Vermont Supreme Court
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IN THE SUPREME COURT OF THE STATE OF VERMONT
Docket No. 23-AP-389

Ivo Skoric,
Appellant

v.

Department of Labor (Marble Valley Regional Transit District),
Appellee

Appeal from Employment Security Board
Case No. 03-23-047-01

Brief Amici Curiae of the American Civil Liberties Union Foundation of Vermont, Disability Rights Vermont, and Vermonters for Criminal Justice Reform Supporting Appellant

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INTERESTS OF AMICI CURIAE[1]

The American Civil Liberties Union Foundation of Vermont (ACLU-VT) is a statewide nonprofit, nonpartisan organization with approximately 8,000 members and supporters dedicated to the principles of liberty and equality embodied in the constitutions and laws of Vermont and the United States. The ACLU-VT is dedicated to defending and advancing the individual rights and liberties protected by the state and federal constitutions and has a longstanding interest in ensuring that individuals with disabilities—including disabilities treated through authorized medical cannabis consumption—enjoy equal access to services and benefits in the Green Mountain State. The ACLU-VT has further engaged in public education and advocacy regarding the benefits of a public health approach to substance use, supporting efforts to expand harm-reduction infrastructure, decriminalize drug use, and foster meaningful investments in people and communities instead of replicating the failures of the decades-long "war on drugs."

Disability Rights Vermont (DRVT) is the federally authorized Protection & Advocacy System for people with disabilities in Vermont. DRVT has an interest in pursuing legal remedies for individuals with disabilities who face discrimination. DRVT provides free legal services to advance and protect the rights of people with disabilities throughout Vermont. DRVT provides these services to hundreds of individuals per year under federally-funded mandates established by Congress to protect and advocate for the rights, safety, and autonomy of people with disabilities. DRVT has a significant interest in ensuring that Vermont remains a leader in lowering barriers for individuals with disabilities to access the treatment and services they need.

Vermonters for Criminal Justice Reform (VCJR) is a statewide policy advocacy and direct service organization based in Burlington, Vermont. VCJR works with individuals incarcerated in Vermont correctional facilities, including those in out-of-state facilities under contract with the State of Vermont, as well as individuals under corrections supervision in Vermont communities to safely reduce incarceration, save taxpayer dollars, reinvest in communities, and

[1] No party or counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

keep families together by making Vermont's criminal legal system more humane and effective—for the benefit of all Vermonters. VCJR also operates a specialized re-entry and recovery center for justice-involved people with substance use disorders and co-occurring mental health disorders located in downtown Burlington. VCJR has a critical interest in ensuring that Vermont remains a leader in taking a public health approach to substance use, including by protecting Vermonters' ability to access therapeutic cannabis free of stigma or sanction.

Together, the ACLU-VT, DRVT, and VCJR (*amici*) have significant experience with the legal and policy landscape surrounding cannabis and Vermont's continued efforts to promote a stigma-free and common-sense approach to cannabis's medical and recreational uses. *Amici* hope that their collective experience may provide the Court with additional information for its deliberations on the core legal issue presented by Mr. Skoric's appeal.

SUMMARY OF ARGUMENT

Mr. Skoric's employer terminated him because he tested positive for cannabis. It is undisputed that he did so only because he uses medical cannabis pursuant to a State-issued medical cannabis card.

The Department of Labor nevertheless denied Mr. Skoric a portion of his unemployment benefits because—in the words of the Administrative Law Judge—Mr. Skoric "engaged in misconduct" by "intentionally disregard[ing] the employer's drug and alcohol policy." Findings and Decision of the Administrative Law Judge 5 (May 2, 2023). When Mr. Skoric filed a petition for a declaratory ruling on whether the off-duty use of medical cannabis truly constituted "misconduct" within the meaning of Vermont's Unemployment Compensation Act, 21 V.S.A. § 1344(a)(1)(A), the Employment Security Board endorsed the ALJ's reasoning. Although Mr. Skoric did not submit a standard Rule 15 appeal, the Board issued a Rule 15 decision where it reiterated that Mr. Skoric "was discharged for misconduct associated with his employment" after "he willfully violated the employer's policy prohibiting the use of certain drugs." Employment Security Board Decision 3 (Sept. 11, 2023). The Board then separately responded to Mr. Skoric's Rule 1 declaratory petition, pointing to its Rule 15 decision and confirming that it had "concluded that 21 V.S.A. § 1344(a)(1)(A) was applicable to the off-duty use of medical cannabis because that conduct implicated an acknowledged workplace policy of the employer that carried the possibility of discipline if violated." Notice on Petition for Declaratory Ruling 1 (Oct. 27, 2023).

On the central legal question of this appeal—whether the off-duty use of medical cannabis, standing alone, may constitute misconduct under 21 V.S.A. § 1344(a)(1)(A)—*Amici* urge this Court to reject the Board's conclusion. As explained further below, state-authorized off-duty medical cannabis use, even if violative of employer policy, should not automatically be deemed "misconduct" within the meaning of the Unemployment Compensation Act.

As the Court knows, the "touchstone" of statutory interpretation is "legislative intent." *State v. A.P.*, 2021 VT 90, ¶ 12, 216 Vt. 76, 268 A.3d 58. The General Assembly has enacted comprehensive cannabis legislation, and numerous indicia of legislative intent in those recent enactments show that the General Assembly did not intend for authorized cannabis users to be denied unemployment benefits simply because they consumed legal cannabis off-duty. Moreover, even if there was some question as to the legislature's perspective on authorized cannabis use (and the General Assembly has been quite clear), the shifting legal landscape around cannabis generally, and medical cannabis specifically, should preclude the Board from adopting a reflexive rule like the one below: that any violation of an employer's cannabis policy, without more, rises to the level of intentional "misconduct" necessary to deny a Vermonter benefits.

For all of these reasons, *Amici* urge this Court to reverse the ruling below and make clear that the off-duty medicinal cannabis use, standing alone, cannot constitute "misconduct" under 21 V.S.A. § 1344(a)(1)(A).

ARGUMENT

I. 18 V.S.A. § 4230a(a)(1) Expressly Insulates Authorized Cannabis Users from Penalties or Sanctions like the Denial of Unemployment Benefits.

The Vermont legislature has expressly declared that individuals like Mr. Skoric shall not face penalties for their authorized use of legal cannabis. 18 V.S.A. § 4230a(a)(1) specifically provides that legal cannabis users like Mr. Skoric "shall not be penalized or sanctioned in any manner by the State or any of its political subdivisions or denied any right or privilege under State law." Under that statute's plain text, the State may not penalize individuals like Mr. Skoric for their lawful cannabis use. The Board's denial of state-provided unemployment benefits based on cannabis use "penalize[s] or sanction[s]" individuals like Mr. Skoric and "denie[s]" them a "right or privilege under State law." It is therefore impermissible under 18 V.S.A. § 4230a(a)(1).

Although this Court has not directly addressed this provision, a Michigan Court of Appeals decision, *Braska v. Challenge Mfg. Co.*, 861 N.W.2d 289 (Mich. Ct. App. 2014), is instructive. There, the court confronted nearly identical language in its medical marijuana statute, which provided that medical cannabis users shall "not [be] subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege." Mich. Comp. Laws Ann. § 333.26424. Like Mr. Skoric, individuals were denied unemployment benefits after they failed a drug test, but "would not have failed the drug test had they not used medical marijuana." *Braska*, 861 N.W.2d at 300. The Court of Appeals ruled that those individuals were entitled to benefits under Michigan law; consistent with the statute's plain language, any resulting "denial of unemployment benefits . . . constitute[d] a 'penalty' under the [statute] that was imposed upon claimants for their medical use of marijuana." *Id.* at 299. So too here: the denial of unemployment benefits as a result of disqualification under § 1344(a)(1)(A) is plainly a "penal[ty] or sanction[]" or the denial of a "right or privilege under State law" contrary to 18 V.S.A. § 4230a(a)(1)'s mandate.

The broader structure of the statute confirms this. Although Vermont's comprehensive cannabis legislation contains several carve-outs for penalties for cannabis use in specific situations—such as those under conditions of furlough or parole, through provisions in a lease agreement, or in criminal penalties prohibiting driving under the influence—denial of unemployment benefits does not appear anywhere in the list. *See* § 4230a(b)(2). Likewise, although the statute cautions that it should not be construed to require an employer to accommodate or allow cannabis "in the workplace," it nowhere includes a similar carve-out for *off-duty* cannabis use. *See* § 4230a(e). It is a settled rule of statutory interpretation that "when a statute explicitly enumerates certain exceptions, no other exceptions will be implied." *Vt. Dev. Credit Corp. v. Kitchel*, 149 Vt. 421, 424–25, 544 A.2d 1165, 1167 (1988). These omissions were intentional: if the legislature wanted to penalize off-duty use of legal cannabis through the denial of unemployment benefits, it would have said so.

When reading two laws, the goal should always be "to harmonize statutes and not find conflict if possible." *Gallipo v. City of Rutland*, 173 Vt. 223, 235, 789 A.2d 942, 951 (2001). This Court can readily do so by construing "misconduct" within the Unemployment Compensation Act so as not to encompass authorized off-duty cannabis use protected by 18 V.S.A. § 4230a(a)(1). However, to the extent that the Court concludes that this cannabis-specific language genuinely

conflicts with 21 V.S.A. § 1344(a)(1)(A), the cannabis-specific language should govern: this Court has made clear that "specific and more recent statutes regarding the same subject matter control over more general and older statutes." *Athens Sch. Dist. v. Vt. State Bd. of Educ.*, 2020 VT 52, ¶ 30, 212 Vt. 455, 237 A.3d 671. As Vermont's more recent enactment, 18 V.S.A. § 4230a(a)(1) therefore precludes an interpretation of the Unemployment Compensation Act that penalizes individuals like Mr. Skoric solely for their legal, off-duty medical cannabis use.

The Board erred in concluding otherwise. In its October 27, 2023, response to Mr. Skoric's petition, the Board reasoned that "the violation of a written workplace drug use policy stood alone as an independent source of disqualifying conduct" and, after noting that Mr. Skoric's employer was required to drug test its employees through federal regulations, explained that "employers may adopt policies prohibiting or punishing otherwise legal conduct and violating those policies may constitute misconduct for purposes of unemployment eligibility." Notice on Petition for Declaratory Ruling 2 (Oct. 27, 2023).

That conclusion is impossible to square with 18 V.S.A. § 4230a(a)(1). Of course, the Board is correct that *employers* may prohibit or punish certain otherwise lawful conduct—whether because of federal directives or otherwise—and may terminate an individual's employment if they do not comply. But where that noncompliance stems entirely from lawful cannabis use, the Board was required to pause and consider § 4230a(a)(1) before imposing additional State-backed penalties or sanctions on a Vermonter in the form of denying unemployment benefits. Because that statutory provision expressly protects individuals like Mr. Skoric from collateral penalties stemming from their lawful cannabis use, this Court should reject the Board's conclusion.

II. Even Ignoring 18 V.S.A. § 4230a(a)(1), Off-Duty Medical Cannabis Use Cannot—By Itself—Constitute "Misconduct."

Even overlooking 18 V.S.A. § 4230a(a)(1)'s express instruction, this Court's interpretation of the Unemployment Compensation Act makes clear that off-duty medical cannabis use cannot—by itself—meet the legal definition of "misconduct connected with [one's] . . . work." 21 V.S.A. § 1344(a)(1)(A). This Court has instructed that the Unemployment Compensation Act is "to be interpreted in line with its benevolent objectives, and therefore no claimant should be excluded from its provisions unless the law clearly intends such an exclusion." *Nolan v. Davidson*, 134 Vt. 295, 298, 357 A.2d 129, 131 (1976). In the present day, it is

anything but "clear" that off-duty use of medical cannabis rises to the level of "misconduct" under the statute.

As this Court has explained, "[m]isconduct that is sufficient for discharge is not necessarily sufficient to require a disqualification from benefits under the Unemployment Compensation Act." *Johnson v. Dep't of Emp. Sec.*, 138 Vt. 554, 556, 420 A.2d 106, 107 (1980). Instead, "[t]he term 'misconduct' as used in unemployment compensation law connotes an 'act or course of conduct in violation of the employee's duties, which is tantamount to an *intentional* disregard of the employer's interest.'" *Porter v. Dep't of Emp. Sec.*, 139 Vt. 405, 411, 430 A.2d 450, 454 (1981) (emphasis added). This "[s]ubstantial disregard"—which must be "wilful or culpably negligent"—"is essential to a finding of misconduct [within the statute]." *In re Therrien*, 132 Vt. 535, 537, 325 A.2d 357, 358 (1974) (internal quotation marks and citation omitted).

Given that Vermont empowers individuals like Mr. Skoric to use medical cannabis precisely because of its therapeutic effects, the off-duty use of State-authorized cannabis cannot, by itself, demonstrate that an employee necessarily intended to substantially disregard their employer's interests. The predicate for long-approved medical cannabis users like Mr. Skoric is that they suffer from a "[d]ebilitating medical condition"—specific conditions or chronic states where "reasonable medical efforts have been made over a reasonable amount of time without success to relieve the symptoms." Rules Regulating Cannabis For Symptom Relief § 1.7, Code of Vt. Rules 28 000 0003; *see also* 7 V.S.A. § 951(8) (defining "[q]ualifying medical condition" as specific conditions "result[ing] in severe, persistent, and intractable symptoms" or "a disease or medical condition or its treatment that is chronic, debilitating, and produces one or more of the following intractable symptoms: cachexia or wasting syndrome, chronic pain, severe nausea, or seizures"). It is difficult to conclude—as the Board appeared to—that Vermonters treating their debilitating medical conditions truly demonstrate "intentional disregard of the[ir] employer's interest" through their authorized medical cannabis use. *Porter*, 139 Vt. at 411, 430 A.2d at 454. In fact, the opposite may be true: treating an otherwise-debilitating condition through medicinal cannabis may actually *further* an employer's interest by enabling the individual to better or more comfortably perform. *See, e.g.*, Nicole Wershoven, Amanda G. Kennedy, & Charles D. MacLean, *Use and Reported Helpfulness of Cannabinoids Among Primary Care Patients in Vermont*, 11 J. of Primary Care and Cmty. Health 1–6 (2020).

In any event, the shifting legal landscape surrounding medical marijuana and disability law should preclude any conclusion that an employee necessarily intended to substantially disregard their employer's interests through therapeutic cannabis use. Guidance released by the Vermont Attorney General's office interpreting the State's earlier medical cannabis statute, for example, states that "the laws do not permit employers to discriminate against disabled applicants or employees who use medical marijuana outside of work to treat their disability." *See* Vermont Office of the Attorney General, Civil Rights Unit, *Guide to Vermont's Laws on Marijuana in the Workplace* 11 (June 2018). An individual reading this guidance could conclude (quite reasonably) that their off-duty use of medical marijuana is fully consistent not just with an employer's interests—but its obligations. Similarly, while this Court has not yet considered the issue, other New England high courts have ruled that employers may be required to permit medical marijuana use for employees as a reasonable accommodation. *See, e.g., Barbuto v. Advantage Sales & Mktg.*, LLC, 78 N.E.3d 37, 48 (Mass. 2017) ("Because the plaintiff's continued use of medical marijuana under these circumstances is not facially unreasonable as an accommodation for her handicap . . . we reverse the dismissal of count 1, alleging handicap discrimination."); *Paine v. Ride-Away, Inc.*, 274 A.3d 554, 558 (N.H. 2022) ("We hold that the trial court erred in determining that the use of therapeutic cannabis prescribed in accordance with RSA chapter 126-X cannot, as a matter of law, be a reasonable accommodation for an employee's disability under RSA chapter 354-A.").

If employers may have to permit some employees to use medical cannabis, it follows that an employer must show something more than simple off-duty use of medical cannabis to prove the "[s]ubstantial disregard for the employer's interest" that is "essential to a finding of misconduct." *Therrien*, 132 Vt. at 537, 325 A.2d at 358. The Court should therefore reverse the Board and make clear that that off-duty medical marijuana use does not, standing alone, make out "misconduct" under 21 V.S.A. § 1344(a)(1)(A).

Conclusion

The central legal issue raised by Mr. Skoric's appeal is not whether an employer has sufficient reason to discharge an employee after they test positive for cannabis, contrary to the employer's policy or federal directives. The issue is instead whether use of State-authorized cannabis to treat debilitating conditions like Mr. Skoric's qualifies as "misconduct" that further punishes a Vermonter by disqualifying them from unemployment benefits. Looking to the text and purpose of both 18 V.S.A. § 4230a(a)(1) and 21 V.S.A. § 1344(a)(1)(A), it is clear that the legislature did not intend for a positive cannabis test, alone, to meet the high bar for benefits disqualification. *Amici* respectfully urge the Court to reverse the Board and make clear that lawful, off-duty medical marijuana use cannot, by itself, qualify as "misconduct" under the Unemployment Compensation Act—regardless of an employer's policy.

Respectfully submitted,

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February 2, 2022

On behalf of:

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DISABILITY RIGHTS VERMONT
VERMONTERS FOR CRIMINAL JUSTICE REFORM

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief totals 2839 words, excluding the table of contents, table of authorities, signature blocks, and this certificate as permitted by Vt. R. App. P. 32. I have relied upon the word processor used to produce this brief, Microsoft Word for Office 365, to calculate the word count.

_____/s/_____

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CERTIFICATE OF SERVICE

Pursuant to Vt. R. App. P. 25(c), I hereby certify that I have served the above motion as required under Vt. R. App. P. 25(b) and 2020 V.R.E.F. 11 by filing this motion through the Court's electronic filing system and providing copies to all parties via electronic mail.

_____/s/_____

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