COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
COLORADO COURT OF APPEALS Case Nos. 12CA0595 and 12CA1704 Opinion by Judges Davidson and Marquez (Judge Webb, dissents)	▲ **COURT USE ONLY**
DISTRICT COURT FOR ARAPAHOE COUNTY STATE OF COLORADO Case No. 2011CV1464 Judge Elizabeth Volz	Supreme Court Case No. 2013SC000394
Petitioner: BRANDON COATS, v. Respondent: DISH NETWORK, LLC.	
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AMENDED BRIEF OF AMICUS CURIAE COLORADO MINING ASSOCIATION	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically the underlined certifies that:

The brief complies with C.A.R. 28(g).

It contains 6,679 words (exclusive of certificates, tables, and identified issues).

The brief complies with C.A.R. 28(k).

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on, if applicable.

/s/ Laura E. Beverage
Laura E. Beverage
Meredith A. Kapushion

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Standard of Review (C.A.R. 28(k))

Amicus curiae, the Colorado Mining Association, joins in the position taken by Respondent Dish Network, LLC ("Dish Network") with respect to the standard of review and preservation for appeal.

Issue Addressed by Amicus

Whether Colorado's "Lawful Activities" Statute, COLO. REV. STAT. § 24-34-402.5 (2012), prohibits employers in safety-sensitive industries from terminating an employee for using medical marijuana.[1]

Introduction

The Court of Appeals addressed the question of whether federally prohibited but state-licensed medical marijuana use is a "lawful activity" under Colorado's Lawful Activities Statute. The statute is part of Colorado's Civil Rights Act ("CCRA") and, subject to certain exceptions, prohibits employers from discharging employees for "engaging in any lawful activity off the premises of the employer during nonworking hours." COLO. REV. STAT. § 24-34-402.5.

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[1] The questions presented on certiorari are: (1) whether the Lawful Activities Statute, COLO. REV. STAT. section 24-34-402.5, protects employees from discretionary discharge for lawful use of medical marijuana outside the job where the use does not affect job performance; and (2) whether the Medical Marijuana Amendment makes the use of medical marijuana "lawful" and confers a right to use medical marijuana to persons lawfully registered with the state.

Petitioner brought a wrongful termination claim against Dish Network. He argued, *inter alia*, that although the use of marijuana is illegal under federal law, only the fact that it may be used for medical purposes under Colorado state law is relevant in interpreting and applying the CCRA provision limiting an employer's right to terminate employees for engaging in "lawful" off-duty activities. The trial court dismissed Petitioner's complaint, finding that medical marijuana use is not a "lawful activity" protected under Colorado law.[2]

The Court of Appeals affirmed the dismissal of the complaint for failure to state a claim, albeit on different grounds. *Coats v. Dish Network, L.L.C.*, 303 P.3d 147, 149-50 (Colo. App. 2013). The Court of Appeals found that the term "lawful activity" in the CCRA includes federal law, and that "for an activity to be 'lawful' in Colorado, it must be permitted by, and not contrary to, both state and federal law." *Id*. at 150.

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[2] In this case, the trial court found that Colorado's constitutional amendment exempting medical marijuana use from the "state's criminal laws" under certain circumstances actually does not make medical marijuana use "lawful" under the CCRA. *Coats v. Dish Network, L.L.C.*, 303 P.3d 147, 149-50 (Colo. App. 2013). Rather, the amendment provides an affirmative defense against criminal prosecution. *Id.*; *see also Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970, 978 (Colo. App. 2011) (observing that "the General Assembly understood Colorado's medical marijuana amendment to have created an exception to criminal prosecution, and not to be a grant to medical marijuana users of an unlimited constitutional right to use the drug in any place or in any manner").

The Court of Appeals' decision should be affirmed. In enacting the CCRA, the Colorado legislature did not define the term "lawful" to exclude consideration of applicable federal laws, and marijuana possession and consumption remain illegal under federal law, even for medical purposes. Moreover, marijuana use is not the type of off-duty "activity" Colorado's Lawful Activities Statute was intended to protect. The physiological effects of off-duty marijuana consumption can last for hours or even days, thus extending into working hours and bringing the activity outside the purview of the statute.

In addition, even if Colorado's Lawful Activities Statute protected medical marijuana consumption in some occupations, the exemptions under COLO. REV. STAT. § 24-34-402.5(a)(b) should apply to mining and other industries and occupations in which, because of the nature of the work involved, employers must be particularly safety conscious. Employers in those industries cannot afford to take a "wait and see" approach to determining whether off-the-job marijuana consumption will affect job performance and safety. A lapse in judgment, alertness, or concentration by an employee in a safety-sensitive occupation may have catastrophic consequences. *See generally Amalgamated Transit Union v. Cambria Cnty. Transit Auth.*, 691 F. Supp. 898, 907 (W.D. Pa. 1988) ("The

[employer] has a right to determine which workers pose a potential problem and to take steps to prevent that potential from erupting into a tragedy.").

Indeed, a mine operator that allowed an impaired miner on the work site would be violating the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (the "Mine Act") and its implementing regulations. Thus, construing "lawful activities" to include medical marijuana use could force mine operators to choose between violating federal law by allowing an impaired miner to work, or violating state law by terminating a miner for off-site marijuana consumption. For this reason, the interpretation of the Lawful Activities Statute being argued for by Petitioner is, at least insofar as the mining industry is concerned, preempted by Federal law.

Argument

1. Colorado's Lawful Activities Statute Does Not Limit "Lawful" to State Laws.

A. The Court of Appeals Correctly Applied the Plain Meaning of "Lawful."

Colorado's Lawful Activities Statute provides in relevant part:

> (1) It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction:

(a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or

(b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.

COLO. REV. STAT. § 24-34-402.5.

The statute does not specifically define the term "lawful." However, nothing in the statute suggests a construction of the term that would include activities that are prohibited by federal law. *See Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190, 1203 (N.D. Cal. 2012) (concluding that an activity "is 'unlawful' if it violates an underlying state *or federal* statute") (emphasis added); *Avila v. Cmty. Bank of Virginia*, 143 S.W.3d 1, 5 (Mo. Ct. App. 2003) ("The term 'lawful' means to be 'in harmony with the law' or 'constituted, authorized, or established by law.' . . . [T]he term does not imply a limitation as to a particular type of law, *i.e.*, federal, state, local or otherwise." (quoting MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 658 (10th ed. 2000))).

Although Colorado arguably has "legalized" the use of marijuana for state criminal law purposes,[3] marijuana possession and use remain unlawful under federal law. *See United States v. Scarmazzo*, 554 F. Supp. 2d 1102, 1105 (E.D. Cal. 2008) ("The use of medical marijuana remains unlawful."), *aff'd sub nom. United States v. Montes*, 421 F. App'x 670 (9th Cir. 2011). The Court of Appeals found that "because activities conducted in Colorado, including medical marijuana use, are subject to both state and federal law… for an activity to be 'lawful' in Colorado, it must be permitted by, and not contrary to, both state and federal law." *Coats*, 303 P.3d at 150. Thus, a "lawful" activity is one that is in compliance with all applicable federal and state laws.

As an exercise in statutory construction, the Court of Appeals' reasoning is sound. The statute contains no limiting language suggesting that it was intended to protect employees who engage in any activity deemed lawful "under state law," despite its illegality as a matter of federal law. The courts are not at liberty to read such limiting language into the statute by judicial construction. *See State Dep't of Revenue v. Adolph Coors Co.*, 724 P.2d 1341, 1345 (Colo. 1986) ("[W]e cannot restrict by judicial decision a provision that the General Assembly has left

[3] But see footnote 2 *supra*.

unrestricted."); *cf. Avila*, 143 S.W.3d at 5-6 ("Courts are not authorized to add provisions to a statute that are not plainly written or necessarily implied. . . . We must presume the legislature acted with knowledge of existing state and federal interest laws, and would have expressly stated that the interest rates [need only] be *lawful under Missouri law* if it had so intended.") (emphasis in original).

The Court of Appeals' construction of "lawful" is consistent with other jurisdictions' construction of that term. *See Oregon v. Ehrensing*, 296 P.3d 1279, 1286 (Or. Ct. App. 2013) (refusing to construe the term "lawfully" contained in an Oregon evidence return statute to apply to medical marijuana "because possession of that marijuana . . . would violate federal law" (citing *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.*, 230 P.3d 518 (Or. 2010) (holding that employers are not required to accommodate their employees' off-duty medical marijuana use partly because the Federal Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801-904 (2000), preempts the Oregon Medical Marijuana Act, rendering the state act "without effect" to the extent it purports to authorize the use of medical marijuana))); *cf. United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1101 (N.D. Cal. 1998) ("[T]he fact that it may be lawful under state law . . . to cultivate and possess marijuana for medical purposes, does not make it lawful under federal law . . . ."); *Washington v. Carter*, 255 P.3d 721, 727 n.8 (Wash. Ct.

App. 2011) (noting that Washington's Medical Marijuana Act "allows for marijuana possession under state law that would be unlawful under federal law").

The significance of these cases was made strikingly clear by the Colorado Court of Appeals' recent analysis of them in *People v. Crouse*, ___ P.3d ___, 2013 COA 174 (Colo. App. 2013). Construing entirely different statutory (or in that case constitutional) language, the *Crouse* court held that the CSA does not preempt the provision of Colorado's Medical Marijuana Amendment, COLO. CONST. art. XVIII ("Medical Marijuana Amendment"), providing that after an acquittal in a state criminal prosecution, a licensed medical marijuana user is entitled to the return of any marijuana and related paraphernalia that had been "seized by . . . law enforcement officials . . . in connection with the claimed medical use of marijuana." *Crouse*, 2013 COA 174, at ¶¶ 30, 42, 47 (quoting COLO. CONST. art. XVIII, § 14(2)(e)). In reaching this result, the *Crouse* court emphasized that unlike under the Oregon evidence return statute at issue in *Ehrensing*, a Colorado medical marijuana user's right to the return of seized marijuana "does not depend on *lawful* possession." *Crouse*, 2013 COA 174 at n.10 (emphasis added). Colorado's Lawful Activities Statute, by contrast, constrains an employer's rights only with respect to its employees' "lawful" off-duty activities. *See Watson v. Pub. Serv. Co.*

of Colo., 207 P.3d 860, 862 (Colo. App. 2008) ("[S]ection 24-34-402.5 . . . prohibits terminating an employee based on lawful, off-duty conduct.").

B. Construing "Lawful Activities" to Include Medical Marijuana Use Is Contrary to the Voters' Intent and the Legislative Intent.

Colorado voters clearly did not intend for the Medical Marijuana Amendment to curtail employers' ability to enforce workplace drug policies that prohibit marijuana use. For one thing, the Amendment itself made no such pronouncement. On the contrary, the Amendment expressly permits employers to maintain their workplace drug policies. *See* COLO. CONST. art. XVIII, § 14(10)(b) ("Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place."). In addition, the Bluebook guide to proposed Amendment 20 did not contain any language that would have alerted voters to the possibility that employers would be required to tolerate medical marijuana use by their employees. *See* Colorado Bluebook (2000) *available at* www.coloradobluebook.com.

The Amendment is certainly not a wholesale endorsement of the contrary position, i.e., that employers must accommodate the medical use of marijuana that does not occur in the work place itself. *See Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970, 977 (Colo. App. 2011) (noting that "in the context of wrongful termination cases, language similar to section 14(10)(b) . . . has been interpreted

not to require employers to accommodate employees' off-site use of medical marijuana") (citing *Roe v. TeleTech Customer Care Mgmt. (Colo.), LLC*, 257 P.3d 586, 592-93 (Wash. 2011)).

While the Medical Marijuana Amendment provides a defense to state criminal law, it expressly left the relationship between employers and employees untouched. *See Beinor*, 262 P.3d at 977 ("The Colorado Constitution does not give medical marijuana users the unfettered right to violate employers' policies and practices regarding use of controlled substances."); *cf. Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200, 205 (Cal. 2008) (legalizing the use of marijuana for medical purposes "does not eliminate marijuana's potential for abuse or the employer's legitimate interest in whether an employee uses the drug").

Allowing employers to prohibit the use of marijuana outright is consistent with the voters' intent that the employer/employee relationship be separate from, and not affected by, the legalization of medical marijuana. Indeed, the Medical Marijuana Amendment leaves employers free to prohibit the use of marijuana as a condition of employment. This was subsequently reiterated by the passage of Amendment 64 that further amended Article 18 of the Colorado Constitution to legalize the recreational consumption of marijuana. Amendment 64 clearly articulates the right of employers to prohibit the use of marijuana – even outside

the workplace. *See* COLO. CONST. art. XVIII, § 16(6)(a) (**"Nothing in this section is intended** to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or **to affect the ability of employers to have policies restricting the use of marijuana by employees."**) (emphasis added). Consistent throughout the passage of both amendments is the protection of employers' rights to prohibit marijuana use. Reading the Lawful Activities Statute to encompass marijuana use as "lawful" would be a substantial departure from the express language and intent of both amendments.

Moreover, the Lawful Activities Statute should not be construed to protect medical marijuana use because such use was unlawful even as a matter of state law at the time the statute was enacted. The Colorado legislature undoubtedly was silent as to marijuana use precisely because it was categorically illegal under both state and federal law and therefore did not present any controversy. *Cf. Ross*, 174 P.3d at 207 ("[G]iven the controversy that would inevitably have attended a legislative proposal to require employers to accommodate marijuana use we do not believe that [a statute] can reasonably be understood as adopting such a requirement silently and without debate.").

Neither the Medical Marijuana Amendment nor Amendment 64 reflects any substantive departure from existing employment policies. Nor did the legislature make any changes to the Colorado Lawful Activities Statute when it subsequently enacted statutes codifying regulations required by the amendments. The legislature's inaction should not be viewed as an endorsement of a view inconsistent with its original enactment. *See Hewlett-Packard Co. v. Dep't of Revenue*, 749 P.2d 400, 406-07 (Colo. 1988) ("When a statute is amended, the . . . constriction previously placed upon the statute is deemed approved by the General Assembly to the extent that the provision remains unchanged.").[4]

2. Colorado's Lawful Activities Statute Does Not Protect Activities the Effects of Which Extend Beyond "Nonworking Hours."

Colorado's Lawful Activities Statute prohibits employers from discharging employees for "engaging in any lawful activity off the premises of the employer during nonworking hours." COLO. REV. STAT. § 24-34-402.5. While the focus of the lower courts and the parties' briefs has been on the meaning of "lawful," similar consideration should be given to whether off-site medical marijuana use is

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[4] If the legislature had intended to prohibit employers from terminating employees who test positive for off-duty use of medical marijuana, it easily could have done so. *Cf.* ARIZ. REV. STAT. ANN. § 36-2813(B)(2) (prohibiting employers from terminating or otherwise discriminating against licensed medical marijuana users based on a "positive test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment").

truly an "activity off the premises . . . during nonworking hours." *Id.* Unless the "activity" in question is unequivocally limited to nonworking hours, the statute should not apply.

The statute does not specifically address how employers are to treat the *effects* of an activity, such as marijuana use, that continue long after the affirmative act. However, the statute clearly distinguishes between those "lawful" activities that may impact the workplace from those that do not. *See Marsh v. Delta Air Lines, Inc.*, 952 F. Supp. 1458, 1462 (D. Colo. 1997) (the Lawful Activities Statute "was meant to provide a shield to employees who engage in activities that are personally distasteful to their employer, but which activities are legal and *unrelated to an employee's job duties*") (emphasis added). Due to the drug's lingering effects, the "activity" of consuming marijuana is not limited to non-working hours, regardless of when the specific consumption of the drug actually occurs.

Employers are entitled to expect their employees to report to work sober. *See Boudreaux v. Rice Palace, Inc.*, 491 F. Supp. 2d 625, 635 (W.D. La. 2007) (noting that "an employer has a right to expect and demand that employees not be impaired at work"). In this context, medical marijuana is not unlike alcohol. While the consumption of alcohol during nonworking hours is generally lawful and

ordinarily would not be grounds for termination, employers are not required to tolerate or accommodate an employee who comes to work inebriated. Just as the effects of alcohol are unsuited to the workplace, so too are the effects of marijuana or THC.[5] *See Kehde v. Iowa Dep't of Job Serv.*, 318 N.W.2d 202, 207 (Iowa 1982) ("[T]he intoxicating effect of marijuana poses obvious safety risks to an employee who is under the influence of the drug and to coworkers. . . . An employer has a right to expect that an employee will not jeopardize his or her own safety or the safety of coworkers by being intoxicated during working hours.").[6]

In short, the employer's concern is not with the physical acts of drinking alcohol or ingesting marijuana, but with the short and long term physiological consequences of those activities, specifically as they pertain to safe and efficient workplace practices. As consumption of marijuana may subsequently impact an employee's performance in the workplace, it is not simply a private, off-the-job activity. *Marsh*, 952 F. Supp. at 1462 (noting that the Lawful Activities Statute reflects the legislature's determination that "the policy of protecting an employee's

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[5] Tetrahydrocannabinol ("THC") is the physiologically active chemical component of marijuana. *See People v. Velasquez*, 666 P.2d 567, 568 (Colo. 1983).; *People v. Denn*, 557 P.2d 1200, 1201 (Colo. 1976).

[6] *See also* COLO. CONST. art. XVIII, § 16(3)(d) (prohibiting use of marijuana that endangers others); Colorado Bluebook (2012), p. 7 ("The use of marijuana in public or in a manner that endangers others is prohibited.") *available at* www.coloradobluebook.com.

off-the-job privacy must be balanced against the business needs of [the] employer").

A positive drug test shows that an employee was *and still may be* impaired. *Cf. Amalgamated Transit Union*, 691 F. Supp. at 907 ("[D]rug testing . . . serve[s] the laudable goal of fostering a drug-free and sober workforce. That an individual has used drugs or alcohol on some occasions does not compel the conclusion that he . . . will show up for work impaired, but, generally, those who have used these substances are more likely to use them again than those who have never used them.").

Considerable empirical evidence shows that the use of marijuana impairs cognitive functions and the ability to perform complex tasks requiring attention and mental coordination, and that this impairment may persist long after the drug was ingested. *See, e.g.*, *Goebel v. Warner Transp.*, 612 N.W.2d 18, 23 (S.D. 2000) ("[I]mpairment following the smoking of a single marijuana cigarette has been scientifically shown to exist 48 hours after the ingestion. THC, the principal psychoactive ingredient of marijuana, affects the mental thought processes of the

individual, resulting in mental dullness, and lack of attention to detail in the post-euphoric phase, or the 'down' phase.").[7]

Petitioner asserts that because THC remains in a user's system for an extended period of time, a positive drug test is not dispositive of a person's level of intoxication or impairment. *Opening Br.*, 51-52.[8] This assertion ignores the fact that precisely because THC remains in the user's system for so long, an employee's *negative* test for marijuana or THC is virtually incontrovertible evidence that the employee was *not* impaired at the time of the test. Conversely, a positive test is at least some evidence that the employee *may* have been impaired at the time of the test. *See Amalgamated Transit Union*, 691 F. Supp. at 907 ("[T]esting may deter workers from using drugs. The time it takes a drug to leave the body may vary considerably; workers may decide to abstain entirely rather than

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[7] *See also Bocanegra v. Vicmar Services, Inc.*, 520 F.3d 581, 585 (5th Cir. 2003) ("[E]xtensive scientific literature show[s] that impairment of mental and cognitive functions from marijuana use continues to occur for at least twelve hours after the acute 'high' has worn off." (citing Jerome A. Yesavage et al., *Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance*: *A Preliminary Report*, 142 AM. J. PSYCHIATRY 1325 (Nov. 1985))); *Fowler v. New York City Dep't of Sanitation*, 704 F. Supp. 1264, 1275 (S.D.N.Y. 1989) ("Serious skill impairment has been measured 24 hours after smoking a single marijuana cigarette.").

[8] Notably, Petitioner's concern is not one of "false positives" for non-use, but rather positive results for past use of marijuana where the effects may (but also may *not*) have worn off. *See Arizona v. Lucero*, 85 P.3d 1059, 1063, ¶ 18 (Ariz. Ct. App. 2004) ("Even when THC is no longer detectable in the blood, it remains for a time in the nervous system and continues to affect the user. It affects judgment, the ability to think, and the ability to solve problems. It can make the ability to perform multiple tasks . . . difficult.").

run the risk that their last uses were remote enough to leave no trace. This deterrent effect will help to achieve the [employer's] legitimate goal of keeping its workforce drug free.") (citation omitted).

Given that the impairing effects of marijuana use may persist for up to two days, expecting employers to ignore positive test results because the testing process is imprecise, asks too much. *See Slaughter v. John Elway Dodge Southwest/AutoNation*, 107 P.3d 1165, 1170 (Colo. App. 2005) ("[I]t is acceptable for an employer . . . to terminate an employee as the result of a drug test showing the presence of marijuana in the employee's system during working hours." (citing COLO. REV. STAT. § 8-73-108(5)(e)(IX.5))); *In re Frito Lay, Inc.*, 109 Lab. Arb. (BNA) 850, 853 (1997) (Heekin, Arb.) (noting that a "positive urine test" for marijuana "is accepted in many realms – including that of a collective bargaining agreement – as more than sufficient for purposes of justifying termination").[9]

[9] In fact, several states have dealt with the limitations inherent in drug testing by establishing a statutory *presumption* of impairment whenever an employee tests positive for marijuana. *See, e.g., Collins Signs, Inc. v. Smith*, 833 So.2d 636, 638 (Ala. Civ. App. 2002) (noting that by statute in Alabama, an employee who "tested positive for marijuana . . . is conclusively presumed to have been impaired"); *Stenson v. Pat's of Henderson Seafood*, 84 So. 3d 661, 664-65 (La. Ct. App. 2012) (discussing a Louisiana state statutory "presumption of intoxication based on the existence of [a] valid drug screen showing that [the employee] tested positive for marijuana").

Due to the potential for long-lasting adverse effects beyond immediate impairment, it is also reasonable for employers to adopt a zero-tolerance approach that prohibits all marijuana use. *See Garrido v. Cook Cnty. Sheriff's Merit Bd.*, 811 N.E.2d 312, 320 (Ill. App. Ct. 2004) ("It would be absurd to even suggest that zero-tolerance policies in a [safety-sensitive] workplace . . . are inherently bad and serve no legitimate . . . purpose."); *cf. United States v. 5528 Bell Pond Drive*, 783 F. Supp. 253, 257 (E.D. Va. 1991) ("[T]he federal government's policy with regard to drugs is *zero tolerance.*") (emphasis in original), *aff'd sub nom. United States v. Campbell*, 979 F.2d 849 (4th Cir. 1992).

3. Prohibiting Medical Marijuana Use Is a Bona Fide Occupational Requirement for Safety-Sensitive Industries Under COLO. REV. STAT. § 24-34-402.5(a-b).

As discussed above, off-duty marijuana use may have an adverse impact on job performance. *See, e.g., Ahart v. Dep't of Corrections*, 943 P.2d 7, 10 (Colo. App. 1996) (noting "evidence in the record that complainants' [off duty] drug use could have repercussions on their ability to perform on the job"), *aff'd,* 964 P.2d 517 (Colo. 1998). Accordingly, requiring an employee to abstain from consuming marijuana during nonworking hours may be a bona fide occupational requirement for many types of employment. *See, e.g., Smith v. Zero Defects, Inc.*, 980 P.2d 545, 549 (Idaho 1999) ("Maintaining a completely drug-free workplace is

consistent with [an employer's] goals in reducing absenteeism and theft and maintaining employee morale and productivity.").

Maintaining a drug-free workplace is particularly critical in highly safety-sensitive industries. In those industries employees who may be impaired by off-duty drug use "pose a threat to co-workers, the workplace, the environment and to the public at large." *Citgo Asphalt Ref. Co. v. Paper Workers Int'l Union Local No. 2-991*, 385 F.3rd 809, 820 (3d Cir. 2004); *see also Ahart*, 943 P.2d at 10 (noting the "important safety and security concerns about [employees' off duty] drug use as it relates to their ability to perform effectively as corrections officers"); *Hein v. Gresen Div.*, 552 N.W.2d 41, 44 (Minn. Ct. App. 1996) (holding that an employee's off-duty drug use "interfere[d] with [his] employment because [he] operated heavy machinery that posed a danger to others if he were under the influence of drugs"); *In re BWay Mfg., Inc.*, 127 Lab. Arb. (BNA) 1665, 1670 (2010) (Heekin, Arb.) (upholding the termination of an employee who tested positive for marijuana he had consumed while on medical leave because use of the drug "clearly could impact his ability to safely perform [a] safety sensitive job").

As a result, a number of federal laws prohibit employee drug and alcohol use. *See, e.g.*, 41 U.S.C. § 8102-8103 (recipients of federal aid must maintain a drug and alcohol free workplace); 49 U.S.C. § 5331; (Department of

Transportation mandatory controlled substances testing for public transportation employees); 49 U.S.C. § 20140 (railroad carriers mandatory controlled substances testing); 49 U.S.C. § 31306 (commercial motor carriers mandatory controlled substances testing); 49 U.S.C. § 45102 (air carriers mandatory controlled substances testing).

The mining industry is no exception. In addition to the other federal prohibitions on marijuana possession and consumption, there are specific prohibitions on drug and alcohol use in the Mine Act. As part of the Mine Act's comprehensive regulations for protecting miner health and safety, the regulations relating to metal/nonmetal mining prohibit impaired miners from being on the job site: "Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job." 30 C.F.R. §§ 56.20001, 57.20001. The coal standards are silent on the issue; however, the Mine Act broadly provides that any condition or practice that could reasonably be expected to cause death or serious injury is subject to a withdrawal order. 30 U.S.C. § 817(a).[10]

[10] A withdrawal order has the effect of requiring an immediate withdrawal of miners from the affected area of the mine until the safety concern is resolved. Such an order can be served on the spot, without a hearing by an authorized representative of the Secretary of Labor.

Under the Mine Act, mine operators face the possibility of strict liability for accidents and other actions caused by an impaired miner.[11] 30 C.F.R. §§ 56.20001, 57.20001. *See, e.g., Mar-Land Indus. Contractor, Inc.*, 14 FMSHRC 754 (Rev. Comm. Mar. 1992) (a fatal accident occurred while a miner was testing his safety lines and the deceased miner tested positive for benzoylecgonine, a substance the liver metabolizes from cocaine; the presence of benzoylecgonine did not, per se, diminish Respondent's negligence to any significant degree, finding a violation of 30 C.F.R. § 56.15005); *Worley Blue Quarry, Inc.*, 25 FMSHRC 399 (July 16, 2003) (ALJ Melick) (presence of marijuana and benzodiazepines in deceased miner's system did not mitigate mine operator's negligence in violating 30 C.F.R. § 56.15005, where fatal accident occurred after a miner fell 28 feet from the edge of a working ledge to the quarry floor); *Kaiser Sand and Gravel Co.*, 3 FMSHRC 1941 (Aug. 18, 1981) (ALJ Vail) (finding operator liable where a miner was killed after backing his truck up over the side of a road, notwithstanding testimony that the deceased was under the influence of drugs). Mine operators have specifically

[11] The Mine Act's enforcement scheme is uniquely premised on strict liability for failure to comply with performance-based standards and its statutory provisions. *See, e.g., Asarco, Inc.-Northwestern Mining Dep't v. Fed. Mine Safety and Health Review Comm'n*, 868 F.2d 1195 (10th Cir. 1989). As MSHA has stated, "the principle of liability without fault *requires* a finding of liability even in instances where the violation resulted from unpreventable employee misconduct." *Western Fuels-Utah, Inc.*,10 FMSHRC 256, 261 (Rev. Comm. Mar. 1998) (emphasis added).

been found liable for violations of the Mine Act where the employee involved in the accident tested positive for marijuana. *See, e.g., Weathers Crushing, Inc.*, 22 FMSHRC 1032 (Aug. 31, 2000) (ALJ Bulluck) (operator was strictly liable for employee's impairment due to marijuana in connection with fatal crusher accident); *Newmont Gold*, 20 FMSHRC 561 (May 11, 1998) (ALJ Cetti) (finding company liable for violation of regulation requiring drivers to maintain control of equipment where haul truck driver tested positive for marijuana on the day of accident). The mine operator may be liable even if the operator is completely unaware of an employee's drug or alcohol use. *See Weathers Crushing, Inc., supra.*

The regulations on drug use are not limited to prohibited drugs. Rather, a mine operator is liable for an impaired miner, even if the use of drugs has been medically prescribed. *See, e.g., Sheperd v. Black Hills Bentonite*, 25 FMSHRC 129, 134 (Mar. 13, 2003) (ALJ Manning) (noting that citations had been issued for violating 30 C.F.R. § 56.20001 at three plants where employees were allowed to continue working while taking prescription pain medications). The Mine Act's enforcement scheme places a heavy burden upon the mine operator to ensure a drug and alcohol free workplace. Allowing impaired miners on site – even if their

drug consumption took place off-duty – is a violation of the law, regardless of whether the drug is "legally" permitted or not. *See id*.

As alluded to above, if marijuana use were deemed lawful for purposes of Colorado's Lawful Activities Statute, mine operators would be placed in an impossible situation. Allowing a miner who tests positive for marijuana to enter or remain on the jobsite is a clear violation of federal law. But terminating that employee would violate state law, subjecting the mine operator to potential civil liability. Such an interpretation of the Lawful Activities Statute is clearly prohibited by the federal preemption doctrine in the case of mining industry employment. *See Banner Adver., Inc. v. People of the City of Boulder*, 868 P.2d 1077, 1080 (Colo. 1994) (observing that federal preemption occurs "when it is impossible for a private party to simultaneously comply with both state and federal laws," and that the "preemptive effect of a federal regulation is equal to that of a federal statute").[12]

[12] To the extent an employee testing positive for marijuana might argue that the mine operator could avoid this conflict by paying the employee to stay home, the argument would be inconsistent with the Mine Act. *See Sheperd*, 25 FMSHRC at 134 (finding no discrimination where miner took strong prescription muscle relaxants and pain medication after he was injured because this was not a protected activity; rather "[i]t merely demonstrates that he was not capable of performing work that was required by his job while taking these medications").

Even if this Court were to conclude that the Lawful Activities Statute protects off-duty medical marijuana use in some occupations, the statutory exemptions found in subsections (a) and (b) of the statute should extend to occupations and industries like mining, where safety is a critical concern. In particular, the mining industry as a whole should be recognized as one in which every job includes a "bona fide occupational requirement" to refrain from marijuana consumption. COLO. REV. STAT. § 24-34-402.5(1)(b); *cf. Ayala v. United States*, 49 F.3d 607 (10th Cir. 1995) ("Congress's clear intention that operators remain primarily responsible for mine safety is a particularly important consideration under Colorado law. In the absence of clear legislative intent to create a civil remedy, the Colorado Supreme Court has been unwilling to impose civil liability on actors whose obligations are imposed by statute.").

Because of the unique safety concerns and federal safety regulations applicable in the mining industry, mining operators typically require pre-employment drug testing, post-accident drug testing, and random drug testing, and maintain other policies designed to keep their workplaces drug-free. As a condition of employment, mine operators often adopt "zero tolerance" policies for marijuana and other drugs. A zero-tolerance approach has the prophylactic effect of barring impaired miners from work sites, and also serves as a deterrent to future

consumption. *See Dickensen-Russell Coal Co. v. Int'l Union, United Mine Workers of America*, 840 F. Supp. 2d 963, 965 (W.D. Va. 2012) ("[I]t is undisputed that . . . [a] zero tolerance Drug Policy serves to reduce potential hazards . . . ." (quoting arbitrator's decision)); *cf. Sosa v. Indus. Claim Appeals Office*, 259 P.3d 558, 559 (Colo. App. 2011) ("Employer has a zero tolerance policy regarding drugs and alcohol use because employees use knives and potentially hazardous machinery in the workplace.").

This approach is imperative. Drug use and safety-sensitive occupations are incompatible. *In re Consol. Coal Co.*, 87 Lab. Arb. (BNA) 729, 737 (1986) (Hoh, Arb.) recognized the unique concerns of the mining industry because workers work under conditions requiring "full physical and mental capacity at all times, to a higher degree than jobs with lesser safety considerations." To permit the "possession and/or use of illegal drugs" would "endanger the safety of other employees."

In 2008, MSHA proposed regulations to require substance abuse testing. Although the proposed rulemaking was ultimately abandoned, the discussion surrounding the proposal is instructive. The preamble to the proposed rules acknowledged that mining accidents often involve the operation of complex and complicated equipment, tools and machinery such that drug or alcohol abuse,

including the use of prescription medications "may affect a miner's perception and reaction time" and that "clear focus on the work at hand is a crucial component of mine safety." 73 Fed. Reg. 52136, 52137 (Sept. 8, 2008) (the Mine Act, Dept. of Labor, Proposed Rules "Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance").

Mining operators expressed considerable opposition to the proposed rule changes, largely because the changes were thought to be *too lenient*. The rules proposed limiting testing to miners who received comprehensive training, only contemplated testing for enumerated substances, and would have allowed for continued employment despite a positive test. A sampling of the more than 150 comments to the proposed changes demonstrates the perceived problems with these proposals:

- "The CMA supports MSHA in its efforts to improve the safety and health of the nation's miners. CMA further supports the reduction and elimination of drug and alcohol abuse in all mining activities. However, CMA is opposed to MSHA's proposed rule as written. First and foremost, the proposed rule appears to be a step backwards for many companies with well-established drug and alcohol programs that have zero tolerance policies." Comments to Proposed Rule RIN 1219-AB41 from the Colorado Mining Association (Oct. 27, 2008) (AB41-COMM-102).

- "Since October, 2003, OMLLC has experienced a low number of positive screening results. In each positive screening result, the prohibited substance was THC (marijuana). OMLLC has historically

terminated, for a first offence, the employment of persons with a confirmed positive test. … It was *not* thought at the time of testing that the persons were displaying behavior that would lead an objective observer to think they were ***impaired***. THC is known to have a relatively short-term physio-psychological effect, yet metabolize slowly from the body. ***In each case, however, the employees in violation were terminated from OMLLC employment***." Comments to Proposed Rule RIN 1219-AB41 from Steven Lewis, Oxbow Mining (Oct. 28, 2008) (AB41-COMM-104).

- "[W]e are concerned that the definition of 'safety sensitive' is too narrow. At coal mines, all employees have to drive onto mine property, around large, moving equipment and other dangerous areas on the way to and from work, and almost every office and warehouse position involves some kind of travel into the active mine site. Our General Managers are at the active mining areas daily as part of their jobs, as are Human Resources Managers, Safety Managers and other office workers." Comments to Proposed Rule RIN 1219-AB41 from Steven Leer, CEO, Arch Coal, Inc. (Oct. 30, 2008) (AB41-COMM-113).

Mine operators were in agreement with MSHA that drug and alcohol abuse may contribute to or cause accidents in the workplace. *See* 73 Fed. Reg. 52136, 52141 (Sept. 8, 2008) (". . . the misuse of alcohol and drugs increases the risk of accident, injury, or death. It is reasonable to expect that any diminution of a miner's attentiveness, concentration, dexterity, balance, or reaction time could play a contributing, if not causative, role in an accident. No one disputes that a miner who is under the influence of alcohol and/or drugs is an unacceptable safety risk."). Although both MSHA and operators had the same goal, the proposed standards

were perceived as weakening the protections that mine operators already had in place. The zero-tolerance policies already enforced by many mines were broader, applied equally regardless of job duties, and often required immediate termination. These policies allow employers to terminate current employees or refuse to hire applicants who test positive for prohibited substances, and also serve as a deterrent to use by employees and applicants.

Although all employers have a bona fide interest in prohibiting marijuana use, this interest is even more acute in safety-sensitive industries, and in some cases – in the mining industry, in particular – such prohibitions are mandated by federal law. Although Colorado's Lawful Activities Statute does not expressly exempt particular industries from its scope, the statutory exemptions should be interpreted to apply to safety-sensitive occupations and industries, including all mining industry occupations.

Conclusion

Given the timing of its enactment, the Lawful Activities Statute could not have been intended, and it should not now be interpreted, to prohibit employers from terminating employees for engaging in off-duty drug use that was and remains unlawful under federal law. This conclusion is consistent with the provision of the Medical Marijuana Amendment that absolves employers of any

obligation to accommodate marijuana use in the workplace. The consumption of medical marijuana is not "lawful" for purposes of the statute. Further, the "activity" of consuming marijuana during nonworking hours is properly deemed to extend into the workplace due to the drug's lingering physiological effects. As it is neither "lawful" nor an activity confined to nonworking hours, marijuana consumption falls outside the purview of the statute.

Because of the adverse physiological effects of marijuana use, all employers have a bona fide interest in prohibiting its consumption. In the mining industry in particular, the need to prohibit such activity is imperative. Not only does marijuana use pose a threat to the health and safety of an employee who consumes the drug, it also puts the employee's coworkers, innocent bystanders, and the employer's facilities and equipment at risk. Prohibiting the activity is appropriate both as a matter of private employment policy and as a matter of federal law under the Mine Act and the Controlled Substances Act.

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the above and foregoing **AMENDED BRIEF OF AMICUS CURIAE COLORADO MINING ASSOCIATION** upon all counsel of record, by e-serving a copy via ICCES this 22nd day of May, 2014.

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