38531-7-II

Supreme Court No. 81283-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JANE ROE,

Appellant,

v.

TELETECH CUSTOMER CARE
MANAGEMENT (COLORADO) LLC,

Respondent.

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BRIEF OF RESPONDENT

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I. INTRODUCTION

In 1998, the citizens of Washington passed Initiative 692 ("I-692"), the Washington State Medical Use of Marijuana Act (the "MUMA" or "the Act"). The Act conferred to qualifying patients and their primary caregivers an affirmative defense to criminal liability under state law for the use of marijuana for medical purposes. The Act also excepted physicians from the state's criminal laws for advising qualifying patients of the risks and benefits of medical marijuana. The intent and purpose of the MUMA is stated in the Act itself: that qualifying patients "shall not be found guilty of a crime under state law," that primary caregivers "shall also not be found guilty of a crime under state law," and that physicians "be excepted from liability and prosecution" for authorizing the use of medical marijuana. RCW 69.51A.005.[1] The voters did *not* express an intent that the MUMA would require employers to accommodate their employees' use of medical marijuana or that it would otherwise alter the general rule in Washington that employment is at will. To the contrary, the only reference to employment in the Act disclaimed any such intent:

---

[1] The MUMA was amended by the Legislature, effective July 2007. See infra at 7. Plaintiff-Appellant Jane Roe ("Roe") concedes that it is the original version of the Act that is at issue in this case, because her employment was terminated in October 2006. See Brief of Appellant ("App. Br.") at 3 n.1. Therefore, except where otherwise indicated, references to the Act will be to the original version, which was the version that was in effect at the time of Roe's termination. For the Court's reference, the original Act in its entirety can be found at CP 177-86.

"Nothing in this chapter requires any accommodation of any medical use of marijuana in any place of employment . . . ." RCW 69.51A.060(4).

In October 2006, Defendant-Respondent TeleTech Customer Care Management (Colorado), LLC ("TeleTech") made a conditional offer of at-will employment to Plaintiff-Appellant Jane Roe ("Roe"). In accordance with TeleTech's substance abuse policy, Roe's employment was contingent on her passing a pre-employment drug screen. Roe used marijuana more than four times a day, allegedly in accordance with the MUMA as treatment for migraines. She therefore failed the drug screen when she tested positive for marijuana (which remains illegal under federal law, whether for medicinal purposes or otherwise). Accordingly, Roe was ineligible for employment at TeleTech. Her employment offer was rescinded, and she was terminated.

Roe then filed this lawsuit, a case of first impression in which she seeks to create new civil workplace protections out of the finite protections from criminal prosecution the MUMA conferred. She claims that her termination violated the MUMA and/or a public policy embodied in the MUMA. The MUMA, however, does not afford Roe the protections she seeks. When interpreting a statute enacted through the initiative process, the role of the court is to determine the intent of the voters. Here, the clear and unambiguous intent of the voters when

enacting I-692 was to decriminalize the medical use of marijuana for purposes of state law. There is no evidence that the voters intended that users of medical marijuana should be exempted from employers' legitimate efforts to maintain a drug-free workforce. Nor does the MUMA contain a clear mandate of public policy that users of medical marijuana be exempted from the general rule that employment is at-will. The voters were entitled to change criminal law without also speaking to employment law, which is exactly what they did. To preserve the integrity of the initiative process, this Court must honor the voters' intent. It should reject Roe's invitation to impose a duty on employers when none exists.

II. RESPONDENT'S STATEMENT OF THE ISSUES

1. Did the trial court properly grant summary judgment in favor of TeleTech on Roe's claim that her termination violated the MUMA?

2. Did the trial court properly grant summary judgment in favor of TeleTech on Roe's claim of wrongful discharge in violation of public policy?

3. Did the trial court properly deny Roe's motion for summary judgment?

III. STATEMENT OF THE CASE

A. The Federal Controlled Substances Act

The federal Controlled Substances Act (the "CSA") prohibits the possession, distribution, and cultivation of marijuana. See 21 U.S.C. § 841. The CSA classifies marijuana as a "Schedule I" substance, meaning it has (1) a high potential for abuse, (2) no currently accepted medical use in treatment in the United States, and (3) no accepted safety for use in treatment under medical supervision. See 21 U.S.C. § 812; 21 C.F.R. § 1308.11(d)(19).

B. The MUMA

Washington also classifies marijuana as a Schedule I controlled substance. See RCW 69.50.204(c)(14). Before 1999, it was illegal under state law to use marijuana for any purpose, with only one narrow exception for research. RCW 69.51.020-080. On November 3, 1998, the voters passed I-692, codified in Chapter 69.51A RCW. See Clerk's Papers ("CP") 177-86. The Act provides qualified patients with an affirmative defense to criminal charges for the use and possession of medical marijuana. See RCW 69.51A.040(1). It confers similar protections to the primary caregivers of qualified patients and to physicians who authorize the medical use of marijuana. See id.; RCW 69.51A.030. There is only one reference to employment in the MUMA.

At the time Roe was terminated, that reference provided: "Nothing 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).

The voters' intent was memorialized in the Act itself:

> **Purpose and intent.** 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.
>
> **Therefore, the people of the State of Washington intend that: Qualifying patients** with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, **shall not be found guilty of a crime under state law** for their possession and limited use of marijuana.
>
> **Persons who act as** primary **caregivers** to such patients **shall also not be found guilty of a crime under state law** for assisting with the medical use of marijuana; and
>
> **Physicians also be excepted from liability and prosecution** for the authorization of marijuana use to qualifying patients for whom, in the physician's professional judgment, medical marijuana may prove beneficial.

RCW 69.51A.005 (bold emphasis in original; bold and underlined emphasis added). The voters' intent in enacting the MUMA can also be

gleaned from the voters pamphlet from the November 1998 election. See CP 178-86. The official ballot title of I-692 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 181. The explanatory statement in the voters' pamphlet written by the Attorney General focused on marijuana's status in Washington as an illegal drug. See CP 181-83. The Attorney General assured voters that the measure would not "require the accommodation of any medical use of marijuana in any place of employment." CP 183. The explanatory statement contained no other statement related to employment. See CP 177-86. In the Statement For I-692 contained in the voters pamphlet, the proponents for the initiative stated that I-692 was "needed" because "patients who use medical marijuana, and doctors who recommend it, are still considered criminals in this state." CP 181. The Statement For also contained the following representation under the heading "**ADDITIONAL SAFEGUARDS IN I-692**": "Prohibits marijuana use . . . in the workplace." CP 181 (emphasis in original). The Statement For I-692 contained no other language relating to employment. CP 181. The Statement Against I-692 was silent on the issue of employment. See CP 182.

The MUMA was amended by the Legislature in April 2007. See CP 168-76. The amendments, inter alia, created a broader definition of "primary caregiver," modified the standard of when doctors are permitted to authorize the use of medical marijuana, and prohibited law enforcement from seizing more than a representative sample of marijuana. See CP 168-76. In addition, RCW 69.51A.060(4) was amended. It now reads:

> 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, 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.*

RCW 69.51A.060(4) (2007) (emphasis added). The amendments to the MUMA became effective on July 22, 2007. See CP 168-72.

Although the MUMA confers protections to medical marijuana users from criminal liability under state law, the use of marijuana for medical purposes remains illegal under federal law. See Gonzales v. Raich, 545 U.S. 1, 29, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail."); U.S. v. Oakland Cannabis Buyers' Corp., 532 U.S. 483, 491, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001) (a medical necessity exception for marijuana is at odds with terms of CSA).

C. Roe's Use of Marijuana

Roe sought medical treatment for migraine headaches. CP 188-98. A medical provider at THCF Medical Clinics, an acronym for The Hemp and Cannabis Foundation, saw Roe on one occasion in June 2006, at which time he issued her an Authorization to Possess Marijuana for Medical Purposes in Washington State (the "Authorization"). See CP 187-206. At the time she received the Authorization, Roe was already using marijuana more than four times a day. See CP 194. She was 21 years old. See CP 191.

D. TeleTech's Applicant Drug Policy

TeleTech is an outsourcing company that provides a full range of front- to back-office outsourced solutions to its clients. See CP 215-16 (at ¶ 2). One of TeleTech's customers is Sprint Nextel. See CP 216 (at ¶ 3). TeleTech contracts with Sprint Nextel to provide certain telemarketing and telesales services. See id. As a part of its services to Sprint Nextel, TeleTech operates a customer service call center in Bremerton, Washington. See id.

TeleTech has a substance abuse policy that applies to all applicants (the "Applicant Drug Policy"). See CP 217 (at ¶ 6), 220-31. The Applicant Drug Policy provides: "All applicants . . . to whom TeleTech has given a conditional offer of employment, are required to submit to a

pre-employment drug test and must receive a negative result as a condition of employment." CP 221. The Applicant Drug Policy further provides: "Any applicant who receives a confirmed positive drug test result will be ineligible for employment." Id. TeleTech implemented the Applicant Drug Policy because the "unlawful or improper presence or use of drugs or alcohol in the workplace presents a danger to everyone." Id. As stated in the Applicant Drug Policy: "TeleTech is firmly committed to ensuring a safe, healthy, productive, and efficient work environment for its employees as well as its customers and to the general public." Id. In addition, Sprint Nextel requires TeleTech to perform pre-employment drug testing. See CP 217 (at ¶ 6). TeleTech makes no exception for medical marijuana in its drug policy and has not done so in practice.[2] See id.; CP 219 (at ¶ 11).

E. Roe's Pursuit of Employment at TeleTech

In October 2006, Roe applied for a customer service consultant position at TeleTech's Bremerton facility. See CP 217 (at ¶ 7). Roe was given a conditional offer of at-will employment. See id.; CP 224-25. The offer letter stated: "This offer is contingent upon receiving favorable

[2] The Applicant Drug Policy makes reference to TeleTech's Substance Abuse (Employees) policy, which applies to "all TeleTech employees employed and/or working in the U.S." CP 217 (at ¶ 6), 218 (at ¶ 9), 220-23. As with the Applicant Drug Policy, (...continued)

results from . . . drug screening . . . ." CP 225. As it often does with applicants, TeleTech permitted Roe to begin training for work while waiting for the results of the drug screen. See CP 218-19 (at ¶ 10). Roe began training on October 10, 2006. See id. Thereafter, TeleTech learned that Roe's drug screen was positive for marijuana. See CP 219 (at ¶ 11), CP 232-33. Roe's positive drug screen made her ineligible for employment with TeleTech. See CP 217 (at ¶ 6), 219 (at ¶ 11-12), 220-27. Consequently, TeleTech rescinded Roe's offer and terminated her employment on or about October 18, 2006.[3] See CP 217 (at ¶ 6), 219 (at ¶¶ 11-12), 234-35.

F. Procedural History

Roe initiated this lawsuit on February 13, 2007. See CP 52-55. She thereafter filed an Amended Complaint in which she brought two claims: violation of the MUMA and wrongful termination in violation of public policy. See CP 1-4. The parties filed cross-motions for summary judgment on November 16, 2007. See CP 384-405, 406-28. Roe filed two separate motions to strike in connection with TeleTech's summary

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(...continued)
TeleTech's Substance Abuse (Employees) policy makes no exceptions for medical marijuana usage. See CP 217 (at ¶ 6).

[3] TeleTech terminated Roe's employment only after its local human resources contact conferred with her superiors at corporate headquarters and confirmed that TeleTech had not made and would not make any exceptions to its drug policies for medical marijuana usage. CP 217 (at ¶ 6), 219 (at ¶¶ 11-12), 234-35.

judgment submissions. The first, entitled "Plaintiff's Motion to Strike Inadmissible Hearsay" sought to strike exhibits 1, 3, and 4 to the Declaration of Molly Daily in Support of TeleTech's Opposition to Plaintiff's Motion for Summary Judgment. See CP 487-89. The second, entitled "Plaintiff's Motion to Strike Defendant's Reply Exhibits," sought to strike certain exhibits from the Supplemental Declaration of James Shore in Support of Defendant's Motion for Summary Judgment. See CP 577-81. On February 1, 2008, the trial court issued two orders: (1) Order Granting Plaintiff's Motion to Strike Inadmissible Hearsay and (2) Order Granting Defendant TeleTech Customer Case Management's Motion for Summary Judgment. See CP 370-71, 659. Neither order stated any grounds for the trial court's decisions. See id. The trial court never entered an order on Plaintiff's Motion to Strike Defendant's Reply Exhibits. See CP 379 (at ¶ 5). On March 26, 2008, the trial court entered a supplemental order, clarifying the record on review. See CP 377-80.

IV. STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. See Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The reviewing court may affirm the trial court's grant of summary judgment if it is supported by any part of the record, whether or not the trial court considered that particular evidence. See LaMon v. Butler, 112 Wn.2d

193, 200-01, 770 P.2d 1027 (1989). Summary judgment is appropriately granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. See CR 56(c).

V. ARGUMENT

A. The Trial Court Properly Granted Summary Judgment to TeleTech on Roe's Claim for Violation of the MUMA

In this case of first impression, Roe claims that the MUMA prohibits an employer from terminating or refusing to hire a person who uses marijuana for medical reasons so long as the marijuana is used off-site, and that her termination was therefore unlawful.[4] The trial court properly found that Roe's claim for violation of the MUMA fails as a matter of law. First, the voters did not intend for the MUMA to confer employment protections to users of medical marijuana or to impose affirmative obligation on employers. Second, the MUMA did not create a private cause of action, explicitly or implicitly.

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[4] It is important to note that Roe did not bring a reasonable accommodation claim under state or federal disability laws. The issue before this Court, therefore, is not whether an employer has a duty under the Americans with Disabilities Act (the "ADA") and/or the Washington Law Against Discrimination (the "WLAD") to accommodate a disabled employee's use of medical marijuana, but solely whether the *MUMA* created such a duty. As an aside, Roe could not have prevailed on a claim of disability discrimination because (1) she concedes that at the time this lawsuit was filed, her condition did not meet the definition of disability, see App. Br. at 22 n.3, and (2) under both state and federal disability laws, illegal drug use is not a reasonable accommodation. See, e.g., Hines v. Todd Shipyards Corp., 127 Wn. App. 356, 373, 112 P.3d 552 (2005); Brown v. Lucky Stores, Inc., 246 F.3d 1182 (9th Cir. 2001).

1. The MUMA Did Not, and Was Not Intended to, Create Employment Protections

Roe interprets the MUMA as requiring employers to accommodate their employees' off-site use of medical marijuana. Roe's strained and unreasonable interpretation of the MUMA is in direct conflict with both the Act itself and with the voters' well-documented intent. In determining the meaning of a statute enacted through the initiative process, "the court's purpose is to ascertain the collective intent of the voters who, acting in their legislative capacity, enacted the measure." Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 205, 11 P.3d 762 (2001). Voter intent is determined from the language of the initiative "as the average informed voter voting on the initiative would read it." Id. When possible, the intent of the electorate is derived from the plain language of the statute itself. See SuperValu, Inc. v. DLI, 158 Wn.2d 422, 429, 144 P.3d 1160 (2006); State v. Thorne, 129 Wn.2d 736, 762-63, 921 P.2d 514 (1996). When construing a statute, courts should read it in its entirety, not piecemeal, and should interpret the various provisions of the statute in light of one another. See Thorne, 129 Wn.2d at 763. "Where the language of an initiative enactment is 'plain, unambiguous, and well understood according to its natural and ordinary sense and meaning, the

enactment is not subject to judicial interpretation.'" Amalgamated Transit, 142 Wn.2d at 205 (quoting Thorne, 129 Wn.2d at 762-63).

An ambiguity exists only if the language of the enactment is susceptible to more than one reasonable interpretation. See Thorne, 129 Wn.2d at 763 n.6. If there is ambiguity in the enactment, courts may look to extrinsic aids, including statements in the voters pamphlet, to determine the voters' intent. See Amalgamated Transit, 142 Wn.2d at 205-06 (citing Thorne, 129 Wn.2d at 763). When the voters' intent is clearly expressed in the statute, however, "the court is not required to look further." Id. at 205; see also McGowan v. State, 148 Wn.2d 278, 288-89, 60 P.3d 67 (2002) ("Where the people's intent is clearly expressed in the initiative measure, the court need not look to the voters' pamphlet or other extrinsic sources to ascertain the voters' intent.").

a. The MUMA Is Unambiguous: Employers Are Not Required to Provide Any Accommodations For the Medical Use of Marijuana

Here, the Court need only look to the MUMA itself to conclude that the voters did not intend for I-692 to provide medical marijuana users with heightened employment protections. Nothing in the MUMA confers a duty on employers to accommodate their employees' marijuana use. Indeed, the *sole* reference in the MUMA to employment unambiguously affirms the lack of any such duty: "Nothing in this chapter requires any

accommodation of any medical use of marijuana in any place of employment . . . ." RCW 69.51A.060(4). That provision is subject to only one reasonable interpretation—that employers have no duty under the MUMA to accommodate an employee's medical use of marijuana. The Court should not go any further than the language of the statute itself to determine that Roe's claim under the MUMA is without merit.

Despite (or perhaps because of) the MUMA's clear language that an employer has no duty to accommodate an employee's medical use of marijuana and the lack of any other provision in the MUMA expressly conferring employment protections to users of medical marijuana, Roe strains to create ambiguity when none exists. She argues that two provisions give rise to such a duty. First, she claims that the language in RCW 69.51A.060(4) quoted above applies only to the on-site use of marijuana, which she believes suggests that employers then have a duty to accommodate their employees' off-site use. Second, Roe argues that RCW 69.51A.040(1), the subsection that provides qualifying patients with an affirmative defense to criminal liability, prohibits anyone from denying any qualified patient any right or privilege or from penalizing them in any manner. For the following reasons, both of Roe's attempts to create ambiguity are unavailing.

(i) The Average Informed Voter Would Not Read RCW 69.51A.060(4) as Creating a Duty to Accommodate "Off-site" Use

Roe's argument that the version of RCW 69.51A.060(4) that was in effect at the time of her termination—providing that nothing in the MUMA "requires any accommodation of any medical use of marijuana in any place of employment"—somehow conferred a duty on employers to accommodate employees' off-site use of marijuana fails for two reasons. First, Roe asks this Court to insert a word into the statute that is not there. Cf. State v. Watson, 146 Wn.2d 947, 955, 53 P.3d 1 (2002) (court will not add to or subtract from clear language of a statute even if it believes the Legislature intended something else but did not adequately express it.) Roe's proposed distinction between "on-site" and "off-site" use cannot be derived from the subsection's clear language. The average informed voter would not have understood such a distinction to exist. The original language of the statute is unambiguous and the Court should look no further. [5]

[5] Roe ignores the obvious difficulties such an interpretation would create as to the meaning of "on-site." For example, is an employee who regularly telecommutes from home working "on-site" or "off-site"? Are construction workers on a job site "on-site" or "off-site"? The real distinction that Roe would like to make is "during working hours," but there is *nothing* in the statute that would even remotely suggest that distinction. Roe's interpretation would potentially allow employees who work from remote locations to consume marijuana on-the-clock, during work hours. This cannot have been the voters' intent.

Second, even if the subsection were limited to "on-site" use (which it is not), the Act would still be silent as to whether an obligation exists to accommodate behavior outside the workplace. Inserting "on-site" into RCW 69.51A.060(4) does not affirmatively impose a duty on employers with respect to "off-site" use. Instead, Roe has to rely on a negative inference to show that there is an affirmative duty to accommodate at-home use. The average informed voter, however, would not conclude that just because the Act assures employers that they do not have to allow their employees to use marijuana at the worksite, it strips them of their right to terminate employees for illegal drug use outside of the workplace.[6] The Court should refuse to recognize a duty when one is not expressly declared—particularly when, as here, the behavior that purportedly must be accommodated is illegal under federal law.

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[6] Roe alleges that the voters construed "accommodation" the way the term is used in the ADA and the WLAD. App. Br. at 21-22. TeleTech disagrees that that is the plain, ordinary meaning of the term. "Accommodation," as it is used in the disability discrimination context, is a technical term that confers affirmative obligations. The average, informed voter would not necessarily be aware of those technical connotations. Moreover, if Roe's definition of "accommodation" is correct, the MUMA might cause employers to run afoul of federal law. For example, it would arguably require employers to give employees time off during the day so that the employees could leave the premises to use medical marijuana, which might constitute aiding and abetting criminal behavior.

(ii) The Average Informed Voter Would Not Have Read the MUMA as Guaranteeing Medical Marijuana Users the "Privilege" of Employment.

Roe also seeks to create ambiguity through reliance on the second sentence of RCW 69.51A.040(1). To discern the meaning of the sentence on which Roe relies, however, it is important that the Court read the entire provision as a whole. See Thorne, 129 Wn.2d at 763 (when construing statute, court should read it in its entirety, not piecemeal, and should interpret various provisions in light of one another). In its entirety, that subsection reads:

> **Qualifying patients' affirmative defense.**
>
> (1) If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver who assists a qualifying patient in the medical use of marijuana, will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter. 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) (bolded emphasis in original; underlined emphasis added). Relying on the second sentence, Roe argues that the MUMA prohibits the denial of any right or privilege and forbids a person from being penalized in any manner—whether by the state, the federal

government, a private individual, or a private entity. Roe's interpretation is unreasonable for a host of reasons.

First, the sentence on which Roe relies is taken out of context. Read in context within the subsection as a whole, the only reasonable interpretation of the reference to "rights and privileges" is the intent to prohibit the state, not private entities, from penalizing individuals who use medical marijuana in accordance with the Act but are nonetheless charged with a violation of state law.[7] The sentence cannot be construed, as Roe suggests, to apply to private individuals and entities in all contexts.[8]

Second, Roe's proposed interpretation would render the Act internally inconsistent, because the Act contains many provisions limiting the so-called "rights" and "privileges" of medical marijuana users. Indeed, such an interpretation would be in direct conflict with RCW 69.51A.060(4), which expressly states that the MUMA does not require employers to accommodate the medical use of marijuana in any place of

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[7] Roe argues that if the MUMA's purpose was limited to providing immunity from state prosecutions, "there would have been no reason for the People to have enacted RCW 69.51A.040(1)." App. Br. at 15. But it is RCW 69.51A.040(1) itself that establishes the affirmative defense to criminal liability.

[8] The provision must be read in context and in a way that does not lead to an absurd result. See, e.g., Watson, 146 Wn.2d at 955 (the court must avoid literal interpretation leading to absurd result). It would be absurd to read the "rights and privileges" clause as extending to private actors. For example, marriage is often referred to as a "right" or a "privilege." Roe's theory, if accepted, would prohibit a person from choosing not to marry an individual based on the individual's use of medical marijuana. That result would be absurd and clearly not what the voters intended.

employment. Qualifying patients are also denied the "privilege" to use marijuana on a school bus, on any school grounds, or in any youth center. See RCW 69.51A.060(4). They are denied the ability to use or display medical marijuana "in a manner or in a place which is open to the view of the general public." RCW 69.51A.060(1). A health insurer can deny qualified patients the "privilege" or "right" to reimbursement for medical marijuana. RCW 69.51A.060(2). Roe's claim that medical marijuana users cannot be "penalized" in any way for that use would be in direct conflict of those provisions. The Curt should seek to avoid interpreting the statute in a way that leads to inconsistency. See Lutheran Day Care v. Snohomish Cty., 119 Wn.2d 91, 103, 829 P.2d 746 (1992).

Third, if the Court were to adopt Roe's interpretation that the MUMA forbids a person from being penalized "in any manner" for the use of medical marijuana, the Act would be in direct conflict with federal law and would be void. "A state statute is void to the extent that it actually conflicts with a valid federal statute." Edgar v. Mite Corp., 457 U.S. 624, 631, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982). A conflict exists where: (1) "compliance with both federal and state law is impossible" or (2) the "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. Marijuana is illegal under federal law, and the use of marijuana is certainly penalized under

federal law. See 21 U.S.C. § 841. Roe's interpretation of the MUMA, however, would prohibit the federal government from penalizing a medical marijuana user. There can be no doubt that such a prohibition would be an obstacle to the accomplishment and execution of the federal drug laws. If Roe's interpretation was adopted, the provision would be rendered void.[9] The Court should resist an interpretation that would lead to such a result. See, e.g., Hayes v. Yount, 87 Wn.2d 280, 290, 552 P.2d 1038 (1976) (statute should, whenever possible, be interpreted so that no portion is superfluous, void, or insignificant).

Because it is clear from the plain, unambiguous language of the MUMA that the voters did not intend to create new employment protections for medical marijuana users, the Court should look no further than the statute itself to affirm the trial court's summary judgment order.

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[9] Roe herself recognizes the supremacy of federal law. For example, she acknowledges that if federal law requires a particular employer to maintain a drug-free workplace, that obligation "trumps" MUMA under the Supremacy Clause of the U.S. Constitution. App. Br. at 22-23 n.4.

b. The Extrinsic Evidence of the Voters' Intent Does Not Support Roe's Claimed Duty

Even if this Court were to find that the MUMA is ambiguous (which it is not), the overwhelming extrinsic evidence compels the conclusion that the voters did not intend for I-692 to provide broad employment protections to users of medical marijuana.

(i) The Voters Memorialized Their Intent in the Act Itself

The voters' intent is memorialized in the MUMA itself: that qualifying patients "shall not be found guilty of a crime under state law," that primary caregivers "shall also not be found guilty of a crime under state law," and that physicians "also be excepted from liability and prosecution for the authorization of marijuana use." RCW 69.51A.005. "Where the voters' intent is clearly expressed in the statute, the court is not required to look further." Amalgamated Transit, 142 Wn.2d at 205 (emphasis added); see also McGowen, 148 Wn.2d at 288-89. Here, the voters clearly articulated their intent that the purpose of the MUMA was to decriminalize certain conduct relating to the use of medical marijuana. The voters did not state an intent to impose a duty on private employers, nor did they state an intent to protect medical marijuana users from all ramifications of their drug use. The Court should look no further.

(ii) The Voters Pamphlet Does Not Demonstrate an Intent to Provide Employment Protections

Should the Court nonetheless look to other extrinsic evidence of the voters' intent, it should focus its inquiry on the voters' pamphlet. See Amalgamated Transit, 142 Wn.2d at 205-06. Here, the statements in the voters pamphlet by the proponents of the initiative, by those in opposition to the initiative, and by the Attorney General all portray the sole purpose of the statute as the decriminalization of the medical use of marijuana for purposes of state law.

The official ballot title of I-692, which was written by the Attorney General, 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 181. The explanatory statement written by the Attorney General focused on marijuana's status in Washington as an illegal drug. See CP 182-83. The Attorney General assured voters that the measure would not "require the accommodation of any medical use of marijuana in any place of employment." CP 183.

The Statement For I-692, drafted by the initiative's proponents, made the following representation:

> **But patients who use medical marijuana, and doctors who recommend it, are still considered criminals in this state**. Initiative 692 will protect patients who suffer from terminal and debilitating

> illnesses, and doctors who recommend the use of medical marijuana. **That's why we need I-692**.

CP 181 (emphasis added). Clearly, the implication made to the voters was that the "thing" I-692 would protect patients and doctors from was criminal prosecution. Nowhere in the Statement For I-692 did the proponents of the initiative inform the voters that one of the purposes of the initiative was to modify employment law by conferring employment protections to individuals who used medical marijuana. To the contrary, the proponents expressly assured voters, under the heading "**ADDITIONAL SAFEGUARDS IN I-692**," that the measure "[p]rohibits marijuana use . . . in the workplace."[10] CP 181 (emphasis in original).

Finally, noticeably lacking from the opponents' Statement Against I-692 is commentary on what Roe alleges were the broad implications of the Act. If the business community believed that the Act might prohibit employers from enforcing otherwise legitimate workplace rules forbidding the use of illegal substances, it would be expected that at least some business advocacy groups would have spoken out against the initiative.

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[10] Notably, the proponents overstated the safeguard contained in RCW 69.51A.060(4), because nothing in that subsection would appear to actually prohibit employers from choosing to accommodate their employees' use of medical marijuana.

The utter absence of any such dialogue is strong evidence that no one intended for the Act to be so far reaching.

There is nothing in the voters pamphlet from which an average informed voter would interpret the initiative as modifying employment law.[11] Had the proponents of I-692 truly intended for it to provide employment protections, they could have—and should have—been upfront with the voters on that point. As the California Supreme Court poignantly observed when rejecting similar claims made under California's Compassionate Use Act, "'the proponents' ballot arguments reveal a delicate tightrope walk designed to induce voter approval, which we would upset were we to stretch the proposition's limited immunity to cover that which its language does not.'" Ross v. RagingWire Telecomm., Inc., 174 P.3d 200, 206-07 (Cal. 2008) (quoting People v. Galambos,104 Cal. App. 4th 1147, 1152 (2002)).

(iii) The Alleged Intent of the Drafters Is Not Relevant Because It Was Not Communicated to the Voters

Perhaps because the voters pamphlet does not support her theory, Roe relies heavily on the declaration of Timothy Killian, a co-drafter of

[11] Indeed, the Washington Supreme Court has recognized that the purpose of I-692 was to create a compassionate use defense against marijuana charges. See State v. Tracy, 158 Wn.2d 683, 685, 147 P.3d 559 (2006). The Tracy dissent came to the same conclusion based on a review of the voters pamphlet and the voters' memorialized intent. See id. at 693-94 (J. Johnson, dissenting).

and campaign manager for I-692, as evidence of the initiative's intent. In his declaration, Mr. Killian claims that I-692 was intended to protect qualified patients from "other secondary, adverse consequences" of their medical use, including employment. CP 291. Mr. Killian's purported intent in drafting I-692, however, is not dispositive, because it is the intent of the voters that is at issue. Moreover, in this instance, Mr. Killian's purported intent has no relevance at all and should be entirely disregarded. **First**, there is no evidence that Mr. Killian communicated his purported "intent" to the voters. Roe cites to In re Marriage of Kovacs, 121 Wn.2d 795, 854 P.2d 629 (1993), and Duke v. Boyd, 133 Wn.2d 80, 942 P.2d 351 (1997), for the proposition that Washington courts "pay particular attention to the statements of prime drafters and sponsors of the enactment at issue." App. Br. at 18. Roe grossly misrepresents the holdings of those cases. At best, Kovacs and Duke stand for the proposition that statements made by drafters and sponsors of legislation to the legislature before the passage of a piece of legislation may be useful in ascertaining what the intent of the legislature was when it enacted the legislation.[12] Here, Roe

[12] See Kovacs, 121 Wn.2d at 807 (statements of individual lawmakers and others before the Senate Judiciary Committee cannot be used to conclusively establish intent of the Legislature as whole, but are instructive in showing the reasons for changes in legislations); Duke, 133 Wn.2d 80, 86-87 (finding language of legislature-enacted statute to be unambiguous, but noting in dicta that reading is consistent with comments made by senator before passage but also noting that "[n]ormally, one legislator's comments from the floor are considered inadequate to establish legislative intent").

has presented no evidence at all that Mr. Killian—or any other sponsor of I-692—informed the voters before the November 1998 election that I-692 would confer employment protections to users of medical marijuana. There is therefore no basis for imputing his beliefs to the voters as a whole. See, e.g., RagingWire, 174 P.3d at 208 (court refused to impute intent of the authors of Compassionate Use Act to entire legislature because they did not assert "that they shared their view of the proposed legislation with the Legislature as a whole."). **Second**, Mr. Killian's statements are unreliable, given that they were made (1) almost 10 years after I-692 was enacted and (2) solely in the context of this litigation. To afford any weight to Mr. Killian's after-the-fact assertions as to his alleged intent would set a dangerous precedent, because it would give drafters an incentive to use vague language in an effort to appeal broadly to voters, who would have no way to understand the consequences of that for which they are voting. Such a result would jeopardize the integrity of the initiative process. If the sponsors of I-692 truly intended that employers be required to accommodate employees' off-site use of medical marijuana, it was incumbent on them to draft language that expressly provided as such.

(iv) The Media Portrayed I-692 As a Decriminalization Statute

If the Court is inclined to look at extrinsic evidence outside of the voters pamphlet, it should not look to statements made by Mr. Killian 10 years after I-692 was passed, but rather to the information presented to the voters in the media before the election. There is no evidence in the record that the voters were ever expressly told by anyone that I-692 would require employers to accommodate an employee's off-site use of medical marijuana. TeleTech submitted to the trial court all of the newspaper articles and editorials it could find leading up to the initiative; without exception, those newspapers articles and editorials focused solely on the decriminalization aspect of the initiative. See CP 296-312, 506-35, 606-11.[13] Not one mentioned employment. See id. Indeed, on October 30,

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[13] Roe states in her opening brief that TeleTech did not appeal the trial court's order granting her motion to strike. App. Br. at 12. TeleTech, however, was not required to separately appeal the trial court's order. This Court may affirm the trial court's grant of summary judgment if it is supported by any evidence in the record, whether or not the trial court considered that evidence. LaMon, 112 Wn.2d at 200-01 Here, the exhibits that the trial court struck (presumably on the grounds of hearsay) are properly part of the record on review as they were presented to the trial court. RAP 9.12; CP 378 (at ¶ 2). Evidentiary rulings made in conjunction with a summary judgment motion are reviewed de novo. See Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); Momah v. Bharti, --- Wn. App. ---, 182 P.3d 455, 465 (April 28, 2008); Cotton v. Kronenberg, 111 Wn. App. 258, 264, 44 P.3d 878 (2002). Thus, as part of its review of the trial court's summary judgment order, this Court must first determine whether the three struck exhibits were properly excluded.

Here, the trial court clearly erred when it granted Roe's motion to strike exhibits 1 and 4 to the Declaration of Molly Daily as hearsay. Those two exhibits are newspaper articles about I-692 that were printed prior to the November 3, 1998 election. CP 298-300, 309-12. "Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter

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1998—a mere three days before the election—Mr. Killian himself was quoted as follows: "The simple question that needs to be asked is: Do we as Washington citizens feel we need to arrest seriously ill patients if they find relief from using marijuana?" CP 299 (emphasis added). Again, if the public understood that employment issues were impacted by the initiative, one would have expected that there would have been some discussion in the media on that point. The lack of any discourse on the employment ramifications of the initiative strongly suggests that the public was not interpreting this statute in the manner Roe advocates.

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asserted." ER 801(c) (emphasis added). Thus, statements that are not offered to prove the truth of the matter asserted are, by definition, not hearsay. Those exhibits were offered not to show the truth of the matters asserted therein, but rather to show what was not asserted therein—namely, that I-692 would require employers to accommodate the off-site use of medical marijuana by employees. Moreover, whether the information contained in the newspapers articles at issue was true is not the point: The information was presented to the voters by way of published newspapers and might aid the Court in assessing the voters' intent in approving I-692. This type of evidence has been recognized by the Washington Supreme Court as proper extrinsic evidence for a court to consider when determining voter intent. See Nelson v. McClatchy Newspapers, Inc., 131 Wn.2d 523, 531, 936 P.2d 1123 (1997) (looking to newspaper articles and editorials published during the 1992 election season to determine meaning of particular provision in a voter-enacted statute); State v. Allison, 923 P.2d 1224, 1230 (Or. Ct. App. 1996) (it is appropriate to look to "contemporaneous sources," such as "newspaper stories, magazine articles and other reports from which it is likely that the voters would have derived information").

The third exhibit that the trial court struck was Exhibit 3 to the Declaration of Molly Daily, which was a 2006 article in the Seattle Post-Intelligencer in which Mr. Killian's brother and co-drafter of I-692 was quoted as saying that the intent of the law was "to protect valid patients from prosecution." CP 306. As this article postdates the election, TeleTech does not object to the trial court's having struck the exhibit.

With respect to Roe's motion to strike exhibits from the Supplemental Declaration of James Shore, the trial court never ruled on that motion. CP 379 (at ¶ 5). The fact that the trial court did not consider that evidence when ruling on the summary
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(v) The 2007 Amendments Are Not Evidence of the Voters' Intent

Finally, Roe argues that the Legislature's 2007 amendments to the MUMA—which, inter alia, added the term "on-site" to RCW 69.51A.060(4)—are extrinsic evidence that the voters intended all along for that subsection to mean that employers were required to accommodate "off-site" use.[14] This Court should refuse to look to the Legislature's amendments when determining what the voters intended ten years earlier. **First**, the case to which she cites, State v. Baldwin, stands merely for the proposition that when the Legislature amends a former statute, it is strong evidence of what the Legislature originally intended. See State v. Baldwin, 109 Wn. App. 516, 527, 37 P.3d 1220 (2001). Here, the Legislature amended a statute enacted not by it, but by the *voters*. It is not

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judgment motions is immaterial. Roe's suggestion that TeleTech had an obligation to appeal an order that was never issued is specious.

[14] The amendments do not apply retroactively, as Roe seemingly acknowledges. See App. Br. at 20-21. Statutes that affect vested rights operate prospectively absent legislative intent for retroactive application. See, e.g., Agency Budget Corp. v. Washington Insur. Guarantee Assn., 93 Wn.2d 416, 424, 610 P.2d 361 (1980); Hammack v. Monroe Street Lumber Co., 54 Wn.2d 224,230, 339 P.2d 684 (1959). Here, the legislative history shows that the Legislature did not intend for the amendments to apply retroactively. See CP 212-14.

Roe previously suggested to the trial court that "where an amendment is merely a clarification, a court should apply the amended language to cases arising under the original language of the statute or regulation," but she appears to have dropped that argument on appeal. CP 460. In interpreting a new legislative enactment, the court must presume that that it amends rather than clarifies existing law and that it therefore applies prospectively. For the reasons set forth in TeleTech's briefing to the trial court, CP 437 n.3, the changes to the MUMA were not mere clarifications.

the purview of the Legislature to declare the intent of the voters—statutory construction is a function of the courts. **Second**, Roe's characterization of the Legislature's changes to the MUMA as mere "clarifications" is inaccurate. The changes the Legislature made to the Act were extensive and quite substantive. See supra at 7. **Third**, it is not at all clear that the Legislature even intended to confer employment protections by inserting the phrase "on-site" into RCW 69.51A.060(4). There is still no affirmative duty expressly imposed on employers. When the Legislature intends to modify the general rule that employment is at-will, it does so in express, certain terms.[15] Moreover, there is nothing in the legislative

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[15] 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," "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

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history to the amendments that supports Roe's arguments that the legislators were concerned about employment. See CP 169-76. The Final Bill Report, for example, did not even address the addition of "on-site." See CP 213-14. It did, however, describe the background of I-692 as follows: "[T]he citizens of the state of Washington intended to allow for the limited medical use of marijuana by patients with terminal or debilitating illnesses. Such patients and their primary caregivers will not be found guilty of a crime for possession and limited use of marijuana under state law . . ." Id. (emphasis added). The House Bill Report also did not mention employment consequences. CP 208-11. The only evidence Roe proffers for the proposition that the amendments were intended to address employment is the declaration of Mr. Killian, who is not a member of the Legislature. For all of those reasons, the Court should reject Roe's backdoor attempt to give retroactive effect to the 2007 amendments.[16]

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by" the Washington Family Leave Act, "or because he or she has filed a complaint, testified, or assisted in any proceeding" under it).

[16] Notably, if the Legislature intended for the amendments to confer a duty on employers, they are unconstitutional because the title of the bill did not express the subject of employment. See Wash. Const. art. II, § 19 ("No bill shall embrace more than one subject, and that shall be expressed in the title."). A bill's title is required to give concise information about the contents of the bill. See State ex rel. Seattle Elec. Co. v. Superior Court, 28 Wn. 317, 321, 68 P. 957 (1902). The 2007 Senate Bill was entitled "An act relating to medical use of marijuana." CP 208. There is nothing in that title that
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c. Roe Has Crafted Her Own Employment Scheme

Interestingly, Roe claims that an employer does not have a duty to accommodate an employee's off-site use of marijuana "no matter what the circumstances." App. Br. at 23. For example, she contends that if the employee's at-home use of medical marijuana impaired her ability to perform the essential functions of her job, the employer would not have to accommodate the use. See id. at 22-23. Likewise, she contends that if the employer had a safety-sensitive position and her use of medical marijuana outside of work made her a direct safety threat, the employer would not have to accommodate the employee in that situation. See id. at 24-25. Should the voters or the Legislature someday choose to impose the duty on employers that Roe seeks, Roe's "exceptions" certainly would be reasonable ones. They, however, appear nowhere in the statute. It is very illuminating that Roe has to concoct an entire employment scheme from whole cloth to make her alleged claim palatable. The lack of any reference to these "exceptions" in the statute itself further demonstrates that employment was not on the voters' minds.

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would give notice to employers that their rights were affected by the bill. See Patrice v. Murphy, 136 Wn.2d 845, 854, 966 P.2d 1271 (1998).

d. The Language in the MUMA Regarding Employment Has Never Been Construed to Impose a Duty on Employers

TeleTech could find no cases in which the MUMA has been construed in the manner that Roe seeks, nor could TeleTech find such cases from other states whose medical marijuana statutes contain substantively identical provisions regarding employment.[17] Under facts very similar to those here, however, the California Supreme Court recently held that California's Compassionate Use Act did not require employers to accommodate their employees' use of medical marijuana, nor did it create a public policy that employees should not be terminated because of their use of medical marijuana. See RagingWire, 174 P.3d at 204-09. The Court noted that nothing in the text or history of the Compassionate Use

[17] See, e.g., Alaska Stat. § 17.37.040(d) ("Nothing in this chapter requires any accommodation of any medical use of marijuana (1) in any place of employment . . ."); Colo. Const. Art. 18, § 14(10)(b) ("Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place . . . ."); Montana Code Ann. 50-46-205(2)(b) ("Nothing in this chapter may be construed to require: . . . (b) an employer to accommodate the medical use of marijuana in any workplace . . . ."); Nev. Rev. Stat. Ann. § 453A.800 ("The provisions of this chapter do not . . . [r]equire any employer to accommodate the medical use of marijuana in the workplace"); Or. Rev. Stat. Ann. § 475.340 ("Nothing in ORS 475.300 to 475.346 shall be construed to require . . . [a]n employer to accommodate the medical use of marijuana in the workplace"). TeleTech notes that Oregon's Bureau of Labor and Industries has taken the position that an employer might be required under Oregon's disability discrimination law to accommodate a disabled employee's use of medical marijuana. See, e.g., Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries, 186 P.3d 300 (Or. Ct. App. 2008). Oregon courts have decided at least two lawsuits brought by plaintiffs who sought relief under state's disability statute. See id.; Washburn v. Columbia Forest Prod., Inc., 134 P.3d 161 (Or. 2006). Both cases were decided on procedural, not substantive, grounds. In any event, neither plaintiff contended that Oregon's medical marijuana law itself imposed an obligation on employers.

Act suggested that the voters intended the measure to address the respective rights and duties of employees and employers. Id. at 203. Although the language of the version of the Compassionate Use Act that was in effect at the time of the plaintiff's termination was different from the MUMA's, the California legislature subsequently amended the Compassionate Use Act to read: "'Nothing in the article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment . . .'" Id. at 207 (quoting Cal. Health & Saf. Code § 11,362.785(a)). Like Roe, the plaintiff argued that the amendments demonstrated an intent that employers be required to accommodate the off-site use of medical marijuana. After noting that the plaintiff's termination preceded the amendment by more than two years, the California Supreme Court additionally refused to infer a duty from the amendment for two reasons. First, it found that the statute's "literal effect" was to negate "any expectation that the immunity to criminal liability for possessing marijuana granted in the Compassionate Use Act gives medical users a civilly enforceable right to possess the drug at work or in custody." Id. Second, the court stated that "given the controversy that would inevitably have attended a legislative proposal to require employers to accommodate marijuana use, we do not believe that Health and Safety Code section 11,362.785, subdivision (1), can reasonably be

understood as adopting such a requirement silently and without debate." Id. The same is true here.

For all of the reasons cited above, it is clear that the voters did not intend for the MUMA to confer employment protections to users of medical marijuana. It is the duty of this Court to honor the voters' intent. As the RagingWire court eloquently stated: "For a court to construe an initiative statute to have substantial unintended consequences strengthens neither the initiative power nor the democratic process; the initiative power is strongest when courts give effect to the voters' formally expressed intent, without speculating about how they might have felt concerning subjects on which they were not asked to vote." Id.

2. The MUMA Does Not Provide a Private Cause of Action Against a Private Entity

The trial court's dismissal of Roe's claim for violation of the MUMA can be upheld on the additional ground that the MUMA does not create a private cause of action. The narrow purpose of the MUMA is to protect certain users of medical marijuana from criminal penalties under state drug laws. See RCW 69.51A.005. It is a restraint on the government's ability to penalize a narrow class of marijuana users; it does not regulate relationships between private entities. For that reason, the

Act does not provide medical marijuana users a right of action or a remedy against private persons or entities.

Roe herself concedes that the voters did not explicitly provide her with a right of recovery. App. Br. at 25. She asks the Court, however, to find an implied cause of action. The Court should decline her invitation. When the Legislature creates a duty, a court may provide a remedy for its breach if the remedy is appropriate to further the purposes of the statute and is needed to ensure its effectiveness. See Bennett v. Hardy, 113 Wn.2d 912, 920, 784 P.2d 1258 (1990). A court should imply a cause of action from a statute only if (1) the plaintiff is within the class for whose "especial" benefit the statute was enacted, (2) legislative intent, explicitly or implicitly, supports creating or denying a remedy, and (3) implying a remedy is consistent with the underlying purpose of the legislation. See id. at 920-21. "'We will not imply a private cause of action when the drafters of a statute evidenced a contrary intent; public policy is to be declared by the Legislature, not the courts.'" Cazzanigi v. General Elec. Credit Corp., 132 Wn.2d 433, 449, 938 P.2d 819 (1997) (quoting Bird-Johnson Corp. v. Dana Corp., 119 Wn.2d 423, 428, 833 P.2d 375 (1992)).

TeleTech concedes that Roe, as a user of medical marijuana, is within the class for whose benefit the statute was enacted. Implying a remedy would be improper, however, as the voters did not intend to create

a private cause of action. The voters' intent was not to alter employment law. The Act's only reference to employment was to affirm that an employer has no duty to accommodate the medical use of marijuana in employment. It did not affirmatively impose any duty on employers. See, e.g., M.W. v. DSHS, 149 Wn.2d 589, 601, 70 P.3d 954 (declining to find implied private cause of action because harm was outside statutory duty).

For all of the reasons stated above, this Court should affirm the trial court's grant of summary judgment in favor of TeleTech on Roe's claim for violation of the MUMA.

B. The Trial Court Properly Dismissed Roe's Claim for Wrongful Termination In Violation of Public Policy

Recognizing that she might not have a claim directly under the MUMA, Roe also brought a claim for wrongful termination in violation of public policy. To prevail on a public policy claim, a plaintiff must prove: (1) the existence of a clear mandate of public policy (the clarity element), (2) that discouraging the conduct in which the plaintiff engaged would jeopardize the public policy (the jeopardy element), (3) that the public-policy-linked conduct caused the dismissal (the causation element), and (4) that the defendant does not have an overriding justification for the dismissal (the absence of justification element). See, e.g., Roberts v. Dudley, 140 Wn.2d 58, 64-65, 993 P.2d 901 (2000). The Washington Supreme Court has warned that the tort of wrongful discharge "should be

applied cautiously in order to avoid allowing an exception to swallow the general rule that employment is terminable at will." Sedlacek v. Hillis, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001). Here, Roe cannot establish three of the four necessary elements to her public policy claim. The trial court properly dismissed this cause of action.

1. There Is No Clear Mandate of the Putative Public Policy

Roe bears the burden of proving that her dismissal violates a clear mandate of public policy. Sedlacek, 145 Wn.2d at 393. To "state a cause of action, the employee must plead and prove that a stated public policy, either legislatively or judicially recognized, may have been contravened. This protects against frivolous lawsuits and allows trial courts to weed out cases that do not involve any public policy principle." Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 232, 685 P.2d 1081 (1984). The public policy exception is narrow and courts have been advised to "proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject." Id. (emphasis in original; citation omitted). The public policy for which a court must search "is an authoritative public declaration of the nature of the wrong." Roberts, 140 Wn.2d at 63. Whether a particular statute contains a clear mandate of public policy is a question of law. See id. at 65.

Roe's sole source for her claimed public policy is the MUMA. She claims that the Act states a public policy that "the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based on his or her physician's professional judgment and discretion." App. Br. at 27-28; RCW 69.51A.005. Roe states that this public policy "could not be clearer." App. Br. at 28. TeleTech notes, however, that the technical reading of the section of the MUMA on which Roe relies is that the "personal, individual decision" the voters were protecting is a physician's "decision to authorize the medical use of marijuana," not the patient's decision to use medical marijuana. RCW 69.51A.005 (emphasis added).[18] Although TeleTech recognizes that this is likely the result of poor drafting, any ambiguity at all in the provision necessarily defeats a showing of an authoritative public declaration.

Moreover, Roe's claimed public policy is not the kind that the Washington Supreme Court has previously found sufficient to satisfy the clarity element.[19] See, e.g., Korslund v. Dyncorp Tri-Cities Serv., Inc.,

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[18] The provision states in full: "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.060(4).

[19] The clarity element can be manipulated by how the purported public policy is framed. Here, it seems that the real public policy Roe advocates is that individuals should be free to use marijuana for medical purposes without suffering adverse employment consequences. Indeed, during the course of this litigation, Roe has characterized her claimed public policy in three different ways—two of which were much

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156 Wn.2d 168, 125 P.3d 119 (2005) (Energy Reorganization Act, which provides that "[n]o employer may discharge any employee or otherwise discriminate against any employee . . . because the employee . . . notified his employer of an alleged violation of this chapter" evidenced clear public policy encouraging and protecting plaintiffs' right to report without fear of retaliation or reprisal); Hubbard v. Spokane Cty., 146 Wn.2d 699, 50 P.3d 602 (2002) (enforcement of Spokane Zoning Code and airport master plan to ensure uniform planning and the general safety and welfare of the county created a valid public policy); Roberts, 140 Wn.2d 58 (finding public policy against sex discrimination in prior case law and in several state statutes); Gardner v. Loomis Armored Services, 128 Wn.2d 931, 913 P.2d 377 (1996) (recognizing public policy in favor of protecting human life, but rejecting public policy encouraging citizens to help law enforcement); Thompson, 102 Wn.2d at 234 (Foreign Corrupt Practices Act, which prohibits bribery of foreign officials and requires certain businesses to maintain a system of internal controls, is "clear expression of public policy that bribery of foreign officials is contrary to the public

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broader than the public policy she now advances. In her Amended Complaint, Roe claimed that the MUMA contains a clear public policy authorizing the medical use of marijuana "without adverse repercussions to the patient." CP 3 (at ¶¶ 5.1-5.5). In her Opposition to TeleTech's Motion for Summary Judgment, she claimed that the MUMA
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interest"). Unlike those public policies cited above, Roe's claimed public policy says very little and confers no real rights, duties, or obligations. This simply is not the kind of public policy that can support a claim under the narrow exception to the at-will doctrine.

The Court should reject Roe's claimed public policy for the additional reason that it is in direct conflict with federal law. The CSA prohibits the use of marijuana. The medical use of marijuana may be a personal, individual decision, but it is nonetheless an illegal one. Roe has no legal right to use marijuana, the MUMA notwithstanding. If the voters (or the Legislature) wish to declare a public policy that is in direct contradiction to federal policy, that public policy should be expressed in unambiguous terms.

2. Roe's Termination Did Not Jeopardize the Claimed Public Policy

Even if the Court was to find that Roe has stated a clear mandate of public policy, she cannot, as a matter of law, show that her termination jeopardized that policy. To establish jeopardy, a plaintiff must show (1) that he or she was "engaged in particular conduct, and the conduct directly relates to the public policy, or was necessary for the effective enforcement

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"establishes a clear public policy that forbidding Washington employers from discharging employees solely based on their at-home use of medical marijuana." CP 467-68.

of the public policy," Korslund, 156 Wn.2d at 181 (citations omitted); (2) that discouraging the conduct that he or she engaged in would jeopardize the public policy, see Ellis v. City of Seattle, 142 Wn.2d 450, 460, 13 P.3d 1065 (2000); (3) that other means of promoting the public policy are inadequate, see Korslund, 156 Wn.2d at 181-82; and (4) how the threat of dismissal will discourage others from engaging in the desirable conduct, see Hubbard, 146 Wn.2d at 713. In determining whether the public policy has been contravened or jeopardized, a court must look to the "letter or purpose of a statute." Dicomes v. State, 113 Wn.2d 612, 620, 782 P.2d 1002 (1989) (emphasis added).

Roe argues, in essence, that anything that discourages the use of medical marijuana jeopardizes the individual's right to make a "personal, individual" decision regarding its use. The flaw in Roe's argument, however, is that the MUMA does not encourage the use of medical marijuana—it merely decriminalizes that use for purposes of state law. The purpose (and the letter) of the MUMA was to permit the use of medical marijuana for the purposes of state criminal law. It is of no consequence, however, whether policies such as TeleTech's would lead some patients to opt not to use medical marijuana. It still remains a "personal, individual decision" and individuals are still free, in consultation with their physicians, to use marijuana for medicinal purposes

without fear of a state conviction. The fact that the MUMA does not encourage (or favor or require) the use of medical marijuana distinguishes this case from others in which public policies were found to be jeopardized by employees' terminations. Compare Korslund, 156 Wn.2d 168 (public policy encouraged reporting of violations of Energy Reorganization Act); Roberts, 140 Wn.2d 58 (public policy prohibited sex discrimination) Gardner, 128 Wn.2d 931 (public policy favored protecting human life); Thompson, 102 Wn.2d 219 (public policy encouraged reporting of violations of Federal Corrupt Practices Act).

Moreover, TeleTech's decision to terminate Roe's employment cannot jeopardize a public policy found in the MUMA when the MUMA itself expressly protects TeleTech's right to do just that. RCW 69.51A.060(4) ("Nothing in this chapter requires any accommodation of any medical use of marijuana in any place of employment . . . .").

3. TeleTech Has an Overriding Justification for Refusing to Employ Current Users of Illegal Drugs

Finally, TeleTech has an overriding justification for refusing to employ individuals who report to work under the influence of illegal substances such as marijuana. "This fourth element of a public policy tort acknowledges that some public policies, even if clearly mandated, are not strong enough to warrant interfering with employers' personnel

management." Gardner, 128 Wn.2d at 931. The negative implications to employers of drug use by employees are well documented. See, e.g., Robinson v. Seattle, 102 Wn. App. 795, 801, 10 P.3d 452 (2000) (summarizing findings of Seattle City Council that illegal drug use results in "substantial loss to the national and local economies by way of lost productivity, absenteeism, turnover costs, health care costs, increased workplace accidents and injuries, more workers' compensation claims, and losses from impaired judgment and creativity" and recognizing that "[r]eductions in absenteeism, sick leave, workers' compensation claims, disciplinary problems, and turnover are 'unimpeachable goals'" for employers).[20] TeleTech's concern about maintaining a work environment that is safe, healthy, productive, and efficient for its employees, its customers, and the general public is justified and legitimate. See Gardner, 128 Wn.2d at 948-49 (recognizing that employers have "legitimate interest in maintaining a safe workplace"). TeleTech also has a justifiable interest

[20] Marijuana presents problems similar to other illegal drugs. 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. See United States Department of Health & Human Services, National Institutes of Health, National Institute on Drug Abuse, InfoFacts, *available at* http://www.drugabuse.gov/PDF/InfoFacts/Marijuana07.pdf at 5 (Apr. 2006) (citing C. Zwerling, et al., *The Efficacy of Pre-employment 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 Psychological Medicine 1415-22 (2003) (heavy marijuana abusers reported that drug

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in protecting itself from the risk of vicarious liability that might arise from tortious acts committed by employees whomemployers know to be under the influence of illegal substances. Finally, TeleTech's only customer in Washington is Sprint Nextel. See CP 216 (at ¶ 4). In its contract with TeleTech, Sprint Nextel requires that TeleTech perform pre-employment drug testing. See id. (at ¶ 6). TeleTech is at risk of losing its only client in the state of Washington should the Court hold that it has a duty to accommodate Roe's illegal drug use.[21]

For all of those reasons, the trial court properly dismissed Roe's claim for wrongful discharge in violation of public policy.

C. The Trial Court Did Not Err When It Denied Roe's Motion for Summary Judgment

Finally, should this Court reverse summary judgment in favor of TeleTech (which it should not), it should nonetheless affirm the trial court's denial of Roe's motion for summary judgment. There are material issues of fact that preclude entry of a judgment in Roe's favor.

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impaired several important measures of life achievement including cognitive abilities, career status, social life, and physical and mental health).

[21] A ruling in favor of Roe could have wide-reaching implications on business in this state. Thus, this case presents public policy interests that run counter to those raised by Roe.

1. There Is a Material Issue of Fact as to Whether Roe was a Qualifying Patient

There is a genuine issue of material fact as to whether Roe is a "qualifying patient" under the Act.[22] To be a "qualifying patient," the individual must have been diagnosed by a physician as having a terminal or debilitating medical condition. See RCW 69.51A.010(3)(b). A "terminal or debilitating medical condition" means, inter alia, "[i]ntractable pain unrelieved by standard medical treatments and medications." RCW 69.51A.010(4)(b).

Here, Roe's medical records reveal that she did not exhaust all standard medical treatments or medications for her migraines before seeking an authorization to use medical marijuana. The doctor who issued the Authorization, Dr. Thomas Orvald of The Hemp and Cannabis Foundation, saw Roe on only one occasion. See CP 187-97. In diagnosing her as having a terminal or debilitating medical condition, he relied on the chart notes of William Minteer, D.O. See CP 313-18. Roe saw Dr. Minteer on only four occasions for her headaches: March 2, 2005; January 31, 2006; April 18, 2006; and June 7, 2006. See CP 314-18. On June 7, 2006, Dr. Minteer noted that Roe had not previously tried Inderal

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[22] For the purpose of its summary judgment motion only, TeleTech conceded that Roe is a qualifying patient under the Act. See CP 391 at n.1. For purposes opposing (...continued)

for her migraines. See CP 315. He warned her that she would have a couple of weeks of discomfort before things would hopefully improve. See id. This was in part because he anticipated that she would experience "rebound headaches" as she weaned herself from her "chronic pain medicine use." Id. Yet, less than three weeks later, Roe received the Authorization from Dr. Orvald. See CP 199-200. The records show that she was already using marijuana more than four times a day at the time she sought the Authorization. See CP 194. Roe did not give the Inderal time to take effect or the rebound headaches time to subside before turning to marijuana. Nor does anything in the record suggest that Dr. Orvald or Dr. Minteer examined whether there were other standard medications that might relieve Roe's headaches. Marijuana may provide Roe relief from her migraines; the MUMA, however, contemplates that individuals with intractable pain must show that their pain cannot be relieved by "standard medical treatments and medications" before they may avail themselves of the MUMA's protections. There is sufficient evidence from which a jury could conclude that Roe failed that standard.

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Roe's motion for summary judgment, however, TeleTech disputed that Roe was a qualifying patient. See CP 446-48.

2. There Is a Material Issue of Fact as to Whether Roe Was "Using" Marijuana in the Workplace

Finally, even under Roe's own interpretation of the MUMA, an employer has no duty to accommodate the use of marijuana on-site. A careful reading of Roe's argument reveals that she interprets the word "use" to mean "consume," thereby twisting the language of the MUMA even further to reach the conclusion that it is only the on-site "consumption" of marijuana that an employer need not accommodate. She then argues that because she consumes her marijuana at home, she is not in violation of the statute. Roe's position is untenable. Under her theory, if an employee consumed marijuana just outside the employer's front gate and appeared for work under the influence of marijuana, she would not be "using" marijuana in the workplace. Clearly that is not what the voters intended when they passed a measure providing that an employer has no duty to accommodate the medical use of marijuana in the workplace. The common meaning of the word "use" includes "to put into action or service" and to "avail oneself of." Webster's New Collegiate Dictionary at 1288 (1st ed. 1973). A person who is under the influence of marijuana is "availing oneself" of marijuana and is thus "using" marijuana. A careful reading of Roe's declaration reveals that she did not state that she did not, or would not, report for work under the influence of

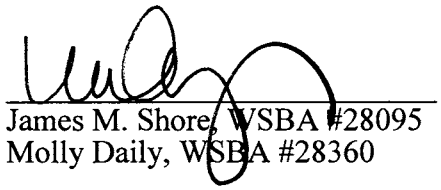
marijuana.[23] Nor did she state that she only consumes marijuana at night. To the contrary, she testified in her declaration that without marijuana, she is unable to work and that using marijuana "allows her to work." CP 261 (at ¶ 5), 262 (at ¶12). At the time she received the Authorization, Roe was using marijuana more than four times a day. See CP 194. It is undisputed that when Roe reported for her drug test, she had marijuana in her system. For those reasons, Roe cannot show that, as a matter of law, she was in compliance with MUMA when she reported for her drug test. The trial court therefore properly denied her motion for summary judgment.

VI. CONCLUSION

The trial court's summary judgment order should be affirmed.

DATED: August 27, 2008.

STOEL RIVES LLP



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[23] Roe claims in her declaration that she uses only a "small" amount of marijuana. CP 262 (at ¶ 12). She did not identify the actual amount of her use; thus her conclusion that it is "small" lacks any evidentiary value. Nor did she offer any evidence that she only used marijuana in a quantity that was necessary for her personal, medical use, as is required by the statute. See RCW 69.51A.040(2)(b).