STATE OF MICHIGAN
MICHIGAN UNEMPLOYMENT INSURANCE APPEALS COMMISSION

IN THE MATTER OF:

CONSOLIDATED MRTMA FIRST IMPRESSION CASES

ALJ: LINDSAY WILSON

APPEAL DOCKET NOS.
19-[redacted]-260172
19-[redacted]-260176
21-[redacted]-262736W

UIA CASE NUMBER: [Redacted]

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**BRIEF OF AMICUS CURIAE MICHIGAN ATTORNEY GENERAL DANA NESSEL IN SUPPORT OF CLAIMANTS**

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## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

Page

**Cases**



Statutes

## STATEMENT OF QUESTIONS PRESENTED

The use and possession of marijuana by individuals over 21 years of age in Michigan are "not unlawful, are not an offense, are not grounds for . . . penalty in any manner, . . . and are not grounds to deny any other right or privilege[.]" MCL 333.27955(1).

1. Because the claimants' use of marijuana was not unlawful, should the claimants have been disqualified for benefits for the use of marijuana under the "illegal drugs" provision of the Michigan Employment Security Act (MESA)?

   The UIA's answer: No.

   Employers' answer: Yes.

   Claimants' answer: No.

   The Attorney General's answer: No.

2. Even if the language of the MESA called for disqualification, would the claimants nonetheless be entitled to benefits where the Michigan Regulation and Taxation of Marijuana Act (MRTMA) applies "[n]otwithstanding any other law" and provides that the use of marijuana cannot be the basis to impose any penalty?

   The UIA's answer: Yes.

   Employers' answer: No.

   Claimants' answer: Yes.

   The Attorney General's answer: Yes.

## STATEMENT OF INTEREST OF THE ATTORNEY GENERAL AS AMICUS CURIAE

These cases present an issue of first impression and statewide importance: whether the Michigan Regulation and Taxation of Marihuana Act (MRTMA) means what it says: that the use of marijuana is not unlawful, not an offense, and is not a ground to deny any right or privilege in the State of Michigan, and that this applies "[n]otwithstanding any other law[.]" MCL 333.27955(1).

This issue has divided administrative law judges, who have reached different results in different cases on the question of whether the claimant may be disqualified for "illegal drugs" based on their use of marijuana. The Commission's ruling on this issue will directly impact many law-abiding Michigan workers who may be terminated for the use of marijuana.

The Attorney General is the constitutionally established officer who serves as the chief law enforcement officer for the State. The Legislature has authorized the Attorney General to participate in any action in any state court when, in her own judgment, she deems it necessary to participate to protect any right or interest of the State or the People of the State. MCL 14.28. Thus, Attorney General Dana Nessel participates in this action to ensure that Michigan law is properly interpreted and that the People's decision to legalize marijuana in Michigan is given the respect and effect to which it is entitled.

## INTRODUCTION

The issue before the Commission tests the intricacies and interplay of certain Michigan laws. But it also tests the State's statutory commitments to worker protections and personal freedom.

Michigan's Employment Security Act (MESA) recognizes the "crushing force upon the unemployed worker and his family," and condemns the economic insecurity of unemployment as "a serious menace to the health, morals, and welfare of the people of this state." MCL 421.2(1). As a consequence, Michigan generally supplies individuals who are fired from their jobs with temporary benefits to meet the "necessities of life." MCL 421.8. An individual is disqualified from those basic benefits only under specific circumstances. Two are relevant here: where the employee tests positive for illegal drugs or commits misconduct related to work.

With these principles in mind, it should be common sense that engaging in a legal activity that does not affect an individual's work would be a poor basis for denying an individual the necessity of unemployment benefits.

This applies to the off-duty and legal recreational consumption of marijuana, just as it would to the medical use of marijuana or any other legal activity, for that matter. In 2018, the People of Michigan legalized the recreational use of marijuana. For too long, marijuana had been widely perceived by policymakers as a corrupter of the social fabric—a theory riddled with racial stereotypes and resulting in severe overincarceration, among other things. To close the chapter on this sordid history, the People broadly expressed their intent "to prevent arrest and penalty for personal possession and cultivation of marihuana" with the adoption of the MRTMA

as a citizens' initiative in 2018. MCL 333.27952. The People reserved for themselves the personal freedom to consume and cultivate marijuana, and the State cannot deprive an individual of unemployment benefits for simply engaging in this legal activity.

Employers still generally retain their ability to hire and fire at will, but Michigan employees need not question whether their legal, off-duty conduct will leave them without unemployment benefits should an employer exercise that ability. Arguments to the contrary hinge on outmoded understandings of marijuana that the People of Michigan have rejected, once and for all.

The Commission should follow Michigan law and hold that an individual may not be stripped of unemployment benefits for the off-duty consumption of marijuana that does not affect their work. The Commission should reach this holding for three reasons:

First, an employer cannot deem private activity done off-site and off-hours that does not affect job performance "misconduct" in order to avoid contributing to unemployment benefits.

Second, § 29(1)(m) of the MESA defines a drug test as a "test designed to detect the *illegal use* of a controlled substance."[1] The tests administered to claimants in these cases did not detect, nor could they have detected, the illegal use

[1] Notwithstanding the MRTMA, amicus does not dispute that marijuana remains a "controlled substance" in Michigan. MCL 421.29(1)(m)(i); 333.7104(3); 333.7212(1)(c).

of marijuana because the use of marijuana is *legal*, subject to certain exceptions not applicable here.

Finally, a holding that unemployment benefits *could* be denied to claimants merely for the private, legal use of marijuana would conflict with the plain language of the MRTMA, which provides in § 5 that the use of marijuana cannot be "grounds to deny any . . . right or privilege," and provides in § 4 that "[a]ll other laws inconsistent with th[e] act do not apply to conduct that is permitted by th[e] act."

## ARGUMENT

To begin, it is worth clarifying what is not at stake in these cases. These cases do not present any question about whether an employer is permitted to enforce a workplace drug policy. Amicus does not dispute that right, both before and after the enactment of the MRTMA. See MCL 333.27954(3). Nor do these cases present any questions of an employee possessing or using marijuana while on their employer's property or while working, nor any question of an employee being under the influence of marijuana while at work.

Rather, amicus understands the matter of first impression in these cases to be a narrow one: whether an employee who is fired due to the use of marijuana on their own time, off company property, and not affecting their job performance, may be denied unemployment benefits solely as a result of that marijuana use, whether because they failed a drug test, or because they violated a company policy. The answer is no, for the reasons that follow.

### I. Straightforward application of the MESA, as informed by the MRTMA, demonstrates that claimants are not disqualified under either the "misconduct" or "illegal drugs" provisions.

The employers in these cases argue that the claimants are disqualified for benefits on two grounds: under MCL 421.29(1)(b) ("misconduct connected with the individual's work") and (1)(m) ("testing positive on a drug test"). Neither of these is a proper basis.

### A. The private use of marijuana is not "misconduct connected with the individual's work."

The first provision arguably at issue here is § 29(1)(b), which provides in part that "an individual is disqualified from receiving benefits if he or she . . . [w]as suspended or discharged for misconduct connected with the individual's work[.]" The employers in cases 260172 and 260176 argue that, because they had a policy against marijuana use, their employees' use of marijuana violated that policy and therefore constituted misconduct.

At the outset, the Commission should decline to consider this argument. In *Braska v Challenge Mfg Co*, the Court of Appeals considered similar arguments in a case in which claimants were discharged for the *medical* use of marijuana. 307 Mich App 340 (2014). The court held that § 29(1)(b) was not applicable to the cases before it. *Id.* at 364. The court applied the rule that, " 'where a statute contains a specific statutory provision and a related, but more general, provision, the specific one controls.' " *Id.,* quoting *In re Haley*, 476 Mich 180, 198 (2006). Because the only "misconduct" alleged in *Braska* was the medical use of marijuana, the court held that only § 29(1)(m) (regarding drug tests) applied, and not the general misconduct provision.

*Braska* is a published decision of the Court of Appeals and therefore binds the Commission. The Commission should therefore decline to examine these claims under § 29(1)(b) and restrict its analysis to the more specific provision, § 29(1)(m).

If this Court does consider the misconduct provision, it should hold that the claimants are not disqualified. Our Supreme Court has discussed and defined

"misconduct" for purposes of benefits disqualification, holding that the definition is not broad, but limited to particular conduct:

> [T]he term misconduct . . . is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. [*Carter v Michigan Emp Sec Comm'n*, 364 Mich 538, 541 (1961), quoting *Boynton Cab Co v Neubeck*, 237 Wis 249 (1941).]

Again, this case does not present the question whether an employer is allowed to discipline or discharge its employees for lawful conduct they engage in off-duty and outside the workplace subject to a "workplace drug policy," MCL 333.27954(3). Rather, this case is about whether employers have the power to label such private lawful acts "misconduct" in order to avoid their obligations under the MESA. They do not. To hold otherwise would be to stretch the limited definition of "misconduct" in *Carter* into a loophole large enough to allow any employer to escape their duty to contribute. And even worse, such a misinterpretation of "misconduct" would grant private employers the power to control virtually every aspect of their employees' lives, on threat of discharge without unemployment benefits. The Legislature did not pass § 29(1)(b) in order to give employers this awesome power, but to recognize that, when an employee is truly misbehaving in a way that harms the employer's legitimate interest, the employer ought to be able to terminate the employee without having to also contribute to the employee's unemployment benefits.

The private, lawful use of marijuana, like the private, lawful use of alcohol or tobacco, is not evidence of a "willful or wanton disregard of an employer's interests" that warrants a denial of unemployment benefits. An employer certainly has an interest in their employees showing up for work sober and staying sober on the job—especially in cases, like No. 260172 and 262736W here, in which the employees are operating motor vehicles as part of their employment. Of course, an employee discharged for knowingly using an intoxicating substance at work could be disqualified for benefits, whether the substance was a legal one like alcohol or marijuana, or an illegal one. But employers cannot use a code of acceptable conduct to avoid paying unemployment benefits to workers who, on their own time, engage in legal behavior the employer simply does not like. Here, there was no evidence introduced that any of the claimants had used or were under the influence of marijuana on the job, and none of the claimants in these cases should be disqualified for misconduct solely for their private, lawful use of marijuana.

### 1. In case 260172, the ALJ did not consider the misconduct provision as it related to the use of marijuana, and neither should the Commission.

In case 260172, the ALJ considered the misconduct provision of the MESA and held that the claimant had not committed misconduct. (No. 260172, Order at 5.) But the ALJ did not consider the question whether the claimant had committed misconduct by using marijuana, but rather whether he had committed misconduct in the course of the vehicular accident that preceded his termination. (*Id.*) The ALJ

held that there was no misconduct, but only "an isolated instance of ordinary negligence." (*Id.*)

The Commission's order allowing argument on these cases describes the matter of first impression as follows:

> The impact of Michigan Regulation and Taxation of Marihuana Act, MCL 333.27951 et seq, on the application of Sections 29(1)(b) and 29(1)(m) of the Michigan Employment Insurance Act in unemployment insurance benefit determinations.

Because the ALJ's discussion of § 29(1)(b) did not relate to the claimant's use of marijuana, there can be no impact of the MRTMA on the application of § 29(1)(b) in this case. The Commission should therefore affirm the ALJ solely on the correct application of § 29(1)(m), for the reasons discussed in Argument I.B below.

### 2. In case 260176, the Commission should affirm

Of the three cases before the Commission, No. 260176 is the only one in which the ALJ considered whether the claimant committed misconduct under the meaning of § 29(1)(b) by using marijuana. The ALJ concluded correctly that the marijuana use was not "job-related misconduct, as defined . . . in *Carter*":

> MCL 333.27954 indicates that the Michigan Regulation and Taxation of Marijuana Act does not prohibit an employer from disciplining or discharging an employee for violation of a workplace drug policy. However, as noted in *Grand Rapids Gravel Company v Appeal Board*, Case Number 46189, Kent County Circuit Court (1960), proof of misconduct must be specific and clear. While the right to discharge an employee rests with the employer, the mere fact that the employer does discharge an employee does not establish that the discharge was for misconduct.
>
> Here, Claimant was discharged for testing positive for marijuana on a drug screen. There was no indication that Claimant used the marijuana on Employer's premises, or was under the

> influence of marijuana while at work. There was insufficient evidence presented that Claimant's use of marijuana that caused the positive drug screen was connected with his employment. While Employer had the prerogative to discharge Claimant for his positive drug screen, insufficient evidence was presented that Claimant's actions constituted job-related misconduct, as defined above in *Carter*. Accordingly, Claimant must be found not disqualified for benefits under Section 29(1)(b) of the Act. [No. 260176, Order at 5.]

Amicus agrees fully with this analysis. *Carter* makes clear that "misconduct" is not any behavior the employer does not approve of, but behavior that threatens the employer's interests—job-related misconduct. There was nothing job-related about the claimant's use of marijuana, and the Commission should affirm the ALJ.

#### 3. In case 262736W, the Commission should decline to consider misconduct as it was not discussed below.

In the order the ALJ issued in case 262736W, a single issue was presented: "Is the Claimant disqualified from receiving benefits under the illegal drug provision, Section 29(1)(m) of the Act?" (No. 262736W, Order at 3.) Neither § 29(1)(b) nor misconduct is mentioned in the order. This Commission should therefore decide the case on the same basis the ALJ decided it and, for the reasons discussed in Argument I.B below, reverse the ALJ's decision.

### B. Because marijuana is legal, a marijuana test is not a "drug test" under the meaning of the MESA.

The second provision the employers have invoked is § 29(1)(m), which provides in part that "an individual is disqualified from receiving benefits if he or she . . . [w]as discharged for testing positive on a drug test[.]" The statute further

provides that " 'Drug test' means a test designed to detect the *illegal* use of a controlled substance." MCL 421.29(1)(m)(ii) (emphasis added).

With certain exceptions, the use of marijuana is legal in Michigan. MCL 333.27955(1)(a).[2] Thus, although marijuana remains a controlled substance in Michigan, MCL 333.7212(1)(c), (2), a marijuana drug test cannot possibly detect the "*illegal use* of a controlled substance." Where the Legislature has chosen to define a specific term, it is that definition, and not the lay definition, that controls. Although a marijuana test is a drug test under an ordinary meaning of the term, it is not a "drug test" under the statutory definition of the term, because marijuana is not an illegal drug and a marijuana test cannot test for illegal drug use.

And so, since a marijuana test is not a "drug test" for purposes of the MESA, it cannot be said that any of the claimants in these cases were "discharged for testing positive on a drug test." None of the claimants should have been disqualified on that basis.

### 1. In case 260172, the Commission should affirm the UIA for the reasons discussed above.

In case 260172, the claimant tested positive for THC metabolites. (Order at 5.) The ALJ held, in reliance on *People v Feezel*, that a THC metabolite is not a "controlled substance" under Michigan law. (*Id.*, citing *People v Feezel*, 486 Mich

[2] Although federal laws against the possession, distribution, and manufacture of marijuana remain on the books, 21 USC 841(a), no law—state or federal—makes the *consumption* of marijuana by a person over 21 years old an offense in Michigan, other than the exceptions in MCL 333.27954, none of which are at issue here.

184 (2010).) For purposes of this brief, amicus expresses no view on the correctness of that decision. This Commission can and should affirm on a different basis—one that will have broad application to those claimants who test positive for THC *or* THC metabolites.

Setting aside for this argument the fact that this test did not show the presence of a controlled substance, it is perhaps more important to note that the test did not show, and could not have shown, that the claimant had *illegally* used marijuana. Thus, the test was not a "drug test" as the Legislature chose to define it in § 29, and the claimant was not discharged for testing positive on a drug test. The Commission should therefore affirm the ALJ's decision holding the claimant not disqualified.

**2. In case 260176, the Commission should affirm the ALJ.**

In case 260176, the claimant was injured at work. (Order at 5.) After the claimant reported the injury to the employer, the claimant was required to take a drug screen. (*Id.*) Claimant tested positive for marijuana at that drug screen, and was fired for that reason less than a week later. (*Id.* at 4–5.) The ALJ reasoned that § 29(1)(m) did not apply to disqualify claimant because "pursuant to the recently adopted [MRTMA], consumption of marijuana by an individual 21 years or older is not an unlawful act." (*Id.* at 5.) This reasoning and result is correct, and the Commission should affirm.

### 3. In case 262736W, the Commission should reverse the ALJ.

In case 262736W, the claimant was seriously injured at work, hospitalized for at least a week and unable to work for a few months. (No. 262736W Order at 4.) While in the hospital, he was, according to the ALJ's findings of fact, "tested for illegal drugs." (*Id.*) He tested positive for marijuana metabolites. (*Id.*) On the basis of this test result, the ALJ held that the claimant was disqualified for benefits.

The ALJ did not analyze the MRTMA at all, nor did she appear to recognize that marijuana is not an illegal drug in Michigan. The reasoning focused only on whether the result of the test was accurate, and contained no explanation as to why a positive test for marijuana metabolites would satisfy § 29(1)(m)'s "illegal drugs provision." (No. 262736W, Order at 4–5.)

The ALJ erred in not recognizing the legality of marijuana in Michigan. The ALJ's order did not cite MRTMA at all, and so it contains no analysis of how MRTMA interacts with § 29(1)(m). For the reasons previously discussed, because the MRTMA made marijuana legal in Michigan, a marijuana test does not test for the illegal use of a drug, and is therefore not a "drug test" under the meaning of the statute. The claimant did not test positive on a drug test, and he should not be disqualified for benefits. The Commission should reverse.

## II. Holding that claimants are disqualified under § 29(1)(b) or (1)(m) of the MESA would conflict with the MRTMA and the MRTMA prevails.

Even if the Commission determined that the language of § 29(1)(b) or (1)(m) of the MESA warranted disqualification, the plain language of the MRTMA forbids any such result.

Specifically, § 5 of the MRTMA broadly protects adults from penalty or denial of rights or privileges for the use of marijuana:

> *Notwithstanding any other law* or provision of this act, and except as otherwise provided in section 4 of this act, the following acts by a person 21 years of age or older are not unlawful, are not an offense, are not grounds for seizing or forfeiting property, are not grounds for arrest, prosecution, or penalty in any manner, are not grounds for search or inspection, and are not grounds to deny any other right or privilege:
>
> (a) except as permitted by subdivision (b), possessing, using or consuming, [or] internally possessing. . . 2.5 ounces or less of marihuana[.] [MCL 333.27955(1) (emphasis added).]

And § 4 also states unequivocally that "[a]ll other laws inconsistent with this act do not apply to conduct that is permitted by this act."

Throughout the MRTMA, the People reiterated their intent that it be broadly construed to serve its purpose. See MCL 333.27967 (the act "shall be broadly construed to accomplish its intent as stated in section 2 of [the] act"); MCL 333.27952 ("To the fullest extent possible, this act shall be interpreted in accordance with the purpose and intent set forth in this section."); MCL 333.27952 ("The intent [of the MRTMA] is to prevent arrest and penalty for personal possession and cultivation of marihuana by adults 21 years of age or older . . . ."). To disqualify a

claimant from benefits based on their use of marijuana would be a "penalty" and the denial of a "right or privilege," which is expressly forbidden by the MRTMA.

The Court of Appeals has held that the denial of unemployment benefits constitutes a penalty. *Braska*, 307 Mich App at 360. That court has also held that the denial of unemployment benefits constitutes the denial of a right or privilege. *Eplee v City of Lansing*, 327 Mich App 635, 653–654 (2019).[3] And so, if the MESA were interpreted to require disqualification of these claimants for benefits based on their marijuana use, it would create an irreconcilable conflict between the MESA and the MRTMA. In that case, because the MRTMA applies "[n]otwithstanding any other law," and "[a]ll other laws inconsistent with [the MRTMA] do not apply," an interpretation of the MESA that would require disqualification for the use of marijuana would have to give way to the MRTMA.

The voters could not have been clearer in the language they chose to enact in § 5(1) of the MRTMA. The language appears calculated to foreclose every possible government-imposed negative consequence that might flow from the now-legal use and possession of marijuana, eliminating any possibility of any exceptions other those specifically enumerated in § 4 of the MRTMA, none of which apply here.

[3] *Braska* did not address the question whether unemployment benefits constitute a "right" or a "privilege," finding it unnecessary in light of the holding that the denial of benefits constituted a penalty. 307 Mich App at 360 n 6. In *Eplee*, the court, discussing *Braska*, held that there must have been a preexisting entitlement to benefits—whether a right or a privilege—in order for the denial of benefits to constitute a penalty. 327 Mich App at 653–654.

Indeed, the answer is even clearer here than it was in *Braska*. When *Braska* was decided, marijuana use was generally unlawful in Michigan, though the Michigan Medical Marihuana Act (MMMA) provided some protection. Now, marijuana use is generally *lawful* in Michigan. It would be absurd to say that a claimant should have more protection for the medical use of marijuana under the narrower MMMA than for the lawful use of marijuana under the broad MRTMA.[4]

In cases 260172 and 260176, the ALJs had no need to consider the possibility of any conflict between the MESA and the MRTMA, because they correctly held that, under the language of the MESA, the claimants were not disqualified from benefits. The Commission should affirm. But in case 262736W, the ALJ erroneously held that the claimant was disqualified under the MESA. Even if that were a correct reading of the MESA (and Amicus respectfully submits that it is not), the ALJ's decision to disqualify the claimant from benefits was a penalty for the use of marijuana, and it was the denial of a right or privilege for the use of marijuana. The ALJ should have recognized that the MRTMA forbids such an outcome. The Commission should reverse.

[4] It would also be no answer to say that these claimants were not fired for using marijuana, but for testing positive for marijuana. *Braska* rightly rejected this argument as "linguistic gymnastics," since the marijuana use and the positive test result were "intextricably intertwined." 307 Mich App at 359–360. And the analogous argument with respect to § 29(1)(b) would be equally meritless. *Braska*, 307 Mich App at 364–365.

## CONCLUSION AND RELIEF REQUESTED

For these reasons, the Attorney General respectfully asks that this Commission affirm the ALJs' decisions in cases 260172 and 260176 holding that the claimants are not disqualified for benefits, and reverse the ALJ's decision in case 262736W holding that the claimant is disqualified for benefits, and further hold that, because the MRTMA legalized marijuana in Michigan, no claimant over the age of 21 can be disqualified for benefits solely for the legal use of marijuana.

Respectfully submitted,

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