

Ross v. RagingWire

Employer’s Right to Fire Workers Supercedes State Law, Says California Supreme Court

By Fred Gardner

The boss’s sacred right to fire a worker supercedes the worker’s legal right to fire up a medicinal herb in his own house on his own time, the California Supreme Court has ruled in the case of *Ross v. RagingWire*. To reach this conclusion the Court had to violate its own impeccable logic in *People v. Mower*, a 2002 ruling that defined physician-approved cannabis users as equal to —“no more criminal than”— prescription-drug users.

Discrimination by employers has been, arguably, the single biggest factor limiting implementation of Prop 215 in the years since its passage. Countless thousands of California workers have been fired, or threatened with termination, or not hired in the first place because they tested positive for marijuana. Millions more won’t consider marijuana as a treatment option for fear that it could cost them their jobs.

Gary Ross, now 45, got injured while in the Air Force in 1983. While he was working on a plane he fell and landed directly on his tailbone, breaking several transverse processes in his lower back.

Veterans Administration doctors put Ross on a series of pain-killers.

His service-connected disability qualified him for vocational rehabilitation. He trained in the computer field and became successful over the years as a systems administrator.

Veterans Administration doctors put Ross on a series of pain-killers. “Soma was popular for a while until they found it highly addictive and took it away,” he says. “Flexoril. Valium. Percocet. Demerol. Vicodin.” In 1999, concerned about the side-effects of high doses of Vicodin (which is hydrocodone and Tylenol), Ross went to see Tod Mikuriya, MD, and got an approval to medicate with marijuana.

In 2001 Ross was hired by RagingWire Telecommunications of Sacramento. He presented his approval letter from Dr. Mikuriya at a pre-employment drug test and notified RagingWire’s human resources department that he used marijuana only when off-duty and not at the work site.

After Ross tested positive, RagingWire fired him. He sued for discrimination, arguing that he had been using legally under California’s Health & Safety Code. He had a documented disability and a doctor’s approval; he smoked at home in the evening; he neither used nor was impaired at the workplace. Raging-

Wire argued that it had a right to fire Ross for testing positive because federal law prohibits all marijuana use.

The Sacramento Superior Court and the Third Appellate District Court ruled for RagingWire. Ross took his case to the California Supreme Court, represented by Sacramento defense specialist Stewart Katz and Joe Elford of Americans for Safe Access.

Ross stated a claim under California’s Fair Employment and Housing Act (FEHA) which bars employers from firing workers for “physical disability” or “medical condition,” and obligates them to make “reasonable accommodation” for



disabled employees. The accommodation Ross sought was a waiver of RagingWire’s requirement that employees test negative for marijuana.

Ross also cited the law created by SB420, which states that “Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment.” The five co-authors of SB420 supported Ross with an *amicus* brief saying that their bill was based on the assumption “that the FEHA does require employers generally to accommodate off-duty, off-premises medical cannabis use by their employees, absent an undue hardship.”

Werdegar opined that the legislature as a whole did not share this assumption, i.e., did not know what they were voting for when they passed SB420. “*Amici* do not assert,” wrote Werdegar, “that they shared their view of the proposed legislation with the Legislature as a whole. We therefore have no basis for imputing the authors’ views to the whole Legislature.”

Ross’s second claim was based on the principle that an employer may not discharge an employee for a reason that violates a fundamental public policy of the state. For example, bosses can’t fire people —legally—because of their gender or race. Ross’s lawyers argued that RagingWire violated the policies implicit in the Compassionate Use Act and the privacy clause of the California Constitution (a worker should be able to choose his or her own medical treatment without interference from his or her boss).

On Jan. 24 a 5-2 majority issued its judgment for RagingWire. It was written by Justice Kathryn Mickle Werdegar, who should know better —her husband, David Werdegar, MD, used to run San Francisco General Hospital.

Werdegar’s key point was that the voters, in passing Prop 215, never “intended... to change employment law.” Since there was nothing in Prop 215 itself suggesting that voters did not want medical-marijuana users to have

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the same rights in the workplace as, say, Zoloft users or insulin users, Werdegar cited the ballot arguments written in support of Prop 215: “The proponents... described the proposed measure to the voters as motivated by the desire to create a narrow exception to the criminal law.”

The proponents she refers to are/is Bill Zimmerman, the campaign manager installed by East Coast masterminds to replace Dennis Peron as their price for funding a signature drive. Zimmerman wrote ballot arguments pitching the initiative as merely a defense in court, not a bar to prosecution. Werdegar pointedly quotes Zimmerman’s line that “police officers can still arrest for marijuana offenses. Proposition 215 simply gives those arrested a defense in court.”

She concluded: “given the Compassionate Use Act’s modest objectives and the manner in which it was presented to the voters for adoption, we have no reason to conclude the voters intended to speak so broadly, and in a context so far removed from the criminal law, as to require employers to accommodate marijuana use.”

Attorney Bill Panzer says that the state Supreme Court ruling for RagingWire “brings to mind my old law school professor who used to say, ‘No case is ever decided on the law. First the judges decide what they want to do. Then they find the reasoning. The reasoning here, distilled down, is ‘Just because it’s not

illegal doesn’t mean it’s legal.’ To which I answer: ‘Yes, it does.’”

The Ross case “came down to the state-federal conflict,” says Panzer, “and the state Supreme Court chickened out.”

Legislative Remedy?

As Joe Elford got news of the ruling against Ross Jan. 24, he was preparing a response to the City of Garden Grove’s request for a review by the state Supreme Court of an appellate court ruling in the *Kha* case. (See story on page 51.)

Asked about the implications of the Ross decision, Elford said, “it clearly signals that the California Supreme Court is not hospitable to medical marijuana. So it puts any pro-medical-marijuana decision that comes out of the courts of appeals at risk.

“On the other hand,” Elford hastened to add, “I don’t see any direct implications for *Chakos* because that was a purely criminal case.”

Americans for Safe Access won’t appeal the Ross decision to the U.S. Supreme Court. “This is a purely state-law case,” Elford says. “We had two causes of action under state law. The state’s highest court should be determining state law. The U.S. Supreme Court really has no business interfering in state law.”

ASA has been working with State Sen. Mark Leno on legislation that would prevent employers from discriminating against medical marijuana users based on their patient status or a positive test.

Standing up for Workers’ Rights

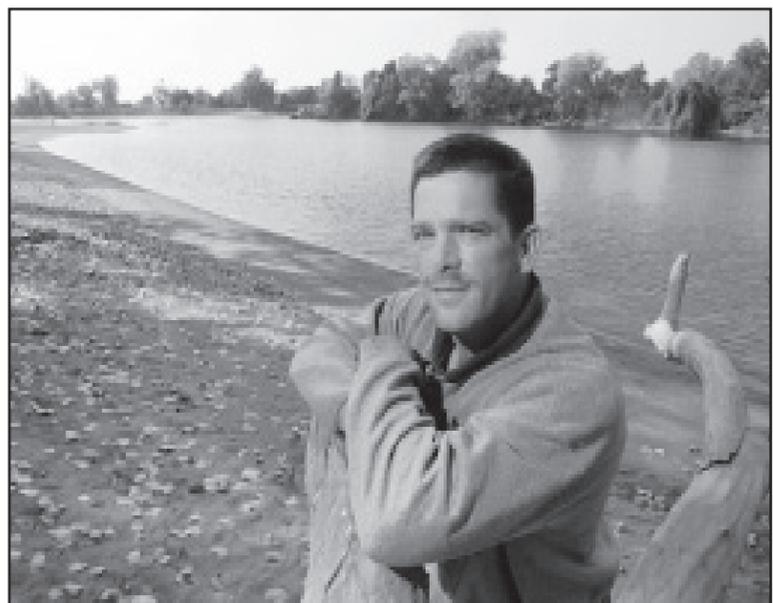


photo by Rich Pedroncelli/AP

GARY ROSS was acting in the interests of all Americans who work for a living.

An Interview With Gary Ross

Gary Ross is now employed as a camp superintendent for a Sacramento non-profit. Last January his wife was killed in an auto accident. He has a grown daughter whose family he is very close to, and a 21-year-old son in the Army, stationed at Fort Knox. “It won’t be long before he gets in the rotation to go overseas, which scares the heck out of me,” Ross told *O’Shaughnessy’s* in

an interview November 7, the morning after his case was argued before the state Supreme Court. Some excerpts follow.

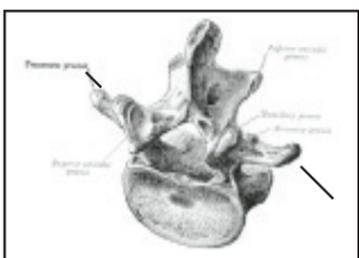
O’Shaughnessy’s: ...How did you find marijuana (as an alternative to painkillers from the VA)?

Ross: I went to see Dr. Tod Mikuriya.

O’S: This article is going to come out in an issue honoring him.

Ross: Fantastic!

continued on next page



LUMBAR VERTEBRA are irregular bones at the base of the spine. Transverse processes (arrows) extend from each side and connect to muscles and ligaments.

Ross vs. RagingWire *from previous page*

O'S: Tod connects to just about every story, it turns out.

Ross: Nothing but respect for the man. He was a pioneer, for sure.

O'S: How did you know to go to him?

Ross: In '96 when the law passed I said, 'Okay, let's see what's going to happen.' And I started following the news. Of course, Dr. Mikuriya was all over the news, he was battling McCaffrey. I did some research and found that he'd been studying medical marijuana since 1965. So I said, 'This is the man I need to talk to.' I first saw him in 1999 and then saw him again for renewals. When I went back for a renewal he remembered me very well. He was a sharp man. Then when my case was filed in 2001 we had several discussions about it...

O'S: How did getting approval to medicate with marijuana affect your VA situation?

Ross: I didn't rush into the VA. Almost every doctor that I've talked to about alternative medicine has always laughed in my face...

O'S: Where did you see the ad for RagingWire?

Ross: on Monster.com. There's about 10 interviews to go through. Before you start the interview process you have to be cleared by security. You fill out your application, give them your social security number and they run a background check on you. It can take months. I applied in

January '01 and I started in April or May. So, to go through that and get the job and then four days later get suspended—that was frustrating...

The director of HR called me up and said, "We've decided to terminate you." She gave me a form saying I was being terminated for THC. She also presented me with a five- or six-page document and said if I'd sign the document they'd give me two weeks pay or something like that and I would release them from all civil responsibility for terminating me for THC in my system. So I told her I wasn't going to sign it, I was going to take it home and think about it. I gave it to my lawyer, Stewart Katz...

O'S: Why is drug testing required in the computer industry?

Ross: I don't know. I've known companies that are straight-up government contractors and they don't give drug tests. And I've worked for others that had nothing to do with government and they drug test. I've been wondering: how many state employees use medical marijuana? Are federal dollars being withheld from California because state employees use medical marijuana? RagingWire doesn't have any government contracts. All they do is house computers...

O'S: What exactly were you going to be doing for RagingWire?

Ross: I was going to be an on-site repair person. So if your company had

"I thought this was an intrastate issue, not interstate commerce. I thought my case was cut-and-dry. California voted for it. California employer." —Gary Ross

computers at RagingWire and there was a problem that required service and you didn't feel like sending your UNIX admin up, I'd be able to take care of it. I was also taking care of the servers.

O'S: You must be highly skilled. There's lots of troubleshooters out there but you were a troubleshooter for the troubleshooters.

Ross: That's correct. What I used to do—what I love to do—is, I was the guy on the front line who would parachute into companies and fix their problems and move on to the next...

O'S: When did you decide to fight RagingWire's decision to terminate you?

Ross: Immediately...

O'S: How did you find Stewart Katz?

Ross: I joined NORML. And I started going through their list of lawyers and calling them. None of them asked me any questions, they just turned me down. Either it wasn't their specialty or there was nothing in it for them. Finally one of them referred me to Stewart. He asked me questions and—this is nothing against Stewart—he realized my salary was \$74,000 and that there was a potential for some money.

O'S: How does federal law come into it. Joe Elford says there's no federal law prohibiting employment by someone with THC in their system.

Ross: I thought this was an intrastate issue, not interstate commerce. I thought my case was cut-and-dry. California voted for it. California employer. When I worked for a company in Denver called R Squared, my office was at my home in California. The labor laws that applied to me were California laws, not Colorado laws. They had a policy that you didn't get paid vacation till you had worked for them for one year. But in California, vacation accrues monthly. So that's how mine was handled.

Except for certain safety situations there is no federal law requiring corporations to drug test their employees or to terminate them if they're positive.

Our interview ended with Ross commenting, "I'm a social person. I'm not even angry at RagingWire. They just decided that this is their policy and they're going to enforce it. Personally, I think they'd be better off in Utah or some place."

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Denney on the Ross Ruling: The Court Didn't Get it

Comments by Philip A. Denney, MD, President of the Society of Cannabis Clinicians, upon reading the Ross decision:

There are any number of drugs that can be used legally or illegally. Morphine, amphetamines, cocaine—there are legitimate medical uses for each of them. The purpose of the urine drug screen is to find out whether you've used any *illegal* drugs, not to find out which legal drugs you've used. Its scope is narrowly limited. Therefore, if you use a particular drug legally, the drug test is not "positive" for an illegal drug, it's "negative" for an illegal drug.

I would argue that the court didn't get it. Let's leave cannabis out of it and consider opiates—drugs derived from the opium poppy, either natural ones or synthetic ones. They all look the same on a urine drug screen—heroin and codeine look the same. You can have opiates in your system legally or illegally. The lab that does the drug test reports to the employer "inconclusive," meaning they can't tell whether the substance is there legally or illegally.

The employer then has to hire a physician—a medical review officer—to make the determination whether the urine drug screen is positive or negative. He calls the patient and asks "Are you so and so? Did you submit a drug test on such and such a date?... It came back positive for opiates. Do you have a reason for opiates to be in your urine?"

And you'll say, 'Well, yes, I have a

prescription for Vicodin from my dentist. And he'll say 'Fine, what's your dentist's name? What's the number on the prescription? Where did you get it filled? Is there a phone number on there?'"

And he'll check it out, make a couple of phone calls, and if the patient's story holds up, the drug test is read and reported to the employer as "negative" for illegal drugs.

We now have this curious situation where the Court has said that the test was positive for THC, as if it was an illegal drug, which demonstrates—logically, by the semantics—that they don't get it. Yes, there is THC in the urine. But that doesn't mean that the test came back positive for illegal drugs.

They ignore their own ruling that it be treated as if it were any other drug!

This same Court in *Mower* said that a doctor's approval of cannabis use has to be treated as if it's a prescription for any other drug. They ignore their own ruling that it be treated as if it were any other drug!

It's frustrating trying to accept that this is the last word, and I am hopeful that the legislature will step up and protect people who use cannabis legally from discrimination in the workplace.

I have no problem with a measure that doesn't cover workers in safety-sensitive

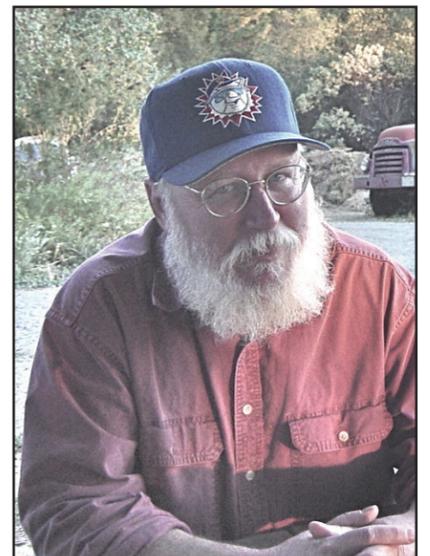
positions, as long as it has a proper definition of "under the influence." I deal with this often in the DUI setting.

Cannabis has the potential to impair your ability to drive. It depends on the level of cannabinoids in your system. You have to take blood to get anything meaningful. Work done by Franjo Grotenhermen in Germany shows that there's a baseline level of THC of about two nanograms per milliliter for people who use cannabis regularly. At levels between five and 10 nanograms per milliliter, there is the potential for impairment. At levels above 10 nanograms per milliliter there's a likelihood of impairment. (See "Rational Guidelines for Dosing," by Gregory T. Carter et al, O'Shaughnessy's *Autumn 2005*.)

To prove impairment in the workplace, one could subject an employee—for cause, i.e. if the person may have caused an accident—to a blood test and tell fairly reasonably if he was likely to have been impaired. This is the way it should be done. It would require a blood test unless less intrusive tests become available—saliva, for example.

A hair sample wouldn't tell you anything about the person's immediate condition, which is what you want to know. You don't want to know if he was impaired last week-end.

The situation is analogous to alcohol. California workers have the right to drink alcohol—a much more dangerous drug than cannabis, by any measure—



PHILIP A. DENNEY, MD.

and the employer has a right to expect them to show up sober. You can be tested on the spot to determine sobriety.

We're all in agreement that workplaces should be safe.

Perhaps Leno's bill will arrange for on-the-spot testing for cause. The key thing is to distinguish between having something in your urine and having it there illegally. That part of the bill should be made real clear. We're not condoning drug use in the workplace. We're not talking about workplace safety. We're all in agreement that workplaces should be safe. What we're talking about is fair treatment for California workers who are using cannabis legitimately.