COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

96696-6

Maria Espindola,

Appellants/Plaintiffs,

v.

Apple King, Inc.,

Respondents/Defendants.

MARIA ESPINDOLA'S ANSWER TO PETITION FOR DISCRTIONARY REVIEW

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I. INTRODUCTION

Maria Espindola (hereinafter "Appellant") is herein answering to Apple King, Inc.'s (hereinafter "Appellee") petition for discretionary review. The Court of Appeals' decision reversed and remanded the lower courts' decision on summary judgment finding that there was sufficient evidence in the record to support Appellant's claim of employment retaliation pursuant to Family Medical Leave Act (hereinafter "FMLA") and Washington State Family Leave Act (hereinafter "FLA"). Appellant agrees that the Court of Appeals' decision was correct as it relates to the FMLA.

However, Appellant hereby raises an issue with and petitions for review of the Court of Appeals' decision as it relates to the FLA. Furthermore, Appellant also raises an issue and petitions for review of the Court of Appeals' silence in finding that a "no-fault" attendance policy is illegal under the FMLA and FLA. Appellant also raises an issue and petitions for review the Court of Appeals' decision denying Appellant's request for attorney fees and costs at the appellate level.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The Court of Appeals erred in interpreting

the FLA in the same manner as the federal circuit courts interpret the FMLA.

Assignment of Error No. 2: The Court of Appeals erred in remaining silent on whether a "no-fault" attendance policy is a violation of the FMLA and/or FLA in and of it self.

Assignment of Error No. 2: The Court of Appeals erred in denying Appellant's request for attorney fees and costs at the appellate level.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the FLA should be interpreted as an independent and sovereign source of regulation for our State's workforce and be endowed with its own standards.

2. Whether a "no-fault" attendance policy is a violation of the FMLA and/or FLA in and of it self.

3. Whether an employee is entitled to attorney fees and costs after succeeding at the appellate level pursuant to RAP 18.1, 29 U.S.C. § 2617(a)(3), 29 C.F.R. § 400(c) and RCW 49.48.030.

IV. RESPONSIVE STATEMENT OF THE CASE

On August 4, 2017, the Court of Appeals granted Appellant's Motion for Discretionary Review because it found that:

> "the adequacy of [Appellant's] notice for leave associated with her intermittent health conditions is an issue that has

> public import such that it should be determined by an appellate court. *See* RAP 2.3(d)(3)." (Appendix 023).

Appellee moved to modify this ruling and the ruling was upheld on October 19, 2017. (App. 027).

The Court of Appeals' decision interpreted Appellant's FLA claim in the same context as the FMLA interference/retaliation standards. (App. 001-22). The Court of Appeals' decision remained silent on whether Appellant's "no-fault" attendance policy was a violation of the FMLA and FLA in and of itself. *Id.* The Court of Appeals' decision indicated that attorney fees and costs for employees are only appropriate at the trial level. *Id.*

V. ARGUMENT

A. ANSWER TO APPELLEE'S ISSUES PRESENTED

1. The Court of Appeals Had Jurisdiction Over This Appeal Pursuant to RAP 2.3(d)(3).

Appellee argues that Court of Appeals did not have jurisdiction and bases its argument on a narrow sited view of the Rules of Appellate procedure. Appellee argues that RAP 2.2(c) only allows for review of appeals of courts of limited jurisdiction only if the review proceeding was a trial de novo. This argument completely ignores the fact that RAP 2.3(d) allows for *discretionary* review of any review proceeding for decisions of superior courts reviewing decisions of courts of limited jurisdiction.

Discretionary review is accepted if a decision "involves an issue of public interest which should be determined by an appellate court." RAP 2.3(d)(3). The Court of Appeals expressly held that the issues in this case were in the public interest and granted discretionary review. The Appellee itself is now arguing in its present Petition for Discretionary Review that the issues in this case are issues of broad public interest.

2. The Court of Appeals' Decision Properly Addressed The Fact That Employers' Requirement For Employees To Comply With A Customary Notice And Procedure Is Only Allowed If The Notice and Procedure Complies With The FMLA

Appellee argues that the Court of Appeals' decision alters employers FMLA's notice requirements by disqualifying Appellee's attendance policy. When an employee is not able to give 30 days' notice, the FMLA and FLA allow employees to give notice as soon as practicable. 29 U.S.C. § 2612(e); 29 C.F.R. § 825.302(a); RCW 49.78.250. When leave is unforeseeable, no advance notice is required. 29 C.F.R. §§ 825.303(a), .305(b). Appellee's attendance policy faulted employees for not giving at least 24-hour advance notice, which is a direct contradiction of the FMLA and FLA.

Appellee argues that requiring an employer to follow up on a single employee request for intermittent leave will make it so that the employer will carry this burden forever. This is an unreasonable exaggeration. Appellee ignores the fact that Appellant's need for leave

was primarily related to her pregnancy, which does not last forever. The Court of Appeals' decision takes into account the fact that employees are entitled to FMLA protections for maternity leave and unexpected childbirth circumstances pursuant to RCW 49.78.250(1); 29 §§ 825.115(f), .120(a)(4), .303(c). The Court of Appeals' decision had more than sufficient basis to find that there was adequate notice to survive summary judgment considering that Appellant gave written consistent notices of need for FMLA/FLA leave to Appellee From July 7, 2011 through April 2012. (App. 28-43). Appellant also gave oral notice to Appellee of her kidney stones and gestational diabetes to the point that Appellee allowed her to check her blood sugar at work in the kitchen or bathroom. (App. 0044-66, at 9:23-10:5; and 22:2-23:15). The Court of Appeals' decision was proper and fair.

3. The Court Of Appeals Properly Interpreted Appellant's FMLA Claim As A Retaliation Claim

The federal circuit courts have adopted an unnecessary and convoluted process to analyze FMLA claims and have created two different categories of FMLA claims; interference and retaliation/discrimination. *See Bachelder v. Am. W. Airlines, Inc.,* 259 F.3d 1112, 1124–25 (9th Cir. 2001); *Burnett v. LFW Inc.,* 472 F.3d 417, 480-81 (7th Cir. 2006); *Lovland v. Employers Mut. Cas. Co.,* 674 F.3d 806 (8th Cir. 2012); 29 C.F.R. § 825.220(c). The Court of Appeals' decision

properly distilled the federal circuits' and U.S. Department of Labor's ("DOL") caselaw and regulations in its analysis of the present claim. Appellant's claim is one of retaliation/discrimination because Appellant used her taking of FMLA leave as a negative factor and terminating her.

4. The Court of Appeals' Decision Properly Applied The Legal Standard For Retaliation Claims

Appellant argues that after an employee proves a prima-facie retaliation claim, there should be a burden-shifting analysis for the employer to prove a nondiscriminatory basis for its actions. The Court of Appeals' decision holds that an employee only has to prove that she was absent for reasons covered by the FMLA, she suffered an adverse employment action and the covered leave was a negative factor in the employer's adverse employment decision. (App. 0013). Discriminatory intent is irrelevant. This is well supported by federal caselaw and regulations. *Bachelder,* 259 F.3d 1112, 1125; 29 C.F.R. § 825.220(c).

B. APPELLANT'S ISSUES PRESENTED FOR DISCRETIONARY REVIEW

Pursuant to RAP 13.4(b)(1), (2), and (4), Appellant hereby presents the following issues for discretionary review. The issue of interpreting the FLA as its own statute is an issue of substantial public interest. Similarly, the issue of holding employers accountable for failing to have their attendance policies to conform to our statutes is also an issue of substantial public interest. The issue of award of attorney fees and costs

to a successful employee at the appellate level is presented because the Court of Appeals' decision is in conflict with decisions of the Supreme Court and published opinions of the Courts of Appeals.

1. The FLA Should Be Interpreted As Its Own Independent Body of Law, Not Dependent On The FMLA

Contrary to Appellee's argument, RCW 49.78.410 does not stand for the notion that the FLA should be interpreted the same way that federal courts interpret the FMLA. Instead our legislature expressly requests that the FLA be construed in a way that gives consideration to the "rules, precedents, and practices of the *federal department of labor* relevant to the [FMLA]." RCW 49.78.410 (emphasis added). Our legislature does not give consideration to federal courts interpreting the FMLA, but only the US DOL, which codifies its rules, precedents and practices in the Code of Federal Regulations and on its website. Appellee's reading of RCW 49.78.410 requires our State to succumb to the confusion and complication of the federal circuits analysis of the FMLA.

Our State has always been a leader in implementing clear, fair and practical caselaw to help our workforce and economy thrive. This is illustrated in the higher standards that our courts have established for analyzing disability discrimination claims, for example. Under the Americans with Disabilities Act and the federal case law, employees have to prove that *but for* their disability, they would not have suffered

discrimination. *T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist.,* 806 F.3d 451, 473 (9th Cir. 2015); 42 U.S.C.A § 12132. This is a high burden to meet because employees are made to prove a negative; that there was no other reason for the adverse employment action. This standard allows employers to dodge liability by simply coming up with any potential reason for the adverse employment action, which makes it so that only perfect employees can stand a chance. This is inefficient at achieving the purpose of these anti-discrimination statutes, which is to eradicate discrimination.

Our State's disability discrimination statute, on the other hand, requires our employees to "present evidence sufficient for a trier of fact to reasonably conclude that the alleged unlawfully discriminatory animus was more likely than not a *substantial factor* in the adverse employment action." *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 186-87, 23 P.3d 440 (2001) (emphasis added); RCW 49.60.180(1). This is a more practical standard that gives both the employer and employee a fair starting point.

Our State is one of the first to provide paid family leave (starting in 2020) and continues to be a role model for the rest of the country in fair employment practices. Our state recognizes that when we treat our employees fairly and with respect, our workforce and economy will thrive.

This is best expressed by our Supreme Court expressing that "remedial statutes in Title 49 RCW should be liberally construed to carry out the legislature's goal of protecting employees." *Bostain v. Food Exp., Inc.,* 153 P.3d 846, 852 (Wash. 2007).

This is the perfect opportunity for our Supreme Court to give life to our FLA and establish standards that are aligned with our People's values. Our courts already have established fair and clear standards for anti-retaliation/discrimination claims that can easily be applied to the FLA. To prove a disability retaliation claim, for example, an employee must show that (1) she engaged in a statutorily protected activity, (2) an adverse employment action was taken, and (3) the statutorily protected activity was a substantial factor in the employer's adverse employment decision. *Francom v. Costco Wholesale Corp.,* 98 Wn. App. 845, 861-62, 991 P.2d 1182, 1191 (Div. III, 2000). This is a straightforward and fair approach that does away with all the confusion of categorizing a claim as an interference, retaliation or discrimination claim.

Furthermore, the FLA is self-sufficient. It entitles an employee to:

> "a total of twelve workweeks of leave during any twelve-month period for one or more of the following: (a) Because of the birth of a child of the employee and in order to care for the child; [or] (d) Because of a serious health condition that makes the employee unable to perform the functions of the position of the employee." RCW 49.78.220.

RCW 49.78.230(1)(b) establishes that:

> "leave may be taken intermittently or on a reduced leave schedule when medically necessary for medical treatment of a serious health condition by or under the supervision of a health care provider, or for recovery from treatment or recovery from a serious health condition."

RCW 49.78.300(1)(b) makes it unlawful for an employer to discharge an individual for taking FLA leave. This statute does not make any distinction between interference, discrimination, restraint or retaliation. Our State is ready for our FLA to take on a life of its own.

It is even more urgent now to promulgate standards for the FLA considering that these are the standards that we will be utilizing when our paid medical leave program goes into effect in 2020.

2. No-Fault Attendance Policies That Curtail FMLA And FLA Benefits Are A Violation In And Of Itself

29 CFR § 825.220(c) expressly states that FMLA leave cannot be "counted under no fault attendance policies." Appellee's attendance policy counted employees' unforeseeable leave under its no-fault policy if the employee did not give more than 24-hour advance notice. (App. 0030). This is a violation of the FMLA (and the FLA, pursuant to RCW 49.78.410) and was proximate cause of Plaintiff's termination. This should be its own cause of action because the policy violates the FMLA/FLA. This is the strongest checks and balances to ensure that employers are following our statutes.

3. Employees Are Entitled To Attorney Fees and Costs at The Appellate Level

The Court of Appeals' decision indicated that attorney fees and costs are not allowed at the appellate level. This is contrary to our courts caselaw. A party is entitled to an award of attorney fees on appeal if a contract, statute, or recognized ground of equity permits recovery of attorney fees at trial and the party is the substantially prevailing party on appeal. *Hwang v. McMahill,* 103 Wash.App. 945, 954, 15 P.3d 172 (2000) (citing *Dayton v. Farmers Ins. Group,* 124 Wash.2d 277, 280, 876 P.2d 896 (1994). In this case RAP 18.1, 29 U.S.C. § 2617(a)(3), 29 C.F.R. § 400(c) and RCW 49.48.030 entitle successful employees with attorney fees and costs. This is because in bringing an employment discrimination action, a prevailing party acts as a "private attorney general: by enforcing a public policy of substantial importance." *Allison v. Hous. Auth. of City of Seattle*, 118 Wn.2d 79, 86, 821 P.2d 34, 36 (1991).

Part of a "comprehensive scheme to ensure payment of wages," the attorney fee statute provides employees both an incentive and a means to pursue their claims to unpaid wages or salary. *Schilling v. Radio Holdings, Inc.,* 136 Wn.2d 152, 157, 961 P.2d 371 (1998). "One of the primary purposes of remedial statutes like RCW 49.48.030 is to allow employees to pursue claims even though the amount of recovery may be small." *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett,* 146 Wn.2d 29, 50, 42 P.3d 1265, 1275 (2002); *see also: Schilling,* 136 Wn.2d 152, 159.

> The Court has discretion as to how much to award in fees. "As nearly as possible, market standards should prevail, for that is the best way of ensuring that competent counsel will be available to all persons with bona fide civil rights claims. This means that judges awarding fees must make certain that attorneys are paid the full value that their efforts would receive on the open market in non-civil rights cases." *Hensley v. Eckerhart,* 461 U.S. 424, 435, 103 S.Ct. 1933 (1983).

C. PRAYER FOR RELIEF

For all these reasons, Appellants respectfully prays Appellee's petition for discretionary review be denied and that Appellant's petition for discretionary review be granted.

Respectfully submitted this 30th day of January, 2019.

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CERTIFICATE OF SERVICE

The undersigned makes the following declaration certified to be true under penalty of perjury pursuant to RCW 9A.72.085:

On the date given below, I hereby certify that the attached document hereto was served on the following in the manner indicated:

Gary Lofland **Meyer, Fluegge & Tenney** 230 S. 2nd Street, #101 Yakima, WA 98901	[x] Electronic mail [ ] Facsimile [ ] Legal Messenger [ ] U.S. mail [x] Other: via Court website

The Court of Appeals of the State of Washington Division III **500 N Cedar St** **Spokane, WA 99201-1905** **Fax (509)456-4288**	[ ] Electronic mail [ ] Facsimile [ ] Legal Messenger [ ] U.S. first class mail [x] Other: Court website

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

Executed this _30TH_ day of January, 2019, at Yakima, Washington.

___/s/ Favian Valencia___
Favian Valencia

APPENDIX

FILED
NOVEMBER 29, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MARIA G. ESPINDOLA, Petitioner, v. APPLE KING, a limited liability company, Respondent.	)	No. 35262-5-III PUBLISHED OPINION

PENNELL, A.C.J. — Under the state and federal family medical leave acts, an employee who is incapacitated due to a serious medical condition, such as pregnancy, has the right to take protected leave from work. This right persists even when an episode of incapacitation is unforeseeable. Should an employee invoke protected leave, including unforeseeable protected leave, an employer cannot use the employee's actions as a negative factor in a subsequent employment decision. Doing so would constitute retaliation in violation of state and federal law.

While employed with Apple King, Maria Espindola discovered she was pregnant. Over the course of her pregnancy, Ms. Espindola experienced medical complications that caused her to miss work. Apple King was aware of Ms. Espindola's pregnancy and knew she had experienced some health problems. Nevertheless, Apple King used some of Ms. Espindola's work absences as negative factors in its ultimate decision to terminate employment. According to Apple King, Ms. Espindola was properly penalized because she failed to comply with the company's attendance policy, requiring at least one day's advance notice of all medical absences not involving hospitalization.

Apple King's reliance on its attendance policy is unavailing. Because Apple King's policy did not account for an employee's right to take unforeseeable protected leave, Ms. Espindola's failure to comply with the policy was not a legitimate basis for an adverse employment action. Given that Ms. Espindola has produced sufficient facts to demonstrate Apple King was on notice of her need for unforeseeable protected leave, Apple King is not entitled to summary judgment on Ms. Espindola's retaliation claim. This matter is therefore reversed.

FACTS

Apple King operates a fruit warehouse and packing facility in Yakima County, Washington. Maria Espindola worked for Apple King from August 2, 2007, to April 20,

2012. On May 1, 2011, Apple King implemented an attendance policy. Ms. Espindola received and signed a copy of the policy on August 14, 2011. The policy provides:

> As of May 1st, 2011, [Apple King] will put into practice a revised 24 point attendance scoring system. Each employee will have 24 points to use up between May 1st and the last day of April. You will start with 0 points and each attendance infraction will be counted in the following manner.
>
> NO POINTS will be counted for appts. with 24 hr. notice and proof of appt.
> 2 Points for not giving 24 hr. notice regardless of proof
> 2 Points for being Tardy
> 2 Points for leaving before end of shift without proof of appointment
> 3 Points per absence without proof of appointment (unless you use a Vacation Day)
> 12 Points for a NO CALL-NO SHOW
> No points will be counted for L&I appointments.
>
> If you reach the 24 point mark before the designated time, your employment with Apple King, LLC will be terminated. It is very important to understand that this will be the same for all Packing House employees. Every 1st of May each employee will start with 0 points once again only if they have managed not to reach the 24 point mark by the end of the last day of April. We strongly encourage you to set up your appointments on your day(s) off.

Clerk's Papers (CP) at 233.

According to an Apple King representative, employees were verbally notified that no points would be assessed against them for attending funerals or for emergencies such as hospitalizations or car accidents. Apple King's attendance policy did not reference the federal or state medical leave acts. Nor did the policy explain how Apple King would

account for leave that is protected under state or federal law. According to testimony from Apple King, the decision of whether to assess points for an employee absence is determined solely by the company's attendance policy.

In June or July 2011, Ms. Espindola discovered she was pregnant and reported her condition to her supervisor. Ms. Espindola was then absent from work on July 20, 21, and 22. She produced a doctor's note dated July 21 stating she had been prescribed two days' bed rest. Pursuant to Apple King's attendance policy, Ms. Espindola was assessed two points for her absence on July 20 because she only provided same-day notice of a medical appointment.

In August 2011, Ms. Espindola developed kidney stones. Ms. Espindola was hospitalized from August 21 to 25, 2011, and submitted a doctor's note stating she was not clear to return to work until after a follow-up appointment on August 31. The doctor's note did not provide the reason for Ms. Espindola's hospitalization, but according to Ms. Espindola she had been hospitalized due to the kidney stones. Apple King did not assess Ms. Espindola any attendance points for her hospitalization. It is unclear whether Apple King knew of the reason for Ms. Espindola's hospitalization, but the company did at least know that Ms. Espindola had been hospitalized during the course of her pregnancy.

In the months following her hospitalization, Ms. Espindola had numerous medical appointments. Apple King was advised of the appointments, and Ms. Espindola was not assessed any attendance points for those absences. Ms. Espindola was also permitted to take time to check her blood sugar at work after reporting that she had been diagnosed with gestational diabetes. Ms. Espindola's gestational diabetes did not cause her to miss work.

The last full month of Ms. Espindola's pregnancy was December 2011. During that month, Ms. Espindola left work early on three occasions. She was assessed two attendance points on each date. Also in December, Ms. Espindola missed a day of work and provided same-day notice of her absence. Ms. Espindola was assessed three points on this occasion. Ms. Espindola did not provide any doctors' notes explaining her December absences. However, Ms. Espindola has testified that she had told her supervisor she was in debilitating pain from kidney stones. According to Ms. Espindola, her supervisor provided permission to either leave work early or stay at home, as at times she was unable to work due to the pain. Apple King did not request medical documentation from Ms. Espindola to verify her explanations.

Ms. Espindola began her maternity leave on January 9, 2012, and returned to work on March 4. During her maternity leave, Ms. Espindola reportedly had her kidney stones

removed. Apple King did not assess Ms. Espindola any attendance points for her maternity leave.

Apple King fired Ms. Espindola on April 20, 2012, because she had exceeded the 24 points allowed annually by the company's attendance policy. The following chart illustrates Ms. Espindola's absences from work between May 1, 2011, and April 20, 2012, and the points she was assessed under the attendance policy:

Date	**Disposition**	**Reason for Absence and/or Disposition**	**Points**	**Record (CP)**
May 20, 2011	Unexcused	Left work early (late proof of appointment)	2	239-40
June 6, 2011	Excused	Dental appointment	0	252-53
June 10, 2011	Excused	Doctor appointment	0	252-53
July 8, 2011	Excused	Illness (bladder infection)	0	254-55
July 12, 2011	Excused	Doctor appointment	0	256-57
July 20, 2011	Unexcused	Left work early (same day notice of appointment)	2	38, 50, 258
July 21, 2011	Excused	Illness (note from doctor dated July 21 calls for 2 days bed rest)	0	38, 50, 258-59

Date	Disposition	Reason for Absence and/or Disposition	Points	Record (CP)
July 22, 2011	Excused	Illness (note from doctor dated July 21 calls for 2 days bed rest)	0	38, 50, 258-59
Aug. 1, 2011	Excused	Doctor appointment	0	260-61
Aug. 21 to 25, 2011	Excused	Hospitalization (note from doctor states she cannot return to work until after her follow-up appointment on Aug. 31)	0	262-63
Sept. 9, 2011	Excused	Doctor appointment (for imaging studies)	0	264-65
Sept. 16, 2011	Excused	Doctor appointment	0	266-67
Sept. 17, 2011	Excused	Left work early (illness)	0	266
Oct. 11, 2011	Excused	Doctor appointment	0	268-69
Oct. 12, 2011	Excused	Doctor appointment (for laboratory studies)	0	268, 270
Oct. 25, 2011	Unexcused	Doctor appointment (no excuse slip)	2	243
Nov. 10, 2011	Unexcused	Absent without advance notice (called same day)	3	134-35, 244, 756
Nov. 22, 2011	Excused	Doctor appointment	0	271
Dec. 9, 2011	Unexcused	Left work early	2	245
Dec. 19, 2011	Unexcused	Left work early	2	246
Dec. 20, 2011	Unexcused	Absent (called same day)	3	134-35, 246
Dec. 27, 2011	Excused	Doctor appointment	0	248
Dec. 30, 2011	Unexcused	Left work early	2	248

Date	Disposition	Reason for Absence and/or Disposition	Points	Record (CP)
Jan. 9 to Mar. 2, 2012	Excused	Maternity leave	0	38, 50, 59, 237, 306-07
Mar. 6, 2012	Excused	Doctor appointment (for her baby)	0	273-74
Mar. 23, 2012	Unexcused	Left work early due to suspension (work performance issue)	2	249, 278
Mar. 24, 2012	Unexcused	Suspension (work performance issue)	3	249, 278
Mar. 26, 2012	Unexcused	Suspension (work performance issue)	3	250, 278
Apr. 4, 2012	Excused	Doctor appointment (for her baby)	0	275-76
Apr. 17, 2012	Unexcused	Left work early	2	251
Ms. Espindola's employment was terminated on April 20, 2012, for accumulating 28 adverse attendance points				237, 251

In July 2014, Ms. Espindola filed suit in Yakima County District Court alleging Apple King had terminated her employment in a discriminatory and retaliatory manner because she missed work due to serious health conditions. In January 2016, the district court dismissed most of Ms. Espindola's claims on summary judgment, leaving only claims for unlawful discrimination and retaliation under the state and federal family medical leave acts. In a letter decision dated June 22, 2016, the district court also granted summary judgment to Apple King on the remaining claims. The superior court affirmed on appeal. Our court granted discretionary review pursuant to RAP 2.3(d)(3).

ANALYSIS

We review orders on summary judgment de novo. *Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014); *Mikolajczak v. Mann*, 1 Wn. App. 2d 493, 496, 406 P.3d 670 (2017). Under this standard, our court engages in the same inquiry as the trial court, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Lyons*, 181 Wn.2d at 783; *Mikolajczak*, 1 Wn. App. 2d at 496-97.

The federal and state medical leave acts

The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601-2654; 29 C.F.R. pt. 825 was implemented by the federal government to address "inadequate job security for employees who have serious health conditions that prevent them from working temporary periods." 29 U.S.C. § 2601(a)(4). The purposes of the FMLA include the need "to balance the demands of the workplace with the needs of families," and "to entitle employees to take reasonable leave for medical reasons" including "the birth . . . of a child." 29 U.S.C. § 2601(b)(1), (2). Similarly, Washington's Family Leave Act (WFLA), chapter 49.78 RCW, states it is "in the public interest to provide reasonable leave for medical reasons." RCW 49.78.010. The WFLA mirrors the FMLA and provides that courts are to interpret its provisions in a manner consistent with similar

provisions of the FMLA. RCW 49.78.410 (The WFLA "must be construed . . . consistent[ly] with similar provisions, if any, of the [FMLA] . . . and [provide] consideration to the rules, precedents, and practices of the federal department of labor relevant to the [FMLA]."); *Shelton v. Boeing Co.*, 702 Fed. App'x 567, 568 (9th Cir. 2017); *Crawford v. JP Morgan Chase NA*, 983 F. Supp. 2d 1264, 1269 (W.D. Wash. 2013).

The substantive right enjoyed by employees under the FMLA and WFLA is the ability to take 12 weeks' leave from work per year for protected health or family reasons without suffering negative employment consequences. 29 U.S.C. §§ 2612(a)(1), 2614(a); RCW 49.78.220, .280. To safeguard this right, both the FMLA and WFLA prohibit employers from discriminating and retaliating against employees who engage in protected conduct.[1] The laws recognize two types of prohibited discrimination and retaliation. First, 29 U.S.C. § 2615(a)(2) and RCW 49.78.300(1)(b), make it unlawful for an employer "to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by" the FMLA and WFLA. Second, 29 C.F.R.

[1] The medical leave statutes also prohibit employers from interfering with an employee's exercise of FMLA/WFLA rights. 29 U.S.C. § 2615(a)(1); RCW 49.78.300(1)(a). However, this case does not involve a straight interference claim, such as what might be asserted if an employer refused to grant an employee the substantive right to reinstatement after the employee exercised protected leave.

§ 825.220(c)[2] "prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights." [3]

The legal test applicable to Ms. Espindola's FMLA/WFLA claim

Ms. Espindola's complaint alleged the second type of protection from retaliation, i.e., that she was terminated for exercising rights protected by the FMLA and WFLA. 29 C.F.R. § 825.220(c). Pursuant to this form of protection, "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring,

[2] The statutory source for this regulation is an area of confusion and dispute. *Compare Arban v. W. Publ'g Corp.*, 345 F.3d 390, 401 (6th Cir. 2003) (retaliation for exercising FMLA rights arises under 29 U.S.C. § 2615(a)(2)), and *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 960 (10th Cir. 2002) (same), and *Loveland v. Emp'rs Mut. Cas. Co.*, 674 F.3d 806, 810-11 (8th Cir. 2012) (same) *with Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199, 1206 (11th Cir. 2001) (retaliation for exercising FMLA rights arises under 29 U.S.C. § 2615(a)(1) and (2) as well as 29 C.F.R. § 825.220(c)), and *King v. Preferred Technical Grp.*, 166 F.3d 887, 891 (7th Cir. 1999) (same), and *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 159-60 (1st Cir. 1998) (same), *and with Bachelder v. Am. W. Airlines*, 259 F.3d 1112 (9th Cir. 2001) (retaliation for exercising FMLA rights arises under 29 U.S.C. § 2615(a)(1) and 29 C.F.R. § 825.220(c)). We need not enter this fray. All courts agree that an employee can bring a retaliation claim based on the exercise of FMLA rights. Furthermore, the WFLA provides statutory authority for considering the terms of the federal implementing regulations. RCW 49.78.410.

[3] The WFLA specifically incorporates consideration of regulatory rules applicable to the FMLA. *Id*.

promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies." *Id.*

The parties dispute the test applicable to the type of retaliation claimed by Ms. Espindola. According to Ms. Espindola, we should apply a *McDonnell Douglas*-style burden shifting analysis, under which the employee must first make out a prima facie case of discrimination; then a production burden shifts to the employer to provide a legitimate, nondiscriminatory reason for its adverse employment action and, if this burden is met, the employee bears the ultimate burden of demonstrating that the employer's articulated reason for its action was a mere pretext for discrimination or retaliation. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Apple King contends that the *McDonnell Douglas* analysis is inapplicable. According to Apple King, we should follow the lead of the Ninth Circuit Court of Appeals and find the *McDonnell Douglas* burden-shifting scheme inapplicable to Ms. Espindola's claim. On this legal point, we agree with Apple King. However, as shall be discussed, the Ninth Circuit's test actually favors Ms. Espindola.

In *Bachelder v. America West Airlines*, the Ninth Circuit held that the *McDonnell Douglas* burden-shifting analysis does not apply to retaliation claims under 29 C.F.R. § 825.220(c). *Bachelder v. Am. W. Airlines*, 259 F.3d 1112, 1125 (9th Cir. 2001).

Because the United States Department of Labor's regulation prohibits the use of FMLA-protected leave as a "negative factor" in an employment decision, the Ninth Circuit recognized that an employee "need only prove by a preponderance of the evidence that her taking of FMLA-protected leave constituted a negative factor in the decision to terminate her. She can prove this claim, as one might any ordinary statutory claim, by using either direct or circumstantial evidence, or both. . . . No scheme shifting the burden of production back and forth is required." *Id.* at 1125.

Based on *Bachelder* and the plain language of 29 C.F.R. § 825.220(c), it is apparent that a plaintiff claiming retaliation for the exercise of FMLA/WFLA rights need only prove: (1) he or she was absent from work for reasons covered by the FMLA/WFLA, (2) he or she suffered an adverse employment decision, and (3) the covered leave was a negative factor in the employer's adverse employment decision.[4] Because establishing a regulatory retaliation claim does not require specific proof of discriminatory intent, there is no need to require the employer to proffer a

[4] Because *Bachelder* found 29 C.F.R. § 825.220(c) was adopted pursuant to 29 U.S.C. § 2615(a)(1) (that prohibits interference with the exercise of FMLA rights), it labeled a regulatory claim an "interference" claim. 259 F.3d at 1124-25. However, because the regulation itself employs the words "discriminating" and "retaliating," a regulatory claim is more appropriately labeled a discrimination or retaliation claim. *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 146 n.9 (3d Cir. 2004).

nondiscriminatory basis for its employment decision or for the employee to rebut the employer's proffer.

Application of the applicable standard to Ms. Espindola's claim

Here, it is undisputed Ms. Espindola was fired from Apple King because of absences from work. Thus, the viability of Ms. Espindola's retaliation claim rests on the first factor of the retaliation test—i.e., whether at least some of Ms. Espindola's absences were protected by the FMLA/WFLA. Proof of this factor depends on whether Ms. Espindola can establish that she provided Apple King with adequate notice of a request for FMLA/WFLA protected leave.

Legal requirements for adequate notice

To invoke the right to protected leave, an employee must provide adequate notice to his or her employer. 29 U.S.C. § 2612(e); RCW 49.78.250. The notice requirement is "not onerous." *Preddie v. Bartholomew Consol. Sch. Corp.*, 799 F.3d 806, 816 (7th Cir. 2015). "An employee giving notice of the need for FMLA[/WFLA] leave does not need to expressly assert rights under the Act or even mention the FMLA[/WFLA] to meet his or her obligation to provide notice." 29 C.F.R. § 825.301(b). Verbal notice is sufficient. 29 C.F.R. § 825.302(c). There are three general components of adequate FMLA/WFLA notice: content, timing, and compliance with employer policy. The failure to meet any of

these three components can result in denial of FMLA/WFLA leave and protections. But once an employee provides adequate notice, the employer must take responsive action.

With respect to content, an employee's notice must refer to a condition that qualifies for leave under the FMLA/WFLA. Protected leave does not apply to minor illnesses; merely calling in sick is insufficient to trigger an employee's right to protected leave. 29 C.F.R. § 825.303(b). However, pregnancy-related incapacitation is an explicitly covered condition. 29 C.F.R. § 825.115(b); RCW 49.78.020(16)(a)(ii)(B). Also covered is incapacitation due to a serious medical condition that "makes the employee unable to perform the functions" of the employee's job. 29 U.S.C. § 2612(a)(1)(D); 29 C.F.R. § 112(a)(4); RCW 49.78.220(1)(d).

An employee's responsibility with respect to timing of notice is somewhat flexible. In general, an employee must provide 30 days' advance notice of planned leave. 29 U.S.C. § 2612(e); 29 C.F.R. § 825.302(a); RCW 49.78.250. However, the FMLA/WFLA recognize that 30 days advance notice is not always possible. In such circumstances, an employee need only provide notice as soon as practicable. 29 U.S.C. § 2612(e); 29 C.F.R. § 825.302(a); RCW 49.78.250. When medical or family leave is unforeseeable, no advance notice is required. 29 C.F.R. §§ 825.303(a), .305(b); *Lichtenstein v. Univ. of Pittsburg*, 691 F.3d 294, 301 (3d Cir. 2012); *Kauffman v. Fed.*

Express Corp., 426 F.3d 880, 885-86 (7th Cir. 2005).

When it comes to certain types of conditions, an employee's obligations with respect to content and timing of notice are intertwined. Maternity leave, for example, is something generally governed by a 30-day notice requirement. RCW 49.78.250(1).[5] But during the course of a woman's pregnancy, the need for protected leave will sometimes be unpredictable. *See* 29 C.F.R. § 825.120(a)(4). For example, an expectant mother may find herself surprisingly debilitated by morning sickness. In such circumstances, the FMLA/WFLA recognize the right to take unforeseeable protected leave, even when such leave does not involve hospitalization or other direct medical supervision. 29 C.F.R. §§ 825.115(f), .120(a)(4).

An employee's notice obligations generally include compliance with an employer's internal notification procedures. 29 C.F.R. §§ 825.302(d), .303(c), .304. For example, an employer may require written notice or that notice be directed to a specific individual. If an employee fails to satisfy an employer's internal notification procedures, FMLA/WFLA leave may be delayed or denied, regardless of whether the employee might actually qualify for leave. 29 C.F.R. § 825.303(c).

[5] Thirty days' advance notice is not required if childbirth is unexpected. In such circumstances, the employee need only provide "such notice as is practicable." RCW 49.78.250(1).

But there is an important limitation to an employer's ability to deny FMLA/WFLA leave based on noncompliance with company policy. When an employer's policy does not comport with FMLA/WFLA standards for invoking leave (such as the standards for invoking unforeseeable leave), an employee's right to protected leave cannot be denied based simply on noncompliance with the employer's policy. *See* 29 C.F.R. § 825.304(e) ("[T]he employer may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances, as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave and the rules are not inconsistent with § 825.303(a) [allowing for unforeseeable leave]."); *see also* 29 C.F.R. §§ 825.302(d), .303(c), .304(a). In circumstances where the employer's policy is insufficient, an employee's notice obligations are governed solely by the terms of the FMLA/WFLA.

Once an employee has provided appropriately timed notice that he or she "may" have a condition that qualifies for FMLA/WFLA leave, the burden falls on the employer to take action. 29 C.F.R. § 825.303(b); *Lichtenstein*, 691 F.3d at 303-04. The employee's notice need not provide definitive proof of the right to take protected leave. All that needs to be raised is "probable basis" to believe the employee is entitled to FMLA/WFLA leave. *Aubuchon v. Knauf Fiberglass, GmbH*, 359 F.3d 950, 953 (7th Cir.

2004). Once this is satisfied, the employer is obliged to either grant protected leave or investigate whether the employee's condition qualifies for leave. 29 C.F.R. §§ 825.301(a), .302(c); *Lichtenstein*, 691 F.3d at 303; *Burnett v. LFW Inc.*, 472 F.3d 471, 480 (7th Cir. 2006).

Application of the adequate notice requirement to Ms. Espindola

Whether Ms. Espindola provided Apple King adequate notice of the need for FMLA/WFLA leave is a question of fact. *Lichtenstein*, 691 F.3d at 303. Thus, Apple King is entitled to summary judgment only if, viewing the record in the light most favorable to Ms. Espindola, no reasonable fact finder could rule in her favor.

It is undisputed that Ms. Espindola notified Apple King of her pregnancy in June or July 2011. Given that pregnancy is the type of condition that can reasonably create the need for unforeseeable protected leave, Ms. Espindola's burden of providing additional notice of incapacitation during the course of her pregnancy was at least somewhat reduced. *See* 29 C.F.R. § 825.302(c) (notice that "employee is pregnant" may be sufficient); *Aubuchon*, 359 F.3d at 953 (note that pregnant woman was having complications would be sufficient, "despite the absence of details"). In like manner, once it was aware of Ms. Espindola's pregnancy, the expectation that Apple King would be

alert to Ms. Espindola's need for unexpected protected leave was at least somewhat enhanced.

The record on appeal suggests at least two pertinent time periods when Ms. Espindola provided adequate notice of the need for protected leave from work.[6] The first time period was late July 2011. On July 20, Ms. Espindola became ill and left work early. She subsequently produced a doctor's note dated July 21 stating she had been prescribed two days' bed rest. A reasonable inference from these facts is that Ms. Espindola's absence on July 20 was related to the need for bed rest prescribed on July 21 and 22. Given that bed rest is a common prescription for pregnancy-related complications, a fact finder could determine that Ms. Espindola's notice was sufficient to reasonably apprise Apple King of the need for protected leave.

The second relevant time period was December 2011. This was the last full month of Ms. Espindola's pregnancy. According to Ms. Espindola, she told her supervisor she suffered from episodic debilitating pain due to kidney stones that required her to stay home from work or leave early. Ms. Espindola's attendance records confirm that in December 2011, Ms. Espindola left work early on three occasions and provided same-day

[6] It is undisputed that there were other periods for which Ms. Espindola provided adequate notice. However, because Apple King excused those absences, they are not relevant to our inquiry.

notice of an absence on one occasion. A reasonable fact finder could infer that the absences in December were due to the episodic and unforeseeable kidney pain described by Ms. Espindola. Particularly given Apple King's knowledge that Ms. Espindola was having a difficult pregnancy,[7] a reasonable fact finder could conclude that Ms. Espindola's notice of debilitating kidney stone pain was sufficient to place Apple King on notice that Ms. Espindola was invoking the right to FMLA/WFLA protected leave. *See Byrne v. Avon Prods.*, 328 F.3d 379, 381 (7th Cir. 2003) (An employee's unusual behavior, alone, can provide notice that "something had gone medically wrong.").[8]

Although the record supports a finding that Ms. Espindola provided sufficient notice of the need for FMLA/WFLA leave in July and December of 2011, Apple King did not provide protected leave or conduct an investigation. Instead, Apple King used Ms. Espindola's absences on July 20 and December 9, 19, 20, and 30 as negative factors in its ultimate decision to terminate Ms. Espindola's employment. Apple King assessed Ms. Espindola a total of 11 adverse attendance points for the aforementioned absences, causing her to exceed the maximum number of attendance points per year by 5 points.

[7] Not only had Ms. Espindola been placed on bed rest during her pregnancy, she was also hospitalized as a result of kidney stones and diagnosed with gestational diabetes.

[8] Ms. Espindola also had unexcused absences in October and November. We do not assess whether those absences were governed by the same analysis as the December absences as it is unnecessary for purposes of this appeal.

Apple King claims it was justified in assessing Ms. Espindola points for the foregoing absences because Ms. Espindola's leave requests did not comport with company policy. Had Apple King's policy provided Ms. Espindola an avenue for claiming unforeseeable FMLA/WFLA leave, this defense would almost certainly prevail. 29 C.F.R. §§ 825.302(d), .303(c). But Apple King's attendance policy does not account for the FMLA/WFLA. The policy provides no explanation of how an employee would be expected to claim unforeseeable protected leave not resulting in hospitalization. Because Apple King's policy was not compliant with the FMLA/WFLA, the policy provides no defense to Ms. Espindola's retaliation claim.

Ms. Espindola has made a sufficient claim for retaliation under 29 C.F.R. § 825.220(c). As a consequence, Apple King is not entitled to summary judgment. The trial court's ruling to the contrary is reversed.

ATTORNEY FEES

Ms. Espindola requests attorney fees and costs pursuant to RAP 18.1, 29 U.S.C. § 2617(a)(3), 29 C.F.R. § 825.400(c), and RCW 49.48.030. This request is premature. Because Ms. Espindola has not yet succeeded on her claim against Apple King, we are not in a position to award attorney fees. If, after remand, Ms. Espindola prevails on her FMLA/WFLA claim, she will qualify as a prevailing party and may be awarded attorney

fees, including fees generated during this appeal, under 29 U.S.C. § 2617(a)(3), 29 C.F.R. § 825.400(c), and RCW 49.48.030.

CONCLUSION

The order on summary judgment is reversed. This matter is remanded for trial or further proceedings consistent with the terms of this opinion.

Pennell, A.C.J.

WE CONCUR:

Korsmo, J.

Fearing, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MARIA G. ESPINDOLA, Petitioner, v. APPLE KING, a limited liability company, Respondent.	)	No. 35262-5-III PUBLISHED OPINION

PENNELL, A.C.J. — Under the state and federal family medical leave acts, an employee who is incapacitated due to a serious medical condition, such as pregnancy, has the right to take protected leave from work. This right persists even when an episode of incapacitation is unforeseeable. Should an employee invoke protected leave, including unforeseeable protected leave, an employer cannot use the employee's actions as a negative factor in a subsequent employment decision. Doing so would constitute retaliation in violation of state and federal law.

While employed with Apple King, Maria Espindola discovered she was pregnant. Over the course of her pregnancy, Ms. Espindola experienced medical complications that caused her to miss work. Apple King was aware of Ms. Espindola's pregnancy and knew she had experienced some health problems. Nevertheless, Apple King used some of Ms. Espindola's work absences as negative factors in its ultimate decision to terminate employment. According to Apple King, Ms. Espindola was properly penalized because she failed to comply with the company's attendance policy, requiring at least one day's advance notice of all medical absences not involving hospitalization.

Apple King's reliance on its attendance policy is unavailing. Because Apple King's policy did not account for an employee's right to take unforeseeable protected leave, Ms. Espindola's failure to comply with the policy was not a legitimate basis for an adverse employment action. Given that Ms. Espindola has produced sufficient facts to demonstrate Apple King was on notice of her need for unforeseeable protected leave, Apple King is not entitled to summary judgment on Ms. Espindola's retaliation claim. This matter is therefore reversed.

FACTS

Apple King operates a fruit warehouse and packing facility in Yakima County, Washington. Maria Espindola worked for Apple King from August 2, 2007, to April 20,

2012. On May 1, 2011, Apple King implemented an attendance policy. Ms. Espindola received and signed a copy of the policy on August 14, 2011. The policy provides:

> As of May 1st, 2011, [Apple King] will put into practice a revised 24 point attendance scoring system. Each employee will have 24 points to use up between May 1st and the last day of April. You will start with 0 points and each attendance infraction will be counted in the following manner.
>
> NO POINTS will be counted for appts. with 24 hr. notice and proof of appt.
> 2 Points for not giving 24 hr. notice regardless of proof
> 2 Points for being Tardy
> 2 Points for leaving before end of shift without proof of appointment
> 3 Points per absence without proof of appointment (unless you use a Vacation Day)
> 12 Points for a NO CALL-NO SHOW
> No points will be counted for L&I appointments.
>
> If you reach the 24 point mark before the designated time, your employment with Apple King, LLC will be terminated. It is very important to understand that this will be the same for all Packing House employees. Every 1st of May each employee will start with 0 points once again only if they have managed not to reach the 24 point mark by the end of the last day of April. We strongly encourage you to set up your appointments on your day(s) off.

Clerk's Papers (CP) at 233.

According to an Apple King representative, employees were verbally notified that no points would be assessed against them for attending funerals or for emergencies such as hospitalizations or car accidents. Apple King's attendance policy did not reference the federal or state medical leave acts. Nor did the policy explain how Apple King would

account for leave that is protected under state or federal law. According to testimony from Apple King, the decision of whether to assess points for an employee absence is determined solely by the company's attendance policy.

In June or July 2011, Ms. Espindola discovered she was pregnant and reported her condition to her supervisor. Ms. Espindola was then absent from work on July 20, 21, and 22. She produced a doctor's note dated July 21 stating she had been prescribed two days' bed rest. Pursuant to Apple King's attendance policy, Ms. Espindola was assessed two points for her absence on July 20 because she only provided same-day notice of a medical appointment.

In August 2011, Ms. Espindola developed kidney stones. Ms. Espindola was hospitalized from August 21 to 25, 2011, and submitted a doctor's note stating she was not clear to return to work until after a follow-up appointment on August 31. The doctor's note did not provide the reason for Ms. Espindola's hospitalization, but according to Ms. Espindola she had been hospitalized due to the kidney stones. Apple King did not assess Ms. Espindola any attendance points for her hospitalization. It is unclear whether Apple King knew of the reason for Ms. Espindola's hospitalization, but the company did at least know that Ms. Espindola had been hospitalized during the course of her pregnancy.

In the months following her hospitalization, Ms. Espindola had numerous medical appointments. Apple King was advised of the appointments, and Ms. Espindola was not assessed any attendance points for those absences. Ms. Espindola was also permitted to take time to check her blood sugar at work after reporting that she had been diagnosed with gestational diabetes. Ms. Espindola's gestational diabetes did not cause her to miss work.

The last full month of Ms. Espindola's pregnancy was December 2011. During that month, Ms. Espindola left work early on three occasions. She was assessed two attendance points on each date. Also in December, Ms. Espindola missed a day of work and provided same-day notice of her absence. Ms. Espindola was assessed three points on this occasion. Ms. Espindola did not provide any doctors' notes explaining her December absences. However, Ms. Espindola has testified that she had told her supervisor she was in debilitating pain from kidney stones. According to Ms. Espindola, her supervisor provided permission to either leave work early or stay at home, as at times she was unable to work due to the pain. Apple King did not request medical documentation from Ms. Espindola to verify her explanations.

Ms. Espindola began her maternity leave on January 9, 2012, and returned to work on March 4. During her maternity leave, Ms. Espindola reportedly had her kidney stones

removed. Apple King did not assess Ms. Espindola any attendance points for her maternity leave.

Apple King fired Ms. Espindola on April 20, 2012, because she had exceeded the 24 points allowed annually by the company's attendance policy. The following chart illustrates Ms. Espindola's absences from work between May 1, 2011, and April 20, 2012, and the points she was assessed under the attendance policy:

Date	**Disposition**	**Reason for Absence and/or Disposition**	**Points**	**Record (CP)**
May 20, 2011	Unexcused	Left work early (late proof of appointment)	2	239-40
June 6, 2011	Excused	Dental appointment	0	252-53
June 10, 2011	Excused	Doctor appointment	0	252-53
July 8, 2011	Excused	Illness (bladder infection)	0	254-55
July 12, 2011	Excused	Doctor appointment	0	256-57
July 20, 2011	Unexcused	Left work early (same day notice of appointment)	2	38, 50, 258
July 21, 2011	Excused	Illness (note from doctor dated July 21 calls for 2 days bed rest)	0	38, 50, 258-59

Date	Disposition	Reason for Absence and/or Disposition	Points	Record (CP)
July 22, 2011	Excused	Illness (note from doctor dated July 21 calls for 2 days bed rest)	0	38, 50, 258-59
Aug. 1, 2011	Excused	Doctor appointment	0	260-61
Aug. 21 to 25, 2011	Excused	Hospitalization (note from doctor states she cannot return to work until after her follow-up appointment on Aug. 31)	0	262-63
Sept. 9, 2011	Excused	Doctor appointment (for imaging studies)	0	264-65
Sept. 16, 2011	Excused	Doctor appointment	0	266-67
Sept. 17, 2011	Excused	Left work early (illness)	0	266
Oct. 11, 2011	Excused	Doctor appointment	0	268-69
Oct. 12, 2011	Excused	Doctor appointment (for laboratory studies)	0	268, 270
Oct. 25, 2011	Unexcused	Doctor appointment (no excuse slip)	2	243
Nov. 10, 2011	Unexcused	Absent without advance notice (called same day)	3	134-35, 244, 756
Nov. 22, 2011	Excused	Doctor appointment	0	271
Dec. 9, 2011	Unexcused	Left work early	2	245
Dec. 19, 2011	Unexcused	Left work early	2	246
Dec. 20, 2011	Unexcused	Absent (called same day)	3	134-35, 246
Dec. 27, 2011	Excused	Doctor appointment	0	248
Dec. 30, 2011	Unexcused	Left work early	2	248

Date	Disposition	Reason for Absence and/or Disposition	Points	Record (CP)
Jan. 9 to Mar. 2, 2012	Excused	Maternity leave	0	38, 50, 59, 237, 306-07
Mar. 6, 2012	Excused	Doctor appointment (for her baby)	0	273-74
Mar. 23, 2012	Unexcused	Left work early due to suspension (work performance issue)	2	249, 278
Mar. 24, 2012	Unexcused	Suspension (work performance issue)	3	249, 278
Mar. 26, 2012	Unexcused	Suspension (work performance issue)	3	250, 278
Apr. 4, 2012	Excused	Doctor appointment (for her baby)	0	275-76
Apr. 17, 2012	Unexcused	Left work early	2	251
Ms. Espindola's employment was terminated on April 20, 2012, for accumulating 28 adverse attendance points				237, 251

In July 2014, Ms. Espindola filed suit in Yakima County District Court alleging Apple King had terminated her employment in a discriminatory and retaliatory manner because she missed work due to serious health conditions. In January 2016, the district court dismissed most of Ms. Espindola's claims on summary judgment, leaving only claims for unlawful discrimination and retaliation under the state and federal family medical leave acts. In a letter decision dated June 22, 2016, the district court also granted summary judgment to Apple King on the remaining claims. The superior court affirmed on appeal. Our court granted discretionary review pursuant to RAP 2.3(d)(3).

ANALYSIS

We review orders on summary judgment de novo. *Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014); *Mikolajczak v. Mann*, 1 Wn. App. 2d 493, 496, 406 P.3d 670 (2017). Under this standard, our court engages in the same inquiry as the trial court, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Lyons*, 181 Wn.2d at 783; *Mikolajczak*, 1 Wn. App. 2d at 496-97.

The federal and state medical leave acts

The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601-2654; 29 C.F.R. pt. 825 was implemented by the federal government to address "inadequate job security for employees who have serious health conditions that prevent them from working temporary periods." 29 U.S.C. § 2601(a)(4). The purposes of the FMLA include the need "to balance the demands of the workplace with the needs of families," and "to entitle employees to take reasonable leave for medical reasons" including "the birth . . . of a child." 29 U.S.C. § 2601(b)(1), (2). Similarly, Washington's Family Leave Act (WFLA), chapter 49.78 RCW, states it is "in the public interest to provide reasonable leave for medical reasons." RCW 49.78.010. The WFLA mirrors the FMLA and provides that courts are to interpret its provisions in a manner consistent with similar

provisions of the FMLA. RCW 49.78.410 (The WFLA "must be construed . . . consistent[ly] with similar provisions, if any, of the [FMLA] . . . and [provide] consideration to the rules, precedents, and practices of the federal department of labor relevant to the [FMLA]."); *Shelton v. Boeing Co.*, 702 Fed. App'x 567, 568 (9th Cir. 2017); *Crawford v. JP Morgan Chase NA*, 983 F. Supp. 2d 1264, 1269 (W.D. Wash. 2013).

The substantive right enjoyed by employees under the FMLA and WFLA is the ability to take 12 weeks' leave from work per year for protected health or family reasons without suffering negative employment consequences. 29 U.S.C. §§ 2612(a)(1), 2614(a); RCW 49.78.220, .280. To safeguard this right, both the FMLA and WFLA prohibit employers from discriminating and retaliating against employees who engage in protected conduct.[1] The laws recognize two types of prohibited discrimination and retaliation. First, 29 U.S.C. § 2615(a)(2) and RCW 49.78.300(1)(b), make it unlawful for an employer "to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by" the FMLA and WFLA. Second, 29 C.F.R.

[1] The medical leave statutes also prohibit employers from interfering with an employee's exercise of FMLA/WFLA rights. 29 U.S.C. § 2615(a)(1); RCW 49.78.300(1)(a). However, this case does not involve a straight interference claim, such as what might be asserted if an employer refused to grant an employee the substantive right to reinstatement after the employee exercised protected leave.

§ 825.220(c)[2] "prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights." [3]

The legal test applicable to Ms. Espindola's FMLA/WFLA claim

Ms. Espindola's complaint alleged the second type of protection from retaliation, i.e., that she was terminated for exercising rights protected by the FMLA and WFLA. 29 C.F.R. § 825.220(c). Pursuant to this form of protection, "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring,

[2] The statutory source for this regulation is an area of confusion and dispute. *Compare Arban v. W. Publ'g Corp.*, 345 F.3d 390, 401 (6th Cir. 2003) (retaliation for exercising FMLA rights arises under 29 U.S.C. § 2615(a)(2)), and *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 960 (10th Cir. 2002) (same), and *Loveland v. Emp'rs Mut. Cas. Co.*, 674 F.3d 806, 810-11 (8th Cir. 2012) (same) *with Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199, 1206 (11th Cir. 2001) (retaliation for exercising FMLA rights arises under 29 U.S.C. § 2615(a)(1) and (2) as well as 29 C.F.R. § 825.220(c)), and *King v. Preferred Technical Grp.*, 166 F.3d 887, 891 (7th Cir. 1999) (same), and *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 159-60 (1st Cir. 1998) (same), *and with Bachelder v. Am. W. Airlines*, 259 F.3d 1112 (9th Cir. 2001) (retaliation for exercising FMLA rights arises under 29 U.S.C. § 2615(a)(1) and 29 C.F.R. § 825.220(c)). We need not enter this fray. All courts agree that an employee can bring a retaliation claim based on the exercise of FMLA rights. Furthermore, the WFLA provides statutory authority for considering the terms of the federal implementing regulations. RCW 49.78.410.

[3] The WFLA specifically incorporates consideration of regulatory rules applicable to the FMLA. *Id*.

promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies." *Id.*

The parties dispute the test applicable to the type of retaliation claimed by Ms. Espindola. According to Ms. Espindola, we should apply a *McDonnell Douglas*-style burden shifting analysis, under which the employee must first make out a prima facie case of discrimination; then a production burden shifts to the employer to provide a legitimate, nondiscriminatory reason for its adverse employment action and, if this burden is met, the employee bears the ultimate burden of demonstrating that the employer's articulated reason for its action was a mere pretext for discrimination or retaliation. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Apple King contends that the *McDonnell Douglas* analysis is inapplicable. According to Apple King, we should follow the lead of the Ninth Circuit Court of Appeals and find the *McDonnell Douglas* burden-shifting scheme inapplicable to Ms. Espindola's claim. On this legal point, we agree with Apple King. However, as shall be discussed, the Ninth Circuit's test actually favors Ms. Espindola.

In *Bachelder v. America West Airlines*, the Ninth Circuit held that the *McDonnell Douglas* burden-shifting analysis does not apply to retaliation claims under 29 C.F.R. § 825.220(c). *Bachelder v. Am. W. Airlines*, 259 F.3d 1112, 1125 (9th Cir. 2001).

Because the United States Department of Labor's regulation prohibits the use of FMLA-protected leave as a "negative factor" in an employment decision, the Ninth Circuit recognized that an employee "need only prove by a preponderance of the evidence that her taking of FMLA-protected leave constituted a negative factor in the decision to terminate her. She can prove this claim, as one might any ordinary statutory claim, by using either direct or circumstantial evidence, or both. . . . No scheme shifting the burden of production back and forth is required." *Id.* at 1125.

Based on *Bachelder* and the plain language of 29 C.F.R. § 825.220(c), it is apparent that a plaintiff claiming retaliation for the exercise of FMLA/WFLA rights need only prove: (1) he or she was absent from work for reasons covered by the FMLA/WFLA, (2) he or she suffered an adverse employment decision, and (3) the covered leave was a negative factor in the employer's adverse employment decision.[4] Because establishing a regulatory retaliation claim does not require specific proof of discriminatory intent, there is no need to require the employer to proffer a

[4] Because *Bachelder* found 29 C.F.R. § 825.220(c) was adopted pursuant to 29 U.S.C. § 2615(a)(1) (that prohibits interference with the exercise of FMLA rights), it labeled a regulatory claim an "interference" claim. 259 F.3d at 1124-25. However, because the regulation itself employs the words "discriminating" and "retaliating," a regulatory claim is more appropriately labeled a discrimination or retaliation claim. *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 146 n.9 (3d Cir. 2004).

nondiscriminatory basis for its employment decision or for the employee to rebut the employer's proffer.

Application of the applicable standard to Ms. Espindola's claim

Here, it is undisputed Ms. Espindola was fired from Apple King because of absences from work. Thus, the viability of Ms. Espindola's retaliation claim rests on the first factor of the retaliation test—i.e., whether at least some of Ms. Espindola's absences were protected by the FMLA/WFLA. Proof of this factor depends on whether Ms. Espindola can establish that she provided Apple King with adequate notice of a request for FMLA/WFLA protected leave.

Legal requirements for adequate notice

To invoke the right to protected leave, an employee must provide adequate notice to his or her employer. 29 U.S.C. § 2612(e); RCW 49.78.250. The notice requirement is "not onerous." *Preddie v. Bartholomew Consol. Sch. Corp.*, 799 F.3d 806, 816 (7th Cir. 2015). "An employee giving notice of the need for FMLA[/WFLA] leave does not need to expressly assert rights under the Act or even mention the FMLA[/WFLA] to meet his or her obligation to provide notice." 29 C.F.R. § 825.301(b). Verbal notice is sufficient. 29 C.F.R. § 825.302(c). There are three general components of adequate FMLA/WFLA notice: content, timing, and compliance with employer policy. The failure to meet any of

these three components can result in denial of FMLA/WFLA leave and protections. But once an employee provides adequate notice, the employer must take responsive action.

With respect to content, an employee's notice must refer to a condition that qualifies for leave under the FMLA/WFLA. Protected leave does not apply to minor illnesses; merely calling in sick is insufficient to trigger an employee's right to protected leave. 29 C.F.R. § 825.303(b). However, pregnancy-related incapacitation is an explicitly covered condition. 29 C.F.R. § 825.115(b); RCW 49.78.020(16)(a)(ii)(B). Also covered is incapacitation due to a serious medical condition that "makes the employee unable to perform the functions" of the employee's job. 29 U.S.C. § 2612(a)(1)(D); 29 C.F.R. § 112(a)(4); RCW 49.78.220(1)(d).

An employee's responsibility with respect to timing of notice is somewhat flexible. In general, an employee must provide 30 days' advance notice of planned leave. 29 U.S.C. § 2612(e); 29 C.F.R. § 825.302(a); RCW 49.78.250. However, the FMLA/WFLA recognize that 30 days advance notice is not always possible. In such circumstances, an employee need only provide notice as soon as practicable. 29 U.S.C. § 2612(e); 29 C.F.R. § 825.302(a); RCW 49.78.250. When medical or family leave is unforeseeable, no advance notice is required. 29 C.F.R. §§ 825.303(a), .305(b); *Lichtenstein v. Univ. of Pittsburg*, 691 F.3d 294, 301 (3d Cir. 2012); *Kauffman v. Fed.*

Express Corp., 426 F.3d 880, 885-86 (7th Cir. 2005).

When it comes to certain types of conditions, an employee's obligations with respect to content and timing of notice are intertwined. Maternity leave, for example, is something generally governed by a 30-day notice requirement. RCW 49.78.250(1).[5] But during the course of a woman's pregnancy, the need for protected leave will sometimes be unpredictable. *See* 29 C.F.R. § 825.120(a)(4). For example, an expectant mother may find herself surprisingly debilitated by morning sickness. In such circumstances, the FMLA/WFLA recognize the right to take unforeseeable protected leave, even when such leave does not involve hospitalization or other direct medical supervision. 29 C.F.R. §§ 825.115(f), .120(a)(4).

An employee's notice obligations generally include compliance with an employer's internal notification procedures. 29 C.F.R. §§ 825.302(d), .303(c), .304. For example, an employer may require written notice or that notice be directed to a specific individual. If an employee fails to satisfy an employer's internal notification procedures, FMLA/WFLA leave may be delayed or denied, regardless of whether the employee might actually qualify for leave. 29 C.F.R. § 825.303(c).

[5] Thirty days' advance notice is not required if childbirth is unexpected. In such circumstances, the employee need only provide "such notice as is practicable." RCW 49.78.250(1).

But there is an important limitation to an employer's ability to deny FMLA/WFLA leave based on noncompliance with company policy. When an employer's policy does not comport with FMLA/WFLA standards for invoking leave (such as the standards for invoking unforeseeable leave), an employee's right to protected leave cannot be denied based simply on noncompliance with the employer's policy. *See* 29 C.F.R. § 825.304(e) ("[T]he employer may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances, as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave and the rules are not inconsistent with § 825.303(a) [allowing for unforeseeable leave]."); *see also* 29 C.F.R. §§ 825.302(d), .303(c), .304(a). In circumstances where the employer's policy is insufficient, an employee's notice obligations are governed solely by the terms of the FMLA/WFLA.

Once an employee has provided appropriately timed notice that he or she "may" have a condition that qualifies for FMLA/WFLA leave, the burden falls on the employer to take action. 29 C.F.R. § 825.303(b); *Lichtenstein*, 691 F.3d at 303-04. The employee's notice need not provide definitive proof of the right to take protected leave. All that needs to be raised is "probable basis" to believe the employee is entitled to FMLA/WFLA leave. *Aubuchon v. Knauf Fiberglass, GmbH*, 359 F.3d 950, 953 (7th Cir.

2004). Once this is satisfied, the employer is obliged to either grant protected leave or investigate whether the employee's condition qualifies for leave. 29 C.F.R. §§ 825.301(a), .302(c); *Lichtenstein*, 691 F.3d at 303; *Burnett v. LFW Inc.*, 472 F.3d 471, 480 (7th Cir. 2006).

Application of the adequate notice requirement to Ms. Espindola

Whether Ms. Espindola provided Apple King adequate notice of the need for FMLA/WFLA leave is a question of fact. *Lichtenstein*, 691 F.3d at 303. Thus, Apple King is entitled to summary judgment only if, viewing the record in the light most favorable to Ms. Espindola, no reasonable fact finder could rule in her favor.

It is undisputed that Ms. Espindola notified Apple King of her pregnancy in June or July 2011. Given that pregnancy is the type of condition that can reasonably create the need for unforeseeable protected leave, Ms. Espindola's burden of providing additional notice of incapacitation during the course of her pregnancy was at least somewhat reduced. *See* 29 C.F.R. § 825.302(c) (notice that "employee is pregnant" may be sufficient); *Aubuchon*, 359 F.3d at 953 (note that pregnant woman was having complications would be sufficient, "despite the absence of details"). In like manner, once it was aware of Ms. Espindola's pregnancy, the expectation that Apple King would be

alert to Ms. Espindola's need for unexpected protected leave was at least somewhat enhanced.

The record on appeal suggests at least two pertinent time periods when Ms. Espindola provided adequate notice of the need for protected leave from work.[6] The first time period was late July 2011. On July 20, Ms. Espindola became ill and left work early. She subsequently produced a doctor's note dated July 21 stating she had been prescribed two days' bed rest. A reasonable inference from these facts is that Ms. Espindola's absence on July 20 was related to the need for bed rest prescribed on July 21 and 22. Given that bed rest is a common prescription for pregnancy-related complications, a fact finder could determine that Ms. Espindola's notice was sufficient to reasonably apprise Apple King of the need for protected leave.

The second relevant time period was December 2011. This was the last full month of Ms. Espindola's pregnancy. According to Ms. Espindola, she told her supervisor she suffered from episodic debilitating pain due to kidney stones that required her to stay home from work or leave early. Ms. Espindola's attendance records confirm that in December 2011, Ms. Espindola left work early on three occasions and provided same-day

[6] It is undisputed that there were other periods for which Ms. Espindola provided adequate notice. However, because Apple King excused those absences, they are not relevant to our inquiry.

notice of an absence on one occasion. A reasonable fact finder could infer that the absences in December were due to the episodic and unforeseeable kidney pain described by Ms. Espindola. Particularly given Apple King's knowledge that Ms. Espindola was having a difficult pregnancy,[7] a reasonable fact finder could conclude that Ms. Espindola's notice of debilitating kidney stone pain was sufficient to place Apple King on notice that Ms. Espindola was invoking the right to FMLA/WFLA protected leave. *See Byrne v. Avon Prods.*, 328 F.3d 379, 381 (7th Cir. 2003) (An employee's unusual behavior, alone, can provide notice that "something had gone medically wrong.").[8]

Although the record supports a finding that Ms. Espindola provided sufficient notice of the need for FMLA/WFLA leave in July and December of 2011, Apple King did not provide protected leave or conduct an investigation. Instead, Apple King used Ms. Espindola's absences on July 20 and December 9, 19, 20, and 30 as negative factors in its ultimate decision to terminate Ms. Espindola's employment. Apple King assessed Ms. Espindola a total of 11 adverse attendance points for the aforementioned absences, causing her to exceed the maximum number of attendance points per year by 5 points.

[7] Not only had Ms. Espindola been placed on bed rest during her pregnancy, she was also hospitalized as a result of kidney stones and diagnosed with gestational diabetes.

[8] Ms. Espindola also had unexcused absences in October and November. We do not assess whether those absences were governed by the same analysis as the December absences as it is unnecessary for purposes of this appeal.

Apple King claims it was justified in assessing Ms. Espindola points for the foregoing absences because Ms. Espindola's leave requests did not comport with company policy. Had Apple King's policy provided Ms. Espindola an avenue for claiming unforeseeable FMLA/WFLA leave, this defense would almost certainly prevail. 29 C.F.R. §§ 825.302(d), .303(c). But Apple King's attendance policy does not account for the FMLA/WFLA. The policy provides no explanation of how an employee would be expected to claim unforeseeable protected leave not resulting in hospitalization. Because Apple King's policy was not compliant with the FMLA/WFLA, the policy provides no defense to Ms. Espindola's retaliation claim.

Ms. Espindola has made a sufficient claim for retaliation under 29 C.F.R. § 825.220(c). As a consequence, Apple King is not entitled to summary judgment. The trial court's ruling to the contrary is reversed.

ATTORNEY FEES

Ms. Espindola requests attorney fees and costs pursuant to RAP 18.1, 29 U.S.C. § 2617(a)(3), 29 C.F.R. § 825.400(c), and RCW 49.48.030. This request is premature. Because Ms. Espindola has not yet succeeded on her claim against Apple King, we are not in a position to award attorney fees. If, after remand, Ms. Espindola prevails on her FMLA/WFLA claim, she will qualify as a prevailing party and may be awarded attorney

fees, including fees generated during this appeal, under 29 U.S.C. § 2617(a)(3), 29 C.F.R. § 825.400(c), and RCW 49.48.030.

CONCLUSION

The order on summary judgment is reversed. This matter is remanded for trial or further proceedings consistent with the terms of this opinion.

Pennell, A.C.J.

WE CONCUR:

Korsmo, J.

Fearing, J.

The Court of Appeals
of the
State of Washington
Division III

MARIA ESPINDOLA,

Petitioner,

v.

APPLE KING, LLC,

Respondent.

No. 35262-5-III

COMMISSIONER'S RULING

Maria Espindola seeks discretionary review of the Yakima County Superior Court's May 1, 2017 Order on appeal from district court. That order affirmed the district court decision, which had dismissed her claims for retaliation and discrimination under the State and the federal family medical leave acts against her former employer, Apple King. She contends that RAP 2.3(d)(3) supports review because the matter "involves an issue of broad public importance", i.e., the interpretation of the notice requirement of the

family medical leave acts.[1]

On August 21-25, 2011, Ms. Espindola was hospitalized with kidney stones. Her doctor provided Apple King with a note that advised it that she would not be able to return to work until after a follow up appointment on August 31, 2011. Ms. Espindola stated in her deposition that she missed work multiple times between September 8 and December 30, due to pain associated with the kidney stones, and that her supervisor knew the cause. She was also pregnant during this time and had developed gestational diabetes. Her supervisor permitted her to use the break room to test her blood sugar. On April 20, 2012, Apple King terminated Ms. Espindola because she had exceeded the 24 points allowed in its leave policy for leave that it believed did not qualify as family medical leave.

At issue in this motion for discretionary review is the adequacy of the notice Ms. Espindola gave Apple King that the leave she took qualified as family medical leave. The district court granted summary judgment to Apple King. It held that

> based on the evidence presented, the court is unable to find that a prima facie case of discrimination has been made. *There are no genuine issues of material fact as to the plaintiff taking "intermittent" leave under the FMLA/WFLA. Plaintiff had returned to work after her allowed FMLA/WFLA leave and given her old job back. Nothing presented to this court would create a genuine issue as to material fact*

[1] The Court notes Apple King's argument that RAP 2.2(c) applies and only appeals from de novo superior court reviews of district court decisions are appealable as a matter of right. Ms. Espindola is not seeking a direct appeal. She wants discretionary review under RAP 2.3(d)(3). The latter rule applies in this circumstance.

> *that the employer should have somehow knew, or should have made further inquiry regarding if the leave could be under the FMLA or WFLA. It was some seven weeks after her final FMLA leave ended.* Plaintiff was not penalized for taking FMLA/WFLA leave. With the passage of time, unspecific doctor's notes and vague phone calls from plaintiff, with nothing else, doom the discrimination case on summary judgment. The employer is not required to guess that it is allowed leave.

(Emphasis added.) Letter Opinion, June 22, 2016.

On May 1, 2017, the superior court affirmed the district court decision. It found no dispute of material fact.

Ms. Espindola agrees that to qualify for leave under the act, the employee must prove that she provided the employer sufficient notice of her intent to take the type of leave that the act covers. She cites a federal regulation under the federal Family Medical Leave Act[2] to argue that when the leave is unforeseeable – such as the leave she says she took because of her kidney stones and to manage her gestational diabetes – the employer is responsible to "designate leave as FMLA-qualifying, . . . based only on information received from the employee or the employee's spokesperson". CFR 825.301(a). Ms. Espindola reasons that her supervisor knew the causes of the leave she took, given the circumstances under which she asked for leave. Therefore, she asserts that Apple King

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[2] RCW 49.78.410 states, as follows: "This chapter must be construed to the extent possible in a manner that is consistent with similar provisions, if any, of the federal family and medical leave act of 1993 (Act Feb. 5, 1993, P.L. 103-3, 107 Stat. 6), and that gives consideration to the rules, precedents, and practices of the federal department of labor relevant to the federal act." Repealed by 2017 3d special session, ch.5, substitute senate bill 5975, effective October 19, 2017.

was required to designate that leave as family medical leave and not deduct it from the 24 points its attendance policy gave each employee every year.

This Court agrees with Ms. Espindola that the adequacy of her notice for leave associated with her intermittent health conditions is an issue that has public import such that it should be determined by an appellate court. *See* RAP 2.3(d)(3).

Accordingly, IT IS ORDERED, the motion for discretionary review is granted pursuant to RAP 2.3(d)(3). The Clerk of Court shall set a perfection schedule for this matter.

Monica Wasson
Commissioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MARIA ESPINDOLA, Petitioner, v. APPLE KING, LLC, Respondent.	)	No. 35262-5-III ORDER DENYING MOTION TO MODIFY COMMISSIONER'S RULING

Having considered Petitioner's motion to modify the commissioner's ruling of August 4, 2017, and the record and file herein;

IT IS ORDERED the motion to modify the commissioner's ruling is denied.

PANEL: Judges Korsmo, Siddoway, Fearing

FOR THE COURT:

George Fearing

GEORGE FEARING
Chief Judge

YAKIMA VALLEY MEMORIAL
AWARD WINNING HOSPITAL

MARIA ESPINDOLA

Name: Espindola-Salas, M.G.
Age: 33Y DOB: Apr 14, 1978
Gender: F
MedRec: 622444
AcctNum: 1005473483
Attending: MNB
Primary RN: TFL
Bed: ED ED 15

YAKIMA VALLEY MEMORIAL HOSPITAL
DISCHARGE INSTRUCTIONS

FINAL DIAGNOSIS
UTI

ADDITIONAL DIAGNOSIS
IUP

TREATED BY:
Attending Physician - Brueggemann, MD, Marty

FOLLOWUP CONTACT

Charles Forster MD, Family Practice
Yakima Farmworkers Clinic
602 East Nob Hill Blvd
Yakima WA 98901
Phone: 2483334

SPECIAL INSTRUCTIONS
Follow up with your OB provider.

MEDICAL INSTRUCTIONS

CYSTITIS, UTI (ADULT FEMALE)
INFECCIÓN DE LA VEJIGA,Mujer [Bladder Infection: Female, adult]

Una infección de la vejiga (cistitis [cystitis – UTI]) suele provocar constantes deseos de orinar y ardor al orinar. Es posible que la orina se vea turbia u oscura, o que tenga olor fuerte. Puede haber dolor en la parte baja del abdomen. Una infección de la vejiga se produce cuando las bacterias del área vaginal ingresan al orificio donde desemboca la vejiga (la uretra [urethra]). Puede ocurrir después de haber tenido relaciones sexuales, por usar ropas muy ajustadas, por deshidratación y otros factores.

CUIDADOS EN LA CASA:
Beba abundante líquido (al menos, entre 6 y 8 vasos por día, excepto que le hayan indicado limitar los líquidos por otras razones médicas). Eso hará que el medicamento ingrese mejor al sistema urinario y arrastrará las bacterias fuera de su cuerpo.
Evite tener relaciones sexuales hasta que los síntomas hayan desaparecido.
No consuma cafeína, alcohol ni comidas muy condimentadas, ya que pueden irritar la vejiga.
Una infección de la vejiga (bladder infection) se trata con antibióticos (antibiotics). También es posible que le receten Pyridium (nombre genérico: fenazopiridina [phenazopyridine]) para aliviar el ardor. Ese medicamento hará que su orina sea de color naranja brillante. Es posible que esa orina de color naranja le manche la ropa. Puede usar un protector diario o una toalla femenina para proteger la ropa.

EVITE FUTURAS INFECCIONES:
Después de evacuar el intestino, siempre límpiese con un movimiento de adelante hacia atrás.

11-80-10 FRI

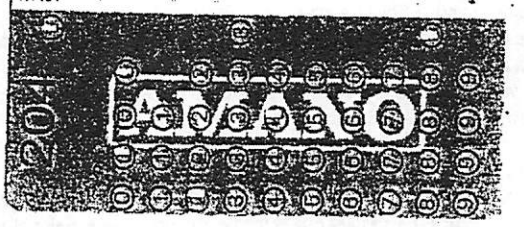
— 42 Maria Espindola
ESPI 003 — 1

DATE	DAY	SHIFT	IN	CODE	OUT	CODE	HOURS WORKED	ACCUMULATED HOURS	ACCUMULATED OVERTIME
	THU		6:31		3:28		8:30	8:30	
	FRI		6:37		3:27		8:00	16:30	
	SAT		6:29		3:37		8:00	24½	

AB/ TNO PTS.
ill-yes exc.
Fri. 07-08-11

1000 24½ 0

A1181



#16

APPLE KING, LLC.
ATTENDANCE POLICY

Apple King, LLC understands that there will be times when employees will miss work due to illness or other unforeseen reasons. It is equally important for the employee to understand the importance of maintaining a good attendance record. Good attendance reflects positively on the packing house as a whole. As of May 1st 2011, we will put into practice a revised 24 point attendance scoring system. Each employee will have 24 points to use up between May 1st and the last day of April. You will start with 0 points and each attendance infraction will be counted in the following manner.

NO POINTS will be counted for appts. with 24 hr. notice and proof of appt.
2 Points for not giving 24 hr. notice regardless of proof
2 Points for being Tardy
2 Points for leaving before end of shift without proof of appointment
3 Points per absence without proof of appointment (unless you use a Vacation Day)
12 Points for a NO CALL-NO SHOW
No points will be counted for L&I appointments.

If you reach the 24 point mark before the designated time, your employment with Apple King, LLC will be terminated. It is very important to understand that this will be the same for all Packing House employees. Every 1st of May each employee will start with 0 points once again only if they have managed not to reach the 24 point mark by the end of the last day of April. We strongly encourage you to set up your appointments on your day(s) off. In order to facilitate this on our behalf we will be rotating the groups less frequently. If we do move the groups we will try to let you know at least 2 weeks in advance.

APPLE KING, LLC.
POLIZA DE ASISTENCIA

Apple King, LLC comprende que van haber ocasiones cuando el empleado falte al trabajo por enfermedad u otras razones imprevistas. Por lo tanto es importante que el empleado comprenda la importancia de mantener un buen historial de asistencia; Un buen historial de asistencia se refleja positivamente en la bodega completa. Apartir del 1ro de Mayo del 2010 pondremos en practica un nuevo sistema que estara basado en puntos.

Cada empleado tendra 24 puntos para utilizar empezando el 1 Mayo hasta al ultimo dia de Abril del siguiente año y cada empleado empezara con 0 puntos y cada infraccion sera contada de la siguiente manera.

NINGUN PUNTO sera rebajado por citas con 24 hrs. de aviso y con comprobante de cita
2 Puntos por citas sin avisar con 24 hrs. de anticipacion
2 Puntos por llegar tarde
2 Puntos por irse temprano sin comprobante
3 Puntos por AUSENCIA sin comprobante (al menos que use un dia de su vacacion)
12 Puntos por 1 DIA DE NO LLAMAR Y NO PRESENTARSE AL TRABAJO
No se contaran puntos por citas de Labor e Industrias.

Si usted llega a la marca de 24 puntos antes del tiempo asignado su empleo con Apple King se dara por terminado. Es muy importante que comprenda que esto aplicara a todos los empleados sin importar la senoria. El 1ro de Mayo, del 2011, cada empleado empezara con 0 puntos solo si han conseguido no llegar a los 24 puntos antes de el ultimo dia de Abril. Le aconsejamos que haga sus citas en su dia de descanso. Para facilitar este nuevo sistema de puntuacion estaremos rotando los grupos con menos frecuencia y en dado caso que rotemos los grupos trataremos de haceries saber con 2 semanas de anticipacion.

Revised

10-18-10

#1

APPLE KING, LLC.
ATTENDANCE POLICY

NO POINTS will be deducted for Appointments if you give 24 hrs notice and proof of appointment.

2 – Points for not giving 24hr. notice regardless of proof.

2 - Points for being Tardy

2 - Points for leaving before end of shift without

Proof of appointment.

3 - Points per absence without a Dr. note (unless you use a Vacation Day)

12 - Points for a NO CALL-NO SHOW

NO POINTS WILL BE COUNTED FOR L & I APPTS.

If you reach the 24 point mark before the designated time, your employment with Apple King, LLC will be terminated. It is very important to understand that this will be the same for all Packing House employees. Every 1st of May each employee will start with 0 points once again only if they have managed not to reach the 24 point mark by the end of the last day of April. We strongly encourage you to set up your appointments on your day(s) off. In order to facilitate this on our behalf we will be rotating the groups less frequently. If we do move the groups we will try to let you know at least 2 weeks in advance.

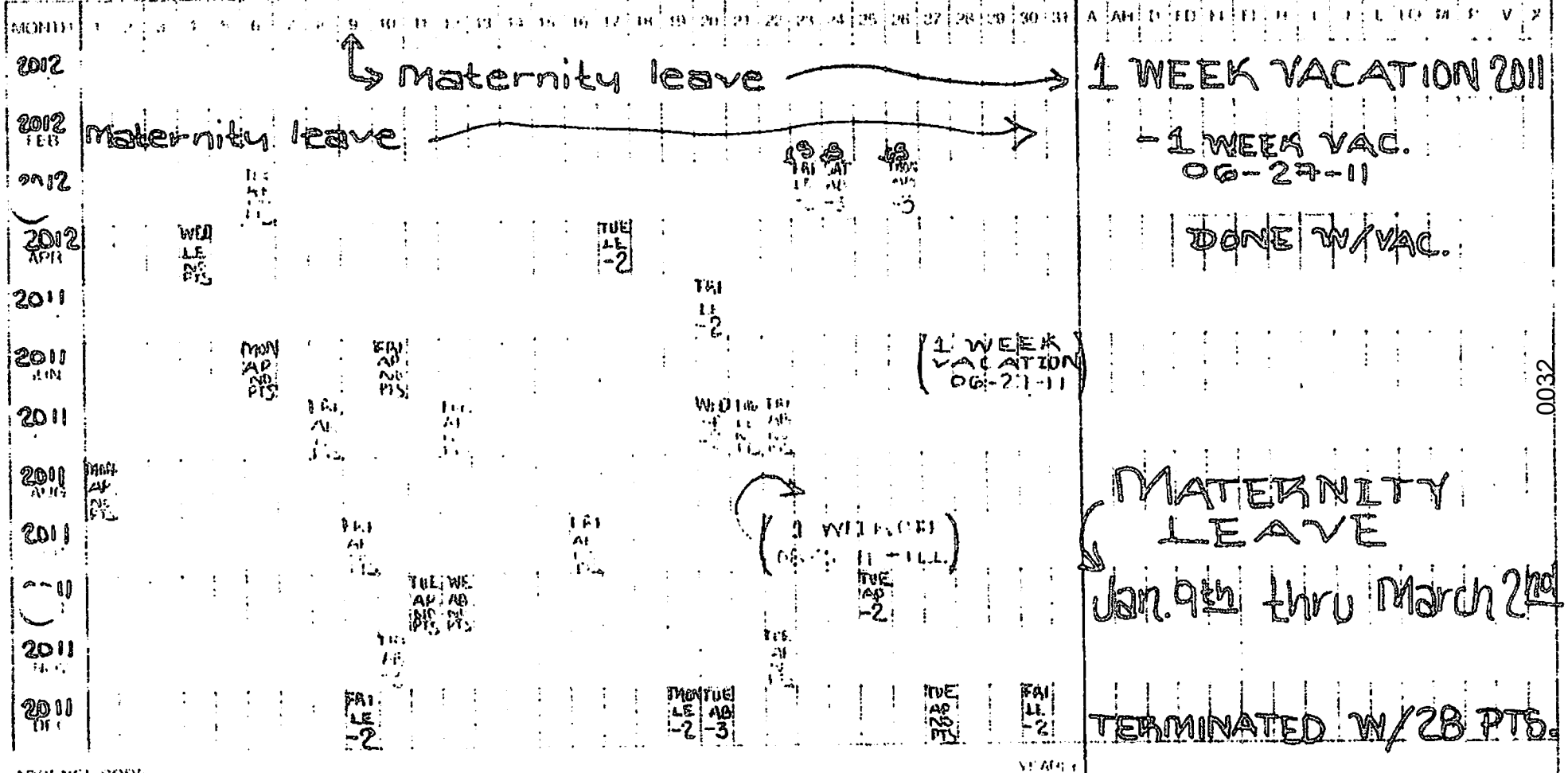
Revised

05-01-11

Attendance Record

Daily Attendance Record

MARIA ESPINDOLA WHSE-1000 ESPI003 2011-2012



0032

ABSENCE CODE

TERMINATION DATE 04-20-12

08-02-07

42 Maria Espindola
ESPI 003 1

DATE	DAY	SHIFT	IN	CODE	OUT	CODE	HOURS WORKED	ACCUMULATED HOURS	ACCUMULATED OVERTIME
18									
19									
20									
20									
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							1000	29	0

WED. 07-20-11
AP / -2.0
notice same day
no exc sup

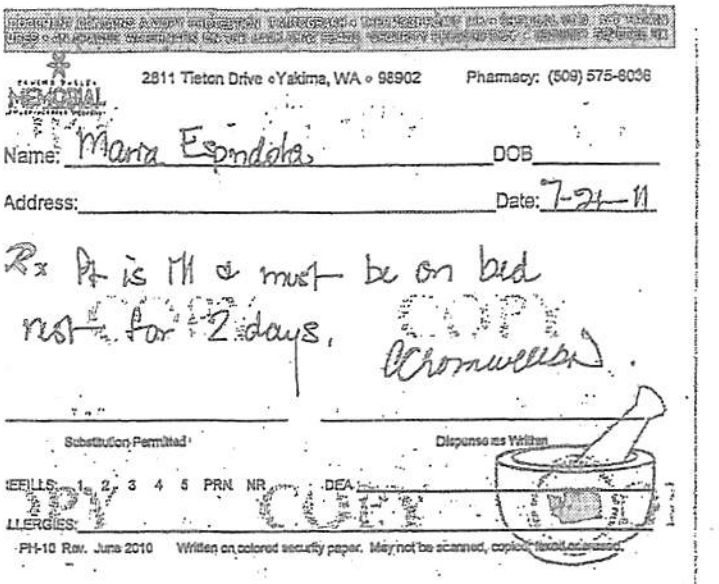
THUR. 07-21-11
LE / ill
NO PTS.
YES EXC.

FRI. 07-22-11
AB / ILL
NO PTS. YES EXC.

A1181

WED 07-20-11
THUR. 07-21-11
FRI - 07-22-11

Employer #3



2811 Tieton Drive ◦ Yakima, WA ◦ 98902 Pharmacy: (509) 575-8036

MEMORIAL

Name: Maria Espindola DOB

Address: Date: 7-21-11

℞ Pt is ill & must be on bed rest for 2 days.

Cromwell

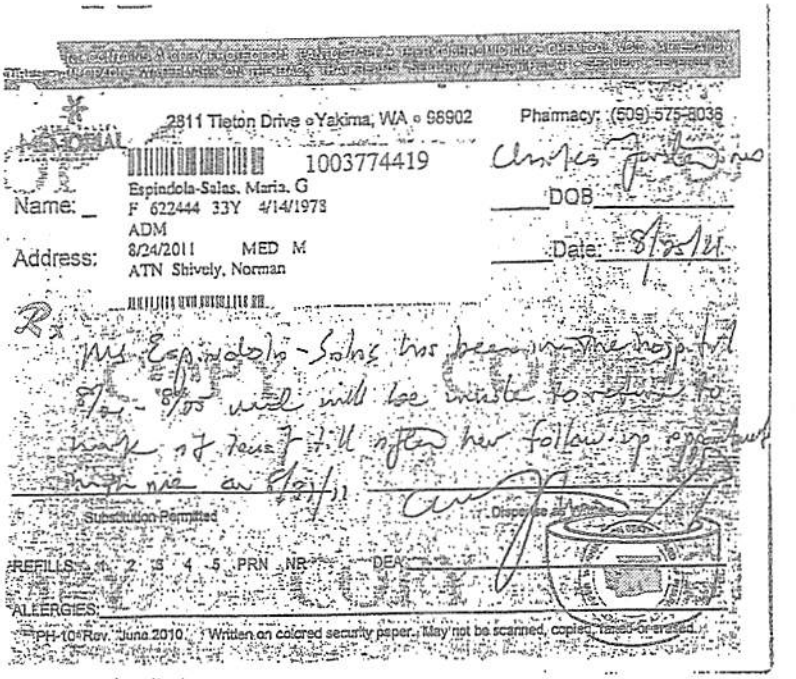
Substitution Permitted Dispense as Written

REFILLS: 1 2 3 4 5 PRN NR DEA

ALLERGIES:

PH-10 Rev. June 2010 Written on colored security paper. May not be scanned, copied, faxed or altered

Employer #4



2811 Tieton Drive • Yakima, WA • 98902 Pharmacy: (509) 575-8036

1003774419

Name: Espindola-Salas, Maria, G
F 622444 33Y 4/14/1978
ADM
Address: 8/24/2011 MED M
ATN Shively, Norman

DOB

Date: 8/25/11

Rx

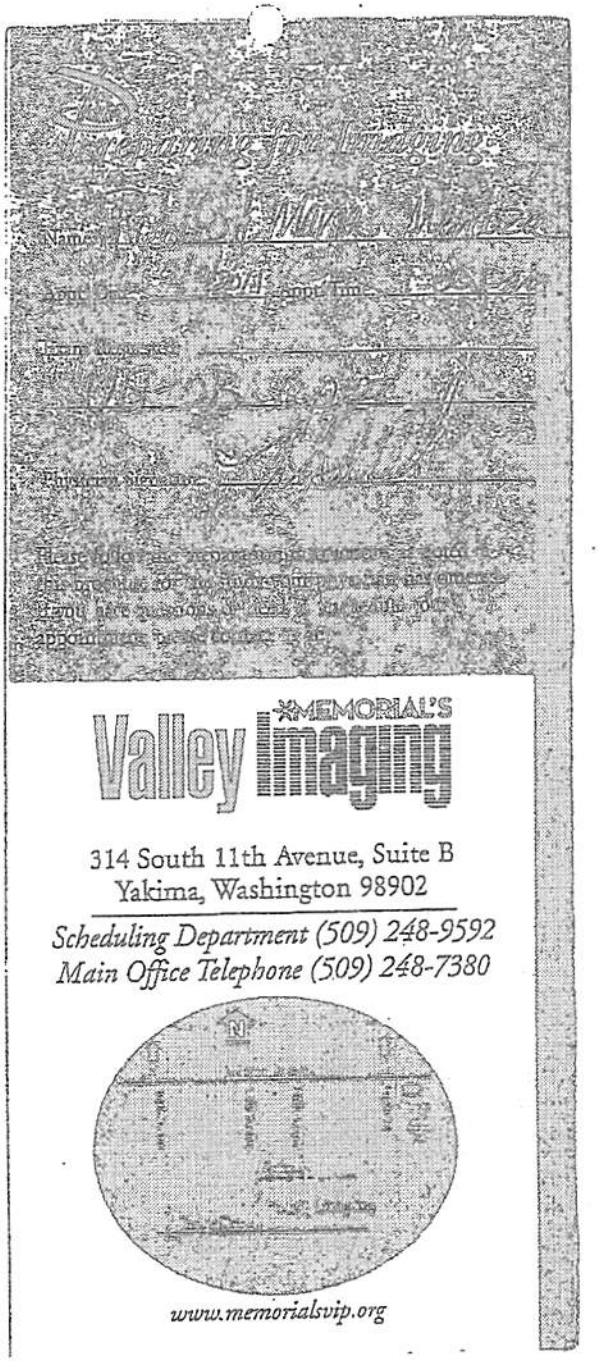
Substitution Permitted

REFILLS 1 2 3 4 5 PRN NR DEA

ALLERGIES

PH-104 Rev. June 2010 Written on colored security paper. May not be scanned, copied, faxed or erased.

Employer #25



MEMORIAL'S
Valley Imaging

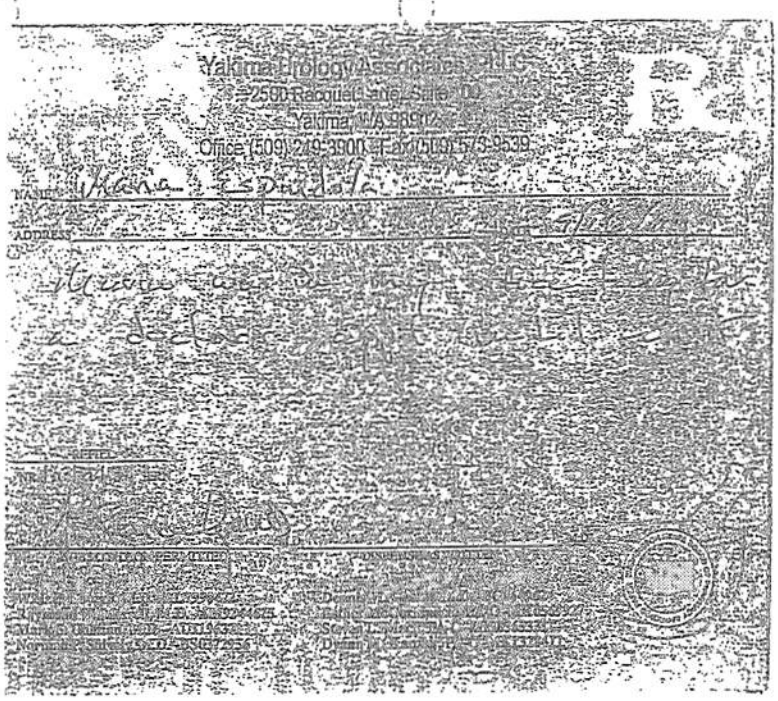
314 South 11th Avenue, Suite B
Yakima, Washington 98902

Scheduling Department (509) 248-9592
Main Office Telephone (509) 248-7380

www.memorialsvip.org

0036

Employer #27


Yakima Urology Associates, PLLC
2500 Racquet Lane, Suite
Yakima, WA 98902
Office (509) 249-3900 Fax (509) 573-9639

Employer #29

Yakima Valley
Farm Workers Clinic
602 E. Nob Hill Blvd.
Yakima, WA 98901
(509) 248-3334

Date: 10/11/2011

To Whom It May Concern:

This letter is to confirm that

Name: Maria Espindola

DOB: DoB 4/14/78

had an appointment today. Please excuse from work/class for this time 2:30 pm / ___ days.

Signature

Employer #31

PAML
PATHOLOGY ASSOCIATES
MEDICAL LABORATORIES
602 E. Nob Hill Blvd.
Yakima, WA 98901
(509) 248-3334 ext: 3180

10/12/11

To Whom It May Concern: DOB- 4/14/78

Maria Espindola was seen for lab work today. If you have any further questions please do not hesitate to call us at (509) 248-3334 ext: 3180. Thank you for your cooperation.

Sincerely,

PAML- Nob Hill Branch

Employer #32

Maria Espindola
ESPI 001

33

DATE	DAY	SHIFT	IN	CODE	OUT	CODE	HOURS WORKED	ACCUMULATED HOURS	ACCUMULATED OVERTIME
21	MO		5:30		3:54		~~10:30~~	10:00	
22	TU		5:28		9:29		4:00	14:00	
22	TU		11:53		3:53		~~2:30~~	18:00	
23	WE		5:27		3:29		~~9:30~~	~~27:30~~	
								26	
							1003	17¾	
							1000	8¼	
							~~11~~	8	0
							~~total~~	34	0

AP/NO PTS.
TUE. 11-22-11

A1181

SEMANO

TUE. 11-22-11

Yakima Valley Farm Workers Clinic
602 EAST NOB HILL BLVD. - YAKIMA, WA 98901

S. María Espíndola

TIENE UNA CITA EL
☐LUNES ☒MARTES ☐MIERCOLES ☐JUEVES ☐VIERNES ☐SABADO

FECHA 11-22-11 A LAS 10:00 A.M. P.M.

SI NO PUEDE ASISTIR A SU CITA, POR FAVOR LLAME 24 HORAS ANTES DE LA CITA.

VENGA AL LABORATORIO UNA SEMANA ANTES DE SU CITA

TELEFONO 248-3334

Employer #33

Maria Espindola
ESPI 001

33

TUE. 12-27-11

*TAL 12-30-11

Dr. TACH

Yakima Valley Farm Workers Clinic
402 EAST NOB HILL BLVD. - YAKIMA, WA 98901

Maria Espindola
S

TIENE UNA CITA EL
Q LUNES Q MARTES Q MIERCOLES Q JUEVES Q VIERNES Q SABADO

FECHA 12/27/11 ATLAS 8:30 AM PM

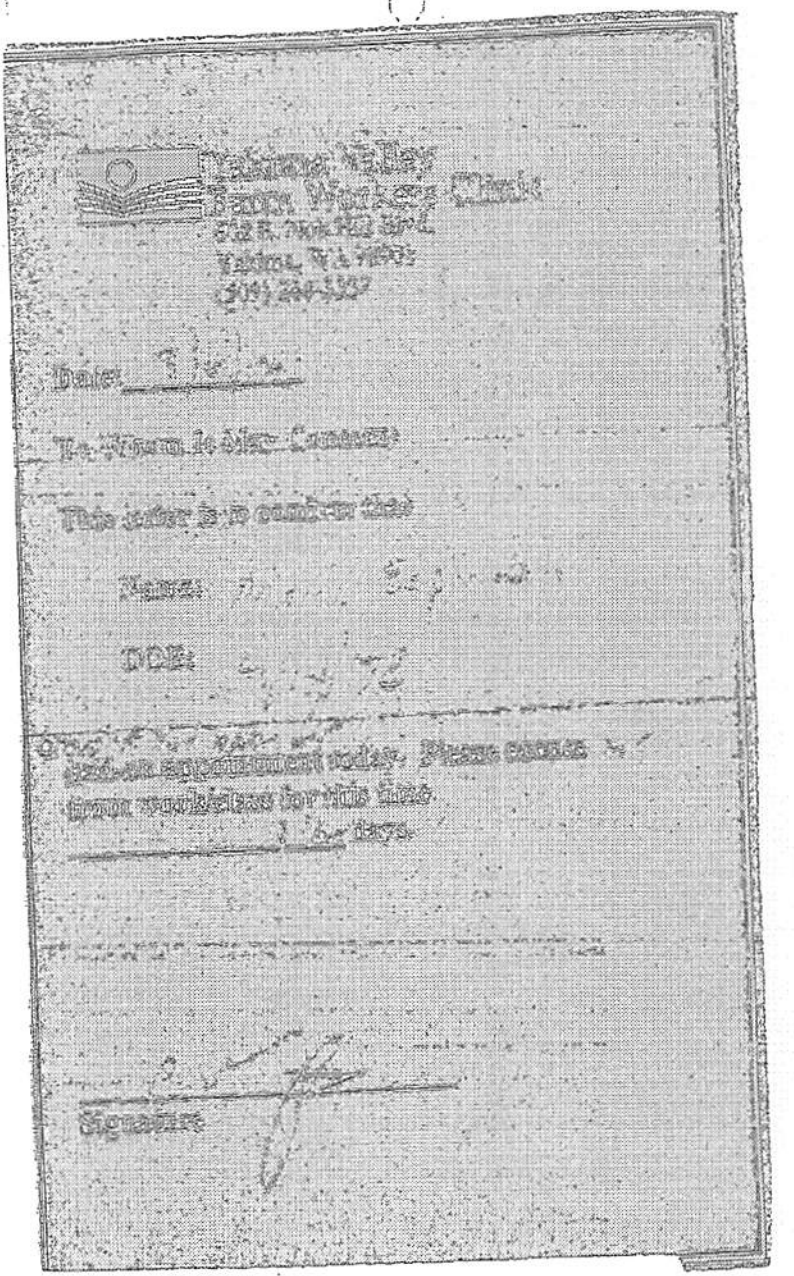
SI NO PUEDE ASISTIR A SU CITA, POR FAVOR LLAME 24 HORAS ANTES DE LA CITA. TELEFONO 248-3334

VENGA AL LABORATORIO/FARMACIA SEMANA ANTES DE SU CITA

DATE	IN	CODE	OUT	CODE	HOURS WORKED	ACCUMULATED HOURS	ACCUMULATED OVERTIME
27TU	6:57		7:57		1:00	1:00	
27TU	9:55		3:126		6:30	6:30	
28WE	6:51		3:30		8:00	14:30	
29TH	6:51		3:25		8:00	22:30	
30FR	6:54		1:00		5:30	28:00	
						27½	
AP/ND PTS. TUE. 12-27-11							
LE/-2PTS. FRI. 12-30-11							

	11	8	27½	0
	1000			
Total			35½	0

A1181



Employer #36

Ma. Espindola.

Yakima Valley
Farm Workers Clinic
602 E. Nob Hill Blvd.
Yakima, WA 98901
(509) 248-3334

Date: 04/04/2012

To Whom It May Concern:

This letter is to confirm that

LAST:MENDOZA
FIRST:BALERIA
DOB:01/12/2012
GENDER: F
FC:08
PID #: 4545-71-1
GID #: 14-80888
PCP:FORSTER, CHARLES
DOS:04/04/12
ORD:H. SCOTVOLD, MD
AR#:0000018
MSR:00076723758

had an appointment today. Please excuse Mother. from work/class for this time
_____ / 1 days.

H. Scotvold MD
Signature

Employer #38

Exhibit 2: Deposition Excerpts of Ms. Espindola

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON AT YAKIMA

MARIA G. ESPINDOLA,	)	
	)	
Plaintiff,	)	
	)	NO. 144197
vs.	)	
	)	
APPLE KING, a limited liability company,	)	
	)	
Defendant.	)	

DEPOSITION UPON ORAL EXAMINATION OF MARIA ESPINDOLA

April 29, 2015
2:17 p.m.
230 South 2nd Street
Yakima, Washington

TAKEN AT THE INSTANCE OF THE DEFENDANT

REPORTED BY:
SUSAN E. ANDERSON, RPR, CCR

APPEARANCES:

FOR THE PLAINTIFF:

MR. FAVIAN VALENCIA
SUNLIGHT LAW, PLLC
Attorneys at Law
402 E. Yakima Avenue
Suite 730
Yakima, WA 98901
509.388.0231
Favian@sunlightlaw.com

ALSO PRESENT:

MR. GARY HERSEY
Attorney at Law
SUNLIGHT LAW, PLLC

FOR THE DEFENDANT:

MR. GARY LOFLAND
MEYER, FLUEGGE & TENNEY
Attorneys at Law
230 S. 2nd Street
Yakima, WA 98901
509.452.2828
glofland@glofland.net

I N D E X

ESPINDOLA v. APPLE KING
NO. 144197
April 29, 2015

T E S T I M O N Y

E X H I B I T S

BE IT REMEMBERED that on Tuesday, April 29, 2015, at 2:17 p.m. at 230 South 2nd Street, Yakima, Washington, the deposition of MARIA ESPINDOLA was taken before Susan E. Anderson, Registered Professional Reporter and Notary Public. The following proceedings took place:

LEVI ENRIQUEZ, being first duly sworn to interpret from English to Spanish and from Spanish to English, interpreted as follows:

MARIA ESPINDOLA, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

EXAMINATION

BY MR. LOFLAND:

Q. Good afternoon. My name is Gary Lofland, I am the attorney for Apple King. And I represent them in this lawsuit. I'm going to ask you some questions. We have to try to work together through this deposition.

Q. Before you look the leave?
A. Before I took the leave I was repacking.
Q. And that was five days a week?
A. No, we were working four days a week.
Q. Why was that?
A. Because that's the way the schedule was set up.
Q. And were there other times that you only worked four days a week?
A. Yes. Just about all of us worked four days, all of us worked four days a week, just about all of us.
Q. At that time or throughout your employment?
A. That schedule had been that way for quite some time.
Q. How long?
A. I couldn't recall the dates, but more than one year, I believe.
Q. But everybody worked the schedule, not just you?
A. We all changed different days, working different days.
Q. But you were all working four days a week?
A. Yes.
Q. Okay. And then when you came back from maternity leave, do you recall when that was?
A. I came back the 5 of March of 2012.
Q. Now, before you went on maternity leave, did you go to somebody at Apple King and tell them you needed maternity leave?

A. Yes, I did that to German.
Q. And you told him you needed to take maternity leave?
A. Yes.
Q. And he told you you could take time off?
A. Yes, he gave me 12 weeks.
Q. And did you take the entire 12 weeks?
A. No, I did not take them because I did not need them. I came back sooner than that to work.
Q. You felt good enough to come back to work?
A. Yes.
Q. Okay. And when you came back to work after maternity leave, what job did you do?
A. Repacking.
Q. And had you done repacking before?
A. Yes, all the time.
Q. All right. And how many days a week were you working when you returned from maternity leave?
A. Four days.
Q. All right. The same type of hours, 8:00 or 9:00, depending on the day?
A. I worked ten hours.
Q. You worked ten hours?
A. Yes.
Q. So you were working more hours when you returned than when you left for maternity leave?

A. No.
Q. Am I confused about the number of hours you worked when you were working four days a week?
A. We were working four days a week, we worked ten hours a day.
Q. Okay. Thank you.
So when you came back after maternity leave, you then worked four days a week?
A. Yes.
Q. And when you were working four days week, you worked approximately ten hours a day?
A. Yes.
Q. And did your job change in any way?
A. No, I was repacking when I took leave to have my baby. And then when I came back I was repacking again.
Q. And when you left to have your baby, what was your hourly wage?
A. They paid me 9 -- I don not recall now.
Q. Well, let me ask it a different way. When you came back from maternity leave, were you paid the same as when you left?
A. Yes.
Q. So there was no change?
A. No.
Q. Now, tell me please after you stopped working at Apple

Did anybody ever explain to you what the lawsuit was about?
A. Yes.
Q. And what is the lawsuit about?
A. The lawsuit is because German laid me off or fired me and I don't think he had any right to, any motive to.
Q. So what happened that caused him to fire you?
A. He fired me, he told me that because my points had terminated. Points had terminated.
Q. You had gotten too many points?
A. I never knew because he never told me.
Q. And so why was that wrong?
A. Why was it wrong? Because I don't know. He just called me to the office. And he told me that I had too many points and that he had to lay me off.
Q. What are points?
A. Points are like if I did -- if I was absent without advising him, that it could be some points. But if I give him notice then he does not apply any points.
(EXHIBIT NO. 30 MARKED.)
Q. (By Mr. Lofland) I have handed you that which is marked as deposition Exhibit 30. Ask you to please take a look at it.
And after you have looked at it would you please let me know when you're done?

A. Yes. Yes, this sheet here is the one they gave me when they informed us about the points that they were going to give us.
Q. And on the bottom there appears to be a name or a signature, is that your writing?
A. Yes.
Q. And you wrote it there when you received it?
A. Yes.
Q. And that occurred about August 14th, 2011?
A. Yes.
Q. Thank you. I will hand you that which has been marked as deposition Exhibit 1 and ask you to look at that, please?
A. Yes, I've read it.
Q. And is that a copy of the policy that you received at Apple King?
A. Yes.
Q. Thank you.

So why was it wrong for the company to deduct points or accumulate points for you?

A. Why was it wrong?
Q. Yeah.
A. Well, it wasn't wrong, but they gave me points because I was sick from my kidney. And I always took him the notes from when I was in the hospital or at a clinic.

Q. What was the -- part of your complaint is that you were discriminated against because you had kidney stones; is that correct?
A. Yes.
Q. And when did you first develop kidney stones?
A. In my kidneys they found them in August of 2011.
Q. And were the kidney stones ever passed or removed?
A. They were removed on 2 February, 2012.
Q. All right. And what hospital or medical facility did you go to when they were removed?
A. Memorial Hospital.
Q. And how long did the procedure take?
A. To remove them, I went in about 11:00 or 12:00 in the morning and I came out about 3 o'clock in the afternoon.
Q. And did that procedure require you to be absent from work any longer than the day in which the kidney stone was removed?
A. No, I took that as a vacation. Because I did not have to get back to 2000 -- April of 2012.
Q. And once you came back to work you no longer had a problem with kidney stones?
A. No.
Q. So from the time the kidney stones were removed up through the time your employment ended at Apple King

you had no difficulty with kidney stones?
A. No.
Q. And when you had the procedure to remove the kidney stones, you were granted time off?
A. Yes. I had left work in January to have my baby. And then in January I had until 2 of April to return to work. But they took my stones out on the 2nd of February. So then I did not need to take more vacation time off.
Q. So help me understand so that I'm clear on what happened. You took time off to have the baby?
A. Yes.
Q. You took maternity leave?
A. Yes.
Q. And then while you were out on maternity leave you then had the procedure to remove the kidney stones?
A. Yes.
Q. Okay. And then you came back?
A. Yes.
Q. All right. Thank you.
When you had the kidney stones how did it affect you?
A. When I had the stones in my kidney I was affected a lot. Because I was always with a lot of pain. In a lot of pain.

Q. Okay. How often did you have the pain?
A. The pain never went away. I always had the pain.
Q. And do you recall on what date or dates you went to the doctor because of pain from the kidney stones?
A. I would go there very often to -- down to the hospital.
Q. You told me very often. And I asked you do you recall the date or dates?
A. No. No.
Q. Do you recall how many times you saw the doctor because of kidney stones?
A. I don't recall. But often I was at the hospital.
Q. You also claim that you had gestational diabetes?
A. Yes, that also.
Q. And that was a condition that came about as a result of your pregnancy; is that correct?
A. Yes, it was because of the pregnancy.
Q. And when was that condition first diagnosed?
A. They told me in the final days of August. I was at the hospital because of the stones in my kidneys. I was in September, because it was after they told me about the diabetes.
Q. And so what effect did the diabetes have on you?
A. Well, it affected me because of my diet. I had to be checking my sugar content.

Q. So how did it affect your diet?
A. It affected me because, for example, I had to ask for permission there at work to go out to check with the sugar back there in the kitchen or the bathroom.
Q. And who did you ask --
A. German.
Q. And when you asked German what was his response?
A. It was okay to go. To check.
Q. And how long did you have to check your blood sugar? How long did it last from the time you discovered it to the time you stopped?
A. The months?
Q. As best you can remember?
A. I didn't recall if it was September or October. Until January when I left work to have the baby.
Q. And so after you had the child the gestational diabetes went away?
A. Yes, never had it anymore. I never had to check anymore.
Q. So by the time you came back to work you no longer had the gestational diabetes?
A. No.
Q. And did the gestational diabetes cause you to miss any work?
A. No.

Q. Other than affecting what -- let me back up, excuse me.

Other than having to check your blood sugar and having to watch your diet, was there anything else that you had to do as a result of the diabetes?

A. No.

MR. LOFLAND: That's all I have. Thank you. Pretty easy. Thank you for your help.

MR. VALENCIA: I have a couple questions.

THE WITNESS: Okay. Okay.

EXAMINATION

BY MR. VALENCIA:

Q. All right. Maria, so I have couple questions for you.

A. That's fine.

(Off the record.)

Q. (By Mr. Valencia) In 2011 when did you find out that you were pregnant?

A. I knew that I was pregnant in June. June, June or July of 2011.

Q. And did you tell German or Armida?

A. Yes.

Q. And how did you tell them?

A. I told Armida that I was pregnant.

Q. Did you have to miss any time from work during the time that you told them?

A. No.
Q. Okay. And you mentioned that in August of 2011 you were hospitalized?
A. Yes.
Q. And what was it for?
A. Because I had rocks in my kidney. They were checking me and then when they told me that I had rocks in my kidney -- or stones in my kidney.
Q. And did you tell your employer?
A. Yes. German, I told German.
Q. What did you tell him?
A. I called him and told him that I was not going to come back to work until I got out of the hospital.
Q. What did he tell you?
A. He answered that that was all right. To take the time that I felt was necessary.
Q. After that week that you were hospitalized for a week in August, did you have any other doctors' appointments?
A. Yes, I had a lot of appointments with the doctor.
Q. And what was -- so during 2011, after the week that you were in the hospital, what were the appointments for? What were the appointments for?
A. For my pregnancy.
Q. And did you tell German or Armida?

A. Yes.
Q. Were there times where you didn't have a note and you had to miss work?
A. Yes, there were times that I had to not go to work.
Q. And would you tell German about it?
A. I would let him know because -- when I could not get out of bed because of the pain in my kidney.
Q. And how would you -- if you couldn't go to work how would you tell him? If you couldn't go to work how would you tell him?
A. I would call him on the telephone. Or to the office.
Q. And would you tell him the reason why you couldn't go to work?
A. Yes.
Q. What were the reasons that you were given?
A. I would tell him that I could not go to work because I was in pain, and my kidney was -- I had a lot of pain in my kidney.
Q. And what would he tell you?
A. He would tell me that all right, that if I could not go the next day to let him know.
Q. And would he tell you that you had gotten points because of it?
A. No, he never told me that I had any points.
Q. Were there any times where you did not go to work

because you were sick and you did not call him?
A. No, that never happened. Because anytime that I did not go to work I let him know.
Q. Would it always be to German or would it be to Armida?
A. To German. I always called German.
Q. And during 2011, between October -- sorry, between August, so the time you were at the hospital, and then the time that you took maternity leave in January, were there any times where you had to leave work early because of your illness? Leave work early because of your illness? During or between August of 2011 when you were in the hospital?
A. Yes.
Q. All the way through the time you took maternity leave in January of 2012?
A. Yes.
Q. And when you left early, during those times that you were ill, would you tell German?
A. Yes. German or Armida.
Q. And how would you tell them?
A. I'd go to the office and I would tell German that I felt very bad. And he would say, You do look very ill, Maria, go and rest.
Q. And would he say anything about points?
A. No, never told me anything about points.

Q. Okay. Thank you.
And I'm going to show you what has been marked as Exhibit No. 28.
And there on the top left, do you recognize that note?
A. That's for an appointment that I had.
Q. And do you recall what the appointment was for?
A. That's because of the pregnancy.
Q. Did you have to miss work because of that one?
A. Yes.
Q. Did you have medicine for kidney pain?
A. No, because when I was -- they did have some pills for when I had a lot of pain, but I do not recall the name of the pills.
Q. Were there any times where you were sick but did not have to go to the doctor?
A. Yes, there were times, I guess. When I had a lot of pain what I had to do would be to lay down, lie down. Because not when I was in the hospital. They put in a stent, I think, like a little apparatus. And that would be where this -- the little stone would stop in the channel.
And I when I had a lot of pain I would ask German for permission and I would go lay down at my house.
Q. Between August and the time you had your baby, about

how many times did that happen?
A. I cannot recall how many times, but it was often.
Q. And do you remember about how many times you had to miss work because of that kind of situation?
A. It must have been two or three times a month.
Q. And when you had to do that did you call German?
A. Yes.
Q. What would you tell him?
A. I would tell him that I could not go because my kidney was hurting me a lot.

MR. VALENCIA: That's all I have.

MR. LOFLAND: A couple more questions based on that. Hold tight while we switch sides once again.

THE WITNESS: Okay.

FURTHER EXAMINATION

BY MR. LOFLAND:

Q. In response to the questions of your attorney you said there were times that you could not get out of bed because the pain was so great because of your kidney.
A. Yes.
Q. Do you remember saying that?
A. Yes.
Q. Do you know when those days --
A. I do not recall the dates.
Q. Do you have a record, did you make any notes of what

happened?
A. No.
Q. Do you have a calendar on which you wrote anything?
A. No.
Q. Do you have any memory of the number of times you called German between August and January?
A. I do not have the memory to tell you.
Q. Say that again, please.
A. My memory, I don't have it, I don't know.
Q. Do you have any notes of that?
A. No. Not -- the I add paperwork and I had pain, no, I do not.
Q. You told your attorney in response to his questions there were times that you felt bad at work and had to leave.
A. Yes.
Q. And those were times you felt nauseous or dizzy?
A. Not dizzy, I've never felt dizzy. But I did -- I -- it was because of my -- the pain in my kidney.
Q. And did German tell you that you could go sit in the break room for a while to see if it got better?
A. He would tell me to go to my house and rest. And he told me that if I could not come tomorrow to let him know.
Q. Was there ever an occasion in which German told you to

go to the break room and rest?
A. No.
Q. Did you ever tell anybody that he told you that?
A. No.
Q. Do you know who Etalita Retna(ph) is?
A. No.
Q. Did you ever speak to anybody from the Washington Human Rights Comission?
A. No.
Q. Did you ever have a telephone conversation on July 16th, 2000 --
A. The human rights, that one?
Q. Yes.
A. About this, yes.
Q. Yes. And did you tell Etalita Retna that German had told you you could go sit in the break room to see if you felt better?
A. No, I don't recall.
Q. Did you ever tell Ms. Retna or anyone that you didn't want to be seen in the break room sitting around being paid by your employer and have other employees think you were lazy?
A. You mean if they told me to go to the kitchen? Or a room? I'm confused, a room or the kitchen?
Q. Pick one. Did they ever tell you to go to a different

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss.
COUNTY OF YAKIMA)

This is to certify that I, Susan E. Anderson, Certified Court Reporter and Notary Public in and for the State of Washington, residing at Yakima, reported the within and foregoing deposition; said deposition being taken before me as a Notary Public on the date herein set forth; that the witness was first by me duly sworn; that said examination was taken by me in shorthand and thereafter under my supervision transcribed, and that same is a full, true and correct record of the testimony of said witness, including all questions, answers and objections, if any, of counsel.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties, nor am I financially interested in the outcome of the cause.

IN WITNESS WHEREOF I have set my hand and affixed my seal this 7th day of May, 2015

Susan E Anderson

SUSAN E. ANDERSON RPR,
CCR NO. 2493
Notary Public in and for the State of Washington, residing at Yakima
My Commission expires on January 9, 2016

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