CANNED FOR MEDICAL CANNABIS: Terminating Employees for Lawful, At-Home Use of Medical Cannabis for Palliative Care Amounts to Disability Discrimination and Chills their Liberty Interest to Pain Relief

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“The Justice Department going after sick individuals using [cannabis] as a palliative instead of going after serious criminals makes no sense.”

-President Barak Obama

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Employment Discrimination Scholarly Writing

Professor P. Gudel

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# TABLE OF CONTENTS

## Cases

### Supreme Court


### State Cases


## Statutes

Articles


Ari Lieberman and Aaron Solomon, A Cruel Choice: Patients Forced to Decide Between Medical Marijuana and Employment, 26 Hofstra Lab. & Emp. L.J. 619, 630 (Spring 2009).................. 16.

David Downs, Pot Clubs Short California $150 Million in Taxes; And Oakland City Councilwoman Desley Brooks says city will move forward on large cannabis farms, East Bay Express (California), (February 2, 2011).................. 9.


Sylvia A. Law, William Howard Taft Lecture: In the Name of Federalism: The Supreme Court’s Assault on Democracy and Civil Rights, 70 U. Cin. L. Rev. 367, 419 (2002)............................ 11.

Websites

Chris Conrad, CA Prop 214 was the First Statewide Medical Marijuana Initiative to Pass in the U.S.A. Available at http://www.chrisconrad.com/expert.witness/Prop215.html ................. 5.


Abstract

Although qualified California citizens may lawfully use medical cannabis, there are no protective regulations in the employment arena for those who are medical cannabis patients. Upon examination of the California Supreme Court case Ross v. RagingWire Telecommunications (medical cannabis patients cannot succeed on grounds of wrongful termination claims when fired for their at-home use of medical cannabis) and the United States Supreme Court case Washington v. Glucksberg (deeply rooted liberty interests in pain relief qualify for protection), I show that there is a disconnect between what the voters clearly wanted—as described in the Compassionate Use Act—and the current state of case law in California. After I scrutinize the Americans with Disabilities Act (federal) and Fair Employment and Housing Act (California), both of which state that employers are under a duty to make reasonable accommodations for their employees, I assert that terminating California employees for at-home use of medical cannabis obtained for palliative care purposes amounts to disability discrimination.
Stephanie is a skilled translator for a private government contractor in San Diego, California. She has a Department of Defense government clearance and she speaks English, Spanish, Arabic and Urdu with a native level fluency. Five years ago, Stephanie sustained head injuries when she was rear ended by a hit-and-run driver on the interstate. After returning to work, Stephanie began experiencing small facial tics and tingling in her fingers, and her coworkers witnessed her have seizures that would leave her weak and disoriented. Stephanie sought medical advice and was diagnosed with epilepsy, likely caused by the head injury she sustained during her car accident. She initially tried to control the epilepsy symptoms with pharmaceuticals prescribed by her doctor, and experienced intolerable side effects such as suicidal behavior, blisters, rashes that caused her skin to peel, excessive bleeding and ulcers.

Stephanie’s seizures would recur as often as five times a week, and invariably they would leave her so tired and disoriented that she would take the rest of the day off work to go home and sleep. Her employer was accommodating, but she wasn’t getting the work done like she used to. Stephanie is a valuable asset to her company: her talent for linguistics coupled with her education and her access to safety-sensitive information make her unique and her employer does not want to lose her. However Stephanie was instructed that she must get her seizures under control in order to return to work at full capacity.

Stephanie next sought relief through alternative medicine, such as acupuncture, cognitive behavioral therapy, and changing her diet. After months of different combinations of treatment under her doctor’s supervision, with very little change in her epilepsy, Stephanie’s doctor mentioned that medical cannabis has achieved a 50% or greater reduction in seizures in clinical trials, and wrote her a recommendation for cannabis, which is legal in California per state legislation. Stephanie started using medical cannabis six
months ago, at home during the evenings. Her seizures have diminished both in length and frequency. This is the first time that Stephanie has seen improvement in her symptoms in 5 years. But her employer has a strict “zero tolerance” policy, especially because it assists governmental operations. Could Stephanie lose her job merely for the type of palliative care she sought, even when it is the only treatment that works? If Stephanie were fired, would she have any recourse, such as arguing wrongful termination for disability discrimination?

The preceding hypothetical is largely based on facts from California cases and law reports. It is a conundrum that many employees face in California, a state that permits cannabis use for medical reasons. The United States as a federal entity still bans cannabis entirely, determining that it has no medical benefit, and those caught possessing it could face criminal prosecution. So what is a California resident to do when facing palliative care options: choose to get canned, for cannabis?

Introduction

Medical cannabis has been used in human and veterinary medicine around the world for centuries. The Egyptians treated their ill with cannabis since the 23rd century B.C., and it appeared in Western medicine in the 19th century. In fact, cannabis was the most popular pain reliever in the 1900s until the invention of aspirin. This history notwithstanding, the United States began taxing cannabis when it passed the 1937 Marijuana Tax Act, and criminalized its import/export in 1951 with the Boggs Act. Finally, cannabis was made illegal with the passage of the Controlled Substances Act (“CSA”) of 1970. Cannabis and all its derivatives remained federally illegal until California voters approved medicinal use of the plant, in California only, by way of statewide initiative in 1996. However, the legislation spoke solely to protecting California’s residents from the criminal ramifications that would otherwise befall those who possessed, cultivated or sold...
cannabis. Where federal and state laws are in conflict, preemption mandates federal law to trump, or “preempt,” state law; thus the CSA, which criminalized medicinal cannabis, trumped the new voter initiative federally.

After the initiative became law in 1996, employers found themselves at a crossroads: a recently illegal drug was now legal for certain medical treatments in California, but the CSA that outlawed cannabis remained in effect federally. There were no guidelines in the 1996 initiative instructing how California’s employers should treat employees who use medical cannabis. With the 1996 legislation silent on any disability protection for California employees, employers began firing their staff whom they drug tested for cannabis. Case law has consistently sanctioned drug testing in the workplace as a constitutionally permissible suspicionless search.iii Throughout California, the effect was ubiquitous: if a workplace drug test caught you with cannabis, you got canned.

Like the famous saying “it'll get worse before it gets better,” things got much worse for California employees who used medical cannabis in January, 2008, when the Supreme Court of California decided Ross v. RagingWire Telecommunications, and held that the Fair Employment and Housing Act (“FEHA”), a state law similar to the federal Americans with Disabilities Act (“ADA”), does not require an employer to accommodate an employee who uses medical cannabis.iv The court in this decision effectively chilled patients’ fundamental right to choose and their liberty interest to pain relief by imposing termination as a penalty.

Terminating critically ill Californians from their employment solely on the basis of their choice of medication amounts to disability discrimination. California voters legalized medical cannabis because they recognized the plant’s medicinal benefits for critically ill people. Although state and federal law are currently in conflict, that fact alone is not enough
to restrict the rights of California employees and reduce those rights to less than those granted by the laws in the state of California.

Part I will examine the Compassionate Use Act ("CUA"), the statewide initiative of 1996, and show that it is incomplete because it is missing language that would protect California employees who are prescribed medical marijuana. Part II will propose amending the CUA and describe proposed legislation by California Senator Mark Leno labeling termination for medical cannabis use to be disability discrimination. Part III will propose declassifying medical cannabis from a Schedule 1 to a Schedule 2 drug in the Controlled Substances Act ("CSA"), in order to avoid preemption, or invalidation, of state law when it conflicts with federal law. Part IV will assert that termination, as a punishment for using medical cannabis, actually chills patients' liberty interest to be free of pain, as articulated by the Supreme Court in Washington v. Glucksberg. Part V will insist that the RagingWire dissent should have been the controlling opinion, because the Americans with Disabilities Act (federal) and Fair Employment and Housing Act (California) state that employers are under a duty to make reasonable accommodations for their employees.

**Part 1: The Compassionate Use Act is Incomplete Because It Does Not Contain Language Protecting Employees Who Use Cannabis for Palliative Care**

A.) Background.

This background will present the origins of medical cannabis legislation and the changes that legislation has undergone since becoming law in 1996. This background should demonstrate that the legislation is both incomplete (because it does not speak to medical cannabis in the employment context) and under construction (because the legislature has tried to amend the existing law, but the Supreme Court of California held some of those amendments to be unconstitutional.)
By the mid-1990s, medical texts listed cannabis as a treatment for over 100 medical conditions.\textsuperscript{vi} With the passage of Proposition 215 in 1996 by statewide initiative, California became the first state to allow patients to use cannabis for medical purposes.\textsuperscript{vii} Titled the Compassionate Use Act (“CUA”) of 1996, this new law permitted California residents to use, possess and cultivate a “reasonable amount” of cannabis after obtaining a written recommendation akin to a prescription from a medical doctor.

The CUA spoke solely to the criminal ramifications of possessing and using what was, prior to 1996, an illegal substance. Notably, the CUA does not shield Californians from criminal liability when police discover patients possessing both medical cannabis and a valid doctor’s recommendation. Instead, police officers continue to lawfully arrest for possession, cultivation and other related cannabis offenses. Then after the arrest has occurred, patients may use the CUA in court as a partial immunity defense. Nothing in the CUA gave patients a way to prove their cannabis usage is lawful and prevent their arrest. Nor did the CUA outline employment standards to protect employees from termination for using a substance that is medically lawful in California, but remains federally illegal.


By 2003, California lawmakers agreed that clarifying the “reasonable amount” standard was a necessary step to keep the CUA workable. The policy of granting a defense post-arrest to users who obtain a valid doctor’s recommendation impeded the work of law enforcement officers, confused patients as to the scope of their rights, and created such a flood to the courts that a lucrative new practice area was born: medical marijuana defense. To help alleviate the confusion of the CUA and present a clearer standard for law
enforcement and cannabis users, the California Legislature created the Medical Marijuana Program\textsuperscript{vii} (“MMP”). The thrust of the program was the creation of a voluntary identification card scheme that provides an affirmative defense against charges and a protection against arrest in California. Under the MMP, when a person suffers from a “serious medical condition”\textsuperscript{ix} and possesses a doctor’s recommendation for medical marijuana, that person may “register and receive an annually renewable identification card that, in turn, can be shown to a law enforcement officer who otherwise might arrest the program participant.”\textsuperscript{x}

Additionally, the MMP defined the CUA’s “reasonable amount standard” by creating quantity restrictions. Since the CUA was non-specific as to quantity, merely allowing patients to possess an amount “reasonably related to the patient’s current medical needs,” the MMP clarified this reasonable amount standard to “no more than eight ounces” of dried marijuana and “no more than 6 mature or 12 immature plants.”\textsuperscript{xii}

C. Supreme Court of California Declares the MMP Violates the State Constitution and Curbs Patients’ Rights by Amending the “Reasonable Amount” Standard.

The Constitution of California grants the state the authority to adopt statutes by initiative measure, as do the constitutions of 20 other states.\textsuperscript{xii} Some states allow their legislature to amend initiative statute, but California forbids legislative amendment of any initiative statute; instead, any amendment to an initiative statute must be put to the voters, unless the statute contains language granting the legislature the authority to amend. In People v. Kelly, the court acknowledged that the CUA did not grant the authority to amend, and contrariwise the legislature did not propose the MMP and submit it to the electorate for approval.\textsuperscript{xii} Thus, the Supreme Court of California decided that the MMP’s quantity restrictions amounted to an amendment of the CUA in violation of the California
Constitution and therefore sent the state back to the first standard, that of an undefined “reasonable amount.”

D. California Patients Are Left in Legal Limbo.

The CUA does not change or override any federal law outlawing medical cannabis, such as the Controlled Substances Act (“CSA”) enacted by Congress in 1970. Under the doctrine of preemption, a federal law will preempt, or trump, a state law when the two are in conflict. Therefore, employers in California will terminate their employees using medical cannabis pursuant to the CSA. New legislation, including a framework for time and place restrictions and an exemption for safety sensitive positions, must be established to protect patients from termination. This legislation will grant medical cannabis users protection from disability discrimination in the workplace.

Part II: California Must Amend the CUA – Either by Voter Initiative or Legislation

Addressing the “Related but Distinct Area” of Employment Rights in the CUA

The CUA is most efficiently amended by the same Californians who wrote the original legislation: the voters. But Californians don’t rewrite existing legislation as a matter of course, that is the job of the legislature. As explained in Part I, voter initiative statutes may not be amended by the legislature unless the statute specifically allows it, which the CUA does not. However, an exception exists for amendment by the legislature of a “related but distinct area” of the law not specifically addressed in the current legislation. The RagingWire majority opinion remarked that there is no language in the CUA that concerns the employment context. Here, the existing legislation is the CUA and the related but distinct area of law is employment discrimination.
California Senator Mark Leno proposed Senate Bill 129, intending to amend the CUA by declaring unlawful any employer’s discrimination based on (a) the employment candidate’s status as a qualified medical marijuana patient, or (b) a positive drug test for marijuana, so long as the use does not occur on the premises or during the hours of employment.\textsuperscript{xvi} Remedies such as damages and injunctive relief will now be available to an employee who suffers such discrimination.

Two hallmarks of SB 129 narrow the scope of the employment discrimination protection: aptitude testing to replace drug testing and exemptions for employees in “safety sensitive” positions. The bill does not suggest that cannabis use will be tolerated at work or on work premises, but rather, declares unnecessary an employee’s immediate termination after a positive drug test. Medical cannabis and workplace drug testing are at odds because THC, the active ingredient in medical cannabis, will stay in a person’s fatty tissues for as long as 90 days after one use, although typical effects end in two to six hours.\textsuperscript{xvii} Therefore, the presence of marijuana in the employee’s urine does not mean that person is high at work.

Typically if an employee tests positive they are instantly terminated, but this bill suggests aptitude testing to replace drug testing in these qualified patients only. Employers reserve the right to terminate employees who come to work impaired or consume cannabis at the workplace.\textsuperscript{xviii} The Americans with Disabilities Act suggests accordance with this policy: “[a] job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in similar jobs. Medical examinations of employees must be job related and consistent with the employer’s business needs.”\textsuperscript{xix}
The bill also exempts employees from this protection if they are working in "safety sensitive" positions. Safety sensitive positions are defined as:

“a position in which medical cannabis-affected performance could clearly endanger the health and safety of others. A safety-sensitive position shall have all of the following general characteristics: (a) its duties involve a greater than normal level of trust, responsibility for, or impact on the health and safety of others; (b) errors in judgment, inattentiveness, or diminished coordination, dexterity, or composure while performing its duties could clearly result in mistakes that would endanger the health and safety of others; (c) an employee in a position of this nature works independently, or performs tasks of a nature that it cannot be safely assumed that mistakes like those described in subparagraph (b) could be prevented by a supervisor or another employee.”

Senator Leno’s bill faces an uphill road to passage. In 2008 when the Senator was an Assemblyman he co-authored AB 2279 with similar language, but the California Chamber of Commerce opposed it under the theory that it hurts employer’s right to maintain a drug-free workplace, and by October 2008 Governor Schwarzenegger vetoed it. However, the Obama administration has indicated a shift in governance, and a willingness to change federal policy, although President Obama has not taken any definite steps to do this as yet. If Senator Leno’s bill passes, or in the alternative if voters decide to amend the CUA themselves, employees will be substantially more protected in the workplace than they are now. However, the president refraining from federal medical cannabis raids does not change the fact that cannabis is federally illegal. The federal laws must also be restructured to accept medical cannabis as an alternative palliative care method.
Part III: Declassify Medical Cannabis to a Schedule II Substance in the Controlled Substance Act to Avoid Preemption

The Supreme Court's first attempt to reconcile the conflict between federal prohibition and California endorsement of medical cannabis occurred in United States v. Oakland Cannabis Buyers' Cooperative.\textsuperscript{xxii} Here, the United States sought to enjoin the Coop, a non-profit medical organization, from providing cannabis to patients with a doctor's recommendation. The Coop defended on the grounds of medical necessity, arguing, "marijuana is the only drug that can alleviate ... severe pain and other debilitating symptoms."\textsuperscript{xxiii} The Supreme Court rejected the medical necessity defense as it applies to "manufacturing and distributing marijuana" but it appears this holding does not touch on private use, considering that Justice Stevens, concurring, said, "whether the defense might be available to a seriously ill patient for whom there is no alternative means of avoiding starvation or extraordinary suffering is a difficult issue that is not presented here."\textsuperscript{xxiv}

The Controlled Substances Act (CSA) reports a list of controlled substances and the Congressional findings concerning their benefits, accepted medical usages and abuse potential. The substances are organized into five categories, or schedules, and each schedule is assigned a numerical number. Schedule 1 is the strictest classification, emphasizing a high potential for abuse and absolutely no currently accepted medical use in treatment in the United States. Medical cannabis is on Schedule 1 of the CSA.

This scheduling definition is preposterous as applied to medical cannabis. The assertion that medical cannabis has no beneficial use is untenable. In State v. Diana, medical cannabis alleviated the spasms associated with the patient’s multiple sclerosis\textsuperscript{xxv}; in Jenks v. State, an AIDS patient testified to suffering from chronic nausea, her oral medications were ineffective, and medicated shots put her in a stupor, but medical cannabis allayed the
nausea, helped her keep food down, and didn't put her to sleep the way stronger drugs did.\textsuperscript{xxvi} Other texts\textsuperscript{xxvi} have cited cases in which medical cannabis mollified illnesses such as fibromyalgia, post-traumatic stress disorder, quadriplegia, rheumatoid arthritis, scleroderma, glaucoma and spinal injuries.

Markedly and by comparison, Vicodin is a Schedule III drug. Schedule III drugs are classified by the CSA as having an accepted medical treatment and a low potential for abuse. Additionally the “date rape drug” often called “roofies” on the street (flunitrazepam, marketed under the trade name Rohypnol\textsuperscript{®}) is not on the CSA schedule because it is not legally marketed in the United States, rather, traffickers smuggle it in. It was extensively trafficked in Florida and Texas in the 1990s.\textsuperscript{xxviii} Yet flunitrazepam falls in the family of depressants called benzodiazepines, which are controlled in Schedule IV of the CSA. Schedule IV is the second to least restrictive classification, defined as a drug with a low potential for abuse, a currently accepted medical treatment, and its abuse only leads to limited physical or psychological dependence.

That medical cannabis is too tightly controlled by the CSA is not a new argument. In California’s employment context, cannabis patients will be secure in their employment if voters petition the government to declassify medical cannabis to Schedule II. Schedule II is characterized by the following language: “(a) the drug or other substance has a high potential for abuse; (b) the drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions; (c) abuse of the drug or other substance may lead to sever psychological or physical dependence.” The second part of that description, an accepted medical use with severe restrictions, characterizes legal medical cannabis, as we know it in California. Medical research has determined\textsuperscript{xxx}, and even the Supreme Court has articulated\textsuperscript{xxx}, that cannabis is
important in palliative care. Aside from federal lawmakers proposing federal legislation, declassifying medical cannabis on the CSA is the only way to eliminate the tension between federal and state policy, because the government must acknowledge that a drug offers medical benefit before the first steps can be taken on the road to legalization.

California employees may prefer the preemption issue ignored altogether and merely write employment protections into the existing state laws. Employees would still receive partial protection in the employment context if the CSA were rewritten, as previously described in Part II, to include language that protects employees with serious medical conditions using cannabis. That puts employees on a slippery slope, but with the Obama administration signaling a leniency in enforcing the CSA as it applies to the states, this may be a risk employees facing termination would like to take.\textsuperscript{xxi} Plus it appears a shift in federal policy is right around the corner. New legislation, authored by a handful of federal representatives including Congressman Ron Paul, has been proposed just weeks ago that would permit people to grow and use medical cannabis in states that allow it without fear of federal prosecution.\textsuperscript{xxii} Certainly, the tides have turned in favor of medical cannabis legalization – the only question is when?

\textbf{Part IV: By Terminating California Employees for Medical Cannabis, California}

\textbf{Employers Chill Patients’ Liberty Interest to Be Free of Pain}

In 1997, one year after the Compassionate Use Act was voted into law, the United States Supreme Court considered “Compassion In Dying,” a Washington based corporation, and three terminally ill patients who fought a Washington state law banning physician-assisted suicide, in \textit{Washington v. Glucksberg}. Using a substantive due process analysis, which involves balancing a person’s fundamental right with the interests of the state,\textsuperscript{xxii} the court looked to our nation’s history and traditions and determined that physician-assisted
suicide was not a fundamental right. However, the concurring opinions of five of the Justices all acknowledged a liberty interest "related not only to avoiding pain, but also to controlling the end of one's life with dignity."xxxiv

To punish (through the criminal justice system, or more slyly, through termination) those who use legal medical cannabis in California will chill their right to use it. And by chilling that right, employers not only deny their employees the right to choose but additionally deny them the liberty interest to be free of pain.

Opponents of medical cannabis look to the practicality and ease of access of traditional lawfully regulated substances, pharmaceuticals and the like, to bolster their argument that medical cannabis is simply unnecessary. Pharmaceuticals in the business of pain relief, such as Valium, already exist on the open market with a doctor's prescription, the FDA has already done extensive testing, and so it is simply redundant, and probably time consuming, to go through that entire process again for cannabis' clinical trials, scheduling declassification and eventual legalization. It is an argument with some bite: why should we struggle with the issue of regulating medical cannabis when those suffering from pain, tics, and seizures can simply use the traditional medicine that is readily available to them? Granted, there are cases in which traditional treatment did not provide the relief that was accomplished through medical cannabis, as in the opening hypothetical as well as the real-life example of Angel Raich in Gonzales v. Raich. However those cases are particular, individualized and scarce. If there is safety in numbers, those individualized cases may slip through the safety net.

Yet, California voters recognized that medical cannabis could be a heavyweight in the arena of palliative care: it is useful to treat pain, increase appetite, decrease nausea, and there are no nasty side effects. Grassroots organizations initiated the legislation and a
majority of California voted to legalize cannabis for certain “serious medical conditions” because those citizens recognized how the face of medicine might be changed with a plant that has treated the ill for centuries and only been criminalized in the last 90 years or so.xxxv

**Part V: The *RagingWire* Court Should Have Found Disability Discrimination**

The California Supreme Court tackled the issue of whether an employee terminated for cannabis use could retaliate by claiming wrongful termination only once, in *Ross v. RagingWire Telecommunications*. In an opinion deemed “less than satisfying”xxxvi by one California labor and employment lawyer, the justices decided that employers can fire their employees simply for using medical cannabis, and no accommodation need be made for the disability that requires the use in the first place.

Gary Ross, a prior serviceman in the United States Air Force, has suffered from muscle spasms and chronic pain since he received a back injury in the line of duty. He is a qualified individual under California’s Fair Employment and Housing Act (FEHA) and he receives disability benefits.xxxvii In September 1999, Ross began using medical cannabis to relieve the back pain at the recommendation of his doctor. Ross only used cannabis at home; he did not use in public or at his place of work. On September 10, 2001, defendant RagingWire Telecommunications hired Ross, and when prompted to take a drug test, Ross disclosed to his employer the fact that he uses medical marijuana pursuant to the Compassionate Use Act and at his doctor’s recommendation. Furthermore, Ross provided a copy of the recommendation to his employer prior to any company-policy drug screening. On September 14 Ross took the drug test. On September 17 Ross began work at RagingWire. By September 20 Ross was suspended from work and on September 25, he was fired.
Ross brought a cause of action against RagingWire under the theory of disability discrimination. The right to obtain and keep employment regardless of physical disability is recognized as an American civil right. Title I of the Americans with Disabilities Act of 1990 (ADA) prohibits employers from discriminating against applicants with disabilities who are otherwise qualified for the position. Furthermore, the ADA requires employers to provide reasonable accommodation to qualified individuals with disabilities who are employees or employment applicants, except when such accommodations would cause undue hardship on the employer. California’s FEHA in Section 12926.1 submits that the ADA provides merely the “floor of protection” to employees; that the FEHA actually goes beyond the ADA to provide additional protections. The FEHA mandates an employer to accommodate an employee’s disabilities so long as the employee can perform the essential functions of the job with reasonable accommodation. Ross argued that though he was disabled, he medicated using cannabis, and under the FEHA, RagingWire should have accommodated this use since Ross can perform his essential job functions.

The California Supreme Court’s decision depended heavily on California case law such as *Loder v. City of Glendale*, a case that evaluated employer drug testing and held that it is lawful for an employer to conduct drug testing at the workplace. Yet the RagingWire dissent raises the point that the workplace drug policy required termination only for “the presence of drugs for which the applicant has no legitimate medical explanation.” Accordingly, an employee should be granted some protection in the workplace for which there is a medical explanation and a doctor overseeing the treatment.

Ross additionally sought relief for wrongful termination under the doctrine of medical necessity, an argument immediately dismissed by the court. However, upon reconsideration of this defense, the doctrine of medical necessity implies that behaviors an
employee makes are justified as reasonable, necessary and appropriate because they are required in a clinical standard of care. Here, Ross was under the care of a physician, who wrote him a recommendation for medical cannabis. The doctor chose that (arguably “milder”) form of treatment rather than stronger prescription drugs so that Ross could continue to work and be a productive member of society. The fact that the court dismissed the doctrine of medical necessity defense out of hand hearkens back to that Glucksberg finding that Americans have a liberty interest in pain relief. By punishing Ross in the legal arena, and in the employment arena through termination, the government is chilling his right to choose (to choose his care) and his liberty interest in pain relief.

Under the test for disability discrimination, the plaintiff will only succeed if he establishes a prima facie case showing that he: (1) was disabled; (2) was otherwise qualified for the position, with or without a reasonable accommodation; and (3) suffered an adverse employment action because of his disability. Here, Ross could show that he was disabled because he received disability benefits in California under the FEHA. The government acknowledged he was disabled from an injury he received overseas during the war. Ross showed that he was qualified because he was a newly hired employee accepting the position of lead systems administrator. He had presumably had done this type of work before, and his resume plus his interviewing skills helped him beat the other candidates for the job. Ross showed that he suffered an adverse employment action because of his disability because he was fired solely for the positive drug test, even though he was up front with his employer about his use of medical cannabis, and provided his doctor’s recommendation that states Ross is qualified to use medical cannabis under the CUA. Therefore, Ross met the standard of establishing a prima facie case.
If Ross establishes a *prima facie* case, the burden shifts to defendant, and now the defendant must show a legitimate, non-discriminatory reason for the termination. Here, RagingWire would show that they fired him for “illegal drug use” pursuant to the federal CSA, which recognizes no medical benefit to cannabis use. Employers have an interest in keeping their workplaces drug free, because of safety and liability concerns. It is not only cheaper, but also safer, to keep all illegal drugs off the employment campus. Therefore, RagingWire likely showed a legitimate, non-discriminatory reason for termination by offering the policy concerns that attach to having drugs at the workplace.

If the defendant RagingWire has met the burden of showing a non-discriminatory reason, the burden shifts back to the plaintiff to show that the defendant’s reason is actually a pretext for discrimination. If the plaintiff can prove pretext, plaintiff wins. Here, Ross was not interested in using medical cannabis at work or off-site but during working hours. In court, neither party contested the fact that Ross only used medical cannabis in the evenings at home. What the RagingWire company was really doing was discriminating against Ross’s method of care. The company discriminated against cannabis itself, the plant, the leafy green “herb” with all the stigma of the last 40 years attached. Yes, RagingWire said, state legislation has legalized cannabis for medicinal purposes, yes, Ross, California acknowledges you are disabled and pays you partial benefits, and yes, you brought a state claim of discrimination under California’s FEHA, not the federal CSA. But still we will use a federal law with archaic findings that cannabis has no medicinal value and terminate you mere days after we offered you the job. Because THC stays in fatty cells up to 90 days after the last time cannabis was ingested or smoked, mere presence of THC in Ross’s urine was not enough to prove he was high at work. Therefore, the public policy argument of maintaining a drug-free workplace is null and void.
The dissent in this case had it right: the CUA contains language protecting the cannabis user from “criminal prosecution or sanction,” and by imposing the sanction of termination on the employee, the CUA cast in a light absent of authority. Therefore, Ross proved that RagingWire’s excuse for termination was simply pretext for discrimination. The majority should have found as such, so that employment is not denied to valid cannabis users in the future, based on precedent rooted in this mistaken decision.

Essentially, the court in RagingWire built its decision on this dual foundation: a plain language reading of the CUA statute and a public policy driven motivation that employers have an interest in keeping their workplaces drug free. The court did a plain-language reading of the CUA and determined that because it only spoke to protections from criminal law, it did not include employment law, and therefore the court did not need to extend the reach of the voters to include employment law in the statute. The court did not suggest amendment in its opinion, and as discussed in Part I, amendment to a voter initiative statute should largely be left up to the voters. Since this decision has come down, California legislators have tried to assist patients by drafting legislation, as demonstrated in Part II, concerning the “related but distinct” area of employment law that was not covered in the initial language of the CUA. The public policy argument was too attenuated to this case because to enforce a “drug free” workplace, it must logically flow that medical cannabis is an entirely illegal drug. Cannabis is only illegal on the federal level, and what place does federal legislation have in a state claim of discrimination under the FEHA? Had Ross wanted to assert a federal claim, he would have cited the Americans with Disabilities Act, a mere floor of protection from which the FEHA supposedly rises.
Conclusion

California’s termination of an employee based solely on that employee’s use of medical cannabis at home with a valid doctor’s recommendation amounts to disability discrimination. With the California Supreme Court now backing that discrimination in Ross v. Ragingwire, termination is used as a punishment that will chill patients’ liberty interest in being free from pain. Arizona is one state that has already acknowledged termination for cannabis use to be disability discrimination by passing legislation on April 15, 2011 that contains specific language cautioning employers from discriminating against a person in hiring, termination, or any term of employment “based solely on that person’s status as a qualified patient.” This issue is ripe for redirection here in California. I conclude with a quote from the plaintiff’s argument in RagingWire: “Just as it would violate the FEHA to fire an employee who uses insulin or Zoloft...it violates [the] statute to terminate an employee who uses a medicine deemed legal by the California electorate upon the recommendation of his physician.”

xlvi
i See Gonzales v. Raich, 545 U.S. 1 (2005) (physician found that Raich’s medical cannabis use as a last-resort method actually slowed her degenerative condition); see also Ross v. RagingWire Telecommunications, 42 Cal. 4th 920 (2008) (Ross began using medical cannabis for a chronic back injury received in the line of duty).


iv RagingWire, 42 Cal. 4th at 931.


vi Chris Conrad, CA Prop 214 was the First Statewide Medical Marijuana Initiative to Pass in the U.S.A., Available at http://www.chrisconrad.com/expert.witness/Prop215.html.


ix Serious medical condition is defined by the MMP as including AIDS, anorexia, arthritis, cachexia, cancer, chronic pain, glaucoma, migraine, persistent muscle spasms (including, but not limited to, spasms associated with multiple sclerosis), seizures (including, but not limited to, seizures associated with epilepsy), severe nausea, and other “chronic of persistent medical symptom[s]” that “substantially limit the ability of the person to conduct one or more major life activities as defined in the Americans with Disabilities Act of 1990” or that, “[i]f not alleviated, may cause serious harm to the patient’s safety or physical or mental health.” (§ 11362.7, subd. (h)).

x People v. Kelly, 47 Cal.4th 1008, 1014 (2010).

xi Id. at 1016.

xii Id. at 1031.

xiii Id. at 1043.

xiv Id. at 1043.

xv RagingWire, 42 Cal. 4th at 932. (“The Compassionate Use Act, as we have explained, simply does not speak to employment law. Nothing in the act’s text or history indicates the voters intended to articulate any policy concerning marijuana in the employment context[.]”)


 xvii David Downs, Pot Clubs Short California $150 Million in Taxes; And Oakland City Councilwoman Desley Brooks says city will move forward on large cannabis farms, East Bay Express (California), (February 2, 2011).


xxiii Sylvia A. Law, William Howard Taft Lecture: In the Name of Federalism: The Supreme Court’s Assault on Democracy and Civil Rights, 70 U. Cin. L. Rev. 367, 419 (2002).
xxix See generally Medical Use of Marijuana: Policy, Regulatory and Legal Issues (Tatiana Shohov ed., 2003). Professor Tatiana Shohov has provided scientific evidence that medical cannabis can provide relief from nausea and chronic pain, increase appetite, and reduce muscle spasms and intraocular pressure.
xxxiv Id. at 1354-5.
xxxvii RagingWire, 42 Cal. 4th at 924.
xxxviii California Fair Employment & Housing Act (FEHA) Government code section 12921(b).
xxxix Ari Lieberman and Aaron Solomon, A Cruel Choice: Patients Forced to Decide Between Medical Marijuana and Employment, 26 Hofstra Lab. & Emp. L.J. 619, 630 (Spring 2009).
xli RagingWire, 42 Cal. 4th at 942.
xlii Halsey v. JP Morgan Chase Bank, WL 3353459 (N.D.Cal., 2009).
xliii RagingWire 42 Cal. 4th at 926.
xliv Id. at 936.
xlvi Ragingwire, 42 Cal. 4th at 926 (plaintiff argument quoted in case).