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STATE OF WASHINGTON
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Supreme Court No. 83768-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JANE ROE,

Appellant,

v.

TELETECH CUSTOMER CARE
MANAGEMENT (COLORADO) LLC,

Respondent.

RESPONDENT'S ANSWER TO *AMICUS CURIAE* BRIEFS OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON AND THE WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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I. INTRODUCTION

Respondent TeleTech Customer Care Management (Colorado), LLC ("TeleTech") submits the following answer to the briefs of *amici curiae* the American Civil Liberties Union of Washington ("ACLU") and the Washington Employment Lawyers' Association ("WELA") in support of Petitioner Jane Roe's appeal. Both ACLU and WELA misconstrue the central issue of this case when they claim that MUMA somehow embodies a public policy supporting a workplace right to use medical marijuana. As TeleTech has already explained in its original briefing, there is no such policy. MUMA merely provides qualified patients, caregivers and physicians with an affirmative defense to state criminal prosecution.

II. ARGUMENT

A. MUMA Contains No Clear Public Policy Mandate Recognizing a Right to Use Medical Marijuana.

Amici contend that MUMA is the source of a public policy "recognizing the right of patients and their physicians to use medical marijuana to treat certain terminal or debilitating illnesses." ACLU Brief at 2; WELA Brief at 1. Amici admit that a plaintiff must prove a *clear and authoritative mandate* of public

policy in order to prevail on a public policy wrongful discharge claim. *See, e.g., Roberts v. Dudley*, 140 Wn.2d 58, 63-65, 993 P.2d 901 (2000). As described below, amici have not shown that MUMA is the source of such a policy.

1. MUMA as Passed by the Voters Does Not Embody the Public Policy Amici Describe.

Amici contend that MUMA as first passed in 1998 stated a clear public policy supporting the right to use medical marijuana. Amici are wrong because they rely on portions of MUMA taken out of context.

Amici first contend that MUMA as passed in 1998 created a clear mandate of public policy because its preamble stated that using medical marijuana is a personal decision made with a physician. (RCW 69.51A.005 (1999) (amended 2007)). ACLU Brief at 4. As the Court of Appeals correctly noted, that statement cannot be viewed in isolation. The preamble also specifically stated how MUMA protected that decision by ensuring that "[q]ualifying patients . . . shall not be found guilty of a crime under state law for their possession and limited use of marijuana" and that physicians "be excepted from liability and prosecution for the authorization of marijuana use to qualifying patients." *Roe v.*

TeleTech Customer Care Mgmt. (Colo.), LLC, 152 Wn. App. 388, 397, 216 P.3d 1055 (2009). "The average informed lay voter would understand from reading MUMA's preamble that it was intended to address just one subject — criminal prosecutions, from a physician's decision to recommend, and a patient's decision to use, marijuana as treatment for a terminal or debilitating illness." Id.

Amici also contend that MUMA provides a clear public policy because former RCW 69.51A.040(2) (1999) states that medical marijuana users should not be penalized for their use of the drug. ACLU Brief at 4-5. The Court of Appeals also considered and properly rejected that argument as failing to recognize the meaning of the phrase in context. Former RCW 69.51A.040(2) (1999) concerns the medical marijuana user's right to an affirmative defense if charged with a drug crime. In that context, the reference to being "penalized" or to being "denied a right or privilege" clearly refers to *criminal* penalties that would affect a qualified medical marijuana user.

2. MUMA as Amended by the Legislature Does Not Embody the Public Policy Amici Describe.

Roe's employment with TeleTech began and ended in October 2006. In April 2007, *months after* her termination, the Legislature amended MUMA. CP 168-76. Among other things, the Legislature amended RCW 69.51A.060(4) (1999) (amended 2007) to add the word "on-site," as follows:

> Nothing in this chapter requires any accommodation of any *on-site* medical use of marijuana in any place of employment, in any school bus or on any school grounds, ((~~or~~)) in any youth center, *in any correctional facility, or smoking marijuana in any public place as that term is defined in RCW 70.160.020*.

(Emphases added; underlined material added in amended statute; material in parentheses with strikethrough removed in amended statute.)

That 2007 amendment should not inform this Court's understanding of what MUMA meant at the time of Roe's termination. Amici contend that the addition of the word "on-site" after the fact by the *Legislature* in 2007 is a definitive interpretation of what the *voters* meant in 1998. That is simply impossible, and it is beyond the Legislature's purview to make such an interpretation.

Even if this Court were to consider the amendment, the fact that the Legislature decided not to require accommodation of "on-site" use hardly provides a clear and authoritative statement that it intended to infer a negative and require accommodation of "off-site" use. The use of the word "accommodation" in RCW 69.51A.060(4) cannot be understood as incorporating a full-blown workplace accommodation scheme of the type set out in the federal Americans with Disabilities Act or Washington Law Against Discrimination ("WLAD") – as the full import of Roe's and amici's arguments would have this Court do. "Accommodation," as it is used in the disability discrimination context, is part of the highly technical concept of "reasonable accommodation" that confers affirmative obligations on employers. *See, e.g.*, RCW 49.60.040(7)(d). The way in which "accommodation" is used in MUMA does not support that technical usage. After all, the word "accommodation" is firmly tethered in the same sentence not just to "places of employment," but also to school buses, school grounds, youth centers, and public places. That tether is clear because, if the word "accommodation" from the original MUMA were removed, the rest of the sentence itself would be incoherent.

Because "accommodation" applies to all the other types of places in the statute, it must mean something other than the technical disability-law usage argued by Roe. Therefore, this Court should reject Roe's attempt to create an unprecedented workplace right via a negative inference.

Declining to assign this single word in a non-employment law statute such overwhelming, and internally inconsistent, weight is the correct statutory interpretation for other reasons as well. First, it recognizes that the Legislature does not draft sweeping employment statutes without more explicit explanations and statement of intent. Other statutes confirm that, when the Legislature intends to modify the general rule in Washington State that employment is at-will, particularly to a degree of such magnitude, it does so in express, certain terms.[1] Those terms do

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[1] *See, e.g.*, RCW 49.17.160 ("no person shall discharge or in any manner discriminate against" employee for filing a complaint under Washington Industrial Safety and Health Act); RCW 49.44.080 (it is "unfair practice" for employer to "refuse to hire or employ . . . or terminate from employment" individual because individual is 40 years of age or older); RCW 49.44.120 (it "shall be unlawful" for employers to "require, directly or indirectly, that any employee or prospective employee take or be subjected to any lie detector or similar tests as a condition of employment or continued employment"); RCW 49.46.100 (any employer that "discharges or in any other manner discriminates against any employee because such employee has made any complaints" under Washington Minimum Wage Act "shall be deemed in violation of this chapter"); RCW 49.60.180 (it is an "unfair practice" for any employer to "refuse to hire,"

(...continued)

not exist in MUMA. In addition, TeleTech's interpretation avoids an absurd result. Under Roe's construction, an employee could smoke or ingest illegal drugs outside the workplace gates before work, or at home, and then travel to work and need to be accommodated. Clearly, that was not MUMA's intended effect.

B. The Other Alleged Sources of Law That Amici Cite Do Not Provide a Clear Mandate Either.

Failing to find any real support for their arguments in MUMA itself, amici fall back on other more general arguments to try and support their claimed public policy. As described below, those efforts are unavailing.

(...continued)
"discharge or bar . . . from employment," or "discriminate against . . . in compensation or in other terms or conditions of employment" individuals based on characteristics identified in chapter 49.60 RCW); RCW 49.60.210 (it is "unfair practice" for any employer to "discharge, expel, or otherwise discriminate again any person because he or she has opposed any practices forbidden by" chapter 49.60 RCW or "because he or she has filed a charge, testified, or assisted in any proceeding under" that chapter); RCW 49.66.030 (it is "unfair labor practice, and unlawful" for any health care activity to "interfere with, restrain or coerce employees in any manner in the exercise of their right of self-organization," or to "[d]iscriminate in regard to hire, terms, or conditions of employment in order to discourage membership in any employee organization having collective bargaining as one of its functions"); RCW 49.78.130 (no employer shall "discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by" the Washington Family Leave Act, "or because he or she has filed a complaint, testified, or assisted in any proceeding" under it).

1. Cases Concerning a Patient's Right to Private Medical Decisions Are Irrelevant.

Amici contend that MUMA's policy protecting the right to use medical marijuana (which, as described above, does not exist) is bolstered by case law and supports the right to private medical decisions. ACLU Brief at 8-12. That argument simply assumes the unproven conclusion that MUMA was meant to unreservedly protect medical marijuana use. This Court should reject that circular argument.

Furthermore, as described below in Section II.C, those cases are not relevant here because TeleTech has done nothing to invade Roe's right to privacy or her right to make her own medical decisions.

2. The DOJ's Drug Enforcement Choices Do Not Provide a Clear Mandate of Public Policy.

Next, amici contend that there is no positive conflict between MUMA and the federal Controlled Substances Act because the U.S. Department of Justice has advised U.S. Attorneys to direct federal resources away from prosecuting state-approved medical marijuana users. That argument confuses the executive branch's fleeting choices regarding allocation of scarce resources with an actual statement of law. The DOJ's determinations are not

law, and they provide no guidance as to what the Controlled Substances Act requires. Moreover, administrations give way to other administrations, and their DOJ enforcement strategies can change back and forth.

However, should this Court decide to consider outside assessments of whether Washington public policy conflicts with federal law, a more appropriate source would be the Washington State Human Rights Commission ("WSHRC"). The WSHRC, in its role as a State agency enforcing the disability claims under the WLAD, has issued interpretive guidance stating plainly that: Washington's Medical Marijuana Act, RCW 69.51A, allows the use of marijuana if prescribed by a physician for a medical condition. The federal Controlled Substances Act, 21 U.S.C.S. § 801 et seq., prohibits marijuana possession. The WSHRC does not consider it a reasonable accommodation of a disability for an employer to violate federal law, or to allow an employee to violate federal law, by employing a person who uses medical marijuana. *See, Washington State Human Rights Commission, Washington Non-discrimination Laws and the Use of Medical Marijuana* at 1 (Jan. 5, 2011), *available at* http://ww.hum.wa.gov/Documents/

Guidance/medical%20marijuana.doc. Based on that determination (and the case law supporting it), the WSHRC concluded in its guidance that it would "decline to investigate any claims of [disability] discrimination involving the use of medical marijuana." *Id.* at 2. Likewise, the WSHRC's website makes clear that current users of illegal drugs are not protected under the law, and that this includes "the use of any illegal drugs." *See, Washington State Human Rights Commission, Disability Law and Addictions: Questions and Answers for Employers Dealing with Addiction Issues in the Workplace* (Jan. 7, 2011), *available at* http://www.hum.wa.gov/FAQ/FAQDisibilityAddiction.html.

C. Roe's Termination Did Not Jeopardize the Alleged Public Policy ACLU and WELA Cite.

Even if there were a clear mandate of public policy in favor of the patient's right to use medical marijuana (which there is not), Roe's termination did not jeopardize that public policy. Policies such as TeleTech's would not impact the doctor-patient relationship in any way. There is no evidence that such policies would change a doctor's decision to authorize medical marijuana, nor do they deprive patients of the right to decide independently whether to use marijuana. While such policies might be a factor in

the patient's decision, it cannot be the case that any outside influence on a patient's medical decisions is impermissible as a matter of public policy. If that were true, then medical care would have to be free of charge, since one of the greatest impediments to medical treatment is cost. Moreover, under amici's theory, employers in Washington would have an obligation to accommodate *any* medical decision made by their employees, including purely cosmetic procedures. That would be a clearly absurd result.

D. WELA Would Improperly Limit an Employer's Right to Raise an Overriding Justification.

WELA's confusing description of the "overriding justification" defense misleadingly suggests that employers may raise the defense only after conceding causation – thus creating one legal scheme for prosecuting and defending wrongful discharge cases when an employer contests causation, and another more plaintiff-friendly scheme when the employer does not.

As an initial matter, WELA misrepresents the facts when it states that TeleTech "concedes that the reason for the dismissal was the plaintiff's public-policy-linked conduct." WELA Brief at 7. In fact, TeleTech contests that any such public policy exists.

TeleTech concedes only that it terminated Roe for failing a uniformly applied drug test – whether or not that test result had anything to do with her medically prescribed marijuana use.

Regardless, the law is the same whether or not an employer contests causation. There are four elements to a Washington common law wrongful discharge claim: (1) that there is a clear mandate of public policy, (2) that discouraging the conduct in which plaintiff engaged would jeopardize the public policy, (3) that the public policy-linked conduct caused the dismissal, and (4) that the defendant does not have an overriding justification for the dismissal. *Roberts,* 140 Wn.2d at 64-65. If the plaintiff meets its burden of proof on the first three elements, the burden shifts to the defendant employer to show that it had an overriding justification. *Wilmot v. Kaiser Aluminum & Chem. Corp,* 118 Wn.2d 46, 70, 821 P.2d 18 (1991). If the employer meets that burden, the burden shifts again to the plaintiff to prove either that the employer's justification was pretextual or that discrimination based on the public policy-linked conduct was a substantial factor in the decision to terminate. *Id.* at 75-76.

WELA twists this simple statement of the law by

suggesting that an employer may advance an overriding justification defense only if it concedes causation – and reasoning backwards, appears to conclude that TeleTech has advanced an overriding justification defense, so it *must* have conceded causation. This logic is nonsensical. First, it overlooks the fact that for every wrongful discharge claim, plaintiff bears the burden of proving each of the first three elements, including the existence of a clear mandate of public policy. As described above, Roe has not done that. Thus, she has not proved her prima facie case, and her claim must be dismissed – regardless of what TeleTech argues or concedes regarding causation. Second, even if plaintiff proves her prima facie case, Teletech still may avoid liability by showing that an overriding justification exists – again, regardless of what it argued as to causation. WELA presents no reason why an employer cannot argue both (1) that it was motivated by something other than the unlawful reason (causation) and (2) that its actual motivation was an important business reason that would trump any effect on a public policy interest that might have been implicated (overriding justification).

E. TeleTech Has an Overriding Justification for Terminating Roe's Employment.

As TeleTech described in its responding brief, it has several overriding justifications for maintaining a drug-free workplace, including the need to avoid vicarious liability for employees who are engaging in illegal activity, the need to avoid the negative implications of drug use (whether on or off the job), and the need to retain business from Sprint Nextel, its only customer in Washington. Brief of Respondent at 44-46. Significantly, neither ACLU nor WELA addresses all of those reasons.[2]

In response, ACLU argues that the public policy of this state is "limited to circumstances in which an employee's lawful, off-site use of medical marijuana has no effect on safety or job performance." ACLU Brief at 19. ACLU offers no reason why its purported public policy should end there – except that ACLU says it does. In fact, ACLU appears to argue elsewhere that

[2] TeleTech also has another overriding justification to comply with federal (and state) drug testing requirements. Teletech's drug testing policy is applied uniformly across its umbrella of companies. The "industries" section of Teletech's website makes clear that an entire Teletech division is devoted to "Government Services," including contracting with the federal government. *See TeleTech Government Services,* (Jan. 7, 2011), *available at* http://www.teletech.com/industries/government-services. In addition to being a public record, TeleTech's website is cited in the paragraph 3 of the Declaration of Libertat Ros. (CP 215-235.)

Washington public policy absolutely protects any private decision between a doctor and patient, whether or not there is a safety problem. ACLU Brief at 8-12.

As described above, ACLU also attempts to imply that medical marijuana use is not exactly "illegal" by relying on the DOJ's decision not to prosecute medical marijuana users. The lack of enforcement simply does not render medical marijuana use legal under federal law. That is particularly important when evaluating whether an employer may be vicariously liable for an employee's tortious actions when it turns a blind eye to an employee's illegal activities.

WELA further contends in response that Roe was more healthy and productive while using medical marijuana and that she never reported to work under the influence. WELA Brief at 11. WELA overlooks the necessity for TeleTech's uniformly applied drug-free workplace rules. While Roe may (or may not) have shown improvement using drugs, other employees who use marijuana will not reap positive benefits. Those employees could become unproductive or a significant risk to themselves and others. TeleTech should not be expected to dispense with a drug-free

workplace because some employees' marijuana use will be claimed to be problem-free. WELA's rationale would require TeleTech to ignore a justifiable risk and wait for an employee to arrive to work under the influence before taking action to stop the problem. By then, liability might already have attached.

III. CONCLUSION

For all of the foregoing reasons, TeleTech respectfully requests that this Court reject Roe's arguments on appeal.

DATED: January 7, 2011.

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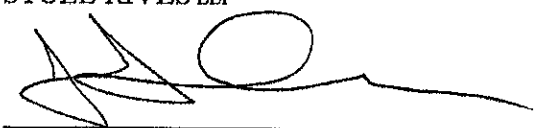

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