2d 163 (Mass. Ct. App. 2004), <i>rev. denied</i> , 823 N.E.2d 782 (Mass. 2005)	16
<i>Rodgers v. Kemper Constr. Co.</i> , 124 Cal. Rptr. 143 (1975)	17
<i>Roe v. TeleTech Customer Care Mgmt. (Colo.), LLC</i> , 152 Wn. App. 388 (2009)	2, 11
<i>Ross v. Ragingwire Telecomms., Inc.</i> , 174 P.3d 200 (Cal. 2008)	1
<i>Sun Veneer v. Employment Div.</i> , 804 P.2d 1174 (Or. 1991)	15
<i>Teahan v. Metro-N. Commuter R.R.</i> , 80 F.3d 50 (2d Cir. 1996)	9
<i>United States v. Oakland Cannabis Buyers' Coop.</i> , 532 U.S. 483 (2001)	18
<i>Willner v. Thornburgh</i> , 928 F.2d 1185 (D.C. Cir.), <i>cert. denied sub nom. Willner v. Barr</i> , 502 U.S. 1020 (1991)	9

State Statutes

Former Wash. Rev. Code § 69.51A.060(4) (1999)	11
King County Code ch. 3.46	5
Seattle Municipal Code ch. 4.77 § 4.77.030	5
Snohomish County Code § 3.58, <i>et seq</i>	5
§ 3.58.010	5
§ 3.58.050	5
Wash. Admin Code § 173-180-630	5

Page

Federal Statutes

41 U.S.C. § 702 (2000) 4

 § 702(a)(1)(A)(2000) 4

 § 702(b) (2000) 4

49 U.S.C. § 5331 (2000) 4

 § 20140 (2000) 4

 § 31306 (2000) 4

 § 45102 (2000) 4

Federal Regulations

49 C.F.R. § 40.85(a) (2006) 4

Miscellaneous

Aldisert, Ruggero J., *Logic for Lawyers: A Guide to Clear Legal Thinking* (3d ed., National Institute for Trial Advocacy 1997) 12-13

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	Page
Crites-Leoni, Abbie, <i>Medicinal Use of Marijuana: Is the Debate a Smoke Screen for Movement Toward Legalization?</i> , 19 J. Legal Med. 273 (1998) (citing Schwartz, et al., <i>Short-Term Memory Impairment in Cannabis-Dependent Adolescents</i> , 143 Am. J. Dis. Child. 1214 (1989)	14
Gruber, A. J., <i>Attributes of long-term heavy cannabis users: A case-control study</i> , 33 Psychol. Med. 1415 (2003)	8
Hall, W. & Solowij, N., <i>Adverse effects of cannabis</i> , 352 Lancet 1611 (1998)	7
Hirschfeld, Laura L., <i>Legal Drugs? Not Without Legal Reform: The Impact of Drug Legalization on Employers Under Current Theories of Enterprise Liability</i> , 7 Cornell J.L. & Pub. Pol'y 757 (1998)	16, 18
Larson, Sharon L., et al., Dep't of Health & Human Servs., <i>Worker Substance Use and Workplace Policies and Programs (2007)</i> , available at http://oas.samhsa.gov/work2k7/work.pdf (visited May 24, 2010)	9-10
Lindstrand, Laura, Wash. State Human Rts. Comm'n, http://www.hum.wa.gov/Documents/Guidance/medical%20marijuana.doc (last visited May 24, 2010)	19
Lidge III, Ernest F., <i>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</i> , 47 U. Kan. L. Rev. 333 (1999)	13
O'Brien, Christine Neylon, <i>Facially Neutral No-Rehire Rules and the Americans with Disabilities Act</i> , 22 Hofstra Lab. & Emp. L.J. 114 (2004)	18

	Page
United States Dep't of Health & Human Servs., Nat'l Insts. of Health, Nat'l Inst. on Drug Abuse, InfoFacts, Marijuana (Apr. 2006) <i>available at</i> http://www.drugabuse.gov/PDF/InfoFacts/ Marijuana06.pdf (last visited May 24, 2010)	7-8
Washington State Dept. of Community, Trade and Economic Development, Lisicich, Priscilla, et al., <i>Governor's Council on Substance Abuse Report: Recommendations for State Policy Action</i> during the 2003-2005 Biennium 42 (June 2002)	14, 18
Wickizer, Thomas M., et al., <i>Do Drug-Free Workplace Programs Prevent Occupational Injuries? Evidence from Washington State</i> , 39 Health Svcs. Research 91 (2004)	10-11

IDENTITY AND INTEREST OF AMICUS

Pacific Legal Foundation (PLF) is the oldest and largest public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF has numerous supporters and contributors nationwide, including in the State of Washington. PLF is headquartered in Sacramento, California, and has offices in Stuart, Florida; Honolulu, Hawaii; and Bellevue, Washington.

In furtherance of PLF's continuing mission to defend individual and economic liberties, the Foundation established its Free Enterprise Project. Through that project, the Foundation seeks to protect the free enterprise system from abusive regulation, a civil justice system that grants excessive liability awards, and barriers to the freedom of contract. PLF briefed the issue of employers' need to accommodate employees' use of medical marijuana in *Ross v. Ragingwire Telecommunications, Inc.*, 174 P.3d 200 (Cal. 2008), and *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industry*, 348 Or. 159 (2010). PLF's arguments based on this experience will assist the court in understanding and deciding the important issues on review in the present case.

ISSUE ADDRESSED BY AMICUS

Whether Initiative 692 or Washington public policy prohibits an employer from discharging an employee solely because of her physician-authorized, at-home use of medical marijuana.

INTRODUCTION

Washington passed Initiative 692 in 1998, authorizing state residents to use medical marijuana without fear of criminal prosecution by state authorities. “Jane Roe” uses medical marijuana, with her doctor’s permission, to treat migraine headaches. *Roe v. TeleTech Customer Care Mgmt. (Colo.), LLC*, 152 Wn. App. 388, 391 (2009). She applied for a job at Teletech, a company that provides telemarketing and telesales services. All applicants to whom TeleTech makes a conditional offer of employment must receive a negative result on a pre-employment drug test. Roe was informed about the policy, submitted to the drug test, and tested positive for marijuana. Teletech makes no exceptions to its no-drug policy for medical marijuana and Roe’s employment was terminated. *Id.* at 392-93. Roe sued, alleging that she was wrongfully terminated in violation of public policy and in violation of the medical marijuana statute.

The facts of this case—particularly Roe’s job that involves mostly talking on the telephone—invite a court to look for narrow grounds to uphold

her complaint. But the laws involved in this case do not offer a narrow, fact-specific solution. Washington's Medical Use of Marijuana Act (MUMA) and federal Controlled Substances Act govern factual situations far removed from this case that nonetheless will be controlled by the holding in this case. Therefore, the Court should consider the ramifications of this holding beyond this case in assessing the public policy concerns that guide the interpretation of statutes and employer responsibilities. These concerns, as well as the statutes' plain language, lead to the conclusion that employers cannot be required to hire or retain employees who test positive for marijuana.

As shown below, neither the statutory and common law duty of accommodation sought in this case is warranted, given the language of MUMA, as well as an employer's duty to maintain a safe workplace, particularly for those industries that must maintain eligibility for state and federal contracts. Moreover, Roe's negative premise that an employer need not accommodate medical marijuana use on the premises does not translate into a positive duty to accommodate such use off the premises, particularly where the biological effects of the marijuana remain in the employee's system.

For these reasons, the decision of the court of appeals should be affirmed.

ARGUMENT

I

EMPLOYERS MUST COMPLY WITH DRUG-FREE WORKPLACE RULES

Companies that contract with the federal government have special concerns with regard to maintaining a drug-free workplace. All Washington recipients of federal aid *must* provide a drug-free workplace for employees. 41 U.S.C. § 702 (2000). Under federal law, employers must notify each employee of the prohibition against using controlled substances, including marijuana. The penalty for violating the law is the suspension or termination of a particular grant and ultimately, debarment for up to five years from future grants. 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). The federal drug-free workplace laws provide that violating the obligations of the Act or

making a false certification of compliance can result in the contract's suspension or termination, and may result in debarment of the non-complying contractor or grantee. State law can incorporate these requirements. *See* Wash. Admin. Code § 173-180-630 (incorporating drug-free workplace requirements for onshore and offshore oil handling facilities).

Most local governments similarly require their own employees to comply with policies prohibiting employment under the influence of drugs or alcohol. *See* Snohomish County Code § 3.58, *et seq.* (noting that “[i]t is the policy of Snohomish county to maintain a drug-free workplace,” § 3.58.010 and that county employees may be terminated for failing a drug test). *Id.* § 3.58.050; King County Code ch. 3.46 (drug testing required in compliance with federal law); Seattle Municipal Code ch. 4.77 (The Drug-free Workplace and Drug and Alcohol Testing Ordinance, specifically, Section 4.77.030, establishing the city’s policy: “It is the policy of the City to take those steps necessary to ensure that its employees perform their duties and responsibilities free of the influence of unlawful drugs and unimpaired by alcohol. The City also complies with all federal, state and local law in furtherance of those objectives.”) Thus, employers in the public sector as well as private sector employers who contract with the government have a compelling interest in maintaining a drug-free workplace.

II

MARIJUANA USE HAS AN ADVERSE IMPACT ON EMPLOYEE PERFORMANCE

Washington employers have legitimate reasons for refraining from hiring or retaining drug-using employees, even when they are not subject to the federal, state, or local drug-free workplace laws. Employer fears of employee absenteeism, shiftlessness, or malfeasance while under the influence of marijuana, even when recommended for medical purposes, rests on medical studies demonstrating a wide range of impacts that can occur especially with prolonged ingestion of the drug. 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.” *Dolan v. Svitak*, 527 N.W.2d 621, 626 (Neb. 1995). See also *Farm Fresh Dairy, Inc. v. Blackburn*, 841 P.2d 1150, 1153 (Okla. 1992) (public policy supports drug testing to promote safety in the workplace).

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. 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." American Medical Association Council on Scientific Affairs, Featured Report: Medical Marijuana (A-01),¹ (citing Pierri J. Chait, *Effects of smoked marijuana on human performance: A critical review*, found in *Marijuana/Cannabinoids: Neurobiology and Neurophysiology* 387-424 (A. Bartke & L. Murphy, eds., CRC Press 1992); W. Hall & N. Solowij, *Adverse effects of cannabis*, 352 *Lancet* 1611-16 (1998)). Users may experience intensified senses, increased talkativeness, altered perceptions, and time distortion followed by drowsiness and lethargy. *Id.* "Heavy users may experience apathy, lowered motivation, and impaired cognitive performance." *Id.*

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. United States Dep't of Health & Human Servs., Nat'l Insts. of Health, Nat'l Inst. on Drug Abuse, InfoFacts, Marijuana (Apr. 2006) at 3 (citing Sidney S. Polen,

¹ Available at <http://www.ama-assn.org/ama/pub/category/13625.html> (last visited May 24, 2010).

et al., *Health care use by frequent marijuana smokers who do not smoke tobacco*, 158 West J. Med. 596–601 (1993)).² Many of these extra sick days are due to respiratory illnesses. *Id.* at 3. Marijuana compromises the ability to learn and remember information, so that a user’s intellectual, job performance, or social skills are more likely to diminish. *Id.* at 4. Other studies also 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.” *Id.* at 5 (citing C. Zwerling, et al., *The efficacy of preemployment drug screening for marijuana and cocaine in predicting employment outcome*, 264 JAMA 2639–43 (1990), and 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*

² Available at <http://www.drugabuse.gov/PDF/InfoFacts/Marijuana06.pdf> (last visited May 24, 2010).

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.), *cert. denied sub nom. Willner v. Barr*, 502 U.S. 1020 (1991) (citing these and other studies and concluding: “These 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.”).

A recent study by the United States Department of Health and Human Services found that, for 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. Sharon L. Larson, et al., Dep’t of Health & Human Servs., *Worker Substance Use and Workplace Policies and Programs* 62 (2007).³ For those workers

³ Available at <http://oas.samhsa.gov/work2k7/work.pdf> (last visited May 24, 2010) (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.*

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. *Id.* 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.

This is consistent with a study published by Dr. Thomas Wickizer and other researchers with the Department of Health Services at the University of Washington evaluating the effect of Washington's drug-free workplace program in a variety of industries. Thomas M. Wickizer, et al., *Do Drug-Free Workplace Programs Prevent Occupational Injuries? Evidence from Washington State*, 39 Health Svcs. Research 91 (2004). The authors recounted then-existing studies that clearly found that drug use increased the risk of occupational injuries, as well as increasing absenteeism, turnover, and disciplinary actions. *Id.* at 92-93. The study then looked at workers' compensation claims from 1994-2000, comparing claims from workers who were employed by companies with a drug-free workplace program established under the Washington Drug-Free Discount Act (2SSB 5516) with claims from workers employed by companies without such a program. The

researchers concluded that in the construction, manufacturing, and services industries, those companies who participated in the drug-free workplace program enjoyed a net reduction in injury rates that was both meaningful and statistically significant. *Id.* at 105.

III

OFF-DUTY MARIJUANA USE ALSO AFFECTS EMPLOYEE PERFORMANCE AND IS OF LEGITIMATE CONCERN TO EMPLOYERS

The court below noted Roe's argument that she did not ingest marijuana while at work or while on Teletech's premises and that she claimed she was therefore entitled to accommodation. *Roe*, 152 Wn. App. at 392. MUMA (at the time of Roe's termination) flatly stated that "[n]othing in this chapter requires any accommodation of any medical use of marijuana in any place of employment" Former Wash. Rev. Code § 69.51A.060(4) (1999). The 2007 amendment to MUMA, that "[n]othing in this chapter requires any accommodation of any *on-site* medical marijuana in any place of employment" (emphasis added), does not work any material change in employer responsibilities. In syllogistic form, Roe's argument goes like this:

1. Employers are not required to accommodate the presence or ingestion of marijuana on company premises.

2. The employee possesses and ingests marijuana at home, not on company premises.
3. Therefore, employers are required to accommodate the employee's marijuana use.

This syllogism 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.” *Bailey v. State of 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). 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 Roe’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.

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, 363-64 (1999) (citing Aldisert, *Logic for Lawyers*, at 153-54 (1990)).

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 major term of “ingesting marijuana at home” does not exist in the premise, in which the major term is “ingesting marijuana at work.” The federal district court for the State of Oregon recognized the nature of this fallacy in *Freightliner, LLC v. Teamsters Local 305*, 336 F. Supp. 2d 1118, 1127 (D. Or. 2004), when it held in a similar case involving medical marijuana use:

Nothing in the Act even suggests that the Act was meant to limit private collective bargaining between employees and employers. Indeed, the only provision touching on employment issues is the workplace provision quoted above, which expressly protects employers from having to accommodate marijuana use. It is entirely irrational and qualifies as a manifest disregard of the law to assert that the workplace provision makes it illegal for parties to a CBA to negotiate how an employer may discipline marijuana use.

Thus the court rejected an arbitrator’s attempt to “construe the Marijuana Act—whose purpose is to provide an affirmative defense to certain criminal

prosecutions—as itself affirmatively setting forth a penal provision applicable to employers.” *Id.*

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 to marijuana—remain concerns over the long term. This is especially true given the increased potency of marijuana. Washington State Dept. of Community, Trade and Economic Development, Priscilla Lisicich, et al., *Governor’s Council on Substance Abuse Report: Recommendations for State Policy Action during the 2003-2005 Biennium* 42 (June 2002) (citing the Univ. of Mississippi’s 2000 Marijuana Potency Monitoring Project which found that THC levels in marijuana rose from under 2% in the late 1970s and early 1980s to 6.07% in 2000).

For example, memory defects may last as long as six weeks after an individual’s last use. 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)). These effects, particularly on cognitive abilities that may cause

lapses in judgment, are a valid concern for employers. *See Burns Bros., Inc. v. Employment Div.*, 890 P.2d 423, 425 (Or. 1995), “certain occupations could invoke safety concerns that may preclude workers from having any intoxicating substances in their systems at any time because ‘off duty drug use [is] intrinsically connected with their [job] performance.’” (Quoting *Sun Veneer v. Employment Div.*, 804 P.2d 1174, 1178 (Or. 1991)); *see also 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: “There 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”).

IV

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. *See, e.g., Howell v. Ferry Transp., Inc.*, 929 So. 2d 226, 227–31 (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. Ct. App. 2004), *rev. denied*, 823 N.E.2d 782 (Mass. 2005) (landlord held liable for negligent hiring of a drug user as a custodian when the stoned and drunk custodian subsequently kidnapped, raped, and murdered a five-year-old girl, which the court found to be a foreseeable consequence of the landlord's failure to make inquiry about the custodian's history of alcohol and drug abuse). *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, 805–07 (1998) (citing seminal examples of extreme employee behavior in *Ira S. Bushey & Sons, Inc. 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), and *Rodgers v. Kemper Constr. Co.*, 124 Cal. Rptr. 143, 146-47 (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.)).

These cases can apply explicitly in the context of an employee’s drug use. As the Oregon Supreme Court noted in *Chesterman v. Barmon*, 753 P.2d 404, 407 (Or. 1988), “If [corporation president and employee] Barmon’s taking the drug did result in plaintiff’s injuries, it is then a question for the jury whether the taking of the drug was within the scope of employment.” See also *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); *Doe Parents No. 1 v. Dep’t of Educ.*, 58 P.3d 545, 596 (Haw. 2002) (holding

that prior indictment of school teacher for sexual misconduct should have prompted further school inquiry even though employee was found not guilty).

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. 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.").⁴ "Forcing the employers to retain current drug users would close off one of the few methods that modern employers have left to insulate themselves from unlimited liability" for every wrongful act committed by employees. Hirschfeld, *Legal Drugs?*, 7 Cornell J.L. & Pub. Pol'y at 840. Employers

⁴ Even determining whether a patient is actually in compliance with MUMA's requirements presents some challenges. There are no standards to determine how much marijuana is "enough," both from the perspective of a patient seeking to remedy ailments and from the perspective of the state, which has yet to define what constitutes the 60-day supply of marijuana authorized by the statute. *Recommendations for State Action, supra*, at 43.

should not be saddled with a workforce engaged in drug use that is largely prohibited by law. See *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001).⁵

CONCLUSION

While the Washington Medical Use of Marijuana Act permits registered patients to use marijuana free of the threat of criminal prosecution, the Act does not stand as a statutory trump card over every other statute and common law duty. Employers have a duty to their employees and customers

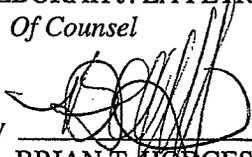
⁵ Because marijuana remains a Schedule I drug outlawed by the federal Controlled Substances Act, the Washington State Human Rights Commission issued a directive indicating that the agency will not investigate any claims of discrimination involving the use of medical marijuana. See Laura Lindstrand, Wash. State Human Rts. Comm'n, <http://www.hum.wa.gov/Documents/Guidance/medical%20marijuana.doc> (last visited May 24, 2010).

to provide a safe and drug-free workplace. For the foregoing reasons, Amicus Curiae respectfully requests that this Court affirm the court of appeals' decision.

DATED: June 17, 2010.

Respectfully submitted,

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By 

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DECLARATION OF SERVICE

I, BRIAN T. HODGES, declare as follows:

I am a resident of the State of Washington, residing or employed in Bellevue, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 10940 NE 33rd Place, Suite 210, Bellevue, Washington.

On June 14, 2010, true copies of AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT were sent via email and placed in envelopes and sent by First Class United States Mail addressed to the following:

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