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 FINAL DECISION
OF THE ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT SCOTT PAINE

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QUESTION PRESENTED

Defendant-Appellee Ride-Away, Inc. d/b/a Mobility Works ("Mobility Works") terminated Plaintiff-Appellant Scott Paine's employment because he used medical marijuana[1] outside of work, consistent with New Hampshire state law, to treat a disability and needed Mobility Works to permit his use as a reasonable accommodation. The issue on appeal is whether the Superior Court erred when it dismissed Mr. Paine's disability discrimination claims under RSA 354-A, without permitting the normal factual inquiry of the reasonableness of his accommodation requests, because, "as a matter of law, employers are not required to make reasonable accommodations for marijuana use." Preserved: *See* Plaintiff's Response to Defendant's Motion for Judgment on the Pleadings (Apx. 21-36) and Plaintiff's Motion to Amend Complaint (Apx. 79-107). [2]

STATUTES INVOLVED IN THE CASE

The language from the following statutes and regulations are included in the Appendix. (Apx. 149-192).

RSA 354-A:2

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[1] The terms "marijuana" and "cannabis" are synonymous and are often used interchangeably. Because the Superior Court referred to it as "marijuana" this brief also uses that term. The term "medical marijuana" refers to marijuana used consistent with a state law, such as New Hampshire's Use of Cannabis for Therapeutic Purposes statute (RSA 126-X), that permits individuals to use marijuana for medicinal purposes.

[2] For purposes of this appeal, Mr. Paine has abandoned his common law claim for wrongful discharge and his retaliation claim under RSA 354-A:19. He is only pursuing claims under RSA 354-A:7(VII)(a) and (b).

RSA 354-A:7

RSA 354-A:25

RSA 126-X

22 M.R.S.A. § 2430-C

410 ILCS 130/50

42 U.S.C. § 12114

29 C.F.R. § 1630.2

STATEMENT OF THE CASE

In response to the Complaint that Mr. Paine filed in Rockingham County Superior Court, Mobility Works filed a Motion for Judgment on the Pleadings. The Superior Court correctly treated Mobility Works' motion as a motion to dismiss for failure to state a claim. Addendum at 42-43. The Superior Court granted Mobility Works' motion but, consistent with this Court's holdings, the Superior Court gave Mr. Paine an opportunity to amend his Complaint to correct the deficiencies that the Superior Court found in it. *Id.* at 52. (*citing Kurowski v. Town of Chester*, 170 N.H. 307, 315 (2017)). Mr. Paine took advantage of this opportunity, filed a Motion to Amend Complaint, and attached his Amended Complaint to that motion. Apx. 79-124. After considering Mr. Paine's Amended Complaint and Motion to Amend Complaint, the Superior Court held that the Amended Complaint did not correct the deficiencies found in the original Complaint because, "as a matter of law, employers are not required to make reasonable accommodations for marijuana use." Addendum at 57. The Superior Court dismissed Mr. Paine's case and this appeal followed.

STATEMENT OF FACTS

The facts of the case are set forth in the First Amended Complaint (Apx. 108-124) and are summarized below.

I. Mobility Works and its drug testing policy

With over 90 consumer showroom locations in 31 states and a Commercial Van Division serving customers nationwide, Mobility Works is the largest adaptive van provider in the United States. Apx. 108. One of Mobility Works' locations is in Londonderry, New Hampshire, where it employs about 50 people. *Id.* at 114.

Under Mobility Works policy, some employees may be required to pass drug tests. *Id.* at 110. The drug test that Mobility Works uses detects whether THC (the psychoactive substance in marijuana) is in a person's body. *Id.* at 116. THC stays in a person's body for weeks after they ingest marijuana even though a person remains under the influence of marijuana for only a few hours after they ingest it. *Id.* Consequently, the drug test that Mobility Works uses on employees cannot determine at what point in time a person was under the influence of marijuana and, as such, it cannot determine whether an employee worked while under the influence of marijuana. *Id.* Mobility Works has at least seventeen locations in eight states with statutes or court decisions that prohibit discrimination against employees who use medical marijuana to treat disabilities. *Id.* at 120. For that reason, Mobility Works' drug testing policy states that the company will permit the use of medical marijuana to serve as a defense to a positive drug test if an applicable law requires that the company do so. *Id*.

If Mobility Works needed to determine whether an employee was working while under the influence of marijuana, it could observe the

employee and use techniques similar to those that law enforcement officers use to determine whether an individual is under the influence of marijuana. *Id.* at 117-18. The New Hampshire State Police and private firms offer training to employers who want to learn how to detect whether an individual is under the influence of marijuana. *Id.* Due to laws in certain states where Mobility Works operates, it may use these techniques to detect whether an employee is working while under the influence of marijuana and terminate the employee if they are under the influence at work; but in these states, Mobility Works cannot terminate a medical marijuana user just because he tests positive for THC. *Id.* Mobility Works is able to operate safely and efficiently in these states where it cannot refuse to employ medical marijuana users who test positive for THC. *Id.* at 120.

II. Mr. Paine and his disability

At all relevant times, Mr. Paine has suffered from post-traumatic stress disorder ("PTSD") and his PTSD constitutes a disability under the New Hampshire Law Against Discrimination ("RSA 354-A"). Apx. 109. Mr. Paine has suffered from PTSD for many years. *Id.* His PTSD stems, in part, from experiences he had while he served as a contractor for various U.S. military and intelligence agencies. *Id.* In July 2018, a couple months after Mr. Paine started working for Mobility Works, Mr. Paine's doctor prescribed marijuana to treat his PTSD. *Id.* Mr. Paine subsequently became legally enrolled in New Hampshire's Therapeutic Cannabis Program and began to use marijuana consistent with the requirements of New Hampshire law (RSA 126-X). *Id.*

III. Events giving rise to Mr. Paine's claims

Mr. Paine started working for Mobility Works at its Londonderry location on May 7, 2018, as an Automotive Detailer. Apx. 109. On July 12, 2018, Mr. Paine informed Mobility Works Human Resources Manager, Courtney Benoit, that he had recently enrolled in New Hampshire's Therapeutic Cannabis Program and asked whether his use of medical marijuana would impact his employment. *Id.* Ms. Benoit, who knew the job duties of Mr. Paine's Automotive Detailer position, said that she did not think Mr. Paine's use of medical marijuana would impact his employment. *Id.* at 109-10. Ms. Benoit told Mr. Paine that other employees were unable to pass drug tests because of prescribed medication and those failed tests did not impact those employees' employment. *Id.* So, she thought it would be reasonable to accommodate Mr. Paine in the same way. *Id.* Ms. Benoit asked Mr. Paine to submit a written request for reasonable accommodation regarding his use of medical marijuana. *Id.* at 110.

In accordance with Ms. Benoit's request, on August 22, 2018, Mr. Paine submitted a written request for reasonable accommodation relating to his use of medical marijuana. *Id.* at 110. In his written request, he asked that Mobility Works make an exception to its drug testing policy for him because of his use of medical marijuana to treat his PTSD. *Id.* On September 7, 2018, Mobility Works' Vice President of Human Resources, Jillian Montmarquet, replied to Mr. Paine's written reasonable accommodation request with an email that said, among other things, that Mobility Works decided to deny the request because the company considered his Automotive Detailer position "Safety Sensitive." *Id.* at 111.

On September 9, 2018, Mr. Paine replied to Ms. Montmarquet's September 7, 2018, email and clarified that he was not asking permission to use marijuana at work or to work while under the influence of marijuana and, instead, he just wanted Mobility Works to continue to employ him if he tested positive for THC. *Id.*

Mr. Paine met with Ms. Montmarquet and General Manager Ronald Hoy on September 10, 2018. *Id.* at 112. Ms. Montmarquet said that, despite Mr. Paine's clarification that he did not want or need to work while under the influence of marijuana, Mobility Works still would not permit him to work for it if he used medical marijuana to treat his PTSD because she said his job was "safety sensitive." *Id.* Mobility Works considered Mr. Paine's Automotive Detailer job safety sensitive solely because he drove vehicles about 10-15 minutes per day. *Id.* at 113. Mr. Paine's medical marijuana use did not make him an unsafe driver. He still had a valid license to drive even though he was a medical marijuana user and studies have shown that marijuana users are not more likely get into motor vehicle accidents than people who do not use marijuana. *Id.* at 112-13.

Nevertheless, because of the expressed concern about him driving, Mr. Paine asked if Mobility Works could restructure his job so that he did not have to drive. *Id.* at 113. Driving was not an essential function of Mr. Paine's job; he only drove about 10-15 minutes per day. Others easily could have driven for him 10-15 minutes per day while he did other work. *Id.* at 113-14. Indeed, Mobility Works had provided that exact same accommodation to an employee who had his driver's license revoked. *Id.* at 113. Ms. Montmarquet and Mr. Hoy declined Mr. Paine's request that others drive for him merely because they did not want to ask anyone to

move vehicles for him. *Id.* at 114. At the conclusion of the September 10, 2018, meeting, they placed Mr. Paine on an involuntary leave of absence because of his medical marijuana use. Ms. Montmarquet said that this leave of absence would expire on September 17, 2018, and he could not return to work if he continued to use medical marijuana. *Id.*

Ms. Montmarquet understood that, if Mobility Works could not accommodate Mr. Paine in his Automotive Detailer position, Mobility Works had an obligation to explore whether it was possible to reassign Mr. Paine to a vacant position he was qualified to perform. *Id.* at 119. Nevertheless, she ignored this obligation. *Id.* Upon information and belief, Mr. Paine has alleged that Mobility Works had vacant positions which it did not consider safety sensitive that Mr. Paine was qualified to perform but, nevertheless, Mobility Works did not offer to reassign him to one of those positions. *Id.*

Mr. Paine contacted the New Hampshire Commission for Human Rights ("NHCHR") after his September 10, 2018, meeting with Ms. Montmarquet and Mr. Hoy. An employee of the NHCHR told him, based on what he said about his situation, that it appeared as though Mobility Works was violating his rights. *Id.* at 115. Mr. Paine then emailed Ms. Montmarquet, Ms. Benoit, and Mr. Hoy on September 12, 2018, said that he believed Mobility Works was violating his rights and he, again, asked the company to accommodate his medical marijuana use. *Id.* Mobility Works refused to change its position and terminated Mr. Paine on September 18, 2018. *Id.* at 115-16.

SUMMARY OF THE ARGUMENT

The Superior Court erred when it held, as a matter of law, that RSA 354-A can never require an employer to accommodate an employee who uses medical marijuana to treat a disability. The determination of whether an accommodation is reasonable requires a fact-intensive case-by-case analysis. The Superior Court erred because it did not permit this fact-intensive analysis to occur and, instead, dismissed the case on the pleadings without any discovery. Mobility Works argued below that because marijuana is illegal under the federal Controlled Substances Act ("CSA") Mr. Paine's requested accommodation is unreasonable, but the CSA does not bar employers from accommodating medical marijuana use. Furthermore, this Court has held that medical marijuana users may enjoy rights under state law despite the CSA. In *Appeal of Panaggio*, this Court recently held that New Hampshire's workers compensation statute may require an employer to reimburse an employee for medical marijuana. If the workers compensation statute can require an employer to reimburse an employee for medical marijuana, RSA 354-A should require an employer to accommodate an employee's medical marijuana use when it is reasonable to do so.

ARGUMENT

I. Legal Standard

This Court should review the Superior Court's decision de novo because the Superior Court determined that Mr. Paine could not prevail as a matter of law. *In re Juv. 2004-789-A*, 153 N.H. 332, 334 (2006) (questions of law reviewed de novo). The ruling on appeal is a decision by the Superior Court granting Mobility Works' motion for judgment on the

pleadings. This Court has held that such a motion "is in the nature of a motion to dismiss for failure to state a claim." *LaChance v. U.S. Smokeless Tobacco Co.*, 156 NH 88, 93 (2007). The appellate standard on review of such a motion is whether the facts alleged by the Plaintiff, as well as all reasonable inferences from those facts construed most favorably to the Plaintiff, constitute a basis for legal relief. *Id.*

All of Mr. Paine's claims arise under the New Hampshire Law Against Discrimination (RSA 354-A). When it interprets RSA 354-A, this Court looks to federal authorities that interpret similar federal statutes for guidance. *Pet. of Dunlap*, 134 N.H. 533, 539 (1991) (court looked to federal disability discrimination law for guidance in interpreting RSA 354-A) and *Madeja v. MPB Corp.*, 149 N.H. 371, 379 (2003) (court looked to federal law to interpret sex discrimination and retaliation prohibitions in RSA 354-A).[3] This Court will also look to cases from other states' courts for guidance when it is interpreting statutes that are similar to the laws of those other states. *Franklin Lodge of Elks v. Marcoux*, 149 N.H. 581, 586-87 (2003).

[3] Because the right to reasonable accommodation under the federal Americans with Disabilities Act ("ADA") incorporates the prohibitions contained in the Controlled Substances Act, 42 U.S.C. § 12114(a), no claim is being made under federal law. However, the approach followed by the federal courts in determining what constitutes a reasonable accommodation is instructive in interpreting how that term should be applied under RSA 354-A.

II. The Superior Court erred when it held that RSA 354-A never requires an employer to accommodate an employee's use of medical marijuana to treat a disability.

The fundamental issue in this case is whether an employer's termination of an employee because that employee uses medical marijuana as a treatment for a legally protected disability can *ever* be a violation of the employee's rights under RSA 354-A. The Superior Court held that it could not and that holding was erroneous. This case turns on the meaning of reasonable accommodation as required by RSA 354-A:7(VII). It is clear from the statutory text that an across-the-board exclusion from the obligation of reasonable accommodation, as a matter of law, is inconsistent with its language.

The right to reasonable accommodations is a "fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities." *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* at General Principles (2002).[4] "Although many individuals with disabilities can apply for and perform jobs without any reasonable accommodations, there are workplace barriers that keep others from performing jobs which they could do with some form of accommodation." *Id.* A reasonable accommodation is, by definition, a "change in the work environment or in the way things are customarily done." *Id.* Thus, "the

[4] The EEOC's Enforcement Guidance can be found on its website here: https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#general (visited Mar. 26, 2021).

fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond" RSA 354-A's potential reach. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002).

The word "reasonable" itself demonstrates that the determination of whether an accommodation is legally required should be decided on a case-by-case basis depending on the specific facts of the case. Reasonableness is intrinsically a factual determination. *Reed v. New Hampshire Dept. of Health and Human Services*, 2017-0302, 2018 WL 2213798, at *1 (N.H. Apr. 17, 2018) ("Determining the reasonableness of an accommodation is a 'fact-specific' question that often must be resolved by a factfinder") and *Calero-Cerezo v. U.S. Dep't of Justice*, 355 F.3d 6, 23 (1st Cir. 2004) ("A careful, individualized review of an accommodation request in light of the specific facts of the case is needed to determine whether the request was reasonable").[5] The language of the statute contrasts a "reasonable accommodation" with an "undue hardship in the operation of the business of the employer." RSA 354-A:7(VII)(a). Undue hardship, which is an affirmative defense, is equally a question of fact. *Eustace v. Springfield Pub. Schools*, 463 F. Supp. 3d 87, 109 (D. Mass. 2020) ("Undue hardship is a case-specific, fact-intensive question"). Furthermore, the definition of reasonable accommodation in RSA 354-A:2(XIV-b) lists various types of modifications which reasonable accommodation "may include." It does not purport to contain a comprehensive list, nor does it contain any criteria for disqualifying other proposed accommodations as a matter of law.

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[5] *See also Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647 (1st Cir. 2000) and *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995).

Equally critical to the statutory analysis is RSA 354-A:25 which provides that "[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." There is nothing less consistent with this canon of construction than excluding a whole category of accommodation – exceptions from drug testing policies for medical marijuana use – that would otherwise enable employees with a range of different types of disabilities from continuing gainful employment.

The guiding principle for courts that consider reasonable accommodation claims is that the plaintiff only needs to allege an accommodation that "seems reasonable on its face, i.e., ordinarily or in the run of cases." *Barnett*, 535 U.S. at 401. "Once the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." *Id.* at 402.

Given the breadth of the ruling by the court below, it was incumbent upon it to identify an inherent characteristic of the use of medical marijuana which would inevitably cause undue hardship to the employer or otherwise disqualify it from individualized consideration as a reasonable accommodation. This it failed to do and, as discussed further below, this error requires this Court to reverse the Superior Court's decision and remand for further proceedings.

A. Based on the facts alleged in the Amended Complaint, Mr. Paine could prevail on his failure-to-accommodate claim under RSA 354-A:7(VII)(a).

The Amended Complaint alleges facts sufficient to support Mr. Paine's claim that Mobility Works failed to provide him with reasonable

accommodations. RSA 354-A makes it illegal for "any employer not to make reasonable accommodations for the known physical or mental limitations of a qualified individual[6] with a disability who is an applicant or employee, unless such employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer." RSA 354-A:7(VII)(a). Under RSA 354-A, a reasonable accommodation may include "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." RSA 354-A:2(XIV-b)(b). To prevail on a motion to dismiss a failure-to-accommodate claim, "the Defendant bears the weighty burden of showing that the fact-intensive inquiry prerequisite to a finding of reasonable accommodation falls completely in its favor." *Vale v. Great Neck Water Pollution Control Dist.*, 80 F. Supp. 3d 426, 438 (E.D.N.Y. 2015) (cleaned up).

To prevail on a failure-to-accommodate claim, a plaintiff must prove these three elements: "(1) he was disabled within the meaning of [RSA 354-A], (2) he was able to perform the essential functions of the job with or without a reasonable accommodation, and (3) [the defendant], despite

[6] The term "qualified individual with a disability" means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." RSA 354-A:2(XIV-a).

knowing of his disability, did not reasonably accommodate it." *Tobin v. Liberty Mut. Ins. Co.*, 433 F.3d 100, 107 (1st Cir. 2005). When analyzing a failure-to-accommodate claim, the defendant's motivation for denying the accommodation request is irrelevant. A plaintiff does not have to prove that the employer refused to provide him with a reasonable accommodation because of disability-based animus. *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999).

With respect to the second element of a failure-to-accommodate claim, there are various factors which should be considered when determining whether a job function is essential or just marginal. 29 C.F.R. § 1630.2(n). The employer's judgment as to which functions are essential is just one factor and is not dispositive. *Ward v. Mass. Health Res. Inst., Inc.*, 209 F.3d 29, 34 (1st Cir. 2000) and *Gillen v. Fallon Ambulance Svc., Inc.*, 283 F.3d 11, 25 (1st Cir. 2002). Other factors include the "amount of time spent on the job performing the function;" "consequences of not requiring the incumbent to perform the function;" and the "work experience of past incumbents in the job." 29 C.F.R. § 1630.2(n). When there is a dispute over whether a job function is essential, the employer bears the burden of proving that the function is essential. *Ward*, 209 F.3d at 35.

With respect to the third element of a failure-to-accommodate claim, as discussed above, courts utilize burden shifting to determine whether the defendant did not reasonably accommodate the plaintiff's disability. First, the plaintiff need only show that the accommodation he requested was, "on the face of things, feasible for the employer under the circumstances." *Calero-Cerezo*, 355 F.3d at 23 (applying *Barnett* standard discussed above). After meeting this relatively slight burden, the burden shifts to the

defendant to prove that the requested accommodation was not feasible and would constitute an undue hardship. *Id.* at 23.

In the Superior Court, there was no dispute that Mr. Paine had sufficiently alleged that he had a disability and could satisfy the first element of his failure-to-accommodate claim. As discussed further below, Mr. Paine can also satisfy the second and third elements of his failure-to-accommodate claim. The Amended Complaint alleges that Mobility Works failed to accommodate Mr. Paine's disability in three ways. (1) Mobility Works refused to make an exception to its drug testing policy for Mr. Paine so that he would not lose his job if he tested positive for THC. (2) Assuming it would have been a safety risk for Mr. Paine to drive at work, which Mr. Paine strongly disputes, Mobility Works could have assigned Mr. Paine's driving duties to others. (3) Assuming it would have been a safety risk for Mr. Paine to drive and assuming that delegating his driving duties to others was not feasible, which Mr. Paine strongly disputes, Mobility Works could have reassigned him to a vacant position. These accommodations are discussed separately below.[7]

[7] Sometimes an employer must provide more than one accommodation to a disabled employee in order to reasonably accommodate him. *Ralph v. Lucent Techs., Inc.*, 135 F.3d 166, 172 (1st Cir. 1998) ("The duty to provide reasonable accommodation is a continuing one…and not exhausted by one effort.").

1. Mr. Paine could have performed his essential job functions if Mobility Works had granted his request that it make an exception to its drug testing policy for him.

Mr. Paine asked Mobility Works to make an exception to its drug testing policy as a reasonable accommodation. This type of accommodation is referred to as a "modification" to a policy, which is a well-recognized form of reasonable accommodation. RSA 354-A:2(XIV-b)(b); *Criado v. IBM Corp.*, 145 F.3d 437, 444 (1st Cir. 1998) (modification to attendance policy was reasonable accommodation); and *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* at Modified Workplace Policies (2002).[8] Applying the body of reasonable accommodation law related to policy modifications, courts have held that employers may have to make exceptions to their drug testing policies in order to accommodate disabled employees who use drugs to treat their disabilities. For instance, in *Wild v. Carriage Funeral Holdings, Inc.*, the New Jersey Supreme Court held that the defendant could be required to make an exception to its drug testing policy for the plaintiff – a funeral director whose job required him to drive – because he used medical marijuana to treat a disability. 227 A.3d 1206 (N.J. 2020) (*affirming Wild v. Carriage Funeral Holdings, Inc.*, 205 A.3d 1144, 1149 (N.J. Super App.

[8] This EEOC Guidance may be found here: https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#workplace (visited Mar. 26, 2021).

Div. 2019)). The Massachusetts Supreme Judicial Court ("SJC") has similarly held that employers may have to make exceptions to their drug testing policies to accommodate employees who use medical marijuana to treat a disability. *Barbuto v. Advantage Sales and Mktg., LLC*, 78 N.E.3d 37, 45 (Mass. 2017).[9] The provisions of New Jersey's and Massachusetts' disability discrimination laws are quite similar to RSA 354-A and the Court should, thus, look to these courts' decisions for guidance.[10]

The Amended Complaint contained facts which were more than sufficient to state a failure-to-accommodate claim. As set forth in the Amended Complaint, Mr. Paine asked Mobility Works to modify its drug testing policy, and make an exception for him, so that he would not be terminated if he tested positive for THC. Apx. 109-10. This policy modification would not have prevented Mr. Paine from performing his essential job functions and was, at least on its face, feasible for Mobility

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[9] Trial and intermediate appellate courts in other states have also held that state disability discrimination laws with language similar to RSA 354-A may require employers to accommodate medical marijuana use. *See e.g., Gordon v. Consol. Edison Inc.*, 190 A.D.3d 639 (N.Y. App. Div. 1st Dept. 2021) and *Callaghan v. Darlington Fabrics Corp.*, C.A. No. PC-2014-5680, 2017 WL 2321181 at *13 (R.I. Super. May 23, 2017).

[10] Courts have also held, with respect to other types of controlled substances, that employers must make exceptions to their drug policies in order to reasonably accommodate employees with disabilities. *See e.g., Stewart v. Snohomish Cty. PUD No. 1*, 262 F. Supp. 3d 1089, 1106 (W.D. Wash. 2017) (employer failed to reasonably accommodate employee's use of narcotics to treat migraines) and *Breaux v. Bollinger Shipyards, LLC*, No. CV 16-2331, 2018 WL 3329059, at *16 (E.D. La. July 5, 2018) (reasonable accommodation could include accommodating employee's use of Suboxone to wean off of prescribed opioids).

Works. Mr. Paine's marijuana use in no way impaired his ability to perform his essential job functions. *Id.* at 111. Mr. Paine never worked while under the influence of marijuana, he did not need to work while under the influence of marijuana, and he never asked to work while under the influence of marijuana. *Id.* Passing a drug test was not an essential function of Mr. Paine's job. *Id.* at 116. Indeed, during the entire time that Mr. Paine worked for Mobility Works, he was never even asked to take a drug test. *Id*. No law required Mr. Paine to pass a drug test and no law prohibited Mobility Works from employing Mr. Paine because he used marijuana. *Id*.

Mobility Works' HR Manager, Ms. Benoit, knew Mr. Paine's job duties and she admitted that Mr. Paine's marijuana use would not have prevented him from doing his job. *Id.* at 109. Ms. Benoit's admission also shows that, at least "on the face of things," she believed that Mr. Paine's accommodation request was feasible. *Calero-Cerezo*, 355 F.3d at 23. Mobility Works accommodates other employees who cannot pass its drug test due to prescription medication and it could have done the same for Mr. Paine. *Id.* at 110.

In support of its decision on Mobility Works' motion for judgment on the pleadings, the Superior Court noted safety concerns with Mr. Paine's request for a modification to the drug testing policy since Mobility Works claimed the Automotive Detailer position was "safety sensitive." Addendum at 51. This amounted to a factual determination not appropriate to a decision on a motion on the pleadings; and it was also highly questionable as a factual matter given the very limited nature of Mr. Paine's driving duties. Moreover, when Mr. Paine filed a Motion to Amend which

alleged that Mobility Works could have further accommodated him in ways that would totally eliminate Mobility Works' purported safety concerns, the Superior Court stated that these additional facts were "of no avail" because its prior opinion had "made it clear that, as a matter of law, employers are not required to make reasonable accommodations for marijuana use." *Id.* at 57. Thus, the Superior Court itself determined that its observation regarding safety was dictum not relevant to its decision.

From Mr. Paine's perspective, the extent to which his job legitimately implicated safety concerns is a fact specific inquiry that the Superior Court and a jury should not undertake until after the parties have had an opportunity to marshal the facts in their favor through discovery. That said, assuming the truth of the facts alleged in the Amended Complaint, which this Court must do, Mobility Works will have a difficult time persuading anyone that it could not accommodate Mr. Paine due to safety concerns.

The only safety sensitive duty associated with Mr. Paine's Automotive Detailer position was driving, which he did only 10-15 minutes per day. Apx. 113. This concern about safety would certainly be a fact that a jury could consider when determining the reasonableness of the policy exception that Mr. Paine requested but it is by no means dispositive. The jury would also be entitled to consider that New Hampshire does not revoke the driving privileges of medical marijuana users, presumably, because it has determined that medical marijuana use does not make a person unsafe to drive so long as they do not drive while under the influence of marijuana. Indeed, a large-scale study conducted by the federal government and other

studies have shown that marijuana users are not more likely to get into motor vehicle accidents than people who do not use marijuana. *Id.* at 112.[11]

Furthermore, Mobility Works employed Automotive Detailers in at least 17 other locations in other states where it could not terminate them for medical marijuana use. *Id.* at 120. Mobility Works is able to safely and efficiently operate its business in these other states. If it is feasible for Mobility Works to operate in states where it cannot terminate employees for medical marijuana use, it is feasible for it to do that in New Hampshire as well. Thus, the fact that Mr. Paine used medical marijuana outside of work did not make him any less safe of a driver than anyone else. In any event, as discussed below, the Amended Complaint also alleges that other reasonable accommodations would have completely addressed any safety concern that Mobility Works might have had with Mr. Paine's request for an exception to its drug testing policy.

2. Mr. Paine could have performed his essential job functions if Mobility Works accommodated him by assigning his driving duties to others.

While Mr. Paine could have safely driven, and there was no reason to assign his driving duties to someone else, the Amended Complaint

[11] According to the "Crash Risk" Study, conducted by the National Highway Traffic Safety Administration, when adjusted for demographic variables of age, gender, and race/ethnicity, a comparison of marijuana users and non-marijuana users shows that marijuana use does not increase the risk for motor vehicle accidents. *See* National Highway Traffic Safety Administration, *Marijuana-Impaired Driving: A Report to Congress*, pp. 25-26 (2017) *available at* https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf (visited Mar. 26, 2021).

alleges that Mobility Works easily could have assigned his driving duties to others if it worried about him driving. Assigning a disabled employee's non-essential job functions, also called "marginal job functions," to other employees is a well-recognized form of reasonable accommodation. This type of accommodation is sometimes referred to as "job restructuring." RSA 354-A:2(XIV-b)(b). For example, in *Kauffman v. Petersen Health Care VII, LLC*, a disabled hairdresser who worked at a nursing home could no longer perform her normal job duty of wheeling residents in their wheelchairs to and from her salon. 769 F.3d 958 (7th Cir. 2014). The court held that others could have performed this marginal function for her as a reasonable accommodation. *Id.* at 963.

Like the employer in *Kauffman*, if it was concerned about Mr. Paine driving, Mobility Works could have granted Mr. Paine's request that it delegate his driving duties to other employees. Apx. 113-14. Driving was a marginal function of Mr. Paine's job. *Id.* He drove only 10-15 minutes per day and it would not have disrupted Mobility Works' business if others had done this driving instead of him. *Id.* Mobility Works employed many people who could have handled these driving duties instead of Mr. Paine. *Id*. Mobility Works had actually assigned others to drive for an Automotive Technician when his driver's license was revoked and it could have done the same for Mr. Paine. *Id.* If others had driven vehicles in-and-out of the area where Mr. Paine detailed them, like others wheeled residents in-and-out of the plaintiff's salon in *Kauffman*, Mobility Works no longer would have considered Mr. Paine's position safety-sensitive and its reason for refusing to modify its drug testing policy for him would have evaporated.

3. Mobility Works could have reassigned Mr. Paine to a vacant position, as a reasonable accommodation, instead of terminating him.

Even assuming, for the sake of argument, that Mobility Works could not have accommodated Mr. Paine in his Automotive Detailer position, Mobility Works could have reassigned Mr. Paine to a vacant position that it did not consider safety-sensitive or that could be restructured so it was not safety-sensitive. Reassignment to a vacant position is another well-established form of reasonable accommodation. RSA 354-A:2(XIV-b)(b) ("reassignment to a vacant position" is one example of a reasonable accommodation); *see also EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* at Reassignment (2002).[12] When an employer determines that a disabled employee can no longer perform his essential job functions with or without reasonable accommodations, and the employee expresses a desire to continue working for the employer, the employer must explore the possibility of reassigning the employee. *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 694 (7th Cir. 1998) ("A request as straightforward as asking for continued employment is a sufficient request for accommodation.").

After Mobility Works decided that it would not permit Mr. Paine to work in his Automotive Detailer position, it did not consider reassigning

[12] The EEOC's Enforcement Guidance can be found on its website here: https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#reassignment (visited Mar. 26, 2021).

Mr. Paine to a vacant position. Apx. 119. Upon information and belief, there were vacant positions that Mr. Paine was qualified to perform, that were not safety-sensitive, which were available at the time of Mr. Paine's termination or would have been available a reasonable time after. *Id.* Mobility Works is a large company with more than 90 locations across the United States including locations in Maine and Massachusetts where Mr. Paine could have worked. *Id.* at 108 and 119.[13] Mr. Paine would have been willing to work in one of these other locations if no vacant positions were available at the Londonderry location. *Id.* at 119. Thus, the Amended Complaint alleges that there were multiple ways that Mobility Works could have reasonably accommodated Mr. Paine and worked around its alleged concerns about the safety-sensitive nature of his job.

4. Contrary to the Superior Court's finding, it is possible to determine whether an individual is currently under the influence of marijuana.

The Superior Court granted Mobility Works' Motion for Judgment on the Pleadings, in part, because it determined that it is impossible for employers to "differentiate between someone who has recently used marijuana and someone who is currently under the influence of marijuana." Addendum at 51. This was an inappropriate factual determination that the Superior Court should not have made and it was also factually incorrect. As Mr. Paine made clear in his Amended Complaint and in briefing filed in

[13] As discussed above, Massachusetts state law requires employers to provide reasonable accommodations to employees who use medical marijuana to treat a disability. Maine's medical marijuana law expressly prohibits employment discrimination against medical marijuana users. 22 M.R.S.A. § 2430-C(3).

response to Mobility Works' Motion for Judgment on the Pleadings, there are techniques that law enforcement officers and others use to test whether someone is currently under the influence of marijuana. Apx. 47-48 and 117-18. Mobility Works could have used those techniques to determine if Mr. Paine was working while under the influence of marijuana. *Id.*

For decades, law enforcement officers have developed techniques for determining whether individuals are under the influence of drugs, including marijuana. *Id.* at 117-18. These techniques include observations of individual's eyes and behavior. The New Hampshire State Police and private firms provide training to employers on how to use these techniques. *Id*. The state uses these techniques in criminal cases to prove that drivers operated vehicles while under the influence of marijuana. *State v. Turcotte*, No. 2016-0694, 2018 WL 1724978 (N.H. Mar. 14, 2018) (law enforcement officers' observations of defendant sufficient to convict of operating motor vehicle while under influence of marijuana). If these techniques are reliable enough for law enforcement, they should be reliable enough for employers.

Mr. Paine exhibits symptoms when he is under the influence of marijuana such as red glassy eyes. Apx. 117. Mobility Works could have had an employee or contractor trained to detect whether an individual is under the influence of marijuana examine Mr. Paine while he was at work to determine if he was under the influence of marijuana. *Id.* at 118. In other states where Mobility Works operates, it cannot terminate medical marijuana users who test positive for THC and it must, instead, rely on these law enforcement techniques to determine whether employees are working while under the influence of marijuana. *Id.* at 118-20. One state

in which Mobility Works operates, Illinois, has actually codified the symptoms of marijuana impairment that an employer can screen and discipline an employee for consistent with Illinois' medical marijuana law. *Id.* at 120. Those symptoms include altered "speech, physical dexterity, agility, coordination, [and] demeanor" as well as "irrational or unusual behavior." 410 ILCS 130/50(f). Mobility Works could have screened for these symptoms in Mr. Paine just like every other employer in Illinois who employs someone that uses medical marijuana.

5. The fact that marijuana is a controlled substance under the federal Controlled Substances Act ("CSA") should not render Mr. Paine's requested accommodation infeasible as a matter of law.

Mobility Works argued to the Superior Court that it should not have to employ someone who uses medical marijuana because marijuana is a controlled substance under the federal Controlled Substances Act ("CSA"). Apx. 128. The Superior Court did not rely on this argument to support its decision and this Court should reject the argument. RSA 354-A contains no language which denies rights to disabled individuals because they use medical marijuana. The federal Americans with Disabilities Act ("ADA"), on the other hand, states that "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). Because the ADA only protects "qualified individuals," this provision allows employers to discriminate against disabled employees on the basis of their use of medical marijuana. RSA 354-A does not contain a provision like this. If the New Hampshire

legislature had intended to deprive medical marijuana users of protections against disability discrimination, it could have added this provision from the ADA to RSA 354-A. The fact that the Legislature did not add this language to RSA 354-A indicates that it intended RSA 354-A to offer broader protection than the ADA.[14]

The Massachusetts SJC also rejected the argument that employers should not have to accommodate employees who use medical marijuana because of the CSA. The *Barbuto* court persuasively reasoned that, while marijuana is classified under the CSA as a substance with "no currently accepted medical use," nearly "ninety per cent of the States have enacted laws regarding medical marijuana that reflect their determination that marijuana, where lawfully prescribed by a physician, has a currently accepted medical use in treatment." *Barbuto*, 78 N.E.3d at 46. "To declare an accommodation for medical marijuana to be per se unreasonable out of respect for Federal law would not be respectful of the recognition of…the vast majority of States, [including New Hampshire] that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions." *Id.* at 46. Indeed, New Hampshire determined when it enacted RSA 126-X that "[m]odern medical research has discovered beneficial uses for marijuana in treating or alleviating the pain, nausea, and other

[14] RSA 354-A contains a provision, in the definition of the term "disability," which states that "current, illegal use of or addiction to a controlled substance as defined in the Controlled Substances Act" cannot be a disability under the statute. RSA 354-A:2(IV). RSA 354-A:2(IV) is irrelevant to this case, however, because Mr. Paine does not claim that his use of marijuana is a disability. Instead, he maintains that his PTSD is the disability which entitles him to reasonable accommodations. Apx. 109.

symptoms associated with a variety of debilitating medical conditions" and that there is a "therapeutic value of marijuana in treating a wide array of debilitating medical conditions." Legislative Findings for RSA 126-X, I and II (Apx. 193-94).[15]

In recent years, the federal government has actually acquiesced to the policy of New Hampshire and the vast majority of the states when, through the appropriations process, it has prohibited federal law enforcement from prosecuting anyone who uses marijuana in accordance with a state's medical marijuana law. *See Consolidated Appropriations Act, 2018*, P.L. 115-141 at § 538; *Consolidated Appropriations Act, 2019*, P.L. 116-6 at § 537; *Consolidated Appropriations Act, 2020*, P.L. 116-93 at § 531; and *Consolidated Appropriations Act, 2021*, P.L. 116-206 at § 531.[16] Thus, Mr. Paine could not have faced criminal prosecution for his use of medical marijuana.

Furthermore, CSA does not prohibit an employer from employing individuals who use marijuana. "An employer would not be in joint possession of medical marijuana or aid and abet its possession simply by

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[15] The Legislative Findings for RSA 126-X can be found here: https://legiscan.com/NH/text/HB573/id/709869 (visited Mar. 26, 2021).

[16] The text of these statutes can be found online in these places: https://www.congress.gov/bill/115th-congress/house-bill/1625/text (visited Mar. 26, 2021); https://www.congress.gov/bill/116th-congress/house-joint-resolution/31/text/pl (visited Mar. 26, 2021); https://www.congress.gov/bill/116th-congress/house-bill/1158/text (visited Mar. 26, 2021); and https://www.congress.gov/bill/116th-congress/house-bill/133/text (visited Mar. 26, 2021). These statutes also list the states with laws that allow for medical marijuana use.

permitting an employee to continue his or her off-site use." *Barbuto*, 78 N.E.3d at 46; *see also Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 3d 326, 334 (D. Conn. 2017) (CSA "does not make it illegal to employ a marijuana user"). Moreover, no law required Mobility Works to drug test Mr. Paine; and no law forbade it from employing him because he used medical marijuana. Apx. 116. This would be a different case if, for instance, a federal regulation required Mobility Works to subject Mr. Paine to drug testing; but no such regulations applied to Mr. Paine's Automotive Detailer position. Therefore, Mobility Works would not have run afoul of any law if it employed Mr. Paine knowing that he used medical marijuana outside of work. Mobility Works actually operates in many states with laws that prohibit discrimination against employees for medical marijuana use and Mobility Works complies with those state laws. *Id.* at 120. That is likely why Mobility Works did not cite respect for federal law as the reason for its decision to terminate Mr. Paine. For these reasons, the CSA should not render Mr. Paine's accommodation requests unreasonable as a matter of law.

6. *Appeal of Panaggio* forecloses Mobility Works' defense based on RSA 126-X and also its argument that CSA preempts RSA 354-A.

Mobility Works has argued that the medical marijuana statute, RSA 126-X, permitted it to refuse to accommodate Mr. Paine's medical marijuana use because that statute does not require employers to accommodate medical marijuana use. Apx. 16. This Court rejected that argument in *Appeal of Panaggio*, a workers' compensation case this Court has considered twice where the claimant sought reimbursement from an

insurer for medical marijuana. *Appeal of Panaggio*, 172 N.H. 13 (2019) ("*Panaggio I*") and *Appeal of Panaggio*, 2019-0685, 2021 WL 787021 (N.H. Mar. 2, 2021) ("*Panaggio II*"). In *Panaggio I*, this Court held that just because RSA 126-X does not require insurers to cover the cost of medical marijuana does not mean that another state law, such as the workers compensation statute, cannot require insurers to cover it. 172 N.H. at 16-17. The same should hold true with respect to RSA 354-A. Just because RSA 126-X does not require employers to accommodate medical marijuana use, that does not mean RSA 354-A cannot require employers to do so.

In *Panaggio I*, this Court did not address whether the insurer could refuse to reimburse the claimant because the CSA preempted the workers' compensation statute. *Id.* at 18-19. This Court addressed this preemption issue in *Panaggio II* where it held that the CSA did not preempt the workers' compensation statute and, as such, the workers' compensation statute could require an insurer to reimburse a claimant for medical marijuana. 2021 WL 787021 at *8.

Mobility Works' argument that CSA preempts RSA 354-A (Apx. 16 at fn2) is even weaker than the insurer's argument that this Court rejected in *Panaggio II*. Mr. Paine did not want Mobility Works to pay for his medical marijuana; he just did not want it to terminate him for using medical marijuana outside of work. For that reason, multiple courts which have analyzed the issue have held that state laws can require employers to accommodate employees' medical marijuana use despite the CSA. *Noffsinger*, 273 F. Supp. 3d at 334-36; *Callaghan*, 2017 WL 2321181 at *14-15; *Smith v. Jensen Fabricating Engineers, Inc.*, No.

HHDCV186086419, 2019 WL 1569048, at *4 (Conn. Super. Ct. Mar. 4, 2019); and *Chance v. Kraft Heinz Foods Co.*, No. CV K18C-01-056 NEP, 2018 WL 6655670, at *4 (Del. Super. Ct. Dec. 17, 2018). These courts have reasoned that the CSA does not preempt these state laws because employing someone who uses medical marijuana does not create an obstacle to the enforcement of the CSA. This makes sense because requiring an employer to accommodate an employee who uses medical marijuana does not prevent the federal government – if it ever becomes allowed to do so again – from prosecuting the employee. This Court relied, in part, on the reasoning from *Noffsinger* when it decided *Panaggio II* and it should do so again. 2021 WL 787021 at *6 and 8. If the workers' compensation statute can require employers to reimburse employees for medical marijuana, RSA 354-A should similarly require employers to accommodate employees' medical marijuana use when it is reasonable to do so.[17]

For all of these reasons, the Court should reverse the Superior Court's decision and hold that Mr. Paine's failure-to-accommodate claim under RSA 354-A:7(VII)(a) may proceed.

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[17] *Appeal of Panaggio* is not the only case where this Court has held that state law may prohibit actions against an individual who violated federal drug laws. Recently, this Court held that New Hampshire state law prohibited criminal prosecution against an individual who used a controlled substance in violation of the CSA. *State v. Mack*, 2019-0171, 2020 WL 7626808 (N.H. Dec. 22, 2020). In *Mack*, this Court held that the New Hampshire Constitution's protections for religious exercise could prohibit the prosecution of an individual who used the federally proscribed drug psilocybin for religious purposes.

B. Mobility Works' decision to terminate Mr. Paine because he needed a reasonable accommodation also violated RSA 354-A:7(VII)(b).

By discriminating against Mr. Paine because he needed reasonable accommodations, Mobility Works also violated RSA 354-A:7(VII)(b). *EEOC v. Dolgencorp, LLC* illustrates how these claims work. 899 F.3d 428 (6th Cir. 2018). In *Dolgencorp*, the court affirmed a jury verdict in an ADA case where an employer discriminated against an employee because she needed reasonable accommodations. The plaintiff-intervenor in *Dolgencorp*, a diabetic named Linda Atkins, worked at one of the defendant's Dollar General stores. *Id.* at 432. The defendant had a policy that prohibited employees from eating or drinking while they were at the cash register working. Atkins asked the defendant to make an exception to this policy for her as a reasonable accommodation because she needed to be able to drink orange juice if she experienced a hypoglycemic episode. The defendant refused to provide her with this accommodation and then terminated her because she violated the policy. The Sixth Circuit held that this discrimination against Atkins because she needed a reasonable accommodation constituted disability discrimination. *Id.* at 435-36. The Sixth Circuit reasoned that "a company may not illegitimately deny an employee a reasonable accommodation to a general policy and use that same policy as a neutral basis for firing him." *Id.* at 435.

Mobility Works' actions in this case resemble the defendant's actions in *Dolgencorp*. Mr. Paine asked for an exception to Mobility Works' drug testing policy as a reasonable accommodation just like Atkins asked for an exception to the policy against drinking beverages at the cash

register. Mobility Works denied Mr. Paine's request just like Dollar General denied Ms. Atkins' request. Mobility Works then proceeded to terminate Mr. Paine because he could not comply with the drug testing policy just like Dollar General did to Ms. Atkins when she could not comply with its beverage policy. Thus, this Court should also permit Mr. Paine to pursue a claim under RSA 354-A:7(VII)(b).

CONCLUSION

Mr. Paine requests that this Court vacate the judgment for Mobility Works, remand this case to the Superior Court, order the Superior Court to grant his Motion to Amend Complaint, and permit his case to move forward.

ORAL ARGUMENT REQUEST

Mr. Paine requests that the full Court hold oral argument in this case so that the parties may respond to any questions the Justices have about the legal arguments the parties have made. If the Court holds oral argument, Attorney Townsend will represent Mr. Paine at the argument.

Respectfully submitted,

Date: March 26, 2021 /s/ Allan K. Townsend

/s/ Jon Meyer

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STATEMENT OF COMPLIANCE

Undersigned counsel certifies that, pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)-(4). Further, this brief complies with New Hampshire Supreme Court Rule 16(11) in that it contains 8,391 words from the Question Presented to the signature of counsel.

Date: March 26, 2021 /s/ Allan K. Townsend

CERTIFICATE OF SERVICE

This brief has been served on all counsel of record through this Court's electronic filing system on the date below.

Date: March 26, 2021 /s/ Allan K. Townsend

ADDENDUM

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The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

Scott Paine

v.

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

218-2019-CV-01492

Order on Motion for Judgment on the Pleadings

Plaintiff Scott Paine filed this employment discrimination action pursuant to New Hampshire's Law Against Discrimination, RSA chapter 354-A, and New Hampshire's common law tort for wrongful termination in violation of public policy against Ride-Away, Inc. d/b/a Mobility Works ("Mobility Works"). Doc. 1. Mobility Works moves for judgment on the pleadings, arguing that even if the facts as alleged in the complaint are taken as true, Plaintiff's claims fail as a matter of law and should therefore be dismissed. Doc. 4. Plaintiff objects. Doc. 6; see also Doc. 9 (Def.'s Response); Doc. 12 (Pl.'s Surreply). The Court held a hearing on this motion on February 27, 2020. For the following reasons, Mobility Works' motion for judgment on the pleadings is **GRANTED**.

Standard of Review

"In general, a motion seeking judgment based solely on the pleadings is in the nature of a motion to dismiss for failure to state a claim." LaChance v. U.S. Smokeless Tobacco Co., 156 N.H. 88, 93 (2007); see Jenks v. Menard, 145 N.H. 236, 239 (2000). In reviewing a motion to dismiss for failure to state a claim upon which relief may be

granted, the Court must "assume the truth of the facts alleged by the plaintiff and construe all reasonable inferences in the light most favorable to the plaintiff." Tosta v. Bullis, 156 N.H. 763, 766 (2008). When ruling on a motion to dismiss, the Court must discern whether the allegations stated in the plaintiff's complaint "are reasonably susceptible of a construction that would permit recovery." Boyle v. Dwyer, 172 N.H. 548, 553 (2019). The Court should test the facts against the applicable law and deny the motion to dismiss "if the allegations constitute a basis for legal relief." Automated Transactions, LLC v. Am. Bankers Ass'n, 172 N.H. 528, 532 (2019); Clark v. New Hampshire Dep't of Employment Sec., 171 N.H. 639, 645 (2019).

Factual and Procedural Background

The Complaint alleges the following relevant facts, which the Court must assume to be true for the purposes of this motion. See Berry v. Watchtower Bible & Tract Soc'y of N.Y., 152 N.H. 407, 410 (2005). Plaintiff was employed as an automotive detailer for Mobility Works from May 7, 2018 through September 18, 2018. Doc. 1. Mobility Works is a New Hampshire corporation with a facility located at 54 Wentworth Avenue in Londonderry, New Hampshire. Id. Mobility Works had more than six employees at all relevant times. Id.

Plaintiff has suffered from Post-Traumatic Stress Disorder ("PTSD") for many years. Id. As a result, Plaintiff's brain function is substantially limited. Id. In July 2018, Plaintiff's doctor prescribed him cannabis[1] to help treat his PTSD. Id. Thereafter, Plaintiff became legally enrolled in New Hampshire's Therapeutic Cannabis Program and began using cannabis in conformance with New Hampshire state law. Id.

[1] The words "Cannabis" and "Marijuana" are used interchangeably throughout this Order and, for the purposes of this Order, are treated as one in the same.

On July 12, 2018, Plaintiff informed Courtney Benoit, Human Resources Manager of Mobility Works, that he was enrolled in New Hampshire's Therapeutic Cannabis Program and questioned whether his use of marijuana would affect his employment. Id. Benoit told Plaintiff that she did not believe his marijuana use would affect his employment and explained that other employees failed drug tests because of prescribed medication and those results did not impact their employment. Id. Benoit requested Plaintiff submit a written request for reasonable accommodation regarding his use of marijuana. Id.

On August 22, 2018, Plaintiff submitted the following written request for a reasonable accommodation which stated, in part:

> I have been medically and psychologically treated for Post Traumatic Stress Disorder for almost 20 years to include the time I was employed as a contractor for numerous US Intelligence and Military Agencies and having possessed some our nation's highest security clearances. Along with the desire to rid myself of synthetic pharmaceuticals, and to find a more effective treatment, I have applied for and been approved as a patient in the State of New Hampshire Therapeutic Cannabis Program. Cannabis contains the chemical compound THC which I understand would cause a negative result if I were to undergo a random drug test on behalf of Mobility Works. I understand and will abide by my responsibilities required by NH RSA 126-X. I ask that a reasonable accommodation be provided for the understanding of my Post Traumatic Stress Disorder disability, it's legal State of New Hampshire regulated treatment, and the conflict this may have with Mobility Works company policy regarding drug testing.

Id. On September 7, 2018, Jillian Montmarquet, Vice President of Human Resources at Mobility Works, sent an email to Plaintiff indicating that Mobility Works had decided to deny his request for reasonable accommodations. Id. Among other things, Montmarquet stated that Mobility Works denied Plaintiff's request because his position with the company is considered "Safety Sensitive." Id. On September 9, 2018, Plaintiff

sent an email to Montmarquet to clarify his request for accommodation because his marijuana use would not affect his ability to safely perform his job duties. Id. Plaintiff further stated in his email that he was not requesting permission to use marijuana during work hours or for permission to possess it on the premises of Mobility Works. Id. Plaintiff explained that he only used marijuana when he was not working and was only asking, as an accommodation, that Mobility Works continue to employ him if he failed a drug test due to his use of marijuana. Id.

On September 10, 2018, Plaintiff met with Montmarquet, Benoit, and General Manager Ronald Hoy. Id. During the meeting, Montmarquet stated that Mobility Works considered Plaintiff's job to be "Safety Sensitive" because he had to move vehicles in a parking lot into and out of the detailing area. Id. As part of his job, Plaintiff moved two or three vehicles per day and it took approximately five minutes for him to move a vehicle. Id. Plaintiff asked if another employee could move vehicles for him as a reasonable accommodation because an automotive technician had a similar accommodation in the past when he lost his driver's license. Id. Montmarquet and Hoy declined to provide this accommodation to Plaintiff because they did not want to ask other employees to move vehicles for him. Id. At the end of the meeting, Montmarquet and Hoy informed Plaintiff they were placing him on an involuntary leave of absence because of his use of marijuana and instructed him to gather his belongings. Id. Montmarquet stated Plaintiff's leave of absence would expire on September 17, 2018 and explained that he would not be permitted to return to work if he continued to use marijuana. Id. Montmarquet informed Plaintiff that he could no longer work at Mobility Works if he used marijuana and advised him to ask his doctor to prescribe a treatment

other than marijuana. Id.

On September 12, 2018, Plaintiff emailed Montmarquet, Benoit, Hoy, and others at Mobility Works and again asked Mobility Works for an accommodation. Id. Benoit responded to Plaintiff's email that same day and stated that "[a]s discussed, you are exploring other accommodations that would work for your condition and meet the requirements of your safety sensitive position." Id. Benoit cc'd Montmarquet, Hoy, and others from Mobility Works in her email. Id. Plaintiff decided to continue using marijuana to treat his PTSD because his doctor prescribed it and he believed it was helping him. Id.

On September 13, 2018, Plaintiff emailed Montmarquet, Benoit, Hoy, and others at Mobility Works and informed them he was going to continue using marijuana to treat his PTSD and Montmarquet responded that day that Mobility Works still would not permit him to work there if he continued to use marijuana. Id. That same day, Plaintiff filed a complaint with Mobility Works' internal "Red Flag Reporting" system concerning the denial of his requests for reasonable accommodations. Id. Plaintiff was told that Gerhard Schmidt, Chief Financial Officer of Mobility Works, would contact him on September 14, 2018 in regard to his complaint. Id. However, nobody from Mobility Works contacted Plaintiff that day. Id.

On September 18, 2018, Mobility Works terminated Plaintiff's employment. Id. However, in a letter dated September 19, 2018, Montmarquet described the termination of Plaintiff's employment as a resignation. Id.

On or about December 12, 2018, Plaintiff filed a timely charge of discrimination against Mobility Works with the NHCHR. Id. Plaintiff asserts he has exhausted all his

administrative remedies, and accordingly filed this four-count complaint for failure to provide reasonable accommodation, disability discrimination, retaliation, and discharge in violation of public policy on October 22, 2019. Id. Plaintiff asserts that he would have returned to work if Mobility Works had not insisted he discontinue his use of marijuana. Id. Plaintiff alleges that as a direct and proximate cause of Mobility Works' violation of his rights and the termination of employment, he has suffered damages, including but not limited to, lost wages and loss of enjoyment of life. Id. Plaintiff alleges Mobility Works willfully violated his rights under RSA 354-A and/or acted with reckless indifference to Plaintiff's rights under the statute. Id.

Analysis

Mobility Works moves to dismiss all four of Plaintiff's claims, arguing that under New Hampshire law, Plaintiff cannot plead facts demonstrating that he was entitled to use marijuana against his employer's wishes. Doc. 4. Although Mobility Works concedes that RSA chapter 126-X provides an exception to the criminal code that allows for marijuana use under a specific set of circumstances, it asserts that the default under New Hampshire law is that marijuana use is still illegal and that marijuana use is both illegal and criminalized under federal law. As such, Mobility Works argues that Plaintiff's claims must be dismissed because the requested accommodation to use marijuana is unreasonable as a matter of law. Plaintiff objects, arguing that Mobility Works' actions against him for using marijuana to treat his PTSD constitute disability discrimination and that in denying his request for an exemption from the company's drug policy as a reasonable accommodation, Mobility Works failed to accommodate his marijuana use for therapeutic purposes. Doc. 6. Further, Plaintiff maintains that his

subsequent termination for continuing to use marijuana despite being denied the accommodation amounts to retaliation and wrongful discharge. Id.

Resolution of this issue requires the Court to interpret RSA 354-A. The interpretation of a statute is a question of law. Appeal of Cover, 168 N.H. 614, 617 (2016). When interpreting a statute, the Court must glean the legislature's intent as expressed in the words of the statute considered as a whole. State v. McGill, 167 N.H. 423, 426 (2015); State v. Addison, 160 N.H. 732, 754 (2010). The Court must look to the plain language of the statute itself, and construe that language, where possible, according to its plain and ordinary meaning and in the context of the overall statutory scheme. McGill, 167 N.H. at 426. Words and phrases are not considered in isolation, but instead within the context of the statute as a whole, which enables the Court to better determine the legislature's intent and to interpret statutory language "in light of the policy or purpose sought to be advanced by the statutory scheme." Zorn v. Demetri, 158 N.H. 437, 438–39 (2009) (quoting In re Alexis O., 157 N.H. 781, 785 (2008)). The Court reads all parts of a statute together to achieve its overall purpose and to "avoid an absurd or unjust result." Id. at 438.

Pursuant to RSA 354-A:7, VII(a), it is an unlawful discriminatory practice for any employer "not to make reasonable accommodations for the known physical or mental limitations of a qualified individual with a disability who is an applicant or employee, unless such employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer." Under the statute, a disability is defined as "(a) A physical or mental impairment which substantially limits one or more of such person's major life activities; (b) A record of having such an

impairment; or (c) Being regarded as having such an impairment." RSA 354-A:2, IV. However, this is 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)[2]. Id.

Under New Hampshire's Use of Cannabis for Therapeutic Purposes statute, RSA 126-X, a qualifying patient[3] may use marijuana on privately-owned real property only with written permission of the property owner. RSA 126-X:3,I. However, nothing in the chapter exempts a person from arrest or prosecution for being under the influence of marijuana while: "(1) Operating a motor vehicle, commercial vehicle, boat, vessel, or any other vehicle propelled or drawn by power other than muscular power; or (2) In his or her place of employment, without the written permission of the employer; or (3) Operating heavy machinery or handling a dangerous instrumentality." RSA 126-X:3, II. In addition, nothing in this chapter shall be construed to require "[a]ny accommodation of the therapeutic use of cannabis on the property or premises of any place of employment . . . 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." RSA 126-X:3, III (c).

Plaintiff argues that Mobility Works' proffered interpretation of RSA 126-X:3, III(c) would render a portion of the statute superfluous, in that an employer's ability to discipline an employee for ingesting marijuana in the workplace or working under the

[2] The term "controlled substance" means "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." 21 U.S.C.A. § 802 (West). Marijuana is considered a schedule I drug under the CSA.

[3] A "Qualifying patient" under the statute means "a resident of New Hampshire who has been diagnosed by a provider as having a qualifying medical condition and who possesses a valid registry identification card issued pursuant to RSA 126-X:4." RSA 126-X:1, X. There is no dispute that Plaintiff is a qualifying patient pursuant to RSA 126-X.

influence of marijuana would be unnecessary if the statute allowed employers to refuse to employ people who ingest marijuana no matter where they ingest it. Doc. 9. Plaintiff further argues that the CSA does not preempt his RSA 126-X and common law wrongful discharge claims. Id. While Plaintiff concedes this issue is one of first impression here in New Hampshire, he asserts that courts in other states have held that the CSA does not preempt state laws that prohibit discrimination against therapeutic marijuana users, and this Court should rule similarly. Id.

Plaintiff's claims are premised on the notion that Mobility Works, as his employer, was obligated to accommodate his marijuana use to treat his PTSD by way of accepting failed drug tests and, because Mobility Works denied his request for this "reasonable" accommodation, it therefore discriminated against him based on his disability. A plain reading of RSA 126-X makes clear that a qualifying patient may use marijuana for therapeutic purposes in New Hampshire even though it is still illegal to use under federal law. However, the statute in no way obligates an employer to accommodate such use. Indeed, a person who uses marijuana in compliance with RSA 126-X is still subject to arrest or prosecution for operating a motor vehicle, commercial vehicle, heavy machinery, or handling a dangerous instrumentality while under the influence and for being under the influence at their place of employment without the written permission of their employer.

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. Rather, RSA 126-X is explicit in that the chapter in no way limits an employer's ability to discipline an employee for

working while under the influence of cannabis, thereby rendering such disciplinary actions discretionary. See RSA 126-X:3, III (c). As both parties concede in their briefs and again at hearing, the current tests cannot differentiate between someone who has recently used marijuana and someone who is currently under the influence of marijuana. See Doc. 12. As a result, the discretion to discipline employees for working while under the influence of marijuana necessarily includes the discretion to discipline employees based upon marijuana-related failed drug tests, which is precisely the accommodation at issue here.

Although Plaintiff argues that he was not seeking an accommodation to use marijuana at work and was only intending to use it at home, the fact remains that a failed drug test cannot differentiate between the two scenarios. Because there are no alternatives to test whether someone is currently under the influence of marijuana (as compared to having merely used marijuana in the recent past), 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. Mobility Works' concern that Plaintiff could be under the influence at work is especially relevant here because Plaintiff's position as an automotive detailer was considered "safety-sensitive." See In re Amalgamated Transit Union, Local 717, 144 N.H. 325, 328 (1999) ("After extensive discussion and review of applicable federal statutes, the First Circuit identified a dominant public policy against allowing employees who test positive for drug usage to perform safety-sensitive positions.").

Further, Plaintiff has failed to allege sufficient facts to show that Mobility Works terminated his employment for his underlying PTSD or for any other reason aside from

not permitting failed marijuana-related drug tests which, as stated herein, is not enough to allege discrimination pursuant to RSA 354-A or a wrongful discharge claim. See Lacasse v. Spaulding Youth Ctr., 154 N.H. 246, 248–49 (2006) (stating that to succeed on a wrongful discharge claim, a plaintiff must prove "(1) [that] the termination of employment was motivated by bad faith, retaliation or malice; and (2) that [he] was terminated for performing an act that public policy would encourage or for refusing to do something that public policy would condemn.") (emphasis added).

In light of the foregoing, the Court concludes that Plaintiff has failed to allege sufficient facts to support his claim for failure to accommodate pursuant to RSA 354-A. 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. Similarly, RSA 126-X does not provide a qualifying patient carte blanche to use marijuana for therapeutic purposes—there are limitations to such use, including potential legal consequences.

In addition, the Court finds that Plaintiff's claims for disability discrimination, retaliation, and wrongful discharge—which are all based on the same set of facts as his RSA 354-A claim—fail as a matter of law and are therefore dismissed. However, consistent with the holding in ERG, Inc. v. Barnes, Plaintiff shall have 30 days in which to file (at his election) a motion to amend his Complaint in order "to correct perceived deficiencies [in the complaint] before an adverse judgment has preclusive effect." See Kurowski v. Town of Chester, 170 N.H. 307, 315 (2017) (quoting ERG, Inc. v. Barnes, 137 N.H. 186, 189 (1993)).

Conclusion

For the reasons set forth above, the Court grants Mobility Works' motion to dismiss. However, as stated herein, Plaintiff has 30 days in which to amend his complaint before the rulings outlined herein will have preclusive effect.

So Ordered.

March 16, 2020
Date

Judge Daniel I. St. Hilaire

Clerk's Notice of Decision
Document Sent to Parties
on 03/16/2020

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

Scott Paine

v.

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

218-2019-CV-01492

ORDER ON MOTION TO AMEND

This action arises out of Defendant's termination of Plaintiff's employment. See Doc. 1 (Compl.) In his original complaint, Plaintiff brought the following counts against Defendant Mobility Works: (1) Failure to Accommodate; (2) Disability Discrimination; (3) Retaliation; and (4) Wrongful Termination in Violation of Public Policy. On March 16, 2020, the Court granted Mobility Works' motion for judgment on the pleadings with respect to all four counts. See Doc. 13. Plaintiff now moves to amend his complaint to correct the deficiencies outlined in the Court's prior order. See Doc. 15. Mobility Works objects. See Doc. 19. For the reasons that follow, Plaintiff's motion to amend is **DENIED**.

Courts may permit parties to substantively amend their pleadings "in any stage of the proceedings, upon such terms as the court shall deem just and reasonable, when it shall appear to the court that it is necessary for the prevention of injustice." RSA 514:9. New Hampshire courts generally permit liberal amendment of pleadings. Sanguedolce v. Wolfe, 164 N.H. 644, 647 (2013). However, an amendment may be denied "if it

would not cure the defect in the writ." Id. "Whether to allow a party to amend his or her pleadings rests in the sound discretion of the trial court." Id.

In his original complaint, Plaintiff alleged that as part of his legal enrollment in New Hampshire's Therapeutic Cannabis Program, he used cannabis prescribed by a doctor to treat his PTSD. See Doc. 1 ¶¶ 11-12. On July 12, 2018, while working for Mobility Works, he informed his Human Resources Manager that he was enrolled in the program and asked whether it would impact his employment. Id. ¶ 13. The Human Resources Manager told him that she did not think it would impact his employment, but asked him to submit a formal request for accommodation. Id. ¶¶ 14-16. Plaintiff submitted a request explaining that he used marijuana for treatment of his PTSD and asking for an accommodation regarding company drug testing. Id. ¶ 17. Mobility Works denied the request for accommodation, reasoning that Plaintiff's position was "safety sensitive" because his job required him to sometimes move vehicles. Id. ¶ 19. Despite Plaintiff's requests, Mobility Works declined to ask other employees to move the vehicles for him. Id. ¶¶ 25-27. Plaintiff attempted to negotiate with Mobility Works via email and in person, but Mobility Works continued to tell him that he could not return to work if he continued to treat his PTSD with cannabis. Id. ¶ 28. Mobility Works placed Plaintiff on administrative leave and advised him to ask his doctor to prescribe alternative treatment. Id.

Turning first to Plaintiff's failure to accommodate claim, in its order dismissing Plaintiff's complaint, the Court held that "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." See Doc.

13 at 9. While the Court acknowledged that a qualifying patient may use marijuana for therapeutic purposes under RSA 126-X, the Court clarified that "the statute in no way obligates an employer to accommodate such use." Id. In reaching this conclusion, the Court emphasized that Plaintiff's position was "safety-sensitive," and that drug tests cannot differentiate between those currently under the influence and those with THC in their system from past ingestion.

Plaintiff attempts to cure the defects in his original complaint by including additional facts about the ways in which Mobility Works could have accommodated his marijuana use for treatment of his PTSD. For example, the amended complaint contains facts about the ease with which Mobility Works could have arranged for someone else to move the vehicles for Plaintiff. Plaintiff alleges that 50 other employees worked at Mobility Works' Londonderry location with him, including 12 people in his department who already moved vehicles, and that any of those individuals could have moved Plaintiff's vehicles for him. See Doc. 16 ¶¶ 38-39.

Plaintiff also included new facts in his amended complaint about other methods of detecting marijuana use that Mobility Works could have used instead of drug testing. For example, he alleges that when he "is under the influence of cannabis, anyone who observes him can tell that he is exhibiting signs of being under the influence of cannabis," such as "glassy red eyes, difference in the way he speaks, and differences in his behavior." Id. ¶ 61. He alleges that Mobility Works could have hired someone who is trained in detecting whether an individual is currently under the influence of marijuana, or trained its employees in such techniques, as an alternative to subjecting him to a drug test. Id. ¶ 66.

Lastly, Plaintiff's amended complaint contains new facts alleging that Mobility Works failed to consider reassigning him to a new position within the company. He alleges that "Mobility Works does not consider all of its employment positions to be safety-sensitive," and that "there were vacant positions [Plaintiff] was qualified to perform that were available at the time of his termination or that would have become available within a reasonable time after his termination." Id. ¶¶ 71-72.

Plaintiff's additional facts are of no avail. 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. Therefore, the additional facts contained in Plaintiff's amended complaint do not cure the defects outlined by the Court in its prior order. Accordingly, amendment of the complaint with respect to Plaintiff's failure to accommodate claim would be futile.

Turning next to Plaintiff's disability discrimination, retaliation, and wrongful termination claims, the Court concluded in its prior order that the claims failed as a matter of law because they were premised on the same set of facts as Plaintiff's failure to accommodate claim. See Doc. 13 at 11. The Court also noted that "Plaintiff failed to allege facts sufficient to show that Mobility Works terminated his employment for his underlying PTSD or any other reason aside from not permitting failed marijuana-related drug tests . . . ." Id. at 10-11. Consistent with the reasoning outlined above, to the extent that Plaintiff intends to cure the defects in these three remaining claims with added facts about the ways in which Mobility Works could have accommodated his marijuana use, such amendments would be futile.

However, irrespective of his allegations about Mobility Works' failure to accommodate, Plaintiff argues that his disability discrimination claim is saved by the following allegation in the amended complaint: "When [Plaintiff] spoke to [the Human Resources Manager] in July, 2018, he did not reveal that he had PTSD. This August 22, 2018, accommodation request was the first time [Plaintiff] had revealed to Mobility Works that he had PTSD." See Doc. 16 at ¶ 19. Plaintiff maintains that because the Human Resources Manager initially indicated that she did not think his marijuana use would be a problem, but he was denied the accommodation after revealing that he used marijuana to treat PTSD, he has made a prima facie case for disability discrimination based upon his PTSD diagnosis. However, as Plaintiff himself alleges in the original and amended complaints, "[Mobility Works] told [Plaintiff] that he could not work there if he used cannabis and advised him to ask his doctor to prescribe treatment other than cannabis." See Doc. 1 at ¶ 28; Doc. 16 at ¶ 43. Even when construed in the light most favorable to Plaintiff, the facts alleged in the complaint make it clear that Mobility Works would have continued to employ Plaintiff, despite his PTSD diagnosis, if he stopped using marijuana to treat his disorder. Accordingly, amendment of his disability discrimination claim would not cure the defects in Plaintiff's original complaint.

With respect to his retaliation and wrongful termination claims, Plaintiff has not included any additional facts in the amended complaint to cure the defects outlined by the Court in its prior order. Instead, in his motion to amend, Plaintiff attempts to readdress the legal arguments already resolved by the Court. Plaintiff has not filed a motion to reconsider and the Court will not treat his motion to amend as such.

Consistent with the foregoing, Plaintiff's motion to amend is **DENIED**.

So Ordered.

September 15, 2020
Date

Judge Daniel I. St. Hilaire

Clerk's Notice of Decision
Document Sent to Parties
on 09/16/2020