HEARING DATE: TUESDAY, AUGUST 11, 2015

STATE OF RHODE ISLAND **PROVIDENCE, SC.**	**SUPERIOR COURT**
CHRISTINE CALLAGHAN, ***Plaintiff,***	**C.A. No. PC 14-5680**
vs.	
DARLINGTON FABRICS, et al. ***Defendants.***	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF OBJECTION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

I. BRIEF INTRODUCTION.

The medical use of marijuana is legal in Rhode Island, twenty-two other states, and the District of Columbia.[1] See The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act ("HSMMA"), G.L. 1956 § 21-28.6-1 et seq.[2] While many states have legalized medical marijuana, some have struggled with the relationship between medical marijuana state law in employment (and other areas) and the federal Controlled Substances Act ("CSA"), 21 U.S.C. § 801 et seq.

[1] In addition to the District of Columbia and Guam, the following states permit medical marijuana use: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. See the National Conference of State Legislatures website at http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx#3.

[2] The HSMMA was named after its sponsor, now-deceased Representative Thomas C. Slater who suffered from lung cancer. See http://www.boston.com/bostonglobe/obituaries/articles/2009/08/11/thomas_slater_68_ri_lawmaker_led_fight_on_marijuana/.

However, in contrast to other state medical marijuana laws, the HSMMA expressly prohibits employers from refusing to hire authorized cardholders leaving no doubt as to HSMMA's clear employment protection. § 28-28.6-4.

Because Plaintiff's complaint states several valid causes of action not only under the HSMMA (Count III), but also under state civil rights law, the Rhode Island Civil Rights Act ("RICRA") (Count II), G.L. 1956 § 42-112-1 et seq., and the Uniform Declaratory Judgments Act ("UDJA") (Count I), G.L. 1956 § 9-30-1 et seq., the Motion to Dismiss filed by Defendants, Darlington Fabrics Corporation and The Moore Company (hereinafter "Defendants"), must fail. See Exhibit A, *Complaint*.

II. FACTS AND TRAVEL.

Plaintiff Christine Callaghan is a Master's Degree student at the University of Rhode Island ("URI"). Ex. A, § 7. For many years, she suffered from debilitating migraine headaches. Ex. A, § 8.[3] Since February 2013, she has lawfully participated in Rhode Island's medical marijuana program to alleviate her medical condition. Ex. A, § 9.[4] To obtain a Master's Degree in the Department of Textiles, Fashion Merchandising and Design, URI requires the completion of an internship in the field. Ex. A, § 11. In June 2014, Plaintiff's URI Professor arranged for Plaintiff to obtain an internship by referring Plaintiff to Darlington. § 12. The paid internship was to

[3] Rhode Island law declares that modern medical research supports the conclusion that marijuana use is beneficial to alleviate "symptoms associated with certain debilitating medical conditions * * *." § 21-28.6-2(1). Chronic and severe migraine headaches constitutes a debilitating medical condition under the HSMMA. § 21-28.6-3(3).

[4] Medical marijuana has been legal in Rhode Island since 2006. According to State Department of Health statistics as of December 30, 2012, there were 4,847 licensed adult cardholders. http://www.health.ri.gov/publications/programreports/MedicalMarijuana2013.pdf.

commence in June. Ex. A, § 12-17.

Callaghan disclosed her medical condition and medical marijuana cardholder status to Defendant. § 19. Defendants then informed Callaghan she would no longer be hired. § 21. Callaghan alleges company officials admitted to violating the HSMMA when they told Callaghan she could not be hired because of her lawful medical marijuana use. Ex. A, § 21-23.

Callaghan filed suit in November 2014, requesting a declaratory judgment regarding the proper construction of the HSMMA anticipating that Defendants would view the statute as not creating any new obligations for Rhode Island employers as it relates to medical marijuana patients. Plaintiff further challenged Defendants' decision not to hire her under both the HSMMA and RICRA. Defendants responded with this Motion to Dismiss.

Because the HSMMA prohibits an employer from refusing to hire a cardholder based on his or her status as a program participant, Defendants' Motion must be denied. Resolving all doubts in favor of the non-movant on a Motion to Dismiss, it is clear that none of the arguments presented by the Defendants excuse adherence to Rhode Island state law. To narrowly construe the statute otherwise, would contravene the HSMAA, render the employment protections provided therein a nullity, and among other things, undermine public policy and police power of the General Assembly. In addition, the arguments raised by Defendants as to the RICRA and UDJA claims are wholly without merit. Accordingly, for the following reasons, Defendants' Motion must be rejected.

III. STANDARD OF REVIEW.

"'The sole function of a motion to dismiss is to test the sufficiency of the complaint.' Rhode Island Employment Security Alliance, Local 401, S.E.I.U., AFL-CIO v. State Department

of Employment and Training, 788 A.2d 465, 467 (R.I. 2002) (quoting Rhode Island Affiliate, ACLU v. Bernasconi, 557 A.2d 1232; 1232 (R.I. 1989)). 'The standard for granting a motion to dismiss is a difficult one for the movant to meet.' Pellegrino v. Rhode Island Ethics Commission, 788 A.2d 1119, 1123 (R.I. 2002). 'When ruling on a Rule 12(b)(6) motion, the trial justice must look no further than the complaint, assume that all allegations in the complaint are true, and resolve any doubts in a [non-movant's] favor.' Id. (quoting Bernasconi, 557 A.2d at 1232). 'The motion may then only be granted if it "appears beyond a reasonable doubt that a [non-movant] would not be entitled to relief under any conceivable set of facts." Id. (quoting Estate of Sherman v. Almeida, 747 A.2d 470, 473 (R.I. 2000))." Toste Farm Corp. v. Hadbury, Inc., 798 A.2d 901, 905 (R.I. 2002) (emphasis added).[5]

IV. ARGUMENT.

A. Defendants' Motion to Dismiss Count III of Plaintiff's Complaint under the HSMMA Must Be Rejected because Rhode Island Law Prohibits Employers from Considering State-Sanctioned Medical Marijuana Program Participation in Hiring Decisions.

1. The HSMMA.

The General Assembly clearly detailed the reasons for enactment of the HSMMA in

[5] The Rhode Island Supreme Court has passed on the opportunity to adopt the federal standard of review for motions to dismiss relied upon by Defendants in their Memorandum in Support of Motion to Dismiss ("Defs. Memo."). See, e.g., Dilibero v. Mortgage Elec. Reg. Sys., 108 A.3d 1013, 1016 (R.I. 2015) (citing Chhun v. Mortgage Elec. Reg. Sys., 84 A.3d 419, 422-23 (R.I. 2014) ("After a review of the hearing justice's decision, it appears that he relied upon the standard articulated in Iqbal, despite the fact that this Court has yet to adopt that standard. * * * Instead, under Rhode Island law, the hearing justice was required to 'assume all allegations [contained in the complaint] are true, resolving any doubts in [the] plaintiff's favor.'"); Ho-Rath v. R.I. Hospital, 2015 R.I. LEXIS 63 at *7-8, 89 A.3d 806 (R.I. 2015) (applying Rhode Island standard of review without reference to federal standard). Accordingly, the more stringent standard of review urged by Defendants is entirely inapplicable.

January 2006 when it found and declared that:

"(1) Modern medical research has discovered beneficial uses for marijuana in treating or alleviating pain, nausea, and other symptoms associated with certain debilitating medical conditions, as found by the National Academy of Sciences' Institute of Medicine in March 1999.

(2) According to the U.S. Sentencing Commission and the Federal Bureau of Investigation, ninety-nine (99) out of every one hundred (100) marijuana arrests in the United States are made under state law, rather than under federal law. Consequently, changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marijuana.

(3) Although federal law currently prohibits any use of marijuana, the laws of Alaska, California, Colorado, Hawaii, Maine, Montana, Nevada, Oregon, Vermont, and Washington permit the medical use and cultivation of marijuana. Rhode Island joins in this effort for the health and welfare of its citizens.

(4) States are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law. Therefore, compliance with this chapter does not put the state of Rhode Island in violation of federal law.

(5) State law should make a distinction between the medical and nonmedical use of marijuana. Hence, the purpose of this chapter is to protect patients with debilitating medical conditions, and their physicians and primary caregivers, from arrest and prosecution, criminal and other penalties, and property forfeiture if such patients engage in the medical use of marijuana.

(6) The general assembly enacts this chapter pursuant to its police power to enact legislation for the protection of the health of its citizens, as reserved to the state in the Tenth Amendment of the United States Constitution.

(7) It is in the state's interests of public safety, public welfare, and the integrity of the medical marijuana program to ensure that the possession and cultivation of marijuana for the sole purpose of

> medical use for alleviating symptoms caused by debilitating medical conditions is adequately regulated." (emphasis added).

Accordingly, in Rhode Island, the use of marijuana for medical purposes is legal for people who first establish that they suffer from a "debilitating medical condition" and are otherwise determined eligible by a medical practitioner[6] and the State Department of Health. G.L. 1956 §§ 21-28.6-3, 21-28.6-6. In order to be a lawful user, the patient must be a qualifying cardholder. §§ 21-28.6-4, 21-28.6-3(1) ("'Cardholder' means a qualifying patient or a primary caregiver who has registered with the department and has been issued and possesses a valid registry identification card."). This case concerns the issue of whether an employer can refuse to hire a person based on her lawful marijuana use outside the workplace. While resolution of this question has been difficult in states in which the medical marijuana law is void of employment protections there is no uncertainty in Rhode Island given the protections set forth in the HSMMA.

2. The HSMMA Prohibits Consideration of Lawful Medical Marijuana Program Participation in Hiring Decisions.

The General Assembly very clearly has prohibited employers from considering cardholder status in hiring decisions. In particular, pursuant to § 21-28.6-4,

> "(c) No school, employer, or landlord may refuse to enroll, employ, or lease to, or otherwise penalize, a person solely for his or her status as a cardholder. Provided, however, due to the safety and welfare concern for other tenants, the property, and the public, as a whole, a landlord may have the discretion not to lease, or continue to lease, to a cardholder who cultivates marijuana in the leased premises." (emphasis added).

[6] For purposes of the HSMMA "'Practitioner' means a person who is licensed with authority to prescribe drugs pursuant to chapter 37 of title 5 or a physician licensed with authority to prescribe drugs in Massachusetts or Connecticut." Chapter 37 of title 5 is the section of the General Laws regulating the practice of medicine in Rhode Island and which authorizes medical doctors to prescribe medication. G.L. 1956 § 5-37-1 et seq.

A person cannot be a lawful user of medical marijuana under the HSMMA without also being a cardholder. Thus, if a cardholder alleges that an employer fails to hire her because she is a medical marijuana patient (which also means she uses marijuana) this necessarily invokes the protections of the statute (and states a claim upon which relief may be granted). In this case, Plaintiff alleges that upon informing Defendants that she is a medical marijuana cardholder and explaining that she will only use medical marijuana outside the workplace to treat her migraine headaches she was not hired. Whether the specific words used by the Defendants to support the decision were "we are not hiring you because you are a cardholder," or "we are not hiring you because you are a medical marijuana user" makes no difference in terms of stating a claim under the statute because the concept is the same.

That the use of the term cardholder status is an inclusive and not exclusive term is supported by § 21-28.6-7 which eliminates protection for lawful users only in discrete instances. In particular, section 21-28.6-7 provides the following is not permitted:

> "(1) Any person to undertake any task under the influence of marijuana, when doing so would constitute negligence or professional malpractice;
>
> (2) The smoking of marijuana:
> (i) In a school bus or other form of public transportation;
> (ii) On any school grounds;
> (iii) In any correctional facility;
> (iv) In any public place;
> (v) In any licensed drug treatment facility in this state; or
> (vi) Where exposure to the marijuana smoke significantly adversely affects the health, safety, or welfare of children.
>
> (3) Any person to operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marijuana. However, a registered qualifying patient

> shall not be considered to be under the influence solely for having marijuana metabolites in his or her system.
>
> (b) Nothing in this chapter shall be construed to require:
> (1) A government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana; or
> (2) An employer to accommodate the medical use of marijuana in any workplace.
>
> (c) Fraudulent representation to a law enforcement official of any fact or circumstance relating to the medical use of marijuana to avoid arrest or prosecution shall be punishable by a fine of five hundred dollars ($500) which shall be in addition to any other penalties that may apply for making a false statement for the nonmedical use of marijuana."

Significantly, § 21-28.6-7 contains only one exception to the broad protection offered by the HSMMA as it relates to employment – an employer is not required to accommodate the use of medical marijuana in the workplace itself. § 21-28.6-7(b). It is well settled that in construing statutes, the courts' "ultimate goal" is to give "effect to that purpose which our Legislature intended in crafting the statutory language." McCain v. Town of N. Providence, 41 A.3d 239, 243 (R.I. 2012) (quoting Webster v. Perotta, 774 A.2d 68, 75 (R.I. 2001)).

Here, the General Assembly clearly struck a balance between employers and employees in a manner it deemed appropriate – it barred employers from making hiring decisions based on lawful use but made clear employers need not accommodate the lawful use in the physical workspace.

Defendants urge that Plaintiff's claim under Count III must be dismissed because even if the company refused to hire Plaintiff based on medical marijuana status, her claim fails because the HSMMA prohibits discrimination only if it based upon "cardholder status." Defendants

advocate that discrimination based upon cardholder status must be strictly construed not to include discrimination based on medical marijuana patient status or use.[7]

To the extent that the Defendants argue that there is no protection against employment discrimination unless a patient can establish (1) that the decision at issue was based on cardholder status and (2) that the "cardholder status" discrimination has nothing to do with actual use or participation in the program, this contention may be swiftly rejected as it is entirely inconsistent with the express, plain language and purpose of the HSMMA and the directive to liberally construe the chapter to "effectuate the purposes thereof." § 21-28.6-13.

In fact, had the General Assembly intended that employers could consider medical marijuana use or participation in the program as a negative factor in the hiring decision (even if there is no workplace use), then § 21-28.6-4(c) never would have been included. Given that "statutes should not be construed to achieve meaningless or absurd results," the tortured construction advanced by the Defendants must be rejected. McCain, 41 A.3d at 243-44 (quoting Ryan v. City of Providence, 11 A.3d 68, 71 (R.I. 2011)).

Further, if accepted, Defendants' argument would render the HSMMA's employment protection a nullity because a violation of HSMMA would be impossible to prove – how does one prove that an employer's decision was solely because of "cardholder status" if that term has no relation to the fact that a patient is a lawful user (i.e., a cardholder must prove that the employer

[7] Defendants also argue that assuming its construction of the HSMMA is accurate (that claims are limited to discrimination based on cardholder status with that term being defined as excluding lawful use) Plaintiff needed to expressly plead that Defendants' failed to hire her was "solely because of her cardholder status," in order to survive the motion to dismiss. Defs. Memo, p. 16-17. This argument must also be rejected as it imposes a heightened standard of pleading not required in Rhode Island. See supra section III.

did not hire her because of a medical marijuana card but that use of the card had absolutely nothing to do with the decision). This construction is simply senseless.

Accordingly, Rhode Island employers may not refuse to hire or otherwise penalize cardholders in the context of employment – and, they are required to accommodate the use of medical marijuana by employees so long as it is not used within the workplace itself. These plain and unambiguous words mean that whether Defendants' decision is characterized as a decision based on cardholder status or a decision based on marijuana use is irrelevant. Both are prohibited by the HSMMA because one is subsumed by the other. Thus, Defendants have simply failed to demonstrate "beyond a reasonable doubt" that Plaintiff is not entitled to relief under any conceivable set of facts on her claim that the HSMMA prohibited Defendants from refusing to hire her after she disclosed her status as a lawful user.

3. The Impact (or Not) of Other State Law Decisions Concerning Employment Protections for Medical Marijuana Patients.

Defendants cite several state court decisions to support the contention that employment protections are not available for medical marijuana patients. To date, it does not appear that any are directly on point given that none have addressed language similar to § 21-28.6-4 in the context of a decision not to hire a medical marijuana patient. For example, while the Colorado Supreme Court recently held that a medical marijuana patient who engages in activity permitted by state law but prohibited by federal law is not protected by "the statute," in the event of discharge, the state law at issue did not expressly prohibit employers from considering medical marijuana status in employment decisions. See Coats v. Dish Network, LLC, 2015 Colo. LEXIS 520 (Colo., filed June 20, 2015). Instead, the statute at issue called the "lawful activities statute" provided "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 certain exceptions apply." Id. at 15. The sole question before the Court was whether medical marijuana use under state law was a "lawful activity" for purposes of the statute. Id. at 1. The plaintiff argued that "lawful" for purposes of the statute meant "lawful under state law," while the employer urged that the definition of lawful must encompass both state and federal law. Accordingly, the Court found that the lawful activities statute did not provide the protection sought by Coats.

Because Coats did not address the viability of employment protections contained in a state medical marijuana statute under comparable language, it is without impact.

The Washington Supreme Court also addressed its medical marijuana statute in the context of an employment dispute, but again, because of the disparate statutory language, it has no persuasive value for the Defendants. In Roe v. TeleTech Customer Care Management, the court affirmed dismissal of the plaintiff's complaint finding that it failed to state a valid claim under Washington's medical marijuana statute. 257 P.3d 518, 536 (Wash. 2011). The Washington law did not contain any language indicating that employers were prohibited from discharging employees for medical marijuana use. Roe argued the statute contained such protection by implication in three separate provisions of the statute.

> "She first argues that MUMA's preamble, codified at former RCW 69.51A.005, demonstrates that Washington voters 'intended the law to do much more than just protect qualifying patients from criminal prosecution.' * * * MUMA's preamble expresses the broad purpose of allowing physicians to 'authorize the medical use of marijuana by patients with terminal or debilitating illnesses.' * * * But the preamble also explicitly expresses MUMA's intent that '[q]ualifying patients * * *shall not be found guilty of a crime under state law for their possession and limited use of marijuana' and that physicians 'be excepted from liability and

prosecution for the authorization of marijuana use to qualifying patients.' * * * The average informed lay voter would understand from reading MUMA's preamble that it was intended to address one subject—criminal prosecutions, from a physician's decision to recommend, and a patient's decision to use, marijuana as treatment for a terminal or debilitating illness. Although employer drug policies may also present an obstacle to a qualified patient's decision to use medical marijuana, the plain language of MUMA's preamble does not demonstrate any intent to address employers' hiring practices, nor does it preclude the operation of drug-free businesses. * * *

Next, Roe argues that former RCW 69.51A.040(1) implies a civil remedy because it explicitly prohibits the denial of 'any right or privilege' to qualified patients using medical marijuana in accordance with MUMA. But Roe reads only the second sentence and takes it out of context. In its entirety former RCW 69.51A.040(1) states:

'If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver who assists a qualifying patient in the medical use of marijuana, will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter. Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.'

An average lay voter reading this provision in context would not understand it to prohibit private employers from maintaining a drug-free workplace and terminating employees who use medical marijuana. The prohibition against 'penaliz[ing] in any manner, or den[ying] any right or privilege' follows that provision's earlier limiting reference to those charged with violating a state criminal law relating to marijuana—that is, those charged and subject to criminal prosecution. * * * The average voter would interpret this language as restricting the State from imposing penalties ancillary to criminal prosecution.

Last, Roe argues that former RCW 69.51A.060(4) (1999)'s statement that '[n]othing in this chapter requires any accommodation of any medical use of marijuana in any place of

> employment' implies that employers must accommodate an employee's offsite use of medical marijuana. But when interpreting the language of a voter initiative, we do not read into the initiative 'technical and debatable legal distinction[s]' that are not apparent to the average informed lay voter. * * * Here, the average informed lay voter would not read this provision as creating a corollary duty for employers to accommodate an employee's medical use of marijuana outside the workplace **where MUMA expressly creates no such duty inside the workplace.** To the contrary, absent the strained construction Roe urges, the provision implies that MUMA will place no requirements on employers or places of employment. Moreover, it is unlikely that voters intended to create such a sweeping change to current employment practices, as Roe suggests, through a negative implication, when prior statutes imposing duties on private employers have done so only with explicit language." Id. at 398-99 (emphasis added).

Significantly, Roe actually supports denial of the instant motion to dismiss because on each point, Rhode Island law provides the very protection that the Washington law lacked.[8] First, while Roe was forced to attempt to find employment protection in reliance on the preamble to the legislation, which she urged did more than protect users from criminal prosecution, the Rhode Island law expressly contains "[P]rotections for the medical use of marijuana" that includes prohibition that "(c) No school, employer, or landlord may refuse to enroll, employ, or lease to, or otherwise penalize, a person solely for his or her status as a cardholder. * * *." (emphasis added).

Accordingly, in stark contrast to Washington law, the plain language of the HSMMA does demonstrate an intent to address employer hiring practices.

[8] Furthermore, because Washington law existed only by voter initiative, the court was required to examine the statute under a very different lens than this Court –refusing to adopt any interpretation that would not be apparent to an average informed lay voter. See Roe, 257 P.3d at 397. Here, the Court is under no such constraint. To the contrary, this Court must construe the HSMMA liberally in order to effectuate its purpose – to protect the health and welfare of its citizens who engage in authorized medical marijuana use and, among other things, who may be subject to adverse employment actions because of that status. See G.L. 1956 § 21-28.6-2, § 21-28.6-4.

Next, while Roe argued the law prohibited the denial of any right or privilege to an authorized which included employer protection the court rejected that claim because the language was taken out of context - - in the Washington statute the "no penalty" language was contained in a section which spoke only to those who were charged with a criminal offense and the availability of an affirmative defense in response to that charge. By comparison, when the General Assembly included very broad language protecting users from being denied "any right or privilege" "for the medical use of marijuana," it did so in a way that made clear it included the denial of any right or privilege in connection with employment opportunity. In particular, § 21-28.6-4(a) (contained in the same "protections for use of medical marijuana" section) provides that:

> "(a) A patient cardholder who has in his or her possession a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, **including, but not limited to**, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marijuana; provided, that the patient cardholder possesses an amount of marijuana that does not exceed twelve (12) mature marijuana plants and two and one-half (2.5) ounces of usable marijuana. Said plants shall be stored in an indoor facility. * * *

Accordingly, unlike Washington law, a Rhode Island medical marijuana cardholder may not be denied **any** right or privilege.

Finally, Roe attempted to rely on language indicating that "[n]othing in this chapter requires any accommodation of any medical use of marijuana in any place of employment" to imply that employers must accommodate an employee's offsite use of medical marijuana. Significantly, this same language exists in the HSMMA and like Roe, the Plaintiff takes the position that it means employers are required to accommodate employee offsite use of medical marijuana. While the Washington court rejected Roe's argument, the exact opposite conclusion is

required here because the HSMMA does prohibit employers from refusing to hire cardholders, does prohibit employers from otherwise penalizing cardholders, and does prohibit the denial of any right or privilege to cardholders. Accordingly, there can be no question that employers are required to accommodate the use of medical marijuana in Rhode Island so long as it is not used in the workplace. To provide otherwise would create an absurd result because if employers are not required to accommodate an employee's off-site use of medical marijuana in Rhode Island, the language prohibiting employers from taking adverse job action against prospective or current employees would be a nullity.

Accordingly, the Defendants attempt to draw analogies to other state court decisions declining to afford protections in employment to medical marijuana cardholders must be rejected given the absence of employment protection in other state laws.

4. The HSMMA Contains an Implied Private Right of Action.

Defendant argues that even if employers are prohibited from refusing to hire lawful users under the HSMMA, those patients have no remedy from the employer who engaged in the prohibited conduct. Defendants conveniently ignore well-settled law implying private rights of action in civil rights and employment laws. See Cannon v. University of Chicago, 441 U.S. 677, 60 L.Ed.2d 560, 99 S.Ct. 1946 (1979) (finding implied right of action in Title IX for gender-based discrimination in medical school admissions based on Cort test); Cort v. Ash, 422 U.S. 66, 78, 45 L.Ed.2d 26, 36-37, 95 S.Ct. 2080 (1975) (creating four prong test for establishing implied private right of action); Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922, 925 (1st Cir. 1983) (finding an implied right of action in the Railway Labor Act for employees who have discharged for organizing activity).

In Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) Chief Justice Marshall set froth that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Many years later, the United States Supreme Court developed a four-part test to assist in determining if in fact Congress implied a private right of action in a particular statute so that, under the right circumstances, where there is a right, there is a remedy. See also Restatement (Second) of Torts § 874A (1979) (recognizing implied right of action).

> "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' * * * that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? * * * Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? * * * * And finally, is the cause of action traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" Hurley v. Allied Chem. Corp., 164 W. Va. 268, 272, 262 S.E.2d 757 (Sup. Ct. App. W. Va. 1980) (internal citations omitted); see also Stepanischen, 722 F.2d at 926.

A review of the facts of Cannon and the application of the four-part test supports Plaintiff's position that an implied right of action exists in the HSMMA. Having been denied admission to the University of Chicago's medical school, Cannon challenged the decision under Title IX given its receipt of federal funds. 411 U.S. at 680. The Court of Appeals affirmed dismissal of plaintiff's complaint on the basis that Title IX contained no private right of action. Although Title IX prohibited sex-based discrimination in programs receiving federal funds, it contained no provision

for a civil remedy. Id. at 680-83.[9] In support of dismissal, the lower court noted that Title IX allowed for a process to terminate the receipt of federal funds in response to a violation and reasoned that if Congress intended for an additional remedy it would have been provided. Id. at 683-84.

On review, the Supreme Court rejected the lower court's reasoning and concluded Title IX did contain an implied right of action. Id. at 689-708. First, the Court found it clear that Title IX was enacted for the benefit of a special class and that plaintiff was a member. In reaching this conclusion, the Court cited to prior decisions involving employee and voting rights. Id. at 689 (citing Texas & Pacific Railroad Co. v. Rigsby, 241 U.S. 33, 40 (1916); Allen v. State Bd. of Elections, 393 U.S. 544-555 (1969)). The Court noted that the language in the statutes "expressly identifies the class Congress intended to benefit" in contrast to statutes "for the protection of the general public." Id. at 690.

Here, the HSMMA was expressly enacted to benefit "patients with debilitating medical conditions * * * if such patients engage in the medical use of marijuana." § 21-28.6-2(5). There is no dispute that Plaintiff is one of these patients. Given that this is not a statute to benefit the general public and instead, is designed to benefit a particular class, "the first of the four factors identified in Cort favors the implication of a private cause of action." Cannon, 441 U.S. at 693-94.

Turning to the second factor, the Cannon Court examined the legislative history of Title IX. Id. at 694. There, the Court stated that "[w]e must recognize, however, that the legislative

[9] Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *." Id. at 682 (quoting 20 U.S.C. § 1681).

history of a statute that does not expressly or deny a private remedy will typically be equally silent or ambiguous on the question. Therefore, in situations such as the present on 'in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." Id. (emphasis in original); Hurley, 164 W.Va. at 271 n. 3 ("By the very nature of the inquiry, the problem exists as to those statutes which are silent concerning the right to a private cause of action."). The Court then proceeded to examine the legislative history of Title IX finding that it did not indicate any purpose to deny a private cause of action.

In this case, the task is quite simple for the Court because there is no evidence that it intended to deny a private right of action, and instead, given its clear purpose and directive to construe the remedial statute liberally, not inferring such a right would be inconsistent with that purpose.

Next, the Cannon Court addressed the third factor – whether a "private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme. On the other hand, when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." Id. at 703. Here, it is clear that providing a cause of action in the event an employer violates § 21-28.6-4 would not frustrate the purposes of the HSMMA but rather would be entirely consistent with the statutory purposes and directives. Thus, all factors weigh in favor of finding an implied right of action for cardholders who are not hired because of their participation in the program in violation of § 21-28.6-4.

State courts follow the federal test relating to implied private rights of action. See, e.g., All Brands Container Recovery, Inc. v. Merrimack Valley Dist. Co., 54 Mass. App. Ct. 297, 301-02 (App. Ct. Mass. 2002) (rejecting implied right of action in Massachusetts "bottle bill" related to bottle recycling); cf. Bennett v. Hardy, 784 P.2d 1258 (Wash. 1990) (finding implied private right of action in state age discrimination statute); Heller v. Dover Warehouse Market, Inc., 515 A.2d 178 (Super. Ct. De. 1986) (finding implied private right of action in employment-related anti-polygraph statute); Hurley, 262 S.E.2d at 760 (finding implied private right of action in state employment statute that prohibited discrimination based upon mental health treatment).[10]

In Heller, the Court noted that the Delaware statute at issue provided for criminal penalties in response to a violation of the anti-polygraph statute but said nothing about a civil remedy to address an employer-violation of the statute. In analyzing the second element of the test, the Court noted that the Delaware statute had a dual purpose "to assure an employee or prospective employee that he or she will not be subjected to a polygraph examination as a condition of employment or continuation of employment and to penalize an employer who requires, requests or causes such a test to be administered." 515 A.2d at 180-81. The Court noted that in another case, when a statute had a dual purpose, but the available remedy addressed only one of the purposes, a private cause of action was implied. "As in the Callaway case, a fine or term of imprisonment imposed on the

[10] Like the Rhode Island Supreme Court, prior to Hurley the West Virginia Supreme Court had not previously given "detailed consideration to the question of under what circumstances a statute gives rise to an implied private cause of action." 164 W. Va. at 270. The facts were similar – Hurley applied for a job and was hired but after he disclosed treatment for depression, the offer was withdrawn. Id. at 269. He sought to sue the employer under a state law which provided that "[n]o person shall be deprived of any civil right solely by reason of his receipt of services for mental illness * * *." Id. at 270 n. 2. In Hurley, the Court concluded that the statute at issue created an implied private right of action against a private employer who denies employment on the basis of receipt of mental health services. Id. at 282.

employer does not provide redress for damages proximately caused by the violation of the statute." Id. at 181 (citing Callaway v. N.B. Downing Co., 172 A.2d 260 (Del. Super. Ct. 1961)). Because there would otherwise be no remedy for one of the purposes of the statute, and because there was no prohibition against a civil remedy in the statute, the Court found that the second factor weighed in favor of finding a private right of action.

Defendants urge that the Rhode Island Supreme Court prefers not to find private rights of action by implication. More accurately, it appears the Court has not directly addressed the applicability of the federal test, and certainly appears not to have faced the question of an implied private action in an employment-rights-creating statute. Significantly, however, the Rhode Island Supreme Court has acknowledged the possibility that a future scenario may lead it to find such an action exists by implication. See Bandoni v. State, 715 A.2d 580, 585 (R.I. 1998) ("Therefore, whatever the merits of the Bandonis' claim may be, we are of the opinion that principles of judicial restraint prevent us from creating a cause of action where a duty to apprise crime victims of their rights did not exist at common law and where our Legislature has neither by express terms nor by implication provided for civil liability.") (emphasis added).[11] Thus, if presented with "evidence to suggest that the Legislature had intended to create a cause of action," it certainly may declare such an action exists. Id. This case presents such an opportunity.

[11] Bandoni can be distinguished. The statutory scheme at issue was entirely different in nature. It provided crime victims with the right to be heard prior to sentencing but was not an employment or civil rights statute – it did not by its plain words afford broad protections in employment for a particular class of people like the HSMMA. Of further interest is the fact that had the Court found an implied private action it would have the effect of providing a significant remedy against the State for failing to meet administrative obligations. See also Tarzia v. State, 44 A.3d at 1257 (refusing to imply cause of action against municipality for failing to properly seal his court records).

The Defendants make much of the fact that the HSMMA contains other enforcement provisions and that other statutes (outside the HSMMA) provide for civil remedies. Defs. Memo, p. 14. In particular, Defendants argue that the statute contains provisions for civil penalties, criminal sanctions and injunctive relief in the event of violations of certain parts of the statute and if it intended to provide a civil remedy for refusal to hire a prospective cardholder-applicant, it would have done so. Id. Further, it points to other employment-related state laws that do contain express private rights of action as evidence of the General Assembly's intent not to provide such a remedy in the HSMMA. This reasoning was expressly rejected by the United States Supreme Court in Cannon. 411 U.S. at 711.

In Cannon, the University pointed out that Congress provided for private rights of action in other statutes and thus, the absence of such a provision must signal a decision not to provide the remedy. In response the Court stated "[t]he fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section. * * * Rather, the Court has generally avoided this type of 'excursion into extrapolation of legislative intent, * * * unless there is other, more convincing evidence that Congress meant to exclude the remedy." Id. (internal citations omitted); see also Stepanischen, 722 F.2d at 926-27 ("MDT argues that the enactment of express criminal penalties enforceable solely by the Attorney General indicates congressional intent to preclude enforcement by private parties in implied civil actions. * * * The Court stated in the same year as Transamerica, however, that the provision of express remedies in one portion of a complex statutory scheme does not provide sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section. * * * Thus, in Cannon, the express penalty of termination of

federal funds to any institution that violated the substantive protections of Title IX did not preclude an implied private cause of action. And last term in Huddleston, the existence of an express remedy under § 11 of the Securities Act of 1933 did not preclude the Court from continuing to infer a private right of action under § 10(b) of the Securities Exchange Act of 1934. The Court explicitly rejected the maxim of statutory construction that the express provision of one remedy mandates the exclusion of all others.").

Finally, even if the Rhode Island Supreme Court has not expressly adopted the federal test, the Court has recognized that actions for negligence arise from statutes that create a duty but do not contain a private right of action under the statute. See Stebbins v. Wells, 818 A.2d 711 (R.I. 2003). In Stebbins, the Court found no private right of action for damages in G.L. 1956 § 5-20.8-1 et seq. Id. at 715-16. Despite providing that the buyer could not sue for damages directly under § 5-20.8-5, the Court held that the buyer could sue the same parties for negligence based on the duty that arose from § 5-20.8-5. Id. at 716-17. "Although the Legislature has not included a provision within the act allowing buyers to sue sellers and real-estate agents for damages resulting from their alleged violations of the act, this does not prevent this statute, or other applicable provisions of the General Laws, from creating a duty on the part of real-estate agents and sellers to disclose material defects to buyers when the defects satisfy the conditions mandating their disclosure under chapter 20.8 of title 5 and otherwise fall within the agent's personal knowledge." Id. (emphasis added).

Based on the language of the statute, the Court found it "anticipates that an agent could be held liable for information provided or not provided to a buyer concerning the real estate in question, if the above-specified conditions are not satisfied." Id. at 718. In this case, the Court was

not persuaded that the absence of an express private right of action did not exist in the statute because "[i]t is evident to us that the overall purpose of the act is to set forth a standard of disclosure for sellers and their agents before the transfer of real estate occurs" and as such "[a]n alleged breach of that duty can be the basis for a negligence claim * * *." Id. at 718-19.

The Stebbins case is critical, not just because it means that Plaintiffs' claim under Count III may stand as a negligence claim because of the duty created under § 21-28.6-4, but also because it demonstrates the resolve not to leave a plaintiff without remedy when a statute so clearly establishes a duty.

While it would have been the "far better course" for the General Assembly to specify a private cause of action expressly within the HSMMA, "under certain limited circumstances the failure of [the General Assembly] to do so is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation. Cannon, 411 U.S. at 717. Based on the three factors set forth above, [12] it is clear that the General Assembly has implied a cause of action under the HSMMA that should be recognized by this Court in order to fully effectuate the purposes of the statute in the employment context and Defendants' Motion as it relates to Count III should be denied. Notwithstanding the viability of the implied private right of action, Plaintiffs claim may stand as one sounding in negligence given the duty created by the statute under the doctrine set forth in Stebbins.

[12] Some state courts simply ignore the fourth factor considering its inapplicability to the state law analysis. See Kelly v. Parents United, 641 A.2d 159 (D.C. Ct. App. 1994) (applying the first three elements of the test) Heller, 515 A.2d at 179 (same); Hurley, 262 S.E.2d at 760 ("It is also apparent that the fourth and final element of the Cort test, whether the cause of action attempted to be inferred from the statute is 'traditionally relegated to state law,' is not applicable to a state statute.").

5. The HSMMA's Employment Protections are not Preempted by Federal Law. [13]

Defendants contend that even if the HSMMA prohibits employers from considering legal marijuana use as a negative factor in employment decisions, the statute is preempted by federal law. Specifically, the Defendants argue that the CSA allows it to ignore HSMMA. This claim must also be rejected.

"The Supremacy Clause of the United States Constitution, Article VI, clause 2, preempts or invalidates state law that interferes or conflicts with any federal law. The preemption doctrine encompasses three types of preemption: (1) express preemption, (2) field preemption, and (3) conflict preemption." Verizon New England, Inc. v. R.I. Public Utilities Commission, 822 A.2d 187, 193 (R.I. 2003) (citing Shaw v. Delta Airlines, Inc., 463 U.S. 85, 95-96, 103 S.Ct. 2980, 2899-900, 77 L.Ed. 2d 490, 500-01 (1983)). An examination of each of the three possible preemption doctrines reveals that none may operate to excuse the Defendants from adhering to state law obligations.

"Express preemption" requires "(1) that the statute expressly provide that it shall supersede related state law, and (2) that the state enactment falls within the class of law that Congress intended to preempt." Id. at 192-93 (citing Gade v. National Solid Wastes Mgmt. Assoc., 505 U.S. 88, 95-97, 112 S.Ct. 2374, 2382, 120 L.Ed.2d 73, 83 (1992)). Here, the CSA does not expressly

[13] Defendants also raise the preemption argument as to the RICRA claim in Count II. The reasoning set forth in this section is equally applicable given the lack of any intention by Congress in the CSA to preempt state law regulation of civil rights. Significantly, even federal civil rights laws do not preempt state civil rights laws, and thus, a federal criminal statute dealing with controlled substances cannot preempt a state civil rights act.

provide that it shall supersede state law. To the contrary, the CSA provides that it shall not be construed to preempt state law. See 21 U.S.C. § 903 ("No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together."); see also Reed-Kaliher v. Hoggatt, 347 P.3d 136, 141 (Ariz. 2015) (no express preemption of state medical marijuana law by the CSA); Beek v. City of Wyoming, 846 N.W.2d 531, 537 (Mich. 2014) (no express preemption of state medical marijuana law by the CSA). Thus, Defendants cannot rely on express preemption as an excuse to refuse compliance with the HSMMA.

"In the absence of express preemption * * * there is a strong basic assumption that Congress did not intend to displace state law."[14] Ohler v. Purdue Pharma, LP, 2012 U.S. Dist. LEXIS 2368, at *40 (E.D. La. 2002) (citing Maryland v. Louisiana, 451 U.S. 725, 726, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981)). "The two remaining types of preemption reflect the congressional intent to preempt state laws based upon 'the federal statute's "structure and purpose."'" Verizon New England, 822 A.2d at 193 (quoting Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25,

[14] As the Ohler Court noted, "the Supreme Court highlighted two presumptions about the nature of preemption: (1) 'Congress does not cavalierly pre-empt state law causes of action * * * particularly in those cases in which Congress has "legislated * * * in a field which the States have traditionally occupied;"' and (2) 'the presumption against pre-emption of state police power' applies to both the question of whether Congress intended preemption at all and to the determination of the scope of an intended invalidation of state law. 518 U.S. at 485 (citations omitted). * * * 'That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.'" Id. at *41-42 (emphasis added).

31, 116 S.Ct. 1103, 1108, 134 L.Ed 2d 237, 244 (1996)). "Field preemption prohibits state regulations in an area in which Congress implemented a comprehensive regulatory framework, thereby indicating its intention to reserve that area solely for federal control." Id. (citing Id.). Field preemption is ruled out as a possible defense for the same reason as express preemption. The language in § 903 makes clear that the government did not intend to occupy the field.

This leaves only conflict preemption as a possible argument – and this too must be rejected by the Court. "Conflict preemption exists when 'compliance with both federal and state regulations is a physical impossibility,' Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S.Ct. 1201, 1217, 10 L.Ed. 2d 248, 257 (1963), 'and where "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Verizon New England, 822 A.2d at 193 (citing Crosby v. National Foreign Trade Council, 530 U.S. 363, 373, 120 S. Ct. 2288, 2294, 147 L. Ed. 2d 352, 361 (2000)) (emphasis added).

"Impossibility pre-emption is a demanding defense, * * * and requires more than '[t]he existence of a hypothetical or potential conflict, * * *." Beek, 846 N.W.2d at 537. "The mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power.[15] * * * What constitutes a sufficient obstacle 'is a matter of judgment,' to be informed by reference to the overall federal statutory scheme. ** * finding of conflict preemption 'turns on the identification of "actual conflict,"' * * * and a court 'should not find pre-emption too readily in

[15] The General Assembly's enactment of the HSMMA was "pursuant to its police power to enact legislation for the protection of the health of its citizens, as reserved to the state in the Tenth Amendment of the United States Constitution." § 21-28.6-2(6).

the absence of clear evidence of a conflict.'" Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp.2d 295, 356 (D. Vt. 2007) (internal citations omitted) (emphasis added).

Here, the critical question is as follows: If Defendants cannot consider that Plaintiff is a lawful user of marijuana under state law in determining whether to hire her or not, is there a violation of federal law or is federal enforcement prohibited as to the Plaintiff? The answer is clearly no. First, by requiring Defendants to consider Plaintiff as a candidate for employment on the merits of her application and not her medical marijuana status, the Defendants themselves have not violated the CSA. The Defendants, nor their agents, are being required to use marijuana or engage in any act that is directly prohibited by the CSA. Simply put, the CSA does not prohibit employers from hiring people who participate in state law-sponsored medical marijuana programs. Given there is no prohibition against such a hiring, there is no conflict created should the Defendants be required to adhere to state law.

Furthermore, the HSMMA does not prohibit federal enforcement of the CSA. In the event Defendants were to hire Plaintiff, this would have no effect on the federal government's ability to enforce the CSA against Plaintiff if it so decided."[16] In all events, it has been established that the

[16] Of course, it would be extremely unlikely for the federal government to enforce the CSA in relation to medical marijuana patients because "the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above. See Guidance Regarding Marijuana Enforcement, Aug. 29, 2013, U.S. Department of Justice ("DOJ"), p. 2. The "harm listed above" is a list of DOJ enforcement priorities as it relates to the CSA and marijuana – none of which include prosecution of people authorized to use medical marijuana under state law. DOJ Memo, p. 1-2. This Court can take judicial notice of the DOJ's Guidance.

state is primarily responsible for the prosecution of those who illegally use marijuana and not the federal government. In particular,

> "(2) According to the U.S. Sentencing Commission and the Federal Bureau of Investigation, ninety-nine (99) out of every one hundred (100) marijuana arrests in the United States are made under state law, rather than under federal law. Consequently, changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marijuana. * * *
>
> (4) States are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law. Therefore, compliance with this chapter does not put the state of Rhode Island in violation of federal law." (emphasis added).

While it is certainly unlikely that the federal government would enforce the CSA against the Plaintiff in response to her state-sanctioned medical marijuana use, even if it did, this is not a basis upon which to find federal preemption for the reasons set forth in § 21-28.6-2(4). Like the State, the Defendants, as prospective employers, are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law. Therefore, compliance with the HSMMA does not require the Defendant to violate federal law.

Both the Michigan and Arizona Supreme Courts have recently issued decisions rejecting application of conflict preemption to state medical marijuana laws based upon the CSA. Beek, 846 N.W.2d 531; Reed-Kaliher, 347 P.3d 136; see also Qualified Patients Ass'n v. City of Anaheim, 2010 Cal. App. LEXIS 1446 (Ct. App. Cal. 4th 2010) (rejecting claim that CSA preempts state medical marijuana law); City of Garden Grove v. Superior Court, 2007 Cal. App. LEXIS 1953, at *56 (Ct. App. Cal. 4th 2007) (same); People v. Crouse, 2013 Colo. App. LEXIS 1971 at *19 (Colo. Ct. App. 2013) (same). In Beek, the state enacted a medical marijuana law but a municipality enacted an ordinance providing that uses contrary to federal law were not permitted

making it impossible for one of its residents to take advantage of the state program without offending the ordinance. Id. at 534. In rejecting the preemption argument, the Court found as follows:

> "The CSA criminalizes marijuana, making its manufacture, distribution, or possession a punishable offense under federal law. Section 4(a) of the MMMA does not require anyone to commit that offense, however, nor does it prohibit punishment of that offense under federal law. Rather, the MMMA is clear that, if certain individuals choose to engage in MMMA-compliant medical marijuana use, § 4(a) provides them with limited state-law immunity from 'arrest, prosecution, or penalty in any manner' – an immunity that does not purport to prohibit federal criminalization of, or punishment for, that conduct." Beek, 846 N.W.2d at 537.

In Beek, the City argued that the state medical marijuana law "forces it, as well as the State of Michigan and every other municipality therein, to 'ignore' the CSA." Id. at 538. The Court declared that this was "not the precise question" in the preemption analysis. (emphasis added). Instead, the question in the preemption analysis is whether it is impossible to comply with both the CSA and the state law. Since the CSA did not require the municipality to do anything, there could be no conflict. Finally, the Court noted that the state act did not "stand as an obstacle to the accomplishment and execution of the full purposes and us objectives of the CSA," because it does not prevent the CSA from accomplishing its purpose. Id.

This is because the "immunity does not purport to alter the CSA's federal criminalization of marijuana, or to interfere with or undermine federal enforcement of that prohibition. The CSA, meanwhile, by expressly declining to occupy the field of regulating marijuana, 21 U.S.C. § 903 'explicitly contemplates a role for the state' in that regard * * *and there is no indication that the CSA's purpose or objective was to require states to enforce its prohibitions. Indeed, as noted Congress lacks the constitutional authority to impose such an obligation." Id.; see also Reed-

Kaliher, 347 P.3d at 21 (finding no conflict created by court removal of probation condition which would have required probationer-medical marijuana patient to comply with federal law); Braska v. Challenge Mfg. Co., 2014 Mich. App. LEXIS 2112 (Ct. App. Mich. 2014) (holding medical marijuana patient eligible for unemployment benefits as lawful participation did not constitute misconduct despite CSA).[17]

For the foregoing reasons, Defendants claim that HSMMA's employment protections are preempted by federal law must be rejected.

B. Defendants Have Not Shown, Beyond a Reasonable Doubt, that there is No Basis for Plaintiff's Request for Declaratory Relief.

Defendants additionally challenge the viability of Count I of Plaintiff's Complaint – the request for declaratory judgment concerning the proper construction of private employers' duties

[17] The Defendants cite to Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 203 P.3d 518 (Ore. 2010), a case in which the Oregon Supreme Court found that, to the extent that the state medical marijuana law authorized the use of marijuana, it was preempted by the CSA. Emerald Steel's reasoning was rejected by the Michigan Court and is further distinguishable. Beek, 846 N.W.2d at 540 and n. 6. Among other things, there was no employment protection contained directly in the medical marijuana law, and the Court expressly noted that its "opinion arises from and is limited to the laws that the Oregon legislature has enacted." Id. at 526 n. 12.

Furthermore, just one year later the Court appeared to distance itself from Emerald Steel, by holding that sheriffs could not withhold concealed handgun licenses from medical marijuana patients who otherwise met the statutory criteria for issuance. See Willis v. Winters, 253 P.3d 1058, 1060 (Ore. 2011). In its ruling, the Court rejected the sheriffs' argument that under federal law the applicant's marijuana use was unlawful and as an illegal user of marijuana she was prohibited from possessing firearms under the federal Gun Control Act. Id. at 1062. The Court acknowledged that marijuana users are engaged in illegal use of drugs for purposes of the CSA and Gun Control Act, and that one of the purposes of the Gun Control Act was to keep firearms away from users of illegal drugs. However, in applying the preemption doctrine the Court still found no conflict because Congress did not enact a law which prohibited sheriffs from issuing the licenses to marijuana users. Id. at 311. Similarly, Congress had not enacted a law prohibiting employers from hiring medical marijuana patients.

under the statute. As demonstrated by the arguments presented in both Defendants' Motion and Plaintiff's Objection, the core of this dispute concerns the scope of the language in the HSMMA and to date, no Rhode Island court has construed the language at issue.

Despite the obvious need for a ruling on the HSMMA, and the clear availability of the UDJA, the Defendants' insist that Plaintiff "attempts to use the [U]DJA as a means to obtain affirmative relief for employment discrimination under the HSMMA, circumventing the plain language of the statute." Defs. Memo., p. 18. Among other things, Defendants are mistaken as to the nature of the request for declaratory relief, and its availability under the circumstances, and thus, its Motion should be rejected on this point.

1. Declaratory Relief is Not Contingent on the Ability to Simultaneously Maintain an Action at Law.

To understand the merit of Plaintiff's request, some history of the origin and scope of the UDJA is appropriate. "Although the concept of declaratory relief dates back to Roman law, it has existed in its current sweeping form in American civil procedure for the last eighty or so years, mostly thanks to the agitation of Professors Edwin Borchard and Edson Sunderland * * * [whose] writings and advocacy ensured passage of the federal Declaratory Judgments Act in 1934." A. Bradt, "Much to Gain and Nothing to Lose:" Implications of the History of the Declaratory Judgment for the (b)(2) Class Action, 58 Ark. L. Rev. 767, 772 (2006). It took fifteen years for Congress to enact the federal declaratory judgment statute, and thus, the rationale for its institution is well-documented. Both Borchard and Sunderland advocated for its passage because they "believed that the judicial system was too rigid and fraught with procedural requirements that prevented courts from resolving legal disputes in advance of a wrong being committed and from applying a milder remedy when parties preferred it to damages or an injunction. These were the twin aims of the Declaratory Judgments Act: to allow courts to provide

preventive relief before a potential wrong was committed, and to provide a milder alternative to coercive remedies." Id. (emphasis added); see also Steffel v. Thompson, 415 U.S. 452, 466-67 (1974); 58 Ark. L. Rev. at 783-84; S. Bray, The Myth of the Mild Declaratory Judgment, 63 Duke L.J. 1091, (2014) (discussing the difference between the injunction and declaratory judgment).

> "Not only had the declaratory judgment been a fixture of European legal systems for centuries, Borchard claimed that it had always been a part of the American legal system as well. Declaratory judgments had long been employed by American courts in actions to quiet title, to decide the validity of marriage status, and to provide a trustee with advice under a trust agreement. Borchard explained that these venerable legal institutions would 'suffice to show that the formal adoption of the declaratory judgment in our practice, far from constituting a radical innovation in our legal institutions, would merely serve to extend the application of remedies already employed.'" Id. at 777-78 (emphasis added).

Accordingly, when the Supreme Court passed on the constitutionality of the federal act, it addressed the distinctive nature of the declaratory judgment as an available remedy when it wrote:

> "Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241, 57 S.Ct. 461, 81 L.Ed 617 (1937) (emphasis added).

Consistent therewith, when Rhode Island adopted the UDJA in 1959, the General Assembly ensured that the availability of an action under § 9-30-1 was broad and expansive in that the UDJA permits this Court to "declare rights, status, and other legal relations whether or not

further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for." Further, pursuant to § 9-30-2, "Any person * * * whose rights, status, or other legal relations are affected by a statute, * * *, may have determined any question of construction or validity arising under the instrument, statute, * * * and obtain a declaration of rights, status, or other legal relations thereunder." See also § 9-30-12 ("This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered. The remedy provided by this chapter shall be cumulative and shall not exclude or prevent the exercise of any other right, remedy, or process heretofore allowed by law or by previous enactment of the legislature."); see also Gray v. Leeman, 94 R.I. 451, 456, 182 A.2d 119 (1962) (providing that a declaratory judgment is neither an action at law or a suit in equity but a novel statutory proceeding). Significantly, the UDJA does not contain anywhere the requirement that a litigant would need to be able to maintain (or have the option to maintain) a simultaneous action for damages in order to have legal rights declared under a particular statute.

Further, granting a motion to dismiss under Rule 12(b)(6) should be avoided when facing a request for declaratory judgment.

> "In Millett v. Hoisting Engineers' Licensing Division, 119 R.I. 285, 291, 377 A.2d 229, 233 (1977), we observed that since the purpose of the declaratory judgment statutes is to facilitate the resolution of disputes between the parties in regard to their legal rights without proof of anyone's fault, the statute should be liberally construed, but then we hastened to comment that any individual seeking declaratory relief must present the court with a viable controversy. * * * However, in Redmond v. R.I. Hospital Trust, 120 R.I. 182, 386 A.2d 1090 (1978), we alluded to the discretionary nature of a declaratory judgment action and pointed out that the discretion rests in the area of whether relief will be granted, not whether the court will entertain the motion. Id. at 186, 386 A.2d at 1092. In line with what we said in Redmond, the trial

> justice erred in not affording the plaintiffs a full opportunity to be heard on the merits of their request. See also 1 Kent, R.I. Civ. Prac. § 57.2 at 427-28. Accordingly, the dismissal of the declaratory judgment count was erroneous." Perron v. Treasurer of Woonsocket, 121 R.I. 781, 786-87, 403 A.2d 252 (1979).

In Redmond, the Court noted that "[w]ithout negating in any way the discretion of a trial justice to withhold determination under § 9-30-6, a threshold question arises as to whether such determination may best be made on a motion to dismiss under Rule 12(b)(6) of the Superior Court Rules of Civil Procedure. In Salem National Bank v. City of Salem, 47 Ill. App. 2d 279, 198 N.E.2d 137 (1964), the court indicated there was a distinction between the granting of declaratory relief and the entertaining of the action. The court determined that the discretion was not one to entertain the action but was only one to enter or to decline entry of judgment." Id. at 1092. Applying the "beyond a reasonable doubt" standard applicable to the motion to dismiss, the Court reversed the lower court decision granting the motion.

Defendants argue that if Plaintiff has no direct private right of action under the HSMMA for employment discrimination, then any relief under the UDJA as it relates to the construction of the HSMMA is foreclosed. Defs. Memo, p. 18-19. In particular, the Defendants contend that "[i]f litigants could employ the [U]DJA in such a manner, it would circumvent the will of the Legislature and effectively overrule every case in which the Courts have found no private cause of action in a statutory scheme." Defs. Memo, p. 18. To support this contention the Defendants point to a single case - - Pontbriand v. Sundlun, 699 A.2d 856 (R.I. 1997). The problem with Defendants' argument is that Pontbriand simply does not stand for the proposition that if the General Assembly does not expressly provide for a suit for damages for a cause of action, the litigant is precluded from seeking declaratory relief.

The dispute in Pontbriand arose from the banking crisis of the early 1990s. 699 A.2d at 861. The Governor wanted the General Assembly to enact the DEPCO Act ("Act") to allow the State to use public funds to reimburse lost deposits to depositors. Id. One controversial feature of the Act would permit the State to reimburse the full amounts of deposits to depositors with accounts that exceeded $100,000 in value, in excess of what these depositors would be entitled to under federal law. Id. Because suspicion existed that those with more than $100,000 were politically connected, the Governor released a list of depositors with social security numbers and account balances. Id.

Pontbriand and other depositors filed suit against the Governor and included several state and federal privacy claims. Id. Cross-motions for summary judgment were filed. The Superior Court granted the Governor's motion and denied Plaintiffs' cross-motion. Id. Plaintiffs appealed to the Supreme Court. Id. A significant part of the decision was devoted to the issue of standing, an argument totally irrelevant to the Defendants' motion here.

Having concluded the depositors had standing, the Court turned to whether the trial justice properly granted the motion for summary judgment that disposed of Plaintiffs' state law privacy claims. Id. at 862. The Court first concluded that the trial justice should not have granted summary judgment on plaintiff's claims under § 9-1-28.1 because there were sufficient fact disputes for a jury to resolve (for example, whether plaintiffs had a reasonable expectation that the information released would remain private). Id. at 865. The Court then considered, and rejected, the Governor's argument that his authority over banking matters in a crisis situation created a degree of immunity that excused the disclosure as a matter of law. Id. at 866.

Next, the Court addressed the grant of summary judgment as to plaintiffs' claims under the Access to Public Records Act, G.L. 1956 § 38-2-1 et seq., and § 19-14-2, a statute that concerned licensing activities of lenders and brokers. Id. at 867. As to the existence of a cause of action under APRA, the Court did not dismiss that claim based on the absence of language expressly creating a private right of action, but rather the Court found dismissal appropriate because the statute did not create the right to prevent release of public records in the first place. Like the federal counterpart known as "FOIA," the APRA provided a right to obtain public records but nothing therein could be construed to provide a right to prevent the release of records – an action known as the "reverse FOIA." Id. Accordingly, the plaintiffs attempt to use APRA to prevent the further disclosure of the records at issue failed.

Finally, the Court turned to the claim that the Governor violated § 19-14-2 which prohibited, among other things, the Director of Business Regulation from engaging in the unauthorized release of records and information in reports of financial institutions. Id. at 867-68. The Court found that the banking regulation statute did not include a cause of action against the Governor for unauthorized disclosure. Id. at 868. However, the Defendants in this case overstate the basis for the holding. Significantly, the Court had already reversed the decision of the trial justice when it concluded that the plaintiffs' cause of action based on violation of the privacy statute was going to a jury. Accordingly, the Court held that "[i]n the case at bar we have already determined that a specific remedy exists for legal redress under the provisions of § 9-2-28.1. It is therefore unnecessary and inappropriate for this court to seek or find an implied right of action under § 19-14-2." Accordingly, the claim under § 19-14-2 was primarily ignored because the Court had already determined the plaintiffs had other options. More importantly, there is nothing

in Pontbriand that analyzes or sets forth (as Defendants urge) a general rule that governs the availability of any relief under the UDJA in the absence of an express grant of a private right of action for damages in the statute at issue.

Although Defendants try to characterize Count I as a back-up plan in the event Plaintiff's claim under Count III fails Defendants' negative characterization is insufficient to support a Motion to Dismiss when measured against the "beyond a reasonable doubt" standard. It totally ignores the facts presented concerning the nature of a declaratory judgment action and its availability to address a specific question of statutory construction that is entirely different and may have no relationship to an action at law for damages or make-whole remedy.

If Defendants were right about the limited availability of the UDJA it would turn the statute on its head because as previously discussed, the UDJA is not an action at law or equity, but rather is a unique statutory vehicle for a preventative or mild remedy based on the court's construction of a contract, will, deed, or in this case, a statute. It is clear based on the plain words of the UDJA that Plaintiff is not required to be able to maintain an action at law in order to be entitled to relief. For example, if Plaintiff no longer wants to be employed by Defendants she may be entirely satisfied with the declarative remedy, "whether or not further relief can or is claimed," and have no need to pursue Count III.

2. Defendants' Motion to Dismiss on the Merits of the Declaratory Judgment Must Be Denied.

Plaintiff argues that when an employer refuses to hire an employee because of his or her lawful participation in the medical marijuana program (which means he or she is using marijuana to treat a medical condition) it has engaged in discrimination solely based upon the prospective employees' cardholder status (i.e., you cannot be lawfully using medical marijuana without being

a cardholder). In other words, the phrase "solely for his or her status as a cardholder," necessarily prohibits discrimination against a candidate's lawful use of marijuana.

The Defendants seek to have the Court reach the merits of the requested declaration on the motion to dismiss – in particular, for the Court to find that refusal to hire based upon medical marijuana use is permitted because the statutory language "only" prohibits discrimination based on "status as a cardholder." The Defendants' Motion seeking to narrowly define HSMMA's protections must be rejected.

Pursuant to § 21-28.6-13, the General Assembly provided that "[t]his chapter shall be liberally construed so as to effectuate the purposes thereof." If Defendants' construction of the statute is accepted the purposes of the statute will be ignored. As previously indicated, the General Assembly has provided that "State law should make a distinction between the medical and nonmedical use of marijuana. Hence, the purpose of this chapter is to protect patients with debilitating medical conditions, and their physicians and primary caregivers, from arrest and prosecution, criminal and other penalties, and property forfeiture if such patients engage in the medical use of marijuana." Significantly, the purpose of the statute is not to protect patients from penalties only because they happen to physically hold a medical marijuana card – the core purpose of the protection is directed at the conduct (lawful use) that is permitted by virtue of being a cardholder. Accordingly, the term "solely for his or her status as a cardholder" protects lawful users from employment discrimination so long as they are in fact a cardholder but it does not require a plaintiff to prove that additionally that the employer has not factored in his or her marijuana use.

C. The Defendants' Motion to Dismiss Must Also Be Denied as to Plaintiff's RICRA Claim because RICRA Does Not Contain or Incorporate the Term "Qualified Individual" found in G.L. 1956 § 42-87-1.

The Plaintiff's Complaint also contains a claim that the Defendants' decision not to hire her violates the RICRA because it constitutes disability-based discrimination. Plaintiff has presented sufficient facts to establish a claim under RICRA. She has alleged that she suffers from debilitating migraine headaches, a condition which she disclosed to Defendants. Complaint § 8, 19. Further, she has alleged that the decision not to hire her was predicated in whole or in part, on that medical condition. § 1, 8, 19, 20, 24, 31.[18] Clearly, these facts are sufficient to plead a claim under RICRA as set forth in Count II of the Complaint. See also R.I. R. Civ. P. 8(a)(1) (requiring only a "short and plain statement of the claim showing that the pleader is entitled to relief").

Enacted in 1990, RICRA is a state civil rights law whose scope expands beyond the employment relationship.

> "As the majority addressed, the RICRA was enacted in response to Patterson v. McLean Credit Union, 491 U.S. 164, 109 S. Ct. 2363, 105 L.Ed. 2d 132 (1989), in which the Supreme Court narrowly interpreted 42 U.S.C. § 1981, The Civil Rights Act of 1866, by holding that that statute afforded protection against race discrimination in contract formation only. See Ward v. City of Pawtucket Police Department, 639 A.2d 1379, 1381 (R.I. 1994). Although the General Assembly incorporated nearly identical language to that used in 42 U.S.C. § 1981 in its enactment of the RICRA, the statute adopted a more expansive definition of contractual rights than its federal counterpart did under the Patterson Court's interpretation. Compare 42 U.S.C. § 1981 (1988) (language

[18] Significantly, in order to recover under RICRA Plaintiff is not required to show that her disability was the sole factor in the decision not to hire her. See, e.g., Robinson v. Southern Bank & Trust Co., 2015 U.S. Dist. LEXIS 46449, at *11-12 (E.D.N.C. 2015) (describing availability of sole and mixed-motive theories in § 1981 cases). She may proceed either on a sole or mixed-motive theory – a decision which need not be made at the pleading stage. See, e.g., Chicago Housing Authority v. Human Rights Commission, 759 N.E.2d 37, 325 Ill. App. 3d 1115, 1128-29 (Ill. App. 2001).

> employed by RICRA drafters) and Patterson, 491 U.S. at 164-65 (interpreting language of 42 U.S.C. § 1981 applying to contract formation only) with G.L. 1956 § 42-112-1(b) (defining language borrowed from federal counterpart to expand protection afforded). * * * As a result, the RICRA 'provides broad protection against all forms of discrimination * * *,' Ward, 639 A.2d at 1381."Horn v. Southern Union Co., 927 A.2d 292, 297-98 (R.I. 2007) (Suttell, C.J., dissenting).[19]

RICRA provides, in pertinent part:

> "(a) All persons within the state, regardless of race, color, religion, sex, disability, age, or country of ancestral origin, have, except as is otherwise provided or permitted by law, the same rights to make and enforce contracts, to inherit, purchase, to lease, sell, hold, and convey real and personal property, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, and are subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) For the purposes of this section, the right to "make and enforce contracts, to inherit, purchase, to lease, sell, hold, and convey real and personal property" includes the making, performance, modification and termination of contracts and rights concerning real or personal property, and the enjoyment of all benefits, terms, and conditions of the contractual and other relationships. * * *" § 42-112-1.

The Defendants argue that the Plaintiff's RICRA claim must be dismissed because her Complaint fails to make out a "prima facie" case of discrimination. Defs. Memo., pp. 5-11. This position may be swiftly rejected because Plaintiff is not required to meet an evidentiary standard

[19] In Horn, the Rhode Island Supreme Court analogized RICRA to the Fair Employment Practices Act ("FEPA"), G.L. 1956 § 28-5-1 for purposes of determining the appropriate statute of limitations. It concluded since both statutes dealt with employment discrimination they should be construed harmoniously, and as such, the statute of limitations under RICRA should be the same as FEPA (one year). Id. at 298. Shortly after the Horn decision, the General Assembly enacted a three-year statute of limitations for RICRA claims signaling its view that RICRA is not simply a mirror image of other state discrimination laws. See § 42-112-2.

at the pleading stage. Even under the heightened (but inapplicable) federal standard, such a contention has been routinely rejected. See Roderiguez-Reyes v. Molina-Roderiguez, 711 A.2d 49, 53-54 (1st Cir. 2013). The following discussion sets forth a succinct rationale to guide this Court.

> "In this case, the district court tested the complaint in a crucible hotter than the plausibility standard demands. It repeatedly faulted the complaint for failing to 'establish a prima facie case of political discrimination.' Rodríguez-Reyes, 851 F. Supp. 2d at 381-82. The plaintiffs argue that this laser-like focus on a prima facie case is misplaced at the pleading stage; that requirement, they say, should be reserved for summary judgment and trial. We agree.
>
> In Swierkiewicz v. Sorema, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002), the Supreme Court negated any need to plead a prima facie case in the discrimination context and emphasized that the prima facie model is an evidentiary, not a pleading, standard. Id. at 510, 512; cf. Leatherman v. Tarrant Cnty. Narcotics Intell. & Coord. Unit, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993) (rejecting heightened pleading standard for section 1983 cases). Three years later, we confirmed the applicability of Swierkiewicz to political discrimination cases. See Educadores Puertorriqueños en Acción v. Hernández, 367 F.3d 61, 66 n.1 (1st Cir. 2004).
>
> We recognize that these cases were decided before the Supreme Court effected a sea change in the law of federal pleading in Iqbal and Twombly. This gives rise to two questions. First, does the hegemony of the Swierkiewicz/Leatherman/Educadores line of cases continue in a post-Iqbal/Twombly world? * * *[20]
>
> We answer the first question in the affirmative: the Swierkiewicz holding remains good law. It is not necessary to plead facts sufficient to establish a prima facie case at the pleading stage. See Swierkiewicz, 534 U.S. at 512 * * * The prima facie standard is an evidentiary standard, not a pleading standard, and there is no need to set forth a detailed evidentiary proffer in a complaint.

[20] This Court need not be concerned with the second question raised in Roderiguez-Reyes given that the plausibility standard is inapplicable here. See supra Section III.

> In answering the first question, we do not write on a pristine page. Several other courts of appeals have considered the question and concluded, as we do, that the Swierkiewicz Court's treatment of the prima facie case in the pleading context remains the beacon by which we must steer. * * *." Id. at 53-54.

Accordingly, the arguments presented by Defendants concerning the Plaintiff's obligations regarding the prima facie case must be totally disregarded at the pleading stage.

Defendants' primary contention is that to state a claim under RICRA she must prove she is a "qualified individual" and she cannot meet that standard because the definition of "qualified individual" excludes people who are engaged in the "illegal use of drugs." Defs. Memo, p. 7-8. The problem with Defendants' argument is that in stark contrast to other Rhode Island disability-discrimination laws, the RICRA contains **no** requirement that Plaintiff establish she is a "qualified individual because the term "qualified individual" appears nowhere in the text of RICRA.

Accordingly, Defendants are forced to urge a strained construction of § 42-112-1(d). But the fact is that § 42-112-1(d) incorporates only some but not all of the definitions contained in a different disability-discrimination statute, the Rhode Island Civil Rights of Disabilities Act ("RICRPDA") – and noticeably absent is any incorporation of the term central to Defendants' position – "qualified individual," or "qualified individual with a disability." Section 42-112-1(d) provides, in pertinent part, as follows: "[t]he term 'disability' has the same meaning as that term is defined in § 42-87-1, and the terms, as used regarding persons with disabilities, 'auxiliary aids and services,' 'readily achievable,' 'reasonable accommodation,' 'reasonable modification,' and 'undue hardship' shall have the same meaning as those terms are defined in § 42-87-1.1." (emphasis added).

Thus, § 42-112-1(d) incorporates only six different terms that are defined by the RICRPDA

– not every single term in the RICRPDA. Turning to the RICRPDA terms that are incorporated into RICRA, none of them include the term "qualified individual" or "qualified individual with a disability" as urged by Defendants. First, the term "disability" itself is defined by § 42-87-1(1) and provides that: "'Disability' means, with respect to an individual:

> (i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (ii) A record of such impairment; or
> (iii) Being regarded as having such an impairment (as described in paragraph (4));
> (iv) Includes[21] any disability which is provided protection under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. and federal regulations pertaining to the act 28 CFR 35 and 29 CFR 1630; and
> (v) Nothing in this chapter alters the standards for determining eligibility for benefits under workers' compensation laws or under state disability benefit programs." (emphasis added).

Accordingly, when Plaintiff reaches the stage of this case in which she is required to prove she has a disability (and we are not there yet) – there is no requirement in the definition of disability of § 42-87-1(1) (incorporated into RICRA) that she establish she is a "qualified individual" to be entitled to RICRA's protections. The remaining terms that are incorporated into RICRA are

[21] Significantly, Defendants argue that if a marijuana user is excluded from the federal definition of disability under the Americans with Disabilities Act ("ADA"), then she should also be excluded from state law disability discrimination protection under RICRA. Significantly, however, the state law definition of disability (in RICRA or RICRPDA) does not mirror the federal definition. Instead, the General Assembly only provided if a person also was considered disabled under federal law he or she would also be considered disabled under state law. There is no provision excluding from the state law definition of disability any person who is also excluded by federal law. This point also disposes of Defendants' argument that because the ADA excludes from its protections persons engaged in the illegal use of drugs this Court should adopt such a position in this case. The state law definition is simply not dependent upon the ADA and Plaintiff's Complaint contains no federal claims. See, e.g., Brown v. E. Me. Medical Center, 2006 U.S. Dist. LEXIS 50593 at 9-10 (D. Me. 2006) (finding no reason to import federal employment law provisions into comparable state laws when state laws contain different terms).

contained in § 42-87-1.1 a section that does not include the term "qualified individual" or "qualified individual with a disability" at all.

To be sure, the term "qualified individual" does appear in § 42-87-1(6). Significantly, however, this term is not incorporated into § 42-87-1(1) or RICRA and is the only term in the RICRPDA that contains any reference to the CSA. Pursuant to § 42-87-1(6) "qualified individual" means:

> (i) With respect to employment, a person who, with or without reasonable accommodations, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this chapter, due consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job;
>
> (ii) With respect to the rental of property, a person with a disability who, personally or with assistance arranged by the person with a disability, is capable of performing all of the responsibilities of a tenant as contained in § 34-18-24;
>
> (iii) With respect to any other program or activity, a person with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or benefits, or the participation in the program or activity;
>
> (iv) The fact that an individual has applied for, received or continues to receive private insurance or government assistance based upon his or her disability shall not be determinative as to whether the individual is qualified as defined herein, nor shall it constitute an estoppel or otherwise serve as a basis to deny the individual the protections of this chapter; and
>
> (v) 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.
>
> *(A) In general.* The term 'illegal use of drugs' means the use of drugs, the possession or distribution of which is unlawful under the controlled substances act (21 U.S.C. § 812). Such term does not include the use of a drug taken under supervision by a licensed

> health care professional, or other uses authorized by the controlled substances act or other provisions of federal law.
>
> *(B) Drugs.* The term 'drug' means a controlled substance, as defined in schedules I through V of § 202 of the controlled substances act.

Accordingly, the part of RICRPDA that Defendants rely upon as a basis for dismissal, § 42-87-1(6) was never incorporated into RICRA, and thus, its exclusion based on illegal use of drugs is totally inapplicable to a RICRA claim.

One can easily see that this term was never incorporated into RICRA by plainly examining its substantive protection which simply provides:

> (a) All persons within the state, regardless of race, color, religion, sex, disability, age, or country of ancestral origin, have, except as is otherwise provided or permitted by law, the same rights to make and enforce contracts, to inherit, purchase, to lease, sell, hold, and convey real and personal property, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, and are subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (emphasis added).

Accordingly, there is no requirement that Plaintiff establish that she is a "qualified individual" as that term is described in § 42-87-1(6) in order to establish a claim under RICRA. RICRA's provisions are expansive, and do not deny employment discrimination protection to disabled persons who may also be participants in Rhode Island's medical marijuana program. Simply put "all persons" who have a "disability" means "all" and not only the ones that prove they are "qualified individuals" as that term is understood in an entirely different statutory term. Given that RICRA contains no exclusions based on the CSA or medical marijuana use, Plaintiffs Complaint states a claim under RICRA.

Defendants make one final attempt related to Plaintiff's RICRA claim. Defendants argue

that because Plaintiff alleges that Defendants told her the reason for its refusal to hire was her medical marijuana status she cannot contend her disability was a factor in the same decision. This contention ignores Rule 8(e)(2) which allows for pleading in the alternative. Furthermore, there is certainly an argument to be made that the two concepts are inextricably intertwined - - the Company automatically discriminates on the basis of disability when it makes decisions based on treatment for the disability. Finally, as pointed out supra, RICRA does not contain a sole motive theory so even if Plaintiff could not establish that her medical marijuana status was the sole motive for refusal-to-hire under HSMMA, she could still prevail under RICRA on a mixed-motive theory.

V. CONCLUSION.

While Defendants have raised many interesting points as it relates to this case of first impression, none of them justify the extreme remedy of dismissing a Complaint pursuant to Rule 12(b)(6). The Defendants have simply failed to show, beyond a reasonable doubt, that Plaintiff cannot, under any set of facts, state a claim for disability-based discrimination under RICRA, or employment discrimination under the HSMMA. The Defendants further cannot demonstrate that Plaintiff is not entitled to invoke the UDJA in order to obtain this Court's construction of the HSMMA. Accordingly, Defendants' Motion must be denied.

Plaintiff,
By her attorney,

/s/ Carly Beauvais Iafrate

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CERTIFICATION

I hereby certify that, on the 3rd day of July 2015, I filed and served this document through the electronic filing system and that it is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System to the following counsel:

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EXHIBIT A

STATE OF RHODE ISLAND **PROVIDENCE, SC.**	**SUPERIOR COURT**
CHRISTINE CALLAGHAN, ***Plaintiff,*** **vs.** **DARLINGTON FABRICS CORPORATION and THE MOORE COMPANY,** ***Defendants.***	**C.A. No. PC 14- 5680**

COMPLAINT

1. This complaint arises out of allegations of employment discrimination based on disability and other protected activity.

JURISDICTION

2. The jurisdiction of this Court is invoked pursuant to the Rhode Island Civil Rights Act, G.L. 1956 § 42-112-1 et seq., the Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, § 21-28.6-1 et seq. and the Rhode Island Declaratory Judgments Act, G.L. 1956 § 9-30-1 et seq.

PARTIES

3. Plaintiff Christine Callaghan is a female resident of Rhode Island.

4. Defendant The Moore Company is a Rhode Island Corporation that owns and operates the Darlington Fabrics Corporation.

5. Defendant Darlington Fabrics Corporation is a Rhode Island business entity located in Westerly, Rhode Island.

STATEMENT OF FACTS

6. The Plaintiff, Christine Callaghan ("Callaghan" or "Plaintiff") earned her undergraduate degree from the Savannah College of Art and Design in about May 2011.

7. Plaintiff is currently attending the University of Rhode Island, studying textiles and working toward a Masters' Degree in that field.

8. Callaghan also has a medical condition sufficient to qualify as a disability under Rhode Island state law. For a number of years, she has suffered from debilitating migraine headaches.

9. Callaghan has lawfully participated in Rhode Island's medical marijuana program since February 2013 to help treat her medical condition.

10. Despite her medical condition, she has managed to excel at URI.

11. As part of her Masters' Degree program, Plaintiff needed a two credit internship which requires 60 hours of work per credit.

12. In June 2014, Kevin Crompton ("Crompton") from Defendant Darlington Fabrics discussed with URI Professor Martin Bide ("Professor Bide") Darlington's need for an intern for a project in Darlington's dye lab.

13. Professor Bide referred Plaintiff to Darlington Fabrics for the position.

14. Callaghan contacted Crompton who described the specific project that she would be working on, a project related to sustainability in textiles.

15. Crompton referred Callaghan to Karen McGrath ("McGrath") from Darlington's Human Resources Department who indicated she could start the internship in July 2014.

16. McGrath also scheduled a meeting with Callaghan in late June 2014 to discuss the position and the Plaintiff, McGrath, Crompton and URI officials further discussed the nature and details of the internship, which would be paid, in June and July 2014.

17. Professor Bide forwarded the internship paperwork to Crompton and McGrath necessary for the internship credit and her temporary employment with the Defendant.

18. Callaghan met with McGrath on June 30, 2014.

19. During the meeting on June 30, Callaghan disclosed to McGrath her medical condition and status as a cardholder under Rhode Island's medical marijuana law. She explained to McGrath that she would not bring medical marijuana onto the premises and would not come to work after having taken marijuana, and offered McGrath a copy of her card.

20. Prior to this disclosure, all indications were that Callaghan would have the position and that the meeting was simply a formality.

21. On July 2, McGrath called Callaghan and informed her that also on speakerphone was another Company official. Both informed Plaintiff that they could not employ Callaghan because of her status as a medical marijuana patient.

22. The Plaintiff informed the company officials that she must continue with the medical marijuana program because of her medical status, but also assured them that it would not be brought on to company premises nor would she come to work after having used it. The company officials indicated they would speak with legal staff.

23. McGrath and the other company official later called Callaghan and reiterated that she would not be hired because of her medical marijuana use.

24. Plaintiff was not hired by Defendants.

25. As a result of not being hired by Defendants, among other things, Plaintiff was unable to find replacement summer employment, lost the benefit of a major networking opportunity with one of the only companies left in Rhode Island in her field, lost important and unique experience that Defendants were offering, was forced to disclose her medical marijuana status to her professors, and her ability to graduate on time was placed into jeopardy as a result of having to try to find another internship at the last minute.

COUNT I

Declaratory Judgment
G.L. 1956 § 9-30-1

26. Plaintiffs hereby incorporate by reference Paragraphs 1 through 25 of the Complaint as if fully set forth herein.

27. Section § 21-28.6-4 of the Hawkins/Slater Act was enacted by the General Assembly to protect the qualified users of medical marijuana from, among other things, employment discrimination.

28. A potential employer's failure to hire a medical marijuana patient because of, or related to, his or her status as a medical marijuana user and/or cardholder is a direct violation of the Act.

29. Accordingly, Plaintiff requests a declaratory judgment that, among other things, failure to hire a prospective employee based on his or her status as a medical marijuana card holder and user is a violation of the Act.

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COUNT II

Rhode Island Civil Rights Act
G.L. 1956 § 42-112-1 et seq.
(Disability Discrimination)

30. Plaintiff incorporates by reference Paragraphs 1 through 28 as if fully set forth herein.

31. By the aforesaid actions, Defendants have violated the RICRA.

32. Plaintiff is damaged as a proximate result of the Defendants' conduct.

COUNT III

Hawkins and Slater Medical Marijuana Act
G.L. 1956 § 21-28.6-1 et seq.
(Employment Discrimination)

33. Plaintiff incorporates by reference Paragraphs 1 through 32 as if fully set forth herein.

34. By the aforesaid actions, Defendants have violated the Act.

35. Plaintiff is damaged as a proximate result of the Defendants' conduct.

PRAYER FOR RELIEF

Plaintiff prays that this Court:

(1) declare that the Defendants' actions complained of are unlawful;
(2) order the Defendants to make the Plaintiff whole;
(3) order that the Defendants pay Plaintiff compensatory damages;
(4) order that the Defendants pay Plaintiff punitive damages;
(5) retain the jurisdiction of this action to ensure full compliance;
(6) order the Defendants to pay Plaintiff costs and expenses and reasonable attorney's fees;
(7) grant such other relief to Plaintiff as the court deems just and proper.

Plaintiff's damages are in an amount sufficient to invoke the jurisdiction of this Court.

JURY TRIAL DEMAND

Plaintiff demands a trial by jury.

Plaintiff,
By her Attorney,

/s/ Carly Beauvais Iafrate

_____

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Dated: November 12, 2014