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SUPREME COURT
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38531-7-II

No. 81283-7

THE SUPREME COURT
OF THE STATE OF WASHINGTON

FILED
JUN 16 2008

CLERK OF SUPREME COURT
STATE OF WASHINGTON

JANE ROE,

Appellant,

v.

TELETECH CUSTOMER CARE
MANAGEMENT (COLORADO) LLC,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Ten years ago Washington voters approved Initiative 692, the Washington Medical Use of Marijuana Act (“MUMA”), codified at RCW 69.51A. In so doing, the People of Washington made a deliberate decision to protect the right of qualifying patients to use medical marijuana in accordance with their physicians’ medical judgment. Washington courts have repeatedly held that MUMA is much more than a medical marijuana decriminalization statute. The Legislature has made it clear that MUMA requires employers to accommodate their employees’ off-site use of medical marijuana. That duty of accommodation precludes the termination of an employee simply because she uses medical marijuana at home pursuant to MUMA. An employer must accommodate an employee’s off-site use of medical marijuana unless it has specific evidence that such use interferes with her job performance or poses a significant safety risk in the workplace. It is undisputed that TeleTech terminated Ms. Roe *solely* because she used medical marijuana at home under her doctor’s supervision in accordance with MUMA and not because the treatment affected her ability to do her job or posed a workplace safety risk. In so doing, TeleTech violated both MUMA and clear Washington public policy.

II. ASSIGNMENTS OF ERROR

The Superior Court erroneously granted TeleTech’s motion for summary judgment and erroneously denied the summary judgment motion

filed by Ms. Roe. This appeal presents the following issues of law for review:

1. Does MUMA prohibit an employer from discharging (or refusing to hire) an employee solely because of her physician-authorized, off-site use of medical marijuana in accordance with the Act?

2. Does Washington public policy prohibit an employer from discharging an employee solely because of her physician-authorized, off-site use of medical marijuana in accordance with MUMA?

III. STATEMENT OF THE CASE

A. Washington's Medical Use of Marijuana Act.

On November 3, 1998, Washington voters approved Initiative 692, the Washington Medical Use of Marijuana Act ("MUMA") by an "overwhelming vote." *State v. Tracy*, 158 Wn.2d 683, 692, 147 P.3d 559 (2006) (J. Johnson, Madsen, and Sanders, JJ., dissenting). Timothy Killian was the co-drafter and the campaign manager of the Initiative. Declaration of Timothy Killian (Nov. 12, 2007) ("Killian Dec.") at ¶ 1. Clerk's Papers ("CP") 291.

The purpose of the MUMA was to allow patients with terminal or debilitating illnesses to use medical marijuana when authorized by their treating physicians based on their professional medical judgment. *See, e.g., State v. Ginn*, 128 Wn. App. 872, 877, 117 P.3d 1155 (2005). MUMA contains this preamble:

The People of Washington state find that some patients with terminal or debilitating illnesses, under their

physician's care, may benefit from the medical use of marijuana. . . . The People find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.

RCW 69.51A.005 (2006).¹

The Act defines the "medical use of marijuana" as "the production, possession, or administration of marijuana . . . for the exclusive benefit of a qualifying patient in the treatment of his or her terminal or debilitating illness." RCW 69.51A.010(1). A "qualifying patient" is defined as a person who:

- (a) is a patient of a physician licensed under chapter 18.71 or 18.57 RCW;
- (b) has been diagnosed by that physician as having a terminal or debilitating medical condition;
- (c) is a resident of the state of Washington at the time of such diagnosis;
- (d) has been advised by that physician about the risks and benefits of the medical use of marijuana; and
- (e) has been advised by that physician that they [*sic*] may benefit from the medical use of marijuana.

RCW 69.51A.010(3). A "debilitating medical condition" includes "intractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard medical treatments and medications." RCW 69.51A.010(4)(b).

¹The Legislature clarified MUMA in 2007. *See infra* pp. 5-6. Except where otherwise indicated, references will be to the version of the Act in effect at the time of Ms. Roe's termination in late 2006.

The Act requires qualifying patients to have “valid documentation” for their medical use of marijuana. “Valid documentation” consists of “a statement signed by a qualifying patient’s physician, or a copy of the qualifying patient’s pertinent medical records, which states that, in the physician’s professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for a particular qualifying patient.” RCW 69.51A.010(5).

MUMA was intended to protect the right of a qualifying patient to use medical marijuana under her physician’s care and supervision. In addition to furnishing an affirmative defense to state criminal prosecution, MUMA expressly provides: “Any person meeting the requirements appropriate to his or her status under this Chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.” RCW 69.51A.040(1). One of the “privileges” that Initiative 692 was intended to protect qualified patients from losing was the privilege of employment. Killian Dec. at ¶ 7, CP 292.

While the language of RCW 69.51A.040(1) is expansive, the legal protection it confers is not unlimited. MUMA balances the rights of qualifying patients to use medical marijuana in accordance with Act with the legitimate interest of employers, schools, and other entities in prohibiting the on-site use of medical marijuana. *Id.* at ¶ 8. To achieve this balance, RCW 69.51A.060(4) states: “[N]othing in this chapter

requires any accommodation of any medical use of marijuana in any place of employment, in any school bus or on any school grounds, or in any youth center.” RCW 69.51A.060(4). By providing that employers were not required to accommodate the *use* of medical marijuana *in any place* of employment, MUMA was intended to require employers to accommodate an employee’s medical use of marijuana *outside* of the workplace, as long as that use complies with the Act. Killian Dec. at ¶ 10, CP 293.

In the years following the enactment and codification of Initiative 692, the Legislature came to realize that RCW 69.51A.060(4) could be misread to excuse employers from having to accommodate an employee’s off-site use of medical marijuana as well as her on-site use. *Id.* at ¶ 12. On May 8, 2007, the Governor signed Senate Bill 6032, “An Act Relating to the Medical Use of Marijuana.” Engrossed Substitute Senate Bill 6032, CP 240. The stated intent of the Bill was “to clarify the law on medical marijuana so that the lawful use of this substance is not impaired” and to ensure that “qualifying patients may fully participate in the medical use of marijuana.” *Id.* The amendment was also “intended to provide clarification” to “all participants in the judicial system.” *Id.*

The 2007 amendments clarified RCW 69.51A.060(4) by adding the following italicized language: “Nothing in this chapter requires any accommodation of any *on-site* 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 of marijuana in any public*

place. . . . “ CP 245. The phrase “on-site” was added to eliminate any possibility that the limitation on the duty to accommodate the medical use of marijuana in RCW 69.51A.060(4) would be misinterpreted to restrict a patient’s off-site use of medical marijuana as well. Killian Dec. at ¶ 13, CP 293. The limitations on accommodation set forth in that section were always intended to apply only to the *on-site* use of medical marijuana. *Id.* at ¶ 15, CP 294. The House Report for ESB 6032 confirms this intention. The Report states: “This bill clarifies several ambiguities in the current law. . . . This bill does not expand or restrict current law, but clarifies it to help patients comply.” House Bill Report, Engrossed Substitute Senate Bill 6032, CP 210-11.

B. Ms. Roe’s Employment with TeleTech.

For many years, Appellant Jane Roe² suffered from debilitating migraine headaches. Declaration of Jane Roe (November 14, 2007) (“Roe Dec.”) at ¶ 4, CP 261. Her symptoms included chronic pain, nausea, blurred vision, and sensitivity to light. *Id.* at ¶ 5. Ms. Roe’s migraine headaches occurred frequently and became more severe over time. *Id.* at ¶ 4. To treat the migraines, Ms. Roe and her doctors experimented with traditional medicines for more than a year before she was authorized to use medical marijuana. *Id.* at ¶ 6; CP 314-18. Indeed, Ms. Roe and her

² Ms. Roe is bringing this action under the pseudonym “Jane Roe” because federal law does not permit the medical use of marijuana. She is more concerned about federal law enforcement officials seizing her small supply of medical marijuana than she is concerned about being criminally prosecuted. Such federal criminal prosecutions are almost unheard of.

doctors tried six different over-the-counter medications and four different prescription medications before she sought authorization to use medical marijuana. CP 314-18. None of these medications effectively treated her migraines and many caused adverse side effects. Roe Dec. at ¶ 6, CP 261. Ms. Roe's physician eventually advised her to discontinue all use of over-the-counter medicines to treat her migraines. CP 317. But by the spring of 2006, Ms. Roe's condition grew more severe. Roe Dec. at ¶ 7, CP 261. She began having incapacitating migraines on a daily basis. *Id.* These migraines left her unable to work, study, sleep, walk, or interact with her husband or children. *Id.*

Ms. Roe ultimately became a patient of Dr. Thomas Orvald, M.D., at the T.H.C.F. Medical Clinic in Bellevue, Washington. *Id.* at ¶ 8. Dr. Orvald is licensed to practice medicine in Washington. *Id.* On June 26, 2006, at Dr. Orvald's office, Ms. Roe filled out a "Pain Inventory Questionnaire." *Id.* at ¶ 9. Ms. Roe stated that during the past 24 hours, her migraine pain ranged from a "5" to an "8" on a scale of 1 to 10. CP 266. Her average migraine pain was an "8." *Id.* Conventional pain treatments and medication had provided only about 20% relief. CP 267. The extent to which the migraines interfered with Ms. Roe's overall enjoyment of life was a "9." *Id.*

On June 26, 2006, Dr. Orvald provided Ms. Roe with "Documentation of Medical Authorization to Possess Marijuana for Medical Purposes in Washington State." Roe Dec. at ¶ 10, CP 261; CP

269. In accordance with RCW 69.51A.010, Dr. Orvald stated that he was a physician licensed in the State of Washington and that he was treating Ms. Roe for a debilitating condition. CP 269. Dr. Orvald stated that he had advised Ms. Roe of the potential risks and benefits of medical marijuana and assessed her medical history and medical condition. *Id.* He concluded that the potential benefits of the medical use of marijuana would likely outweigh the health risks for Ms. Roe. *Id.* Ms. Roe was a Washington resident at the time she received this authorization and the diagnosis of having a debilitating medical condition. Roe at ¶ 10, CP 262.

After receiving her medical marijuana authorization from Dr. Orvald, Ms. Roe used medical marijuana in full compliance with MUMA. *Id.* at ¶ 11. Medical marijuana was far more effective than any other treatment Ms. Roe had tried for her migraines. *Id.* Her migraine headaches largely disappeared. *Id.* She used marijuana in such small doses that it had no side effects. *Id.* at ¶ 12. It did not negatively affect her ability to work or take care of her children. *Id.* Ms. Roe never used marijuana in front of her children. *Id.* Taking a small amount of medical marijuana at night, in her own home, enabled Ms. Roe to be gainfully employed. *Id.*

On October 3, 2006, Ms. Roe was hired as a Customer Service Consultant by Respondent TeleTech Customer Care Management (Colorado), LLC (“TeleTech”). *Id.* at ¶ 13; CP 271-72. Customer Service Consultant was a non-safety sensitive position. *Id.* at ¶ 13; CP 262. The

position's duties were to answer incoming calls and e-mails promptly; provide concise quality customer service in a professional and courteous manner; and interact with fellow team members. CP 248. The qualifications Ms. Roe demonstrated in order to be hired included "manual dexterity and motor coordination ability" and "eye coordination ability." *Id.*

Ms. Roe received a copy of TeleTech's substance abuse policy for applicants on October 3. Roe Dec. at ¶ 14, CP 262; CP 274-77. When Ms. Roe learned that she would have to take a drug test, she informed TeleTech that she used medical marijuana at home and that she had a medical authorization to do so. Roe Dec. at ¶ 15, CP 262. Ms. Roe offered to provide TeleTech with a copy of her medical marijuana authorization, but TeleTech declined her offer. *Id.* Ms. Roe took the drug test on October 5. *Id.* at ¶ 16.

Ms. Roe started work at TeleTech on October 10. *Id.* at ¶ 17. That same day she received a copy of TeleTech's substance abuse policies for employees. *Id.* at ¶ 18; CP 279-87. Her drug test results also came back on October 10. Not surprisingly, she tested positive. Roe Dec. at ¶ 19, CP 263; CP 288. The positive result was caused by her at-home use of medical marijuana in accordance with her medical authorization. Roe Dec. at ¶ 19, CP 263.

Ms. Roe's drug test had been administered by ChoicePoint Workplace Solutions. CP 288. ChoicePoint accepts medical marijuana as

an explanation for a positive drug test when the employee resides in a state where medical marijuana is legal, the employee has documentation from her physician supporting the medical use of marijuana, and the employer has a policy of accepting medical marijuana. CP 251-52. The day of Ms. Roe's positive drug test result, Mary Ann Peltier, a ChoicePoint supervisor, wrote Llibertat Ros in TeleTech's Bremerton Talent Acquisition Department about Ms. Roe's situation. *Id.* Ms. Peltier asked Ms. Ros for a letter describing TeleTech's medical marijuana policy. *Id.* Ms. Peltier also forwarded ChoicePoint's own policy on medical marijuana to Ms. Ros. *Id.*

Despite Ms. Roe's positive drug test, she continued to work at TeleTech for over a week. Roe Dec. at ¶ 20, CP 263. Her use of medical marijuana in no way impaired her ability to do her job. *Id.* On October 18, TeleTech discharged Ms. Roe from employment solely because she had tested positive for medical marijuana. *Id.* at ¶ 21; CP 290. Ms. Roe has never used marijuana in the workplace, at TeleTech or anywhere else. Roe Dec. at ¶ 22, CP 263.

C. Procedural Background.

Ms. Roe filed this action in Kitsap County Superior Court on February 13, 2007. CP 52-55. She filed an amended complaint on February 26 seeking reinstatement and damages against TeleTech for terminating her in violation of MUMA and Washington public policy. CP 1-4. On March 27 TeleTech removed this case to the United States

District Court for the Western District of Washington on the ground that, contrary to the express assertions in Ms. Roe's complaint, the amount in controversy exceeded \$75,000. CP 10-21. On June 6, 2007 the federal district court granted Ms. Roe's motion to remand the case to the Superior Court. CP 151-158.

After exchanging written discovery, the parties submitted cross motions for summary judgment on November 16. Ms. Roe subsequently filed motions to strike two of TeleTech's filings: (1) a motion to strike certain exhibits attached to the Declaration of Molly Daily in Opposition to Plaintiff's Motion for Summary Judgment; and (2) a motion to strike certain exhibits attached to the Supplemental Declarations of James Shore in Support of Defendant's Motion for Summary Judgment.

The Superior Court held oral argument on December 14, 2007. On February 1, 2008, the Court denied Ms. Roe's motion for summary judgment and granted TeleTech's motion. CP 361-62. The Superior Court did not issue a written opinion explaining its reasoning. The Superior Court granted Ms. Roe's motion to strike with respect to Ms. Daily's declaration. *Jane Roe v. TeleTech*, 07-2-00406-0, Docket # 46. The Court did not issue a ruling on Ms. Roe's motion to strike with respect to the supplemental declarations of Mr. Shore, but did not include either Mr. Shore's supplemental declaration or second supplemental declaration among the items the Court considered on summary judgment. *See* CP 361-62.

On February 27 Ms. Roe filed a notice of appeal to this Court. CP 363-67. On March 27 the Superior Court issued an order clarifying that all briefs and declarations filed in the case had been called to its attention within the meaning of CR 56(f) but that it did not consider either of Mr. Shore's supplemental declarations or a Praecipe related to those declarations in issuing its summary judgment rulings. CP 368-70. TeleTech did not appeal either (1) the Superior Court's grant of Ms. Roe's motion to strike certain exhibits attached to Ms. Daily's declaration or (2) the Superior Court's decision not to consider Mr. Shore's Supplemental and Second Supplemental Declarations and related Praecipe.

IV. ARGUMENT

A. **TeleTech Violated MUMA when it Discharged Ms. Roe Solely Because She Used Medical Marijuana at Home.**

1. **Ms. Roe is a "Qualifying Patient" Who Used Medical Marijuana in Accordance with MUMA.**

At all times pertinent to this action, Ms. Roe met the statutory requirements of a "qualifying patient" under RCW 69.51A.010(3). The language of that section is plain and unambiguous. *State v. Hanson*, 138 Wn. App. 322, 326, 157 P.3d 438 (2007). To be a "qualifying patient" one must: (1) be a patient of a Washington licensed physician; (2) have been diagnosed with a debilitating disease; (3) have been a resident of the state at the time of the diagnosis; (4) been advised of the risks and benefits of the medical use of marijuana; and (5) been advised by her physician that she may benefit from the medical use of marijuana. *Id.* Ms. Roe met all these criteria. Moreover, a written authorization from a physician on

an appropriate Washington State Medical Association form provides conclusive proof that a person is a qualifying patient within the meaning of MUMA. *Id.* at 325-26.

The “Documentation of Medical Authorization to Possess Marijuana for Medical Purposes in Washington State” that Dr. Orvald provided Ms. Roe on June 26, 2006 establishes that she met the requirements appropriate to her status under MUMA in October 2006, when she was both hired and fired by TeleTech. Ms. Roe’s medical authorization is on a form recommended by the Washington State Medical Association. Dr. Orvald was and is licensed to practice medicine in Washington, in compliance with the requirements of *State v. Tracy*, 158 Wn.2d 683, 147 P.3d 559 (2006). Dr. Orvald found that the benefits of the medical use of marijuana would likely outweigh the health risks to Ms. Roe. Thus, she not only was a “qualifying patient” but also possessed “valid documentation” under MUMA. RCW 69.51A.010(5). There can be no doubt that Ms. Roe met all of the requirements appropriate to her status under the Act.

2. MUMA Requires Employers to Accommodate the Off-Site Medical Use of Marijuana by their Employees.

Initiatives are to be interpreted according to the general rules of statutory construction. *City of Spokane v. Taxpayers of Spokane*, 111 Wn.2d 91, 97, 758 P.2d 480 (1988). Those general rules are: (1) a statute that is clear on its face is not subject to judicial interpretation; (2) an ambiguity will be deemed to exist if the statute is subject to more than one

reasonable interpretation; (3) if a statute is subject to interpretation, it will be construed in a manner that best fulfills the legislative purpose and intent; and (4) in determining the legislative purpose and intent the court may look beyond the language of the act to its legislative history. *In re Marriage of Kovacs*, 121 Wn.2d 795, 804, 854 P.2d 629 (1993). Remedial statutes should be construed liberally to promote their purposes. *State v. Grant*, 89 Wn.2d 678, 685, 575 P.2d 210 (1978).

MUMA's preamble demonstrates its broad remedial purposes:

The People find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.

RCW 69.51A.005. MUMA's preamble shows that the People intended the law to do much more than just protect qualifying patients from criminal prosecution. Indeed, Washington courts have uniformly held that MUMA's purpose is to allow patients with terminal or debilitating illnesses to use medical marijuana when authorized by their treating physicians based on their professional medical judgment and discretion. *State v. Hanson*, 138 Wn. App. 322, 329, n.1, 157 P.3d 438 (2007); *State v. Ginn*, 128 Wn. App. 872, 877, 117 P.3d 1155 (2005); *State v. Butler*, 126 Wn. App. 741, 748, 109 P.3d 493 (2005); *State v. Shepherd*, 110 Wn. App. 544, 549, 41 P.3d 1235 (2002).

Other parts of MUMA confirm that it is not just a medical marijuana decriminalization law. In interpreting a statute, a court should

give effect to every word, clause, and sentence if at all possible. Statutes should be construed so that no part is rendered meaningless. *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 13, 817 P.2d 1359 (1991); *State v. Bash*, 130 Wn.2d 594, 602, 925 P.2d 978 (1996); *State v. Seek*, 109 Wn. App. 876, 881-82, 37 P.3d 339 (2002). MUMA expressly protects qualifying patients from being “penalized in any manner, or denied any right or privilege” as a result of using medical marijuana in accordance with the Act. RCW 69.51A.040(1). The language of RCW 69.51A.040(1) is not simply a restatement of the affirmative defense to criminal prosecution set forth elsewhere in the section. The language of this provision is sweeping. It prohibits the denial of “any right or privilege.” If MUMA’s purpose was limited to providing immunity from state criminal prosecutions, as TeleTech suggested to the Superior Court, there would have been no reason for the People to have enacted RCW 69.51A.040(1).

To be sure, RCW 69.51A.040(1) does not set forth a specific list of rights and privileges that cannot be denied because someone uses medical marijuana in accordance with MUMA. But any reasonable voter would have understood that employment was among the rights and privileges the statute intended to protect. Undefined terms in an initiative should be deemed to have their commonly accepted legal meaning. *ATU 587 v. State*, 142 Wn.2d 183, 219-20, 11 P.3d 762 (2000). The law frequently describes employment as a “right” or a “privilege.” For example, both federal and state civil rights statutes prohibit discrimination with respect to

the “privileges” of employment. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (Title VII of the Civil Rights Act of 1964); 29 U.S.C. § 623(a)(1) (Age Discrimination in Employment Act of 1967); 42 U.S.C. § 12112(a) (Americans With Disabilities Act of 1990); RCW 49.44.090(1) (age discrimination); RCW 49.60.040(d)(ii) (disability discrimination); and RCW 49.60172(2) (HIV employment). Other state statutes likewise refer to employment as a “privilege.” *See, e.g.*, RCW 47.64.001(9); RCW 48.43.065(2)(a). *See also White v. State*, 131 Wn.2d 1, 10, 929 P.2d 396 (1997) (“public employment was considered a privilege that could be conditioned or denied”).

Other provisions of MUMA confirm that employment was one of the privileges that the statute intended to protect. As originally enacted, RCW 69.51A.060(4) stated: “[N]othing in this chapter requires any accommodation of any medical *use* of marijuana *in* any place of employment, *in* any school bus or *on* any school grounds, or *in* any youth center.” (emphasis supplied). Read together, RCW 69.51A.040(1) and RCW 69.51A.060(4) provide that an employer may not penalize an employee or deny her the privilege of employment because of her use of medical marijuana in accordance with MUMA, but an employer need not accommodate an employee’s use of medical marijuana on-site. The necessary corollary of this limitation is that an employer has a duty to accommodate an employee’s off-site use of medical marijuana.

TeleTech argued to the Superior Court that RCW 69.51A.060(4) permits an employer to exclude an employee simply because she may have detectable traces of marijuana in her system when she arrives “on-site.” TeleTech’s argument is contrary to the plain language of the Act. MUMA defines “medical use of marijuana” to mean “the production, possession, or administration of marijuana” . . . “for the exclusive benefit of a qualifying patient in the treatment of his or her terminal or debilitating illness.” RCW 69.51A.010(1). Under the express terms of the statute, a person “uses” marijuana when she produces, possesses, or administers the drug. The phrase “medical use of marijuana,” and the terms “use,” “in,” and “on” unambiguously confine RCW 69.51A.060(4) to excusing employers from a duty to accommodate an employee’s *on-site use* of medical marijuana within the workplace. An employee who does not “possess”, “produce” or “administer” marijuana in the workplace does not “use” medical marijuana “on site” and therefore must be accommodated.

The duty of employers to accommodate the off-site, but not the on-site, use of medical marijuana is evident from the text of RCW 69.51A.060(4). But to the extent that this Court finds that provision to be ambiguous, the testimony of Initiative 692 co-drafter and sponsor Timothy Killian, the 1998 voter’s pamphlet, and the 2007 clarifying amendments enacted by the Legislature and signed by the Governor remove any doubt that MUMA requires employers to accommodate off-site medical use of marijuana by employees who are qualifying patients.

Judicial interpretation of a legislative enactment by initiative should focus on “the voters’ intent and the language of the initiative as the average informed lay voter would read it.” *State ex rel. Public Disclosure Comm. v. Davenport*, 156 Wn.2d 543, 554, 130 P.3d 352 (2006). Courts may also rely on statements contained in the official voter’s pamphlet. *Id.* In determining legislative intent, Washington courts pay particular attention to the statements of prime drafters and sponsors of the enactment at issue. *Kovacs*, 121 Wn.2d at 807-08; *Duke v. Boyd*, 133 Wn.2d 80, 86, 942 P.2d 351 (1997). Courts presume that the drafters and sponsors of legislation understand the meaning of the language they propose. *Duke*, 133 Wn.2d at 87. Because state ballot measures adopted by the People are interpreted in the same manner as bills enacted by the Legislature, *see, e.g., ATU 587 v. State*, 142 Wn.2d 183, 205-06, 11 P.3d 762 (2000), courts should likewise pay particular attention to the statements of drafters and sponsors of an initiative. *See id.* at 223.

The declaration submitted by Mr. Killian in this case provides powerful evidence of the intended meaning and scope of MUMA. He confirms MUMA was always intended to prohibit an employer from automatically terminating a qualifying patient who uses medical marijuana in accordance with the Act based solely on a positive drug test. He further states that by providing that employers are not required to accommodate an employee’s medical use of marijuana *in* the workplace, the Initiative was intended to require employers to accommodate an employee’s

medical use of marijuana outside the workplace, as long as that use complied with the Act. Killian Dec.

The ballot title and voter's pamphlet for Initiative 692 and the Legislature's 2007 clarifications to MUMA all reinforce Mr. Killian's testimony. The ballot title for Initiative 692 confirms that it was intended to provide far more protection for the medical use of marijuana than just immunity from criminal prosecution. The ballot title was: "Shall the medical use of marijuana for certain terminal or debilitating conditions be permitted, and physicians authorized to advise patients about medical use of marijuana?" CP at 253. This is very broad language. It shows the scope of the Initiative was intended to be much broader than just creating a defense against criminal prosecutions. The Act's statutory title, the "Washington State Medical Use of Marijuana Act" similarly evinces a legislative concern far beyond criminal consequences.

Moreover, if MUMA were intended to be just a medical marijuana decriminalization statute, there would be absolutely no need for the voters to have enacted RCW 69.51A.060. That provision establishes the extent of the obligations of private actors – including physicians, health insurance providers, employers, schools, and youth centers – to accommodate the medical use of marijuana under the Act. This has nothing to do with decriminalization. The voter's pamphlet for Initiative 692 reflects the importance of this provision. The pamphlet instructed voters that the Initiative "[p]rohibits marijuana use *while* driving, or *in* the

workplace.” CP 258 (emphasis supplied). Any reasonable voter would have understood that MUMA did not give qualified patients the right to use medical marijuana *while* working or driving, but that the measure nevertheless protected them from the loss of either the privilege of employment or driving because of their use of medical marijuana at other times and in other places in accordance with the Act.

The Legislature enacted clarifying amendments to MUMA in 2007. As part of those clarifications, the Legislature inserted the term “on-site” into RCW 69.51A.060(4) to ensure that the limitations on the duty of accommodation imposed by that provision would not be misinterpreted and read more broadly than was originally intended. “[W]hen a former statute is amended, or an uncertainty is clarified by subsequent legislation, the amendment is strong evidence of what the Legislature intended in the first statute.” *State v. Baldwin*, 109 Wn. App. 516, 527, 37 P.3d 1220 (2001) (citing *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 755, 953 P.2d 88 (1998)). The 2007 amendments were intended to clarify rather than change existing law. Indeed, the Washington Legislature went out of its way to characterize the 2007 amendments as nothing more than a clarification of existing law. Section 1 of the Bill expressly states: “The legislature intends to *clarify the law* on medical marijuana so that the lawful use of this substance is not impaired . . .” CP 240 (emphasis supplied). The amendments were also “intended to provide *clarification*” to “all participants in the judicial system.” *Id.*

The 2007 clarifications remove any possible doubt that MUMA requires an employer to accommodate the off-site medical use of marijuana by its employees. Those clarifications show that the limitations on workplace accommodation originally set forth in Initiative 692 and codified at RCW 69.51A.060(4) were always intended to apply only to the *on-site* medical use of marijuana. The House Report states: “Correctional facilities are added to the list of *places* where the *on-site* medical use of marijuana does not need to be accommodated.” CP 210 (emphasis supplied). This further establishes that MUMA requires, and always has required, an employer to accommodate an employee’s off-site medical use of marijuana in accordance with the Act.

3. An Employer Violates its Duty of Accommodation Under MUMA by Having a Blanket Policy Against the Employment of Qualified Patients Who Use Medical Marijuana at Home.

As shown in the preceding section, MUMA’s duty of employer accommodation is firmly rooted in the statute’s text, legislative history, and purpose. Although MUMA does not delineate the precise nature of the “accommodation” employers must provide to employees who use medical marijuana, the statute’s use of the term “accommodation” does not occur in a legal vacuum. This Court must presume that the People and the Legislature deliberately chose the term “accommodation” because of its well-established meaning in the context of disability discrimination and

other areas of employment law.³ Courts must presume that those who wield the legislative power are familiar with previously enacted laws and judicial constructions of those laws. *E.g.*, *Leonard v. City of Bothell*, 87 Wn.2d 847, 853-54, 557 P.2d 1306 (1978).

Where the Legislature mandates that an employer provide a workplace accommodation to a particular class of employees, the employer must make exceptions to its usual workplace policies for those employees. *See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397-98, 122 S. Ct. 1516, 152 L. Ed 2d. 589 (2002). A workplace “accommodation” by definition involves an employer’s adjustment of its standard procedures and practices. *See id.*; *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145, 94 P.3d 930 (2004); *Buckingham v. United States*, 998 F.2d 735, 741 (9th Cir. 1993) (noting that requiring employers to alter existing policies or procedures is “the essence of reasonable accommodation”).

TeleTech terminated Ms. Roe solely because of its voluntarily adopted blanket policy prohibiting the employment of anyone who uses marijuana.⁴ TeleTech’s policy does not differentiate between people who

³ To be sure, Ms. Roe has not brought a failure to accommodate claim under RCW 49.60. When Ms. Roe was terminated in October 2006, *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006), was still the law in Washington and she did not qualify under the *McClarty* definition of “disability.” But the concept of workplace accommodation is not limited to disability law. The law also requires employers to make accommodations for an employee’s pregnancy, *see* WAC 162-30-020, and her religion. *See Trans World Airlines v. Hardison*, 432 U.S. 63, 74, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977).

⁴Certain recipients of federal contracts are required by federal law to maintain an absolutely drug-free workplace. In such a situation, the

use marijuana at home for recreational purposes and those who use it under a physician's supervision in accordance with MUMA. If MUMA's duty of employer accommodation means anything, it means that TeleTech cannot treat employees who use marijuana for medical purposes in accordance with the statute in the same manner as employees who use marijuana recreationally. In short, MUMA's mandate of accommodation forbids an employer from having a policy such as TeleTech's that absolutely prohibits the employment of individuals who use medical marijuana off-site in accordance with the Act.

This does not mean, however, that an employer must employ someone who uses medical marijuana no matter what the circumstances. The very concept of workplace accommodation requires an employer to make an individual assessment of an employee's particular capabilities and fitness for employment. *See, e.g.*, WAC 162-22-090(2) (requiring individualized assessment of an employee's capabilities and prohibiting employment decisions based on generalizations). In the context of MUMA, the duty to accommodate requires the employer to make an *individualized* assessment of whether an employee's off-site use of medical marijuana impairs her ability to perform her job. If the employee's off-site use medical marijuana does not adversely affect her ability to do her job, then the employer is required to allow that off-site

requirements of federal law would trump MUMA's duty of accommodation under the federal Constitution's Supremacy Clause. TeleTech does not have federal contracts requiring it to maintain a drug-free workplace at its Bremerton facility.

use. On the other hand, if an employee's off-site medical use of marijuana prevents her from performing the essential functions of her position, the employer need not accommodate that use.

In this case, it is undisputed that Ms. Roe's at-home use of medical marijuana had no impact on her ability to perform her job. To the contrary, marijuana was the only medication that effectively relieved the pain, nausea and other symptoms caused by debilitating migraine headaches and enabled her to come to work. Ms. Roe used medical marijuana at home when TeleTech hired her. The qualifications Ms. Roe demonstrated in order to be hired included "manual dexterity and motor coordination ability" and "eye coordination ability." None of these were adversely affected by her at-home medical use of marijuana. Ms. Roe worked at TeleTech without incident for over a week after her drug test results came back. TeleTech has never claimed that Ms. Roe's work performance was unsatisfactory or was impaired in *any* way.

As a general matter, the law of workplace accommodation recognizes that specific and particularized workplace safety concerns may sometimes trump an employee's right to a workplace accommodation. *See, e.g.*, 42 U.S.C. § 12113(b) (accommodation not required when individual poses "a direct threat to health or safety of other individuals in the workplace"). An employer must show a workplace safety threat by objective evidence and may not rely on fear and stereotypes. *E.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 648-49, 118 S. Ct. 2196, 141 L. Ed. 2d

540 (1998). There is no evidence whatsoever in the record that Ms. Roe's at-home use of medical marijuana posed a threat to the safety of anyone in the workplace. Ms. Roe did not hold a safety-sensitive position at TeleTech. Ms. Roe's job as a Customer Service Consultant required her to answer the phone in a call-center and respond to Internet inquires. This Court should reject any claim by TeleTech that Ms. Roe's at-home use of medical marijuana posed a workplace safety risk.

In sum, TeleTech violated MUMA and its duty of employer accommodation by depriving Ms. Roe of the privilege of employment solely because of her at home use of medical marijuana in accordance with the Act.

4. Ms. Roe Has an Implied Right of Action under MUMA.

MUMA does not contain an explicit civil cause of action to redress violations of its provisions. Washington courts have a long history of recognizing implied rights of action to enforce remedial statutes. *See Bennett v. Hardy*, 113 Wn.2d 912, 919, 784 P.2d 1258 (1990). Courts assume that neither the Legislature nor the People will enact a remedial statute for an identifiable class of persons without enabling members of that class to enforce those rights. *See id.* at 919-20.

When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purposes of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a

suitable existing tort action or a new cause of action analogous to an existing tort action.

Id. at 920 (quoting Restatement (Second) of Torts § 874A (1979)). To determine whether an implied cause of action is warranted, a court considers three questions: (1) whether the plaintiff is within the class of persons for whose benefit the statute was enacted; (2) whether the legislative intent supports creating a remedy, and (3) whether the underlying purpose of the legislation is consistent with inferring a remedy. *MW v. DSHS*, 149 Wn.2d 589, 596, 70 P.3d 954 (2003).

All three factors supporting recognition of a private cause of action are present here. As a qualifying patient who used medical marijuana in accordance with the Act, Ms. Roe is within the class of persons for whose benefit the statute was enacted. She is being denied the privilege of employment because of her physician-authorized medical use of marijuana in compliance with the statute. The legislative intent behind MUMA supports creating a remedy in these circumstances. There is nothing in the underlying purpose of the legislative scheme of MUMA that is inconsistent with inferring a remedy. Without an implied right of action, MUMA's guarantees and prohibitions would be mere words on a piece of paper. Recognizing a private right of action to enforce the statute is not only *consistent* with MUMA's purpose, but *necessary* to protect the right of qualifying patients to use medical marijuana guided by their physician's care and supervision.

B. Washington Public Policy Forbids an Employer from Terminating an Employee Solely Because She Uses Medical Marijuana at Home.

If the Court holds that TeleTech's dismissal of Ms. Roe violated MUMA and that the statute provides her with a make-whole remedy, it need not reach the question whether her discharge also violated Washington policy. If, however, the Court holds that Ms. Roe does not state a claim directly under MUMA, the Court should still hold that TeleTech wrongfully terminated her in violation of public policy. An employer may not terminate an employee for exercising a legal right or privilege. *Hubbard v. Spokane County*, 146 Wn.2d 699, 707-08, 50 P.3d 602 (2002). In a wrongful termination case:

(1) The plaintiff must prove the existence of a clear [mandate of] public policy (the clarity element).

(2) The plaintiff must prove that discouraging the conduct in which [the employee] engaged would jeopardize the public policy (the jeopardy element).

(3) The plaintiff must prove that the public-policy-linked conduct caused the dismissal (the causation element).

(4) The defendant must not be able to offer an overriding justification for the dismissal (the absence of justification element).

Korslund v. Dyncorp Tri-Cities Servs Inc., 156 Wn.2d 168, 178, 125 P.3d 119 (2005).

Ms. Roe can easily satisfy the first element. MUMA constitutes a clear statement of public policy that "the medical use of marijuana by

patients with terminal or debilitating illnesses is a personal, individual decision, based upon his or her physician's professional medical judgment and discretion." RCW 69.51A.005. This public policy is expressly stated in the text of the statute itself. It could not be clearer. The policy has also been judicially recognized. Washington courts have uniformly ruled that the very purpose of MUMA is to protect the right of qualifying patients to use medical marijuana in accordance with the advice and supervision of their physicians. *State v. Hanson*, 138 Wn. App. 322, 329, n.1, 157 P.3d 438 (2007); *State v. Ginn*, 128 Wn. App. 872, 877, 117 P.3d 1155 (2005); *State v. Butler*, 126 Wn. App. 741, 748, 109 P.3d 493 (2005); *State v. Shepherd*, 110 Wn. App. 544, 549, 41 P.3d 1235 (2002).

Ms. Roe can also easily establish the second element of her public policy tort. To establish jeopardy, the plaintiff must show that he or she engaged in particular conduct, and that discouraging that conduct would jeopardize public policy. *Korlund*, 156 Wn.2d at 181. Ms. Roe used medical marijuana in accordance with MUMA and based on her physician's medical judgment. That is *precisely* the conduct that MUMA was designed to protect. MUMA was enacted to protect the right of qualifying patients to use medical marijuana to treat debilitating illnesses. An employers' automatic discharge of an employee solely because she exercises that right *plainly* jeopardizes the public policy underlying it.

There is no dispute that Ms. Roe's public policy-linked conduct caused her termination. The only reason that TeleTech discharged Ms.

Roe was because her at-home use of medical marijuana in accordance with MUMA caused a positive result on the drug test that TeleTech required her to take on October 5, 2006. Therefore, Ms. Roe can easily establish the first three elements of the tort of wrongful discharge.

TeleTech cannot establish an overriding justification for Ms. Roe's dismissal. Its voluntary decision to adopt a company policy of a drug-free workplace does not override the strong public policy of MUMA. The People of Washington and the State Legislature have authorized the medical use of marijuana to treat debilitating illnesses. In so doing, they made a deliberate decision to treat qualifying patients differently from other individuals who use marijuana and other drugs recreationally. Employers are required to make the same distinction when they require drug tests for their job applicants and employees. Otherwise, MUMA's intended goal of ensuring that patients with terminal or debilitating illnesses are able to use medical marijuana based upon the advice of their physicians would be nullified.

In an attempt to justify its decision to terminate Ms. Roe, TeleTech presented the Superior Court with a parade of horrors associated with the impact of illegal drug use in the workplace such as declining productivity and rising absenteeism, health care costs, sick leave, and disciplinary problems. But TeleTech's alarmist rhetoric is without any specific evidentiary support. TeleTech ignored the distinction at the heart of MUMA between the medical use of marijuana to treat debilitating

illnesses and the recreational use of marijuana and other drugs. There is no evidence that the problems associated with illegal drug abuse occur in patients who use medical marijuana under their doctors' supervision and in full compliance with state law. See *Ross v. RagingWire Telecommunications, Inc.*, 42 Cal. 4th 920, 941, 174 P.3d 200, 70 Cal. Rptr. 3d 382 (2008) (Kennard, J., dissenting and concurring). To the contrary, and as Ms. Roe's own situation demonstrates, medical marijuana often enables patients to be productive employees by allowing them to effectively manage extreme pain and other debilitating symptoms with few, if any, side-effects.

TeleTech may argue that Ms. Roe's wrongful termination claim must fail because the possession and use of marijuana remains illegal under federal law. Wrongful discharge in violation of public policy is a state tort claim that is intended to vindicate *Washington* public policy, not federal law. This Court has expressly held that a wrongful discharge claim must be based on "a clear mandate of *Washington* public policy." *Sedlacek v. Hillis*, 145 Wn.2d 379, 393, 36 P.3d 1014 (2001) (emphasis supplied). In that case, the Court rejected a wrongful discharge claim based on an associational disability discrimination claim, which is cognizable under the federal Americans with Disabilities Act ("ADA"), but not Washington's Law Against Discrimination ("WLAD"). In reaching that decision, the Court reiterated that "Washington statutes and case law [are the] primary sources of Washington public policy." *Id.* at

388. *Sedlacek* teaches that where there is a conflict between federal and Washington public policy, Washington public policy prevails (absent any issue of pre-emption, which does not exist in this case).

State courts are not in the business of enforcing federal criminal law. Indeed, state courts have no jurisdiction to enforce federal criminal laws. For this reason, the legal status of medical marijuana under federal criminal law has no bearing on Washington public policy. States are “independent sovereigns in our federal system.” *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). The individual states “possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.” *DeCanas v. Bica*, 424 U.S. 351, 356, 96 S. Ct. 933, 47 L. Ed. 2d 43 (1976). In voting to approve Initiative 692 and enact MUMA, the voters and legislators of Washington made a deliberate decision to break with the federal government regarding the legal status of medical marijuana. The fact that Washington public policy diverges from federal policy is of absolutely no consequence to Ms. Roe’s state wrongful discharge claim.

“[R]espect for the sovereign States that comprise our Federal Union” imposes a duty “to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to serve as a laboratory in the trial of novel social and economic experiments without risk to the rest of the country.” *United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483, 502, 121 S. Ct.

1711, 149 L. Ed. 2d 722 (2001) (Stevens, J., dissenting) (internal quotations omitted). Washington has a long history of breaking with the federal government on fundamental public policy issues. MUMA is not the first time Washington has extended legal rights and benefits to individuals whose conduct violates federal law.

The very presence of undocumented immigrants in Washington is illegal under federal law. Nonetheless, in 2003, the Washington Legislature expanded the definition of a “resident” student to grant undocumented immigrants the benefit of in-state tuition rates at public universities and colleges. See Engrossed House Bill 1079, “An Act Relating to Resident Tuition at Institutions of Higher Education,” Section 1(e), codified as RCW 28B.15.012(e), CP 322-27. When signing that law, the Governor explicitly vetoed a section that would have limited the in-state tuition benefit to students whose families hold work visas, temporary protected status visas, green cards, or who have received amnesty from the federal government. See CP 326-27.

A Washington employer cannot refuse to comply with a state public policy protecting certain employee conduct on the basis that federal law prohibits the same conduct. Washington repealed its miscegenation statute in 1888, 79 years before the U.S. Supreme Court declared such statutes unconstitutional in *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). See *Wash. Terr. Laws of 1888* § 2380, et seq.; *Wash Terr. Laws of 1866*, p. 81. Assume that 50 years ago there was

a federal law banning interracial marriage. If a Washington employer terminated a White employee solely because she was married to a Black man, the employer would have undoubtedly violated Washington state public policy even though the employee's conduct was in direct violation of federal law. The same is true here. Discharging an employee solely because she uses medical marijuana in accordance with state law is still a violation of *Washington* public policy regardless of the status of the employee's conduct under federal law.

C. California's *Ross v. RagingWire Telecommunications Inc.* Decision is of No Persuasive Value in Deciding this Case.

TeleTech will likely rely heavily on the case of *Ross v. RagingWire Telecommunications, Inc.*, 42 Cal. 4th 920, 174 P.3d 200, 70 Cal. Rptr. 3d 382 (2008). There a divided California Supreme Court held that the sole purpose of California's medical marijuana law was to protect patients from criminal prosecution and that the law did not address the employment relationship in any manner. While *Ross* deals with some of the issues that are before the Court in this case, it construed a medical marijuana law that is quite different than Washington's.

Ross actually involved a claim for disability discrimination under California's Fair Employment and Housing Act, which is that state's equivalent to the WLAD. In 2001 RagingWire had offered Mr. Ross a job as a lead systems administrator. It required him to pass a pre-employment drug test. Mr. Ross told the clinic administering the test that he had a

physician's recommendation for the medical use of marijuana. He began working for RagingWire. A few days later, his drug test came back positive. RagingWire then terminated Mr. Ross. 42 Cal. 4th at 924-25. He sued claiming disability discrimination and wrongful termination in violation of public policy. He argued that California's medical marijuana law, entitled the Compassionate Use Act, had implicitly amended the state's disability discrimination act to preclude his termination.

The California Supreme Court rejected his claim by a vote of five to two. California voters had enacted the Compassionate Use Act in 1996. At the time of Mr. Ross' termination in 2001, California's medical marijuana law made no mention whatsoever of employers or employment. Given this, the *Ross* majority held that "[n]othing in the text or history of the Compassionate Use Act suggests that the voters intended the measure to address the respective rights and obligations of employers and employees." 42 Cal. 4th at 296. The majority reasoned that "the question before us is not whether the voters had the power to change employment law, but whether they actually intended to do so. . . . The Compassionate Use Act [] simply does not speak to employment law." *Id.* Instead, the *Ross* majority held that the voters' sole purpose in enacting the Compassionate Use Act was to protect medical marijuana users from state criminal prosecution. *Id.* at 929.

By contrast, Washington courts have uniformly held that our state's voters had a much broader purpose in mind when they enacted

MUMA. *See* at pp. 2, 14, 28, *supra*. MUMA’s broader purpose would be eviscerated if qualifying patients could lose their jobs just for engaging in the very conduct authorized by the statute. Unlike MUMA, California’s medical marijuana law does not protect qualifying patients from being denied “any right or privilege” as a result of engaging in activities that are authorized by the statute. Instead, the California medical marijuana law protects *only doctors* who recommend medical marijuana from being denied “any right or privilege” as a result of *their* conduct. *See Ross*, 40 Cal. 4th at 935; Cal. Health & Safety Code § 11362.5(c). This difference is in and of itself powerful evidence of MUMA’s broader intent.

Moreover, from the time of its enactment a decade ago, MUMA has contained a provision referring to an employer’s duty to accommodate the medical use of marijuana, as long as the use did not occur at work. Given that Initiative 692 specifically referred to an employers’ duty to accommodate the use of medical marijuana, it is evident that Washington voters did intend to address the employment relationship when they enacted MUMA.

Two years after Mr. Ross’ termination, the California Legislature enacted a provision containing language somewhat similar to that found in RCW 69.51A.060(4): Beginning in 2003 Cal. Health & Safety Code § 11362.785(a) has provided: “Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of

employment. . .”. The *Ross* majority decided there was insufficient evidence the California Legislature had intended this language to create an employer duty to accommodate the off-site use of medical marijuana. 42 Cal. 4th at 930-31. In doing so, the majority gave no weight to the declarations of five legislators who had drafted the 2003 amendment. Those legislators testified that the very purpose of that amendment was to establish an employer’s duty to accommodate the off-site use of medical marijuana. In contrast to Washington, California does not give any consideration to the views of a bill’s authors and sponsors in determining Legislative intent. *Compare id. with Duke v. Boyd*, 133 Wn.2d 80, 86, 942 P.2d 351 (1997).

The *Ross* majority’s analysis of Cal. Health & Safety Code § 11362.785(a) should have no bearing on this Court’s interpretation of MUMA. That portion of the California Court’s opinion was pure *dicta*. The California Legislature enacted section 11362.785(a) two years after Mr. Ross’ termination and it was not a clarification of existing law. Thus, the majority’s analysis of Cal. Health & Safety Code § 11362.785(a) was truly unnecessary to the disposition of the case before them. The California Supreme Court should have held that this subsequent amendment had no bearing on Mr. Ross’ termination.

Furthermore, the *Ross* majority’s conclusion that section 11362.785(a) does not mean an employer must accommodate the medical use of marijuana except where such use occurs “on the property or

premises of any place of employment or during the hours of employment” is dubious at best. The two dissenting Justices rightly accused the majority of engaging in judicial activism and “disrespect[ing] the will of California’s voters.” *Ross*, 40 Cal. 4th at 934 (Kennard, J., concurring and dissenting). These Justices would have held that an employer cannot discharge an employee for doctor-recommended medical marijuana use, where that use “occurs during off-duty hours, does not affect the employee’s job performance, does not impair the employer’s legitimate business interests and provides the only effective relief for the employee’s chronic pain. . . .” *Id.*

Third, and most importantly, the 2007 clarifications to MUMA leave no doubt that the Washington Legislature understood the Act already imposed upon employers a duty to accommodate the off-site use of medical marijuana. The enactment of Senate Bill 6032 to “clarify the law on medical marijuana” in order to “prevent the impairment of the lawful use of medical marijuana” and to “permit qualifying patients to fully participate in the medical use of marijuana” clearly shows that MUMA has always required an employer to accommodate an employee’s off-site use of medical marijuana. If MUMA did not already impose an accommodation duty on employers, the Legislature would have had no reason to insert the words “on-site” into RCW 69.51A.060(4).

In sum, MUMA is altogether different than the California medical marijuana law construed in *Ross*. There is no doubt that Washington

voters and the Washington Legislature intended to address employment and create a duty to accommodate the off-site use of medical marijuana. Washington voters did not want to leave medical marijuana users with a “cruel choice”: “continue receiving the benefits of marijuana use . . . and become unemployed, giving up what may be their only source of income, or continue in their employment, discontinue marijuana treatment, and try to endure their chronic pain or other condition for which marijuana may provide the only relief.” *Ross*, 42 Cal. 4th at 937 (Kennard, J., concurring and dissenting). Washington voters did not intend to render “illusory the law’s promise that responsible use of marijuana as a medical treatment will be free of sanction.” *Id.*

The *Ross* dissenters agreed with their colleagues in the majority that because marijuana remains illegal under federal law, California’s policy regarding medical marijuana could not be “deemed sufficiently fundamental and substantial to support a common law wrongful discharge claim.” *See Ross*, 42 Cal. 4th at 942-43. California’s law of wrongful discharge is significantly different than Washington’s. In California a public policy must be “fundamental and substantial” before it is actionable. *See id.* at 932. Where there is direct conflict between state and federal policy, it may well be that the state policy cannot be said to rise to the level of a “fundamental” public policy. But Washington law does not require a public policy to “fundamental”; just that it be “clear.” *See supra* at p. 27. As set forth in section IV. B, above, Washington

public policy regarding the medical use of marijuana is clear, regardless of whether it is also deemed to be “fundamental.” Therefore, MUMA can support a claim for wrongful termination in violation of public policy.

For all these reasons, *Ross v. RagingWire* is of no value to this Court in interpreting Washington law.

V. CONCLUSION

Under the Superior Court’s decision an employer may fire an employee solely because of her physician-authorized, off-site use of medical marijuana, without *any* showing that her treatment interferes with her job performance or the employer’s legitimate business interests. This result conflicts with Washington public policy and with MUMA’s statutory text, legislative history, and judicially recognized purpose. The Superior Court’s decision undermines the intent of Washington’s voters and Legislature to prohibit employers from terminating qualifying patients solely because of their off-site use of medical marijuana in accordance with state law. The Superior Court’s decision also forces Washington citizens with debilitating illnesses to make a Hobson’s choice between their medical treatment and their livelihoods.

This Court should reverse the Superior Court’s decision and should order the grant of summary judgment to Ms. Roe.

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Respectfully submitted this 16th day of June 2008.

FRANK FREED SUBIT & THOMAS LLP

By: Michael C. Subit
Michael C. Subit, WSBA # 29189
Jillian M. Cutler, WSBA #39305
Attorneys for Appellant Jane Roe
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Dear Clerk of the Court,

Attached please find pdf copies of Appellant's Opening Brief and Certificate of Service regarding *Jane Roe v. Teletech Customer Care Management (Colorado) LLC*, No. 81283-7.

Sincerely,

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