THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2020-0470

Scott Paine

v.

Ride-Away, Inc. d/b/a Mobility Works

On appeal from a decision of the
Rockingham County Superior Court

BRIEF OF DEFENDANT-APPELLEE RIDE-AWAY, INC. d/b/a MOBILITY WORKS

Mark D. Attorri
(N.H. Bar No. 9268)
Lynnette V. Macomber
(N.H. Bar No. 271596)
DEVINE MILLIMET & BRANCH, P.A.
111 Amherst Street
Manchester, NH 03101
(603) 669-1000
mattorri@devinemillimet.com
lmacomber@devinemillimet.com

May 26, 2021

Oral argument requested,
to be presented by Mark D. Attorri

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

New Hampshire Statutes

Federal Statutes

Other State Statutes

Legislative Materials

Other Authorities

QUESTION PRESENTED

Should this Court hold that New Hampshire employers are required to accommodate employee use of medical marijuana (a federal crime), when the legislature deleted that very requirement from the medical marijuana bill before enacting it into law?

STATEMENT OF THE CASE

This is an action for alleged employment discrimination arising from Mobility Works' denial of the plaintiff's request for an exemption allowing him to test positive for marijuana in violation of the company's drug-free workplace policy. The trial court (*St. Hilaire*, J.) granted Mobility Works' motion for judgment on the pleadings (Pl. Add. 42),[1] and denied the plaintiff's subsequent motion to amend his complaint. (Id. 54.) The plaintiff now appeals.

STATEMENT OF FACTS

A. Facts

Mobility Works is a New Hampshire corporation engaged in the business of selling and leasing wheelchair accessible vehicles. (App. 4, 108.) The plaintiff, Scott Paine, was employed as an automotive detailer at the company's Londonderry facility from May 2018 to September 2018. (Id. 5, 109.)

---

[1] Citations to the record are as follows:

"App." refers to the Appendix submitted on behalf of the plaintiff.
"Pl. Add." refers to the addendum to the plaintiff's brief.
"Def. App." refers to the Appendix submitted with this brief.

In July 2018, the plaintiff's doctor prescribed marijuana to treat his Post-Traumatic Stress Disorder (PTSD), a condition from which the plaintiff has suffered for many years. (Id. 5, 109.) The plaintiff subsequently enrolled in New Hampshire's therapeutic cannabis program and began using marijuana as conditionally allowed under the state's medical marijuana law, RSA 126-X. (Id.)[2]

Mobility Works has a drug-free workplace policy under which employees may be required to submit to random drug testing. (Id. 6, 63, 110.) On August 22, 2018, after informing Mobility Works of his enrollment in the cannabis program, the plaintiff submitted a written request for an accommodation allowing him to test positive for marijuana notwithstanding the policy. (Id. 6, 110.)

On September 7, 2018, Mobility Works' Vice President of Human Resources, Jillian Montmarquet, informed the plaintiff that the company was unable to grant his request. (Id. 6-7, 56, 111.) She explained that the plaintiff's job was safety sensitive because it required him to drive vehicles in and out of the parking lot and detailing areas. (Id.) Ms. Montmarquet emphasized that "if there are any other alternate accommodations available, please communicate those and we will do everything in our ability to extend [them]." (Id. 56.)

---

[2] The formal title of RSA 126-X is "Use of Cannabis for Therapeutic Purposes." For simplicity and clarity, Mobility Works adopts the plaintiff's convention (Pl. Br. 8 n.1) and refers to both the statute and therapeutic cannabis by use of the term "medical marijuana."

Further discussions took place over the next several days between the plaintiff and Mobility Works' officers, including Ms. Montmarquet and the company's General Manager, Ronald Hoy. (Id. 7, 55, 112.) The plaintiff clarified that he was not asking for permission to use marijuana during work hours, or to possess marijuana on the work premises, or to work while under the influence of marijuana. (Id.) Rather, he said he only used marijuana off hours and merely wanted Mobility Works to continue employing him if he failed a drug test due to his marijuana use. (Id.) The plaintiff also asked if another employee could move vehicles for him as an accommodation. (Id. 7, 113.)

Mobility Works declined this suggestion. (Id. 8-9, 114-15.) Instead, it asked the plaintiff to "explor[e] other accommodations that would work for your condition and meet the requirements of your safety sensitive position." (Id. 9, 115.) The plaintiff replied that he was not going to stop using marijuana to treat his PTSD. (Id.)

On September 10, 2018, Mobility Works placed the plaintiff on a one-week leave of absence and advised him that he would not be permitted to return to work if he continued to use marijuana. (Id. 8, 114.) The plaintiff maintained his refusal to stop using the drug. (Id. 9, 115.) Consequently, the plaintiff's employment with Mobility Works ended on September 18, 2018. (Id. 9-10, 116.)

B. Proceedings Below

The plaintiff filed this action in October 2019 claiming Mobility Works violated his rights under the New Hampshire Law Against Discrimination, RSA 354-A, by failing to accommodate his use of medical marijuana. (App. 4.)[3] The complaint relied indirectly on RSA 126-X, which provides an exception to state criminal law for the therapeutic use of marijuana under specified conditions. (See, e.g., id. 5-6, 9.)

In lieu of an answer Mobility Works filed a motion for judgment on the pleadings, arguing that even if the facts alleged in the complaint were taken as true the plaintiff would not be entitled to legal relief. (Id. 14.) Emphasizing that marijuana remains illegal under federal law, Mobility Works argued that there is no provision in RSA 354-A or RSA 126-X requiring employers to accommodate an employee's use of medical marijuana, even if the employee promises to use the drug only at home. (Id. 16-17, 40-41.) The plaintiff objected. (Id. 21, 46.)

After hearing oral argument (id. 59), the trial court issued a written order granting the motion and dismissing the complaint. (Pl. Add. 42.) The court began its analysis by focusing on RSA 354-A. (Id. 48.) The court acknowledged that the statute makes it unlawful for any employer "not to make reasonable accommodations for the known physical or mental limitations of a

---

[3] The plaintiff's complaint also asserted claims for unlawful retaliation under RSA 354-A, and for common law wrongful discharge. The plaintiff has abandoned those claims on appeal. (Pl. Br. 8 n.2.)

qualified individual with a disability who is an applicant or employee" unless the employer can show undue hardship. (Id., citing RSA 354-A:7, VII(a).) The court observed, however, that the statute makes this obligation "contingent on the 'disability' not including current, illegal use of, or addiction to a controlled substance as defined in the Controlled Substances Act ("CSA") (21 U.S.C. 802 sec. 102)." (Id. citing RSA 354-A:2, IV.) Noting that marijuana is a controlled substance whose use is still illegal under the incorporated federal law (id. 49 n.3, 50), the court concluded that RSA 354-A "does not require employers to accommodate marijuana use for therapeutic purposes, nor does it hold employers liable for discrimination for not accommodating such use where, as here, there are valid reasons for doing so." (Id. 52.)

The last clause of this statement ("valid reasons for doing so") was a reference to the safety sensitive nature of the plaintiff's job, and to the fact—stipulated by the parties—that "current [drug] tests cannot differentiate between someone who has recently used marijuana and someone who is currently under the influence of marijuana." (Id. 51; App. 47, 62, 77.) Given this limitation, the court explained, "Mobility Works would have no way of knowing whether Plaintiff was under the influence while he was moving vehicles, a necessary function of his job." (Pl. Add. 51.)

Turning to RSA 126-X, the court found that although the statute "makes clear that a qualifying patient may use marijuana for therapeutic purposes in New Hampshire . . . [it] in no way

obligates an employer to accommodate such use." (Id. 50.) "Moreover, a reading of RSA 126-X in conjunction with RSA 354-A does not create an affirmative obligation for an employer to accommodate marijuana use by an employee, even if such use is authorized by state law." (Id.)

The court stated in conclusion that New Hampshire law "does not provide a qualifying patient carte blanche to use marijuana for therapeutic purposes—there are limitations to such use, including potential legal consequences." (Id. 52.) Accordingly, the plaintiff's claims were dismissed. (Id.) The court afforded the plaintiff 30 days to file a motion to amend "to correct [the] perceived deficiencies" in the complaint. (Id., citing Kurowski v. Town of Chester, 170 N.H. 307 (2017).)

The plaintiff availed himself of that opportunity, timely moving for leave to file an amended complaint. (App. 79.) Seizing on the trial court's dictum that Mobility Works had "valid reasons" for denying the requested exemption from drug testing, the plaintiff's proposed amendment added numerous allegations about various ways the company could have accommodated his marijuana use, such as by delegating his safety sensitive driving duties to other employees (id. 113-14); reassigning him to a vacant position that was not safety sensitive (id. 119); or using different methods, other than drug testing, to determine whether he was under the influence of marijuana. (Id. 117-18.) The proposed amendment also alleged that Mobility Works operates in other states whose laws mandate employer accommodation of medical marijuana use (id. 120); those allegations were presum-

ably meant to show that the suggested accommodations were feasible.

Mobility Works objected. (Id. 125.) It argued that the plaintiff's new allegations did not save his case "because they all presuppose that Mobility Works had some legal duty to accommodate his marijuana use in the first place. As the Court has already ruled, New Hampshire law does not require an employer to make *any* accommodation for an employee's use of marijuana—a substance that is still illegal under federal law—even if such use is off-site and for therapeutic purposes." (Id. 127, emphasis in original.)

The trial court agreed and denied the motion to amend. (Pl. Add. 54.) Clarifying its previous order, the court held: "Even assuming that Plaintiff's suggested accommodations would have been feasible or easy for Mobility Works to implement, the Court has made it clear that, as a matter of law, employers are not required to make reasonable accommodations for marijuana use." (Id. 57.) Thus, the plaintiff's additional allegations were "of no avail" and his amendment was "futile." (Id. See also id. 54-55, citing Sanguedolce v. Wolfe, 164 N.H. 644, 647 (2013) (amendment may be denied "if it would not cure the defect in the writ").)

The plaintiff now appeals the lower court's ruling to this Court.

SUMMARY OF ARGUMENT

The trial court's ruling was correct: RSA 354-A does not require employers to accommodate employee use of medical marijuana. RSA 354-A:2, IV excludes illegal drug use from the scope of the statute's protections, and it expressly incorporates federal law to determine what drug use is "illegal." Therefore, since marijuana is still illegal under federal law, Mobility Works was under no duty to accommodate the plaintiff's marijuana use, even if it was off-site and even if he was an authorized user under RSA 126-X.

Appeal of Panaggio, 172 N.H. 13 (2019), is inapposite because it construed a different statute and did not involve an illegal drug exclusion like the one in RSA 354-A. More relevant are decisions by other courts that have applied exclusions identical or similar to the one at issue here to hold that medical marijuana use was outside the scope of statutory anti-discrimination protections, even though such use was allowed by state law.

RSA 126-X does not repeal or amend the exclusion of RSA 354-A:2, IV. Nor does it contain any provision imposing any obligation or burden on employers. In fact, the legislature *deleted* a provision from the original bill that would have imposed the very duty of accommodation that the plaintiff claims here. This Court should not read back into the statute, by way of interpretation, a requirement that the legislature deliberately removed.

The decision below should therefore be affirmed.

ARGUMENT

This appeal presents a single issue: whether RSA 354-A imposes a duty on employers to accommodate their employees' use of medical marijuana. As he did below, the plaintiff devotes much of his brief to arguing about various ways Mobility Works could have addressed its safety concerns while allowing him to test positive for marijuana. Those arguments are irrelevant to the threshold question of whether Mobility Works had a legal duty to accommodate his marijuana use at all. It did not. Whether considered alone or in conjunction with the medical marijuana law, RSA 354-A imposes no such duty.[4]

RSA 354-A DOES NOT REQUIRE EMPLOYERS TO ACCOMMODATE EMPLOYEE USE OF MEDICAL MARIJUANA.

A. Marijuana is illegal under federal law, and RSA 354-A expressly excludes the use of federally prohibited drugs from the scope of its protections.

RSA 354-A forbids employers from discriminating against otherwise qualified individuals who suffer from a physical or mental disability. RSA 354-A:7. This prohibition requires employers "to make reasonable accommodations for the known physical or mental limitations of a qualified individual with a disability" unless the employer can demonstrate undue hardship. RSA 354-A:7, VII (a), (b).

---

[4] Mobility Works does not dispute that, if it was under a legal duty to accommodate the plaintiff's marijuana use, then the feasibility of his requested accommodation would be an issue requiring discovery and further proceedings below.

These protections, however, do not extend to illegal drug use. Specifically, in defining the term "disability" the statute adds the following proviso:

> Provided that "disability" does not include current, illegal use of or addiction to a controlled substance as defined in the Controlled Substances Act (21 U.S.C. 802 sec. 102).

RSA 354-A:2, IV. This proviso excludes illegal drug use from the definition of "disability," which is the basic predicate for the statutory rights and duties at issue here. Moreover, the proviso expressly incorporates federal law—the Controlled Substances Act ("CSA")—as the means for determining whether drug use is "illegal."

There is no dispute that marijuana is a controlled substance under the CSA; nor is there any dispute that the CSA makes the use or possession of marijuana a federal crime.[5] Thus, the use of marijuana constitutes the "illegal use of a controlled substance" for purposes of RSA 354-A, and the failure to accommodate such use is not discrimination because of a "disability" within the meaning of the statute. Accordingly, RSA 354-A imposes no duty on employers to accommodate employee use of marijuana.

---

[5] See 21 U.S.C. § 802 (defining "controlled substance" as a "drug or other substance" listed in schedules I through V); 21 U.S.C. § 812, schedule I (c)(10) (listing "marihuana" as a schedule I controlled substance); 21 U.S.C. §844(a) (criminalizing possession of controlled substances). See also Gonzales v. Raich, 545 U.S. 1, 14 (2005) ("Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment.") (citing 21 U.S.C. § 812(b)(1)).

RSA 354-A's incorporation of federal law readily distinguishes this case from Appeal of Panaggio, 172 N.H. 13 (2019), on which the plaintiff relies. In Panaggio, this Court held that the New Hampshire workers compensation statute, RSA 281-A, may require employers to reimburse injured employees for the cost of medical marijuana. Id. 16-17. But RSA 281-A does not incorporate federal law, nor does it contain any exclusion for federally prohibited drugs, nor does it provide any other federal reference point for understanding its terms. In short, Panaggio construed a different statute and did not involve anything like the proviso in RSA 354-A:2, IV. It is therefore inapplicable here.[6]

The other appellate decisions cited by the plaintiff are distinguishable for the same reason. See Pl. Br. 23-24 & n.9, citing Wild v. Carriage Funeral Holdings, Inc., 241 N.J. 285, 224 A.3d 1206 (2020); Barbuto v. Advantage Sales and Marketing, LLC, 477 Mass. 456, 78 N.E.3d 37 (2017); and Gordon v. Consolidated Edison Inc., 190 A.D.3d 639, 140 N.Y.S.3d 512 (N.Y. App. Div. 2021). None of those cases make any reference to an exclusion like the one contained in RSA 354-A:2, IV. Indeed, one of the cases (Gordon, 140 N.Y.S.3d at 516) involved an anti-discrimination statute that expressly *included* status as a

---

[6] This Court recently issued a second opinion in Panaggio, holding that the reimbursement requirement in RSA 281-A is not preempted by the CSA. Appeal of Panaggio, No. 2019-685 (N.H. March 2, 2021) ("Panaggio *II*"). Mobility Works argued below that if RSA 354-A and RSA 126-X were construed to require employer accommodation of medical marijuana use they would conflict with, and be preempted by, federal law. (App. 16, 127-28.) Having held that RSA 354-A imposes no such requirement, the trial court had no need to consider the preemption issue. In light of the intervening decision in Panaggio *II*, Mobility Works waives its preemption argument on appeal.

medical marijuana user as a protected disability, something which RSA 354-A certainly does not do. The plaintiff's authorities are therefore inapposite.[7]

A more useful precedent is the recent decision by an appellate court in Pennsylvania which considered a statutory exclusion identical to the proviso in RSA 354-A:2, IV. In Harrisburg Area Community College v. Pennsylvania Human Relations Commission, 245 A.3d 283 (Pa. Comm. Ct. 2020), rehearing denied (Jan. 6, 2021), a nursing student filed a complaint against her college for disability discrimination based on the college's refusal to accommodate her use of medical marijuana to treat her PTSD and irritable bowel syndrome. The student asserted claims under two state anti-discrimination statutes, the Pennsylvania Human Relations Act ("PHRA") and the Pennsylvania Fair Educational Opportunities Act ("PFEOA"). Both of those statutes defined the essential term "handicap or disability" with a proviso stating:

> . . . but such term does not include current, illegal use of or addiction to a controlled substance, as defined in section 102 of the Controlled Substances Act (Public Law 91-513, 21 U.S.C. §802).

Id., 245 A.3d at 288-89 (quoting 43 Pa. Cons. Stat. §954 and 24 Pa. Cons. Stat. §5003(7)) (brackets omitted).

---

[7] The plaintiff refers in a footnote to an unpublished trial court decision from Rhode Island that quoted a statutory provision excluding "the illegal use of drugs" from the definition of a "qualified individual." See Pl. Br. 24 n.9, citing Callaghan v. Darlington Fabrics Corp., 2017 WL 2321181 at *11 (R.I. Super. Ct., May 23, 2017). Since the plaintiff did not need to be a "qualified individual" to state a claim for relief under the statute in question, it was unnecessary for the trial judge to decide whether the exclusion applied. 2017 WL 2321181 at *11.

The court of appeals had no difficulty concluding that this proviso unambiguously excluded medical marijuana use from the scope of protections under the two statutes. "The federal CSA is expressly referenced in PHRA and PFEOA, and both statutes incorporate its provisions and prohibitions." Id. at 289. Thus, since marijuana is illegal under federal law, the college "was not required to provide [the student] a reasonable accommodation for her use of medical marijuana" under either statute. Id. at 298. See also id. at 296 ("PHRA and PFEOA are not ambiguous").[8] Harrisburg Area Community College is on point and should be followed here.

Further helpful guidance may be found in federal case law applying similar exclusions in federal civil rights statutes. See Petition of Dunlap, 134 N.H. 533, 539 (1991) ("[T]he experience of the federal courts in applying federal handicap discrimination law assists us in interpreting the similar proscription against handicap discrimination contained in our own law."). See also Burnap v. Somersworth School District, 172 N.H. 632, 637 (2019) (in interpreting RSA 354-A "we are aided by the experience of the federal courts in construing the similar provisions" of federal law) (citation omitted).

For example, the federal Fair Housing Act ("FHA"), which prohibits housing-related discrimination against handicapped

---

[8] The court devoted most of its opinion to determining "whether the language in PHRA and PFEOA [was] overridden by" the Pennsylvania Medical Marijuana Act so as to require accommodation notwithstanding the exclusion in the two anti-discrimination statutes. Id. at 291. Mobility Works undertakes a similar analysis of New Hampshire's medical marijuana statute in part B of this brief, *infra*.

persons, defines "handicap" with an exclusion that is identical to the proviso in RSA 354-A:2, IV:

> . . . but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

42 U.S.C. §3602(h). This exclusion has been applied to hold that the manager of a publicly assisted housing facility "did not have a duty to reasonably accommodate [a tenant's] medical marijuana use," even though that use comported with state law. Assenberg v. Anacortes Housing Authority, 268 Fed. Appx. 643 (9th Cir. 2008).

The Americans with Disabilities Act ("ADA") contains a similar exclusion, although it uses slightly different language than the proviso in RSA 354-A:2, IV. Specifically, the ADA's definition of "disability" states in relevant part:

> For purposes of this title, a 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.

42 U.S.C. §12114(a). The ADA in turn defines "illegal use of drugs" as "the use of drugs, the possession or distribution of which is unlawful under the [CSA]" or which is otherwise not authorized by the CSA. 42 U.S.C. §12111(6)(A). This ADA exclusion has likewise been applied to hold that employers have no duty to accommodate employee use of medical marijuana, regardless of whether such use is permitted by state law. James v. City of Costa Mesa, 700 F.3d 394, 403 (9th Cir. 2012), cert. denied, 569 U.S. 994 (2013); Eccleston v. City of Waterbury, 2021

WL 1090754 at *6 (D. Conn., March 22, 2021); Barber v. Gonzales, 2005 WL 1607189 at *2 (E.D. Wash. 2005).

Lastly, the federal Rehabilitation Act, which prohibits disability discrimination in programs conducted or funded by the federal government, uses the same definition of "disability" and the same exclusion for "illegal drug use" as found in the ADA. 29 U.S.C. §705(10) & §705(20)(C)(i). Like the identical ADA exclusion, the exclusion in the Rehabilitation Act has also been held to place medical marijuana use outside the scope of that act's protections. See Forest City Residential Management v. Beasley, 71 F. Supp. 3d 715, 731 (E.D. Mich. 2014) (individual was "not entitled to a reasonable accommodation to use medical marijuana under . . . the Rehabilitation Act").

The proviso of RSA 354-A:2, IV is like each of these federal statutory exclusions in all relevant respects, and particularly in its incorporation of the CSA to define "illegal drug use." It should be interpreted and applied in the same manner.

The plaintiff concedes that Mobility Works had no duty to accommodate his marijuana use under the federal ADA because of the ADA's exclusion for illegal drug use. (Pl. Br. 16 n.3 & 32.) Nevertheless, he argues that the analogous exclusion of RSA 354-A:2, IV is "irrelevant" to this case. (Pl. Br. 33 n.14.) Specifically, he argues that although RSA 354-A:2, IV excludes federally prohibited drug use from the definition of "disability," his "disability" is not marijuana use but rather PTSD; marijuana is just the accommodation he seeks for that disability. (Id. See also Am. Br. 18 n.3.)

Neither the plaintiff nor *amici curiae* cite any case that has ever applied an exclusion for illegal drug use in the manner they argue. To the contrary, as discussed above, courts have applied exclusions identical to RSA 354-A:2, IV to hold that medical marijuana *use* is outside the scope of anti-discrimination protections, even though any user of medical marijuana could make the same argument as the plaintiff makes here (since, by definition, medical marijuana users must be disabled to qualify for such use). Assenberg, 268 Fed. Appx. at 643; Harrisburg Area Community College, 245 A.3d at 298. The language of these exclusions may differ slightly from the ADA exclusion, but that difference has not caused the courts to apply them any differently. See Harrisburg Area Community College, 245 A.3d at 293 n.10 (comparing ADA's illegal drug exclusion with exclusion in the Pennsylvania Human Relation Act; "PHRA uses different language but accomplishes similar ends").

The bigger problem with the plaintiff's argument is that it proves too much. If the exclusion of RSA 354-A:2, IV concerns only the underlying disability and not the substance or drug being used to treat it, then the legality or illegality of the treatment becomes irrelevant at the pleadings stage. In this case, for example, if the proviso were construed as the plaintiff contends, then whether the medical marijuana law authorized his use of marijuana or not would make no difference—his complaint would survive a motion to dismiss even if he were *not* a qualified user under RSA 126-X.

The door would be opened to discrimination claims based on other kinds of illegal substance use as well. Any disabled employee would be able to state a *prima facie* claim of discrimination for his employer's refusal of a requested accommodation even if the accommodation involved illegal drug use. According to the plaintiff's argument, the factual reasonableness of the requested accommodation would have to be litigated in every such case.[9]

The only possible rebuttal to the foregoing hypotheticals would be that any accommodation involving illegal drug use is unreasonable as a matter of law. That is just another way of saying the same thing that Mobility Works is arguing here—namely, that any drug use which *the statute itself* defines as illegal must be outside the scope of protections afforded by the statute.

---

[9] For example, an employee who felt he needed to use cocaine outside of work to combat debilitating depression would be able to bring a claim of discrimination for his employer's refusal to allow such use. Cf. Calero-Cerezo v. United States Department of Justice, 355 F.3d 6, 20 (1st Cir. 2004) ("This circuit has recognized depression as a mental disability that may constitute, at least in some circumstances, a disability under federal law."). It is not hard to imagine such an employee adopting the argument in the plaintiff's brief (p. 25) to defeat a motion to dismiss: "Mr. Doe's cocaine use in no way impaired his ability to perform his essential job functions. Mr. Doe never worked while under the influence of cocaine, he did not need to work while under the influence of cocaine, and he never asked to work while under the influence of cocaine. . . . No law required Mr. Doe to pass a drug test and no law prohibited Mobility Works from employing Mr. Doe because he used cocaine."

The plaintiff cites two federal cases in which employers were held to have a duty to accommodate employee use of controlled substances, but there is no suggestion in either of those cases that the drug use in question was illegal. See Pl. Br. 24 n.10, citing Stewart v. Snohomish County PUD No. 1, 262 F. Supp. 3d 1089 (W.D. Wash. 2017); Breaux v. Bollinger Shipyards, LLC, 2018 WL 3329059 (E.D. La. July 5, 2018).

Whichever formulation the Court prefers—lack of duty, or unreasonableness of the accommodation as a matter of law—the statute's incorporation of federal law compels the same conclusion: RSA 354-A does not require employers to accommodate employee use of medical marijuana. See In re J.W., 172 N.H. 332, 341-42 (2019) ("A court's power to liberally construe a statute extends only to the degree that the statutory language reasonably allows. . . . Liberal construction does not permit a court to rewrite a statute.") (citations omitted).

B. RSA 126-X did not amend RSA 354-A or place any burden on employers to accommodate medical marijuana use.

Given RSA 354-A's exclusion for federally prohibited drug use, the plaintiff can only prevail on this appeal by demonstrating that RSA 126-X somehow amended that exclusion or otherwise expanded employer obligations under RSA 354-A. Moreover, he must show this by evidence "of convincing force." Gazzola v. Clements, 120 N.H. 25, 28 (1980). See also Regional Rail Reorganization Act Cases, 419 U.S. 102, 134 (1974) ("A new statute will not be read as wholly or even partially amending a prior one unless there [is] . . . language showing that [the legislature] has made a considered determination to that end.").

The plaintiff cannot meet that burden. There is no evidence in the text, structure, or legislative history of RSA 126-X of any intent to supersede the exclusion of RSA 354-A:2, IV or to place any burden on employers to accommodate medical marijuana use. Indeed, the evidence is to the contrary.

First, RSA 126-X makes no mention of RSA 354-A anywhere in its text, even though it does refer to other existing laws. See, e.g., RSA 126-X:4, XI(a) & (b) (addressing impact on Right-to-Know statute, RSA 91-A). Had the legislature wished to amend the illegal drug exclusion of RSA 354-A:2, IV, it could easily have said so.

Second, although medical marijuana statutes in other jurisdictions expressly require employers to accommodate employee use of medical marijuana,[10] RSA 126-X includes no such requirement. This Court has stated many times that "we will not read requirements into [a] statute that the legislature did not see fit to include." New England Backflow v. Gagne, 172 N.H. 655, 664 (2019). See also Martin v. City of Rochester, 173 N.H. 378, 385 (2020); Panaggio, 172 N.H. at 17.

Third, the legislative history shows that the statute's omission of an employer accommodation requirement was not inadvertent, but deliberate. As originally introduced, the bill that later became RSA 126-X included a provision that would have prevented employers from taking any adverse action against an employee who was a registered user of therapeutic marijuana and who tested positive for marijuana, "unless the patient used or possessed, or was under the influence of or impaired by marijuana on the premises of the place of

---

[10] See Ariz. Rev. Stat. § 36-2813(b); Conn. Gen. Stat. § 21a-408p; 16 Del. C. § 4905A; 410 Ill. Comp. Stat. 30/40; 22 Maine Rev. Stat. § 13-3304.1; Minn. Stat. Ann. § 152.32; N.Y. Pub. Health Law §3369(2); Okla. Stat. Tit. 63, § 425; R.I. Gen. Laws § 21-28.6-4; W. Va. Code § 16A-15-4.

employment." (HB 573, §126-W:2, V(c); Def. App. 8.)[11] This provision would have accomplished exactly what the plaintiff now says the law requires, yet it was not enacted; the legislature instead deleted it from the bill before passage.

This rejection alone is sufficient reason to conclude that RSA 126-X did not change the *status quo ante* regarding employers and employee marijuana use. This Court should not read back into the statute, by way of construction, a requirement that the legislature deliberately removed. See Acosta v. Local Union 26, 895 F.3d 141, 144 (1st Cir. 2018) (Souter, J.) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (quoting Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421

---

[11] A complete copy of the "as introduced" bill is included in Mobility Works' Appendix, at 3. The text of the deleted provision was as follows:

> (c) Unless a failure to do so would constitute a violation of federal law or federal regulations, an employer shall not discriminate against an individual in hiring, termination, or any term or condition of employment, or otherwise penalize an individual, based upon either of the following:
>
> (1) The individual's status as a registered qualifying patient or registered designated caregiver; or
>
> (2) A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used or possessed, or was under the influence of or impaired by marijuana on the premises of the place of employment. For purposes of this chapter, "impaired" includes but is not limited to instances where the registered qualifying patient is not able to safely perform essential job tasks.

Def. App. 8. See also App. 145-46 (arguing this point below).

(1987)). See also Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974) (deletion of provision from bill in conference committee "strongly militates against a judgment that Congress intended a result that it expressly declined to enact").

Fourth and finally, there is no irreconcilable conflict between the allowance of medical marijuana use in RSA 126-X and the exclusion for federally prohibited drug use in RSA 354-A:2, IV. See Gazzola, 120 N.H. at 28 (implied repeal will be found "only if the conflict between the two enactments is irreconcilable"). See also In re Regan, 164 N.H. 1, 12 (2012) ("if any reasonable construction of the two statutes taken together can be found, we will not hold that the former statute has been impliedly repealed"). RSA 126-X provides an exception from state criminal law for medical marijuana use, but the exception is narrow. Indeed, it is so narrow that even residents of long-term care facilities, nursing homes, hospitals, and hospice houses have no right to use medical marijuana in the places where they live. RSA 126-X:3, III(c). The legislature clearly did not intend to remove all possible impediments to the use of medical marijuana. The statute gives New Hampshire patients a choice they did not have before, but it does not entitle them to shift the practical burdens of that choice onto their employers.

Notwithstanding all of the foregoing contrary evidence, *amici curiae* purport to discern a duty to accommodate in the last sentence of RSA 126-X:3, III(c), which states: "This chapter shall in no way limit an employer's ability to discipline an employee for

ingesting cannabis in the workplace or for working while under the influence of cannabis." *Amici* argue that if the trial court was correct that employers have no duty to accommodate medical marijuana use at all—even off-site use—then this provision would be surplusage. (Am. Br. 20.) Citing the familiar principle that the legislature is not presumed to waste words, *amici* say the only way to give effect to the provision is to infer, by negative implication, an underlying duty to accommodate off-site use. (Id., citing Town of Amherst v. Gilroy, 157 N.H. 275, 279 (2008)).

Amici's argument fails for several reasons. First, the principle of construction on which it relies is, like all canons of construction, "rather an axiom of experience than a rule of law." Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (Holmes, J.). Such canons are only presumptive guides and "may easily be rebutted by contrary indications" of legislative intent. Utley v. Mill Man Steel, Inc., 357 P.3d 992, 997 (Utah 2015). As discussed above, there is ample evidence that the legislature did not intend the result that plaintiff and *amici* argue for here.

Second, the argument is erroneous because one cannot logically infer a duty to accommodate from a provision that protects *employers* and says nothing at all about the alleged duty. See Roe v. TeleTech Customer Care Management (Colorado), LLC, 171 Wash. 2d 736, 257 P.3d 586, 591-92 & n.4 (2011) (state statute's explicit exclusion of any employer obligation to accommodate on-site use of medical marijuana "does not require reading into [the statute] an implicit obligation to accommodate

off-site medical marijuana use") (citing Hon. Ruggero J. Aldisert, Logic for Lawyers: A Guide to Clear Legal Thinking (3rd ed. 1997)).

Third, one need not assume the trial court's ruling was incorrect to explain the surplusage contained in the last sentence of RSA 126-X:3, III(c). The better explanation is that the legislators, while wanting to express their agreement that employers should not have to tolerate marijuana use or intoxication in the workplace, could not reach a consensus on how to address the obvious but politically thornier question of accommodating *off*-site use. Rather than allowing this impasse to "kill" the bill, the legislators preferred to pass the bill while remaining silent on that issue. Such legislative inaction cannot change the preexisting state of the law. See Wallace v. Wallace, 120 N.H. 675, 679 (1980) ("the legislature speaks by action and not by inaction").[12]

Finally, and perhaps most fundamentally, even if a majority of the legislators *did* want to impose the claimed duty on New

---

[12] The practice described above, sometimes referred to as "legislative default" or "legislative deferral," has received considerable attention from legal scholars who agree one of its main purposes is to shift responsibility for controversial policy decisions to the courts, and thereby to avoid political accountability for potentially unpopular policy outcomes. See George I. Lovell, Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy, p. 9 (2003); Joseph A. Grundfest *et al.*, "Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation," 54 U. Mich. L. Rev. 627, 640-642 (2002); Victoria F. Nourse *et al.*, "The Politics of Legislative Drafting: A Congressional Case Study," 77 N.Y.U. Law Rev. 575, 594-596 (2002). Judge Easterbrook and others have argued persuasively that courts should not facilitate such evasions by making new policy on issues the legislature could have but failed to address. Frank H. Easterbrook, "Statutes' Domains," 50 U. Chi. L. Rev. 533, 544 (1983).

Hampshire employers, an expression as indefinite as the quoted provision of RSA 126-X:3, III(c) does not constitute a valid legislative command. "[A] bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it." Thomas M. Cooley, ed., Blackstone's Commentaries on the Laws of England, vol. 1, p. 45 (2nd ed. 1872). Moreover, "it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in very small character, and hung them upon high pillars, the more effectually to ensnare the people." Id., p. 46. If the legislators had wanted to impose a duty on employers to accommodate employee use of medical marijuana—and to put them at risk of civil liability for failing to comply with that duty—they would have needed to do so in plain terms. The pregnant negative of RSA 126-X:3, III(c) does not satisfy that criterion.

For all of these reasons, the law on this issue is the same following passage of RSA 126-X as it was before: New Hampshire employers are under no legal duty to accommodate employee use of medical marijuana.

C. *Amici*'s policy arguments are addressed to the wrong forum.

Amici curiae (and, to a lesser extent, the plaintiff) make a number of policy arguments to support their preferred construction of the statutes at issue. (Am. Br. 8-11; Pl. Br.

33-34.)[13] "Those arguments are made to the wrong forum as matters of policy are reserved for the legislature." Anderson v. Robitaille, 172 N.H. 20, 26 (2019) (citing Dolbeare v. City of Laconia, 168 N.H. 52, 57 (2015)). See also Artuz v. Bennett, 531 U.S. 4, 10 (2000) (Scalia, J.) ("Whatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them" since the statute "may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted.").

In fact, as *amici* point out, there is presently before the legislature a bill that would prohibit employers from taking adverse action against employees who are qualified medical marijuana users under RSA 126-X and who test positive for marijuana. (Am. Br. 15, citing HB 1386 (2020 Session).) Apparently, the sponsors of this bill correctly recognize that such protections do not currently exist under New Hampshire law. If a majority of their colleagues agree with the policy arguments raised by the plaintiff and *amici* here, however, it is certainly within their power to take legislative action on those concerns.

Amici also encourage this Court to rule in the plaintiff's favor by asserting that "the legal landscape is evolving" in that

---

[13] The plaintiff refers to what he describes as "legislative findings" supporting the enactment of RSA 126-X. (Pl. Br. 33-34.) The findings he cites are from the bill *as introduced*; they do not appear in any subsequent amended version of the bill, or in its final codified form.

direction anyway. (Am. Br. 8, 13, 15.) Apart from the irrelevance of this encouragement, *amici*'s assertion is inaccurate. Numerous courts in other states have declined to find any employer obligation to accommodate employee use of medical marijuana, even where such use complied with state law.[14] For the reasons stated above, this Court should reach the same conclusion.

---

[14] See, e.g., Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225, 1228-9 (D.N.M. 2016) (employer was not obligated to accommodate medical marijuana use under New Mexico's Human Rights Act or medical marijuana statute); Swaw v. Safeway, Inc., 2015 WL 7431106 at *1-2 (W.D. Wash., November 20, 2015) (dismissing employment discrimination claim because "Washington law does not require employers to accommodate the use of medical marijuana where they have a drug-free workplace, even if medical marijuana is being used off site to treat an employee's disabilities, as the use of marijuana for medical purposes remains unlawful under federal law."); Ross v. RagingWire Telecommunications, Inc., 174 P.3d 200, 207-8 (Cal. 2008) (rejecting argument that California's medical marijuana statute requires employers to accommodate employees' at-home use of medical marijuana); Coats v. Dish Network, L.L.C., 350 P.3d 849, 853 (Colo. 2015) (affirming dismissal of employee's claim that termination based on his off-site, off-hours use of medical marijuana violated employment discrimination provision of Colorado Civil Rights Act; "Coats's use of medical marijuana was unlawful under federal law and thus not protected by" the state statute); Eplee v. City of Lansing, 327 Mich. App. 635, 935 N.W.2d 104, 115-16 (2019) (dismissing claim that applicant, a qualified medical marijuana user, was denied any legal right or privilege by prospective employer's withdrawal of conditional job offer after applicant tested positive for marijuana); Johnson v. Columbia Falls Aluminum Co., LLC, 350 Mont. 562, 213 P.3d 789 (table), 2009 WL 865308 (March 31, 2009) (employer's failure to accommodate use of medical marijuana did not violate Montana Human Rights Act or ADA); Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries, 348 Ore. 159, 230 P.3d 518, 535 (2010) (employer had no obligation under Oregon anti-discrimination statute to accommodate employee's off-site use of medical marijuana).

CONCLUSION & REQUEST FOR ORAL ARGUMENT

For all the foregoing reasons, Mobility Works respectfully requests this Honorable Court to affirm the decision below. Mobility Works requests oral argument, to be presented by Mark D. Attorri, Esq.

Respectfully submitted,

RIDE-AWAY, INC. d/b/a
MOBILITY WORKS

By its attorneys,

/s/ Mark D. Attorri

Mark D. Attorri
(N.H. Bar No. 9268)
Lynnette V. Macomber
(N.H. Bar No. 271596)
DEVINE MILLIMET & BRANCH, P.A.
111 Amherst Street
Manchester, NH 03101
(603) 669-1000
mattorri@devinemillimet.com
lmacomber@devinemillimet.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Rule 26 and the word limitation of Rule 16(11). The brief contains 6,991 words exclusive of pages containing the table of contents and table of authorities.

Copies of the foregoing brief have been forwarded to all counsel of record via the Court's electronic filing system.

/s / Mark D. Attorri
Mark D. Attorri