

TABLE OF CONTENTS

	Page(s)
PETITION FOR REVIEW.....	1
ISSUES PRESENTED FOR REVIEW....	1
REASONS FOR GRANTING REVIEW.....	2
STATEMENT OF THE CASE.....	5
STATEMENT OF FACTS.....	5
ARGUMENT.....	7
I. ROSS PROPERLY STATED A CAUSE OF ACTION FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY THROUGH HIS ALLEGATIONS THAT HE WAS FIRED FOR USING MARIJUANA TO TREAT CHRONIC PAIN WHILE OFF-DUTY, IN ACCORDANCE WITH THE COMPASSIONATE USE ACT.....	7
II. ROSS PROPERLY STATED A CAUSE OF ACTION FOR EMPLOYMENT DISCRIMINATION, IN VIOLATION OF CALIFORNIA’S FAIR EMPLOYMENT AND HOUSING ACT.....	13
CONCLUSION	17
CERTIFICATE OF WORD COUNT.....	19
EXHIBIT A Court of Appeals Opinion, <u>Ross v. Ragingwire</u>	

TABLE OF AUTHORITIES

CALIFORNIA AUTHORITIES

CASES

<u>Gould v. Maryland Sound Industries</u> (1995) 31 Cal.App.4 th 1137.....	2,9
<u>Green v. Ralee Engineering Co.</u> (1998) 19 Cal.4 th 66.....	10
<u>Hentzel v. Singer Co.</u> (1982) 138 Cal.App.3d 290.....	12
<u>In re Lance W.</u> (1985) 37 Cal.3d 873.....	12
<u>Loder v. City of Glendale</u> (1997) 14 Cal.4 th 846.....	11
<u>People v. Kelly</u> (1869) 38 Cal. 145.....	4,10
<u>People v. Mower</u> (2002) 28 Cal.4 th 457.....	11,12
<u>People v. Tilehkooh</u> (2003) 113 Cal.App.4 th 1433.....	4
<u>Potter v. Firestone Tire & Rubber Co.</u> (1993) 6 Cal.4 th 965.....	10
<u>Ross v. Ragingwire Telecommunications, Inc.</u> (2005) 132 Cal.App.4 th 590.....	1,5,6,7,13,14
<u>Semore v. Pool</u> (1990) 217 Cal.App.3d 1087.....	2,9,15

<u>Stevenson v. Superior Court</u> (1997) 16 Cal.4 th 880.....	9,10
--	------

STATUTES

California Government Code §12900.....	3,13
California Government Code §12926.1.....	4,14
California Government Code §12940(a).....	13,14
California Government Code § 12960.....	1
California Health and Safety Code § 11362.5.....	2,6,7,8,9
California Health and Safety Code § 11362.785(a).....	15
California Labor Code §1102.1.....	14
California Rules of Court 24(b)(1).....	5
California Rules of Court 28(b)(1).....	4,5
California Rules of Court 28(e)(1).....	5

LEGISLATIVE MATERIALS

<u>Ballot Pamphlet, General Election</u> (November 5, 1996) Rebuttal to Argument in favor of Proposition 215 p.60.....	12,13
--	-------

FEDERAL AUTHORITIES

Page(s)

CASES

Gonzales v. Raich
(June 6, 2005) –U.S.--, 125 S.Ct. 2195.....4,10

Parker v. Atlanta Gas Light Co.
(S.D. Ga. 1993) 818 F.Supp. 345..... 15

Rowles v. Automated Production Sys., Inc.
(M.D. P.a. 2000) 92 F.Supp.2d 424..... 16

STATUTES

21 U.S.C. § 903.....4,11

NON-CALIFORNIA STATE AUTHORITIES

Washburn v. Columbia Forest Products, Inc.
(2005) 197 Or.App. 104..... 3,16,17

SECONDARY SOURCES

Marijuana in the Workplace The Impact of Proposition 215
CALIFORNIA EMPLOYMENT LAW REPORTER
(Dec. 1996)..... 3,9

PETITION FOR REVIEW

TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT:

Petitioner Gary Ross ("Ross") respectfully petitions for review of the decision of the Court of Appeal, Third Appellate District, affirming the trial court's sustaining of a demurrer to petitioner's complaint for employment discrimination based on his legal use of marijuana for medical purposes under California law. The decision, filed September 7, 2005, is attached hereto as Exhibit A and is published as *Ross v. Ragingwire Telecommunications, Inc.* (2005) 132 Cal.App.4th 590.

ISSUES PRESENTED FOR REVIEW

1. May a qualified medical marijuana patient who does not use marijuana while on the job and whose job performance is unimpaired in any way by his medical use of marijuana at home to treat chronic pain have a cause of action for wrongful termination in violation of public policy for being fired for his protected use of marijuana?
2. Does an employer violate California's Fair Employment and Housing Act (Government Code § 12960 *et seq.*) by refusing to accommodate and terminating a qualified medical marijuana employee based on the employee's

private use of marijuana to treat a disability, which in no way impedes his ability to perform his job?

REASONS FOR GRANTING REVIEW

Approved by fifty-six percent of the California electorate in 1996, the Compassionate Use Act was expressly enacted to “ensure that seriously ill Californians have the right to obtain *and use* marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person’s health would benefit from the use of marijuana. . . .” (Cal. Health & Safety Code § 11362.5(b)(1)(A) [emphasis added]). For this promise to have any meaning, persons who use marijuana medicinally, as the voters of California intended, must be protected from losing their jobs for privately tending to their health. While employers have broad discretion to determine whom they employ, they cannot legally make demands of their employees, or terminate them, in violation of the public policy of this State. (See *Semore v. Pool* (1990) 217 Cal.App.3d 1087, 1098, 266 Cal.Rptr. 280 (holding that an employee fired for refusing to take drug test may maintain tort action for wrongful discharge in violation of public policy against the employer because the termination violates state right to privacy); *Gould v. Maryland Sound Industries* (1995) 31 Cal.App.4th 1137, 1147-48 (same where employee was fired so employer could avoid paying accrued commissions and vacation pay); *see also*

Jeffrey Tanenbaum, *Marijuana in the Workplace The Impact of Proposition 215*, CALIFORNIA EMPLOYMENT LAW REPORTER (Dec. 1996) at 2 (stating that employers who discharge employees for medical marijuana usage run “a serious risk of a claim for tortious violation of public policy”). The Court of Appeal’s decision, which denies any legal remedy to qualified medical marijuana patients who are terminated for using marijuana in their private lives, frustrates the will of the California voters who passed the Compassionate Use Act and is contrary to the public policy expressly declared therein. (Cf. *Washburn v. Columbia Forest Products, Inc.* (2005) 197 Or.App. 104, 104 P.3d 609, review granted 339 Or. 156, 119 P.3d 224 (Or. Aug. 9, 2005) [holding that employee stated cause of action for employment discrimination under state disability discrimination statute when he was terminated for using marijuana for medical use in accordance with state law, notwithstanding contrary federal law].) Review by this Court is necessary to restore the will of the California voters who passed the Compassionate Use Act and to settle important questions of law within the meaning of California Rules of Court, rule 28(b)(1).

The Court of Appeal also erred in relying on federal law to defeat petitioner’s claim under the Fair Employment and Housing Act (Government Code § 12900 *et seq.*) (hereinafter “FEHA”), which raises important issues of federalism. In passing the Compassionate Use Act, the voters of California

consciously elected to adopt a public policy that is different from, and at odds with the federal government's prohibition on marijuana for any and all purposes.

Although the United States Supreme Court has ruled that the federal government has the authority under the Commerce Clause to enforce its blanket prohibition on marijuana use if it so chooses (see *Gonzalez v. Raich* (June 6, 2005), -- U.S. --, 125 S.Ct. 2195, state courts are beholden to state law and, absent federal preemption, must enforce state, rather than federal law. (See *People v. Kelly* (1869) 38 Cal. 145, 150; *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1445.) Federal law does not preempt California's medical marijuana laws. (See 21 U.S.C. § 903 (noting that "no provision of the [federal Controlled Substances] Act shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law".) Furthermore, the California Legislature has recently confirmed, as expressed in the relevant case law, that FEHA provides additional protections against employment discrimination to those provided by federal law. (Cal. Government Code § 12926.1, subd. (a)) The Court of Appeal thus erred in choosing to follow federal law in an area governed by the laws of this State. Review by this Court is necessary to resolve these important questions of law. (See California Rules of Court, rule 28(b)(1).)

STATEMENT OF THE CASE

On September 11, 2002, plaintiff/petitioner Gary Ross ("Ross") filed a complaint in the Superior Court of Sacramento County for wrongful termination in violation of public policy, employment discrimination, and breach of contract. The Superior Court sustained defendant's demurrer as to all of the causes of action on January 22, 2003 (served February 4, 2003). On February 24, 2003, Ross filed a timely notice of appeal of that decision. By published decision, dated September 7, 2005, the Court of Appeal for the Third Appellate District affirmed the Superior Court's holding. (*Ross v. Ragingwire Telecommunications, Inc.* (Sept. 7, 2005) 132 Cal.App.4th 590, 33 Cal.Rptr.3d 803.) That decision became final by operation of California Rules of Court, Rule 24(b)(1) on October 7, 2005. Petitioner has timely filed the instant Petition for Review, pursuant to California Rules of Court, Rule 28(e)(1).

STATEMENT OF FACTS

Since January of 1983, petitioner Gary Ross ("Ross") has suffered from lower back pain and muscle spasms resulting from injuries he sustained during his service with the United States Air Force, for which he receives disability benefits. (*Ross, supra*, 132 Cal.App.4th 590, 595.) Ross first attempted to treat his condition with muscle relaxants and traditional pain medications, but when these

conventional medications failed to provide him needed relief from pain his physician recommended that he use marijuana for this purpose. (*Id.* at 596.) This makes Ross a qualified patient under the Compassionate Use Act (Health & Safety Code § 11362.5).

Since Ross became a qualified patient in September of 1999, he has worked successfully in the field of computer systems administration. (*Id.* at 596.) In September of 2001, Ross sought and obtained a position with defendant Ragingwire Telecommunications, Inc. (Ragingwire”) as Lead Systems Administrator and he began work there on September 17, 2001. (*Id.* at p. 596.) A few days before this, on September 14, 2005, Ragingwire required Ross to take a drug test, which prompted Ross to provide the clinic administering the test a copy of his physician’s medical marijuana recommendation. (*Id.* at p. 596.) Ross did not use marijuana during working hours and his private use of it at home to treat chronic pain in no way impaired his ability to perform his job. (*Id.* at pp. 596-597.) Nevertheless, after Ross’ drug test showed that he had detectable amounts of marijuana in his system, Ragingwire terminated his employment on September 25, 2005. (*Id.* at p. 596.)

///

///

///

ARGUMENT

I.

ROSS PROPERLY STATED A CAUSE OF ACTION FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY THROUGH HIS ALLEGATIONS THAT HE WAS FIRED FOR USING MARIJUANA TO TREAT CHRONIC PAIN WHILE OFF-DUTY, IN ACCORDANCE WITH THE COMPASSIONATE USE ACT

When the California electorate approved the Compassionate Use Act in 1996, they expressly declared as its purpose “ensur[ing] that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician. . . .” (Health & Safety Code § 11362.5(b)(1).) Despite this clear and unequivocal pronouncement by the California voters that this be the public policy of this State, the Court of Appeal found that Ross could not state a claim for wrongful termination in violation of public policy because the Compassionate Use Act, when “[r]ead in context,” only protects the right of qualified medical marijuana patients to use marijuana without incurring *state criminal sanctions*. (*Ross, supra*, 132 Cal. App.4th at 604 [emphasis in original]; see also *ibid.* (“Because an employer’s decision not to employ someone who is violating federal criminal laws is not a criminal sanction imposed by the state, it does not violate the policy set forth in the Compassionate Use Act.”).)

The Compassionate Use Act, however, on its face, does more than this. The Act not only states as its purpose the exemption of patients and their primary caregivers from state criminal sanctions (Health & Safety Code § 11362.5, subd.(b)(1)(B)), but it also “encourage[s] the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana” (Health & Safety Code § 11362.5, subd.(b)(1)(C)), and, more fundamentally, it declares the right of seriously ill Californians to obtain and use marijuana for medical purposes in appropriate circumstances (Health & Safety Code § 11362.5, subd.(b)(1)(A)). Ross did precisely this -- he used marijuana to treat chronic pain on the recommendation of his physician after conventional medications had failed him. His termination for doing what the voters intended violates the public policy of this State and the Court of Appeal clearly erred in reading subdivision (b)(1)(A) out of the Compassionate Use Act.

Nor does it make any difference to the state common law tort of wrongful termination in violation of public policy that no statute expressly provides for a cause of action for terminating qualified medical marijuana patients, as the Court of Appeal reasoned. (*Id.* at pp. 604-605.) The tort is fundamentally a creature of the common law and does not require an express prohibition on employment discrimination by statute. Rather, the public policy protected by the common law

tort need only be, in the words of this Court, “tethered to fundamental policies that are delineated in constitutional or statutory provisions. . . .” (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889.) The Compassionate Use Act expressly provides that its purpose is to ensure the right of seriously ill Californians to use marijuana for medical purposes (Health & Safety Code § 11362.5, subd.(b)(1)(A)), which amply supplies the public policy for the common law tort. (Cf. *Semore v. Pool* (1990) 217 Cal.App.3d 1087, 1098, 266 Cal.Rptr. 280 (holding that an employee fired for refusing to take drug test may maintain tort action for wrongful discharge in violation of public policy against the employer because the termination violates state right to privacy); *Gould v. Maryland Sound Industries* (1995) 31 Cal.App.4th 1137, 1147-48 (same where employee was fired so employer could avoid paying accrued commissions and vacation pay); *see also* Jeffrey Tanenbaum, *Marijuana in the Workplace The Impact of Proposition 215*, CALIFORNIA EMPLOYMENT LAW REPORTER (Dec. 1996) at 2 [stating that employers who discharge employees for medical marijuana usage run “a serious risk of a claim for tortious violation of public policy”].) The Court of Appeal erred in depriving Ross of the opportunity to seek a remedy.¹

¹ As a general matter, when a legislative provision protects a class of persons for engaging in certain conduct, but it does not provide for a civil remedy for a violation, the court may accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action, if such remedy is

The district court also erred in choosing to follow federal criminal law, in derogation of the public policy of this State. As stated in *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, “The California courts long ago recognized that state courts do not enforce the federal criminal statutes.” (*Id.* at p. 1445 [citing *People v. Kelly* (1869) 38 Cal. 145, 150].) Instead, they must effectuate the policies expressed in the State constitution and statutes, unless preempted from doing so by federal law. (Cf. *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 71 [“aside from constitutional policy, the Legislature, and not the courts, is vested with the responsibility to declare the public policy of the state”].) While federal law is supreme and the federal government is authorized to regulate in this area, as the United States Supreme Court held in *Gonzalez v. Raich* (June 6, 2005), -- U.S. --, 125 S.Ct. 2195, the federal Controlled Substances Act (“CSA”) does not preempt California’s medical marijuana laws -- the CSA expressly states that “no provision of the Act shall be construed as indicating an intent on the part of

needed to assure the effectiveness of the legislative provision. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1018.) Such is most assuredly the case here, as medical marijuana patients will be relegated to second-class citizens if they are not permitted to work. The Court of Appeal got it backwards when it required a statute to expressly provide for the tort of wrongful termination, rather than seeking to determine whether such public policy is expressed in any statute and, if so, whether such statute preempts the common law tort. (See *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 899-903 [California’s FEHA does not preempt common law tort for wrongful termination in violation of public policy premised on public policy against age discrimination expressed in the FEHA].)

Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law.” (21 U.S.C. § 903.) As in *People v. Mower* (2002) 28 Cal.4th 457, wherein this Court first interpreted the Compassionate Use Act, how the federal government chooses to enforce its blanket probation on marijuana for all purposes “has no bearing upon the question[s] presented, which involve[s] state law alone.” (*See id.* at p. 465 fn.2.)

That the Court of Appeal misunderstands or refuses to implement the policy choice made by the California electorate is evidenced by its reasoning that “[i]n light of the well-documented problems that are associated with the abuse of drugs and alcohol by employees--increased absenteeism, diminished productivity, greater health costs, increased safety problems and potential liability to third parties, and more frequent turnover--an employer, private or public, clearly has a legitimate (i.e. constitutionally permissible) interest in ascertaining whether persons to be employed in any position currently are *abusing* drugs or alcohol.” (*Ross, supra*, 132 Cal. App. 4th at 599 [quoting *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 865] [emphasis added].) Aside from the fact that none of the parade of horrors discussed by the Court were manifested by Ross in the approximately six years he has worked in the field of computer systems administration, the voters of California, in passing the Compassionate Use Act, have rejected the view that use of medical marijuana by a qualified patient is tantamount to the *abuse* of a drug.

(Cf. *People v. Mower, supra*, 28 Cal.4th at p. 482 [so long as the conditions of the Compassionate Use Act are met, “possession and cultivation of marijuana is no more criminal . . . than the possession and acquisition of any prescription drug with a physician’s prescription”].) Although the Court of Appeal may disagree with the policy choice made by the voters of California, it may not substitute its own views for the law they have passed. (See *Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 297 [Courts must not “mistake their own predilections for public policy which deserves recognition at law”].)

Finally, further support for the Petitioner’s policy claim is in the November 5, 1996 General Election Ballot Materials regarding Proposition 215. In *People v. Mower* this court repeatedly (28 Cal.4th at 473, 475, 482) referred to these pamphlet materials in arriving at its decision. The Court noted that such materials are important to determine the purpose of the proposition in question and the intent of the voters to interpret the statute. (*In re Lance W.*, (1985) 37 Cal.3d 873, 886-890). In this case, the Official Title and Summary prepared by the Attorney General notes that the wording of the statute goes beyond criminal conduct. (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) Official Title and Summary p. 58). Moreover, the argument in favor of the Proposition includes the rhetorical question, IF DOCTORS CAN PRESCRIBE MORPHINE, WHY NOT MARIJUANA? ([Capitalized in original], Ballot Pamp., Gen. Elec. (Nov. 5, 1996)

Argument in Favor of Proposition 215, p. 60) The People of the State of California clearly wanted the same protections afforded to users of medical marijuana that are afforded other prescribed or recommended medications, and the voters clearly rejected the notion that medical marijuana users should be discriminated against.

II.

ROSS PROPERLY STATED A CAUSE OF ACTION FOR EMPLOYMENT DISCRIMINATION, IN VIOLATION OF CALIFORNIA'S FAIR EMPLOYMENT AND HOUSING ACT

For similar reasons, the Court of Appeal also erred in finding that Ross could not state a cause of action for violation of California's Fair Employment and Housing Act (Government Code § 12900 *et seq.*) ["FEHA"].) The Court of Appeal acknowledged that Ross is a qualified individual with a disability, as defined by the FEHA. (*Ross, supra* 132 Cal. App.4th at 596 .) Yet, despite the fact that FEHA expressly forbids employers from refusing to hire or accommodate persons due to a physical disability or medical condition (Government Code § 12940, subd.(a)), the Court of Appeal found that the FEHA does not provide a remedy for discrimination perpetrated against Ross. Again, the Court of Appeal relied on federal law to hold this.

Although California courts may look to decisions interpreting the federal anti-discrimination laws to interpret similar provisions of California's FEHA where relevant (see *Ross, supra*, 132 Cal.App.4th at 600 fn.3), the California

Legislature has recently confirmed that the FEHA “provides protections independent from those in the federal Americans with Disabilities Act of 1990” and that while “the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections.” (Cal. Government Code § 12926.1, subd. (a).)² The Court of Appeal erred in applying federal law as a ceiling on the protections afforded to medical marijuana patients through the FEHA and the Compassionate Use Act.

Nor is there any merit to the Court of Appeal’s suggestion that recognition of these protections would require employers to violate federal law. (See *Ross, supra*, 132 Cal. App.4th at pp. 601-602.) Ross is not contending that he be permitted to bring marijuana into the workplace or that he be permitted to come to work under the influence of marijuana. Rather, he is contending that he not be discriminated against based on his disability and that his employer reasonably accommodate his private use of marijuana where it does not impair his job performance or harm the employer in any way. No federal law requires an employer to drug test a person in Ross’ position, much less refuse to hire or terminate him for having detectable levels of marijuana in his system. (See 54

² Unlike the federal anti-discrimination statutes, for instance, the FEHA expressly provides protections for persons with medical conditions and from discrimination based on marital status and ancestry. (Government Code § 12940, subd. (a); see also Labor Code § 1102.1 [same for sexual orientation].)

Fed.Reg. 4946-01 (Jan. 31, 1989) ["10. Question--Do either the Drug-Free Workplace Act or its implementing regulations published today require contractors or grantees to conduct drug tests of employees? Answer--No."]; *Parker v. Atlanta Gas Light Co.* (S.D. Ga. 1993) 818 F.Supp. 345, 347 [same].) There is no conflict here between state and federal law. The Court of Appeal managed to envision such conflict only by transforming Ross' request that his employer accommodate his private medical marijuana use into a demand that he bring his marijuana to work. No federal law would be violated by Ross' proposed accommodation. California law, on the other hand, demands this. (See also *Semore, supra*, 217 Cal.App.3d at pp. 1098-1100 [noting that employer's needs cannot be assessed on a demurrer].)

Indeed, the California Legislature has made precisely such a distinction between private home use of medical marijuana and on-the-job use when it passed legislation clarifying employers' obligations after the passage of the Compassionate Use Act. Although not once mentioned by the Court of Appeal in its published decision, California Health and Safety Code Section 11362.785(a) provides in pertinent part: "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 obvious implication from this provision is that the Legislature assumed that the

Compassionate Use Act and the FEHA required at least some accommodation of medical marijuana use by employers, but that such accommodation would not extend to on-premises or on-duty use. Ross is asking for the bare minimum accommodation from his employer -- that he not be fired merely for using marijuana in his private time to treat his medical condition, which does not affect his employer in any way. (Cf. *Rowles v. Automated Production Sys., Inc.* (M.D. Pa. 2000) 92 F.Supp.2d 424, 430 (holding that employer's drug policy violates the ADA to the extent that it prohibits the use of all legally prescribed controlled substances without a determination that such prohibition is job-related and consistent with business necessity].) By implication, the Legislature has endorsed such accommodation.

That the Court of Appeal erred in concluding otherwise is further underscored by the court's reasoning in *Washburn v. Columbia Forest Products, Inc.* (2005) 197 Or.App. 104, 104 P.3d 609, *review granted by* 339 Or. 156, 119 P.3d 224 (Or. Aug. 9, 2005), wherein a unanimous panel of the Court of Appeals of Oregon held that the trial court erred in granting summary judgment for the defendant-employer on a nearly identical employment discrimination claim as that advanced here. (*Id.* at p. 106.) *First*, the court determined that cases construing the federal Americans with Disabilities Act ("ADA") were not controlling, despite the fact that the Oregon disability law provides that it "shall be construed to the

extent possible in a manner that is consistent with any similar provisions of the [ADA].” (*Id.* at pp. 108-110 [quoting ORS 659A.139].) Then, the court assumed that an employee terminated for using marijuana in accordance with state law may state a disability claim under Oregon law if he could show that he was, in fact, disabled. To defeat this cause of action, defendant argued that Oregon’s medical marijuana law states that nothing in the Act shall be construed to require “[a]n employer to accommodate the medical use of marijuana in any workplace,” (*Id.* at 112 [quoting ORS 475.340(2)]), but the court noted that such “use” in the workplace does not include merely having detectable levels of marijuana in one’s system. (*Id.* at pp. 111-114.) Finally, the court found that the employee’s state law claim for employment discrimination was not preempted by the federal Drug-Free Workplace Act of 1988, since it only prohibits possession and use of marijuana in the workplace and plaintiff “did none of those things ‘in the workplace’ and so cannot be said to have violated (or caused defendant to violate) the Federal Drug-Free Workplace Act.” (*Id.* at p. 115.) The *Washburn* court’s reasoning is sound and this Court should adopt it here.

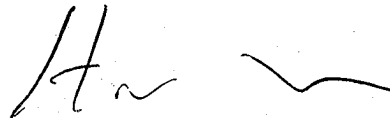
CONCLUSION

Seeming to disagree with the policy choice made by the voters of this State, the Court of Appeal has given employers carte blanche to discriminate against qualified medical marijuana patients who exercise the right promised to them

through the Compassionate Use Act. If this right is to be accorded the meaning ascribed to it by the California electorate, medical marijuana patients who perform their jobs well must have a legal remedy for being terminated simply for exercising this statutory right. Well-established common law and statutory torts already provide the vehicle for such a remedy and the Compassionate Use Act supplies the public policy. Medical marijuana patients and the California electorate deserve to have this Court enforce the public policy expressly stated in the Compassionate Use Act, rather than federal law. While federal officials may enforce the federal drug laws, the voters of California have called upon state courts and officials not to follow their lead.

DATED: October 17, 2005

Respectfully submitted,



STEWART KATZ

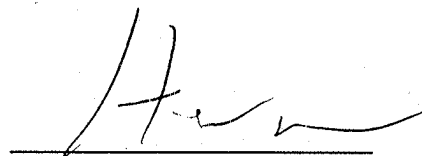
JOSEPH D. ELFORD

Counsel for Petitioner
GARY ROSS

CERTIFICATE OF WORD COUNT

The text of this brief consists of 4,168 words as counted by the Microsoft Word processing program used to generate the brief.

Dated: October 17, 2005

A handwritten signature in black ink, appearing to read 'Stewart Katz', written over a horizontal line.

STEWART KATZ,
Attorney for Petitioner

EXHIBIT – A

CERTIFIED FOR PUBLICATION

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

GARY ROSS,

Plaintiff and Appellant,

v.

RAGINGWIRE TELECOMMUNICATIONS, INC.,

Defendant and Respondent.

C043392

(Super. Ct. No.

02AS05476)

FILED

SEP -7 2005

COURT OF APPEAL - THIRD DISTRICT
DEENA C. FAWCETT

BY _____ Deputy

APPEAL from a judgment of the Superior Court of Sacramento County, Joe S. Gray, Judge. Affirmed.

Law Office of Stewart Katz, Stewart Katz and Costa Kerestenzis for Plaintiff and Appellant.

Jackson Lewis, D. Gregory Valenza and Marlena G. Gibbons for Defendant and Respondent.

In accordance with the Compassionate Use Act of 1996, plaintiff Gary Ross had a physician's recommendation to use marijuana for his chronic back pain. (Health & Saf. Code, § 11362.5 (hereafter the Compassionate Use Act or §.11362.5.) Nevertheless, when plaintiff's

employer, Ragingwire Telecommunications, Inc. (defendant), learned plaintiff had tested positive for marijuana during a preemployment drug test, it discharged him from the position that he had held for eight days.

Plaintiff sued defendant for wrongful termination, employment discrimination, and breach of contract. Judgment was entered against plaintiff after defendant demurred successfully to his complaint.

On appeal, plaintiff contends the trial court erred in ruling that because his use of marijuana violated federal criminal statutes, defendant was justified as a matter of law in terminating plaintiff's employment even if his conduct did not violate state criminal laws due to the Compassionate Use Act. In plaintiff's view, defendant's action violated the Fair Employment and Housing Act (FEHA) and constituted a wrongful termination in violation of public policy.

We shall affirm the judgment. As we will explain, employers have legitimate interests in not employing persons who use illegal drugs. As recognized by the California Supreme Court, such use has resulted in, among other things, increased absenteeism from work, diminished productivity, greater health costs, and increased problems with respect to safety in the workplace. Nothing in FEHA precludes an employer from firing, or refusing to hire, a person who uses an illegal drug. Because the possession and use of marijuana is illegal under federal law, a court has no legitimate authority to require an employer to accommodate an employee's use of marijuana, even if it is for medicinal purposes and thus legal under California law. If FEHA is to be extended to compel such an accommodation, that is a public policy decision that must be made by the Legislature, or by the

electorate via initiative, and not by the courts. Contrary to plaintiff's claim, permitting employers to fire, or refuse to hire, a person who exercises his or her statutory right under California law to use marijuana for medicinal purposes does not violate state policy created by the Compassionate Use Act. That initiative simply permits a person to use marijuana for medicinal purposes in our state without incurring state criminal law sanctions. The initiative says nothing about protecting the employment rights of those who do so. For a court to insert something that is missing from the statute would be impermissible judicial legislation. If the omission is a flaw in statutory scheme, it is up to the Legislature or the electorate, not the courts, to fix it.

FACTS

The complaint against defendant contains the following allegations.

Plaintiff is a qualified individual with a disability as defined by the Fair Employment and Housing Act (FEHA). (Gov. Code, § 12900 et seq.) He has suffered from a lower back strain and muscle spasms since January 1983, as the result of injuries that he sustained during his service with the United States Air Force, for which he receives disability benefits. After plaintiff failed to obtain relief from muscle relaxants and traditional pain medications, his physician gave him a recommendation to use marijuana in accordance with section 11362.5. Plaintiff has used marijuana since September 1999.

In September 2001, defendant offered plaintiff a position as a lead systems administrator. Defendant, a corporation providing

information technology infrastructure to businesses, gave plaintiff two compensation options: (1) a higher base salary and benefits, with fewer stock options, or (2) a significantly lower base salary and benefits, with greater stock options when benefits vested in three years. Plaintiff accepted the latter offer.

Defendant required plaintiff to take a preemployment drug test. Before taking the test, plaintiff gave to the clinic administering the test a copy of his physician's written recommendation regarding using marijuana for medicinal purposes.

Plaintiff began working for defendant on September 17, 2001, a few days after taking the drug test. Plaintiff then got a call from the clinic, advising him that he had tested positive for Tetrahydrocannabinol (THC), the main chemical found in marijuana.

On September 20, 2001, defendant informed plaintiff that he was being suspended as a result of the drug test results. Plaintiff gave defendant a copy of his physician's recommendation and explained that he used marijuana to relieve chronic back pain. Defendant told plaintiff that it would verify the validity of the physician's recommendation, and that it then would advise plaintiff of its decision regarding whether to allow him to continue working.

Defendant terminated plaintiff's employment on September 25, 2001, because of his use of marijuana.

According to the allegations in plaintiff's complaint, his disability and use of marijuana do not affect his ability to perform the essential functions of the job. Since he began taking marijuana for medicinal purposes, he has worked in the same field

as the job offered by defendant and has performed satisfactorily, without any complaints about his job performance.

Plaintiff alleges that defendant's action in firing him because of his use of marijuana as medicine for his disability, and its failure to provide him with reasonable accommodation for his disability, violated FEHA and constituted a wrongful discharge in violation of public policy. He also alleges that the structure of the job offer, including the lesser salary with greater stock options after a three-year vesting period, as well as defendant's policies, practices, and statements, created an implied in fact contract that plaintiff would not be terminated without just cause, which defendant breached when it fired him for using marijuana as authorized by the Compassionate Use Act.¹

Defendant demurred to plaintiff's complaint on the ground that marijuana is an illegal controlled substance under federal law and nothing in the Compassionate Use Act requires employers to ignore this prohibition and employ persons who test positive for using marijuana. According to defendant, refusing to accommodate such illegal conduct does not violate FEHA or public policy. Defendant also asserted that plaintiff was an at-will employee, but even if there was an implied contract to discharge plaintiff only for cause, his illegal drug use was good cause. Thus, the complaint

¹ Plaintiff also pleaded a cause of action for breach of the implied covenant and fair dealing, but agreed with defendant that the claim is superfluous to other claims pleaded by plaintiff. Accordingly, it is not at issue on appeal.

failed to state facts sufficient to constitute a cause of action.
(Code Civ. Proc., § 430.10, subd. (e).)

Plaintiff opposed the demurrer, asserting that the Compassionate Use Act rendered his drug use legal and, thus, it was a violation of FEHA to discharge him rather than to accommodate his use of legal medication necessary to treat his disability. He also argued that firing him for using a legal medication violated the public policy set forth in the Compassionate Use Act, and that the parties had an implied contract, which limited defendant's ability to discharge plaintiff without cause.

After noting the parties agreed that the dispositive issue was whether plaintiff's use of marijuana is an illegal activity, the trial court held that because the conduct violated federal law, it was unlawful even if the use of marijuana for medicinal purposes does not violate state criminal laws due to the Compassionate Use Act. Accordingly, the court sustained the demurrer and entered judgment in favor of defendant.

DISCUSSION

I

In an appeal from a judgment of dismissal entered after a demurrer is sustained, the demurrer is treated as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879) Properly pleaded allegations of material facts, together with facts that may be judicially noticed, are accepted as true. (*Blank*

v. Kirwan, *supra*, 39 Cal.3d at p. 318; *Platt v. Coldwell Banker Residential Real Estate Services* (1990) 217 Cal.App.3d 1439, 1444.)

Accordingly, we presume that plaintiff suffers from disabling back pain, that he needs to use marijuana to treat his pain, that he is able to perform the essential functions of the job if his employer accommodates him by permitting him to use marijuana, and that he has a valid doctor's recommendation for the use of marijuana in compliance with the requirements of the Compassionate Use Act.

The question on appeal is this. If an employer discharges an employee for using marijuana, even though it is being used for medicinal reasons in accordance with the Compassionate Use Act, does the discharge violate FEHA, public policy, or an implied contract not to terminate the employee except for just cause?

II

The trial court determined that plaintiff could not state a cause of action under FEHA because defendant did not discharge plaintiff due to his disability, but because his preemployment drug test disclosed that he was using an illegal drug, marijuana.

Under FEHA, an employer may not discriminate against an employee based on the employee's physical condition or disability. (*Finegan v. County of Los Angeles* (2001) 91 Cal.App.4th 1, 7; Gov. Code, § 12940, subd. (a).)² However, "nothing in the FEHA,

² Government Code section 12940 states in pertinent part: "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United

or any other California statute, purports to prohibit, or place general limitations upon, employer-mandated drug testing."

(*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 865.)

Hiring of a new employee frequently represents a considerable investment on the part of the employer. Therefore, "[i]n light of the well-documented problems that are associated with the abuse of drugs and alcohol by employees--increased absenteeism, diminished productivity, greater health costs, increased safety problems and potential liability to third parties, and more frequent turnover--an employer, private or public, clearly has a legitimate (i.e.,

States or the State of California: [¶] (a) For an employer, because of the . . . physical disability, mental disability, medical condition, . . . of any person, to refuse to hire or employ the person . . . , or to bar or to discharge the person from employment [¶] (1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations. [¶] (2) This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform his or her essential duties, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations."

constitutionally permissible) interest in ascertaining whether persons to be employed in any position currently are abusing drugs or alcohol." (*Loder v. City of Glendale, supra*, 14 Cal.4th at pp. 882-883, fns. omitted.)

Accordingly, an employer lawfully may refuse to employ a person who fails a drug test that is a precondition of employment, even if the person has begun to work for the employer prior to taking the drug test. (*Pilkington Barnes Hind v. Superior Court* (1998) 66 Cal.App.4th 28, 31-34.)

In addition, an employer need not accommodate a disability by allowing an employee to use illegal drugs. FEHA, like the Americans With Disabilities Act (ADA), requires only reasonable accommodation of an employee's disability. (Gov. Code, §§ 12926, 12940, subd. (m); Cal. Code Regs., tit. 2, § 7293.9; *US Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 401 [152 L.Ed.2d 589, 602] [the ADA may require affirmative conduct to promote the entry of disabled people into the work force, but does not demand action beyond the realm of the reasonable].) It is not reasonable to require an employer to accommodate a disability by allowing an employee's drug use when such use is illegal. (See, e.g., 42 U.S.C. § 12114(a) ["the term 'qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use"].)

Here, plaintiff began working for defendant after he took the preemployment drug test, but before defendant received the test results. If plaintiff's drug use is illegal, then defendant was

justified in revoking its job offer and terminating his employment. (*Pilkington Barnes Hind v. Superior Court*, *supra*, 66 Cal.App.4th at p. 34; cf. *Pernice v. City of Chicago* (7th Cir. 2001) 237 F.3d 783, 785 [an employer does not run afoul of the ADA by discharging an employee for the violation of valid work rules applicable to all employees, such as a prohibition against the use of illegal drugs, even if the employee's violation occurred under the influence of a disability]³.)

Thus, as the trial court correctly stated, the dispositive issue is whether plaintiff's use of marijuana is illegal.

Relying primarily on the Compassionate Use Act, plaintiff argues that because possessing and using marijuana for medicinal purposes is not illegal under California law, defendant was prohibited from discharging him based on his use of marijuana with a physician's approval. In plaintiff's view, because his use of marijuana is necessary to alleviate the pain caused by his disability, defendant was required by FEHA to permit him to use the drug as a reasonable accommodation. (Citing Gov. Code, § 12940.) It follows, he claims, that firing him for legally using marijuana for medicinal purposes violates FEHA. We disagree.

The Compassionate Use Act provides that certain criminal statutes prohibiting the possession and cultivation of marijuana

³ Because FEHA is modeled on the federal Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.) and the ADA (42 U.S.C. § 12101 et seq.), decisions interpreting those laws are relevant when interpreting similar provisions of FEHA. (*Finegan v. County of Los Angeles*, *supra*, 91 Cal.App.4th at p. 7; *McCullah v. Southern Cal. Gas Co.* (2000) 82 Cal.App.4th 495, 499.)

(Health & Saf. Code, §§ 11357, 11358) shall not apply to a patient, or to the patient's primary caregiver, "who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician."

(§ 11362.5, subd. (d).)⁴ Its purpose is to ensure that seriously ill Californians have the right to obtain and use marijuana under the medical circumstances specified in the Compassionate Use Act,

⁴ Section 11362.5 states in pertinent part: "(a) This section shall be known and may be cited as the Compassionate Use Act of 1996. [¶] (b) (1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows: [¶] (A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. [¶] (B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction. [¶] (C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana. [¶] (2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes. [¶] (c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes. [¶] (d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician."

and to ensure that those using marijuana in accordance with the act are not subject to criminal prosecution or sanction. (§ 11362.5, subd. (b)(1)(A), (B).)

"[W]ithin its scope, section 11362.5[, subdivision] (d) renders possession and cultivation of marijuana noncriminal--that is to say, it renders possession and cultivation of the marijuana noncriminal for a qualified patient or primary caregiver." (*People v. Mower* (2002) 28 Cal.4th 457, 471.) In other words, so long as the conditions specified in section 11362.5 are met, "possession and cultivation of marijuana is no more criminal . . . than the possession and acquisition of any prescription drug with a physician's prescription." (*Id.* at p. 482.)

Accordingly, the Compassionate Use Act grants patients who use marijuana for medicinal purposes "a limited immunity from [criminal] prosecution, which not only allows a defense at trial, but also permits a motion to set aside an indictment or information prior to trial." (*People v. Mower, supra*, 28 Cal.4th at p. 470.)

However, while the possession, cultivation, and use of marijuana for medicinal purposes under conditions specified in the Compassionate Use Act do not violate California's criminal laws, such conduct is illegal under the federal Controlled Substances Act. (21 U.S.C. §§ 841, 844; *Gonzales v. Raich* (June 6, 2005) ___ U.S. ___ [2005 WL 1321358, p. 13] [the Controlled Substances Act "designates marijuana as contraband for any purpose"]; *People v. Bianco* (2001) 93 Cal.App.4th 748, 753; *Pearson v. McCaffrey* (D.D.C. 2001) 139 F.Supp.2d 113, 121.) As explained by the Supreme Court in *United States v. Oakland Cannabis* (2001) 532 U.S. 483 [149

L.Ed.2d 722], even if a patient is seriously ill, there is no medical necessity defense to the federal prohibition against manufacturing and distributing marijuana, and "nothing . . . suggests that a distinction should be drawn between the prohibitions on manufacturing and distributing and the other prohibitions in the Controlled Substances Act." (*Id.* at p. 494, fn. 7 [149 L.Ed.2d at p. 734].) In a recently decided case, *Gonzales v. Raich, supra*, ___ U.S. ___ [2005 WL 1321358], the court upheld Congress's authority under the Commerce Clause to prohibit the use of marijuana even if that use complies with California's Compassionate Use Act and the marijuana is cultivated and used only in California. (*Id.* at pp. ___ [2005 WL 1321358, pp. 5, 7-10].)

Plaintiff claims we cannot resort to federal law to resolve his claim under FEHA, but he refers us to no legal authority supporting the proposition that he is exempt from federal criminal statutes merely because he lives in California. In fact, the law is to the contrary. (*United States v. Oakland Cannabis, supra*, 532 U.S. 483 [149 L.Ed.2d 722].) Simply because state law does not prohibit plaintiff's conduct does not mean that federal law may not do so. (*U.S. v. Cannabis Cultivators Club* (N.D.Cal. 1998) 5 F.Supp.2d 1086, 1100; cf. *United States v. Rosenberg* (9th. Cir. 1975) 515 F.2d 190, 198, fn. 14.)

We decline plaintiff's invitation to hold that only California marijuana laws apply to his FEHA claim. Such a position raises significant issues of public policy that should be decided by the Legislature, or by the electorate via initiative, rather than by the courts.

For example, taken to its logical conclusion, plaintiff's position would mean that employers must treat the possession and use of marijuana for medicinal purposes just like the acquisition and use of any prescription drug with a physician's prescription. (See *People v. Mower*, *supra*, 28 Cal.4th at p. 482 ["As a result of the enactment of [the Compassionate Use Act], the possession . . . of marijuana is no more criminal--so long as its conditions are satisfied--than the possession and acquisition of any prescription drug with a physician's prescription].) Thus, it could be asserted that if an employer allows other employees with disabilities to bring prescription medication to the workplace as an accommodation that enables them to perform the essential functions of their jobs, then the employer cannot discriminate against medicinal marijuana users by refusing to allow them to bring their medication to work also. If so, this would mean the employer would be compelled to tolerate on its premises the presence of a drug that is illegal under federal law--which, under circumstances not entirely speculative, could result in the employer's workplace being subject to a search conducted by federal authorities pursuing an employee's violation of federal criminal laws.

Another possible consequence is that if an employer must allow certain employees to possess medicinal marijuana at the workplace, so as not to discriminate against them if other employees are allowed to bring prescription medications to work, the employer would be precluded by the Drug-Free Workplace Act from contracting

with the state for provision of goods or services. (Gov. Code, § 8350 et seq.)⁵

Another potential problem with plaintiff's position is that there is no safe method for an employer to determine whether a purported physician's recommendation that an employee use marijuana for medicinal purposes is legitimate, rather than the result of the employee's misrepresentation to the physician regarding his or her physical well being. (*McDaniel v. Mississippi Baptist Medical Center* (S.D.Miss. 1994) 869 F.Supp. 445, 449 [even though a person may be taking drugs under a physician's supervision, if misrepresentation or deceit is involved in obtaining such drugs, the person has violated the Controlled Substances Act and has engaged in illegal use of drugs for purposes of the ADA]; accord, *Weigert v. Georgetown University* (D.D.C. 2000) 120 F.Supp.2d 1, 9, fn. 9.) Unlike prescription drugs that are dispensed under regulated circumstances, the Compassionate Use Act requires only a physician's oral recommendation, which makes it much more difficult for the employer to determine the validity and legitimacy of the employee's use of medical marijuana. Consequently, the employer could be put to the Hobson's choice of either hiring an employee who may be using drugs illegally and is a substance abuser, or refusing to hire the employee and risking the expense of a lawsuit alleging discrimination.

⁵ The Drug-Free Workplace Act provides that to obtain state contracts, a business must certify it prohibits the possession of controlled substances in the workplace. For purposes of the act, controlled substances are defined in accordance with the federal Controlled Substances Act. (Gov. Code, §§ 8351, subd. (c), 8355.)

Unless and until the Legislature, or the electorate, amends FEHA to compel an employer to accommodate an employee's medicinal use of marijuana, we conclude that an employer does not violate FEHA by firing, or refusing to hire, a person whose preemployment drug test reveals that the person is using an illicit drug, including marijuana which is illegal under federal law even when it is being used for medicinal purposes in accordance with the Compassionate Use Act. (*Pilkington Barnes Hind v. Superior Court, supra*, 66 Cal.App.4th at p. 34; cf. *Pernice v. City of Chicago, supra*, 237 F.3d at p. 785.)

While some employers might be willing to employ persons who are using marijuana pursuant to the Compassionate Use Act, so long as they are able to perform the essential functions of the job and do not engage in any disruptive behavior in the workplace, we cannot compel employers to do so. That would require employers to permit employee drug use that is illegal under federal law. A court has no legitimate authority to compel such a result.

III

Plaintiff's complaint also alleged a cause of action for wrongful termination in violation of a fundamental public policy. To support such a claim, the policy (1) must be supported by constitutional or statutory provisions, (2) must inure to the benefit of the public, rather than merely serve the interests of the individual, (3) must have been articulated at the time of the employee's discharge, and (4) must be fundamental and substantial. (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889-890.)

Plaintiff contends that permitting defendant to fire him for using marijuana in accordance with the Compassionate Use Act violates the fundamental public policy set forth in said act of ensuring that seriously ill Californians have the right to use marijuana under specified medical circumstances. (§ 11362.5, subd. (b)(1)(A).) In defendant's view, permitting employers to fire employees who exercise their statutory right to use marijuana for medicinal purposes conflicts with this policy and renders the Compassionate Use Act meaningless, since the lack of job protection undermines the mandated right to use marijuana. We are unpersuaded.

Although the Compassionate Use Act states that one of its purposes is to ensure the right of seriously ill patients to obtain and use marijuana when medically necessary (§ 11362.5, subd. (b)(1)(A)), it "does not trump" the application of federal law. (*People v. Bianco, supra*, 93 Cal.App.4th at p. 755 (conc. & dis. opn. of Scotland, P.J.)) Read in context, the Compassionate Use Act does not confer the unfettered right to obtain and use marijuana for medicinal purposes, only the right to do so without incurring *state criminal sanctions*. (§ 11362.5, subd. (b)(1)(A), (B).) "[O]n its face [the Compassionate Use Act] purports only to exempt certain patients and their primary caregivers from prosecution under certain *California* drug laws--it does not purport to exempt those patients and caregivers from the federal laws." (*U.S. v. Cannabis Cultivators Club, supra*, 5 F.Supp.2d at p. 1094, orig. italics.)

Because an employer's decision not to employ someone who is violating federal criminal laws is not a criminal sanction imposed

by the state, it does not violate the policy set forth in the Compassionate Use Act. Nothing in section 11362.5 mandates that an employer accept or ignore an employee's use of marijuana for medicinal purposes despite the fact that such use remains illegal under federal law. Indeed, the Compassionate Use Act says nothing about protecting the employment rights of seriously ill persons if they use marijuana to treat their illnesses. Perhaps this is because the proponents of the initiative primarily were concerned with ensuring access to marijuana for those who suffer from debilitating illnesses of the type that generally render them unable to work. Or the omission may have been intentional.

It is a cardinal rule of statutory construction that courts may not add provisions to a statute. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 827; Code Civ. Proc., § 1858.) In the absence of a statutory expression of intent to protect the jobs of medicinal marijuana users and to require employers to ignore their employees' violations of federal criminal laws regarding marijuana, we decline to engage in judicial legislation to insert that which is missing from the statute. (*County of Santa Clara v. Perry* (1998) 18 Cal.4th 435, 446.) Such a policy decision must be made by the Legislature, or by the electorate via initiative. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 334 ["if there is a flaw in the statutory scheme, it is up to the Legislature, not the courts, to correct it"].)

Plaintiff suggests that the intent of the Compassionate Use Act (Proposition 215) to protect the jobs of medicinal marijuana users can be gleaned from the ballot pamphlet statements. He points to

the opponents' statement that Proposition 215 "will make it legal for people to smoke marijuana in the workplace . . . or in public places . . . next to your children." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) rebuttal to argument in favor of Prop. 215, p. 60 (hereafter Pamphlet).) But plaintiff ignores that the opponents of Proposition 215 emphasized that the possession of marijuana is prohibited under federal law. (*Ibid.*) Since federal criminal statutes cannot be amended via the state initiative process, the opponents' claims of legality in the workplace logically pertained just to state criminal laws.

The opponents' statement asserts only that if Proposition 215 were approved by the voters, employees could use marijuana at the workplace without violating state criminal laws, not that the initiative would require employers to allow marijuana use in the workplace. There is nothing in the Legislative Analyst's analysis, or in the arguments in favor of the initiative, that would indicate Proposition 215 was designed to ensure job protection for medicinal marijuana users, rather than simply allow them to use marijuana free of state criminal sanctions. (Pamphlet, *supra*, Analysis by the Legislative Analyst, p. 59, argument in favor of Prop. 215, pp. 60-61.)

Expanding the purview of the Compassionate Use Act to include employment protection would be tantamount to impermissible judicial legislation. Courts "have no power to rewrite the statute to make it conform to a presumed intention that is not expressed." (*County of Santa Clara v. Perry, supra*, 18 Cal.4th at p. 446.) Consequently, we must conclude that an employer's firing, or refusing to hire, a

person based on the person's illegal drug use--including marijuana use which is illegal under federal law despite the Compassionate Use Act--does not violate any fundamental public policy set forth in the Compassionate Use Act.⁶

IV

Plaintiff's last contention is that the parties' conduct created an implied in fact contract which indicated that he would not be discharged before the expiration of three years except for good cause. His claim is premised on the fact that he was offered a larger salary and benefits with less stock options, or a second option, which he accepted, of smaller salary and benefits with greater stock options upon vesting in three years. Plaintiff believes that the second option, along with other unidentified statements, policies, and practices of defendant, implied that he would be employed for at least three years so he could receive the benefit of his bargain. Thus, he argues, defendant could not terminate his employment before the end of the three-year period except for cause, i.e., for "'a fair and honest cause or reason, regulated by good faith . . .'" [citation], as opposed to one that is 'trivial, capricious, unrelated to business needs or goals, or pretextual' [Citations.]" (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 467.)

⁶ To the extent plaintiff's claim of wrongful termination in violation of public policy is premised on FEHA, it fails for the reasons set forth in part II of this opinion, *ante*.

We need not address whether there was an implied in fact contract not to fire plaintiff except for cause. Even if there was, defendant had good cause to discharge plaintiff when it learned that he had failed his preemployment drug test. (*Pilkington Barnes Hind v. Superior Court, supra*, 66 Cal.App.4th at pp. 31-34 [an employer may refuse to employ a person who has failed a drug test that is a precondition of employment, even if the person has begun to work for the employer]; *Moore v. May Dept. Stores Co.* (1990) 222 Cal.App.3d 836, 839 [violation of company policies is just cause to terminate the employee]; cf. *Pernice v. City of Chicago, supra*, 237 F.3d at p. 785.)

DISPOSITION

The judgment is affirmed.

SCOTLAND, P.J.

We concur:

RAYE, J.

HULL, J.

PROOF OF SERVICE

I, the undersigned, declare that I am over 18 years of age, and not a party to or interested in the within entitled cause. I am an employee of the Law Office of Stewart Katz, and my business address is 555 University Ave, Suite 270, Sacramento, CA 95825.

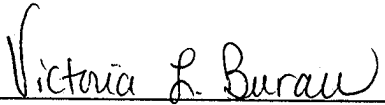
On October 17, 2005, I served the attached **PETITION FOR REVIEW** to the People in this matter by mailing a true copy to the following address:

D. Gregory Valenza
Marlena Gibbons
The Law Office of Jackson Lewis et al
199 Fremont Street, 10th Floor
San Francisco, CA 94105

Honorable Joseph Gray
Sacramento Superior Court
720 Ninth Street, Appeals Unit
Sacramento, CA 95814

Honorable Arthur Scotland, Presiding Justice
Third District Court of Appeals
924 Capitol Mall
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the Fore going is true and correct. Executed on October 17, 2005, at Sacramento, California.


Victoria L. Burau