NO. 38381-4-III

101386-8

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ADELINA GABRIELA SUAREZ,

Appellant/Plaintiff

v.

THE STATE OF WASHINGTON, TAMMY WINEGARD and her community property, JULIANNE MOORE and her marital community property, and TAMMY MASTERS and her community property,

Appellees/Defendants

APPELLANT'S REPONSE TO PETITION FOR DISCRETIONARY REVIEW AND CROSS PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Adelina Gabriela Suarez ("Appellant") hereby responds to the Appellees' Petition for Discretionary Review, wherein the Appellees ask this Court to review the Court of Appeals' September 20, 2022, decision, in the above-referenced matter, and cross petition for discretionary review in *Suarez v. State*, 517 P.3d 474, 477 (Wash. Ct. App. 2022).

In its opinion, the Court of Appeals reversed the lower court's summary judgment dismissal of Appellant's statutory claim for failure to accommodate her religious beliefs and Appellant's tort claim for discrimination in violation of public policy. In doing so, the Court of Appeals found that unresolved factual issues created genuine issues of material fact as to whether Appellees provided a reasonable accommodation to eliminate the conflict with Appellant's weekly Sabbath and whether the accommodation of Appellant's leave request to observe her religious holiday caused the Appellees an undue hardship. Because of the disputed material facts, the Court of Appeals concluded that summary judgment was inappropriate on Appellant's statutory failure-to-accommodate and public policy tort claims. Appellant argues here that this was an appropriate decision that should be affirmed.

Additionally, the Court of Appeals affirmed the lower court's summary judgment dismissal of Appellant's statutory claims for discrimination and retaliation, finding that Appellant did not assert any argument or present evidence to support her claims to the trial court and, thus, had waived the claims on appeal. Appellant disagrees with this portion of the decision and hereby petitions for discretionary review pursuant to RAP 13.4(b)(1).

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The Court of Appeals erred in affirming the lower court's dismissal of Appellant's discrimination and retaliation claims pursuant to the Washington Law Against Discrimination ("WLAD").

III. ISSUES PRESENTED FOR REVIEW

1. Whether an employee sufficiently raises claims at the trial level by alleging her claims in her complaint and arguing these claims in her motion for summary judgment.

IV. RESPONSIVE STATEMENT OF THE CASE

Appellant, Adelina Suarez, hereby incorporates by reference the facts as rendered by the Court of Appeals.

Furthermore, at the trial level, Appellant did argue in support of her WLAD discrimination and retaliation claims. Plaintiff's filed complaint provides:

> "Plaintiff's requests for religious accommodations, complaints about unequal treatment related to her religious accommodations and her taking a time off to practice her religion were a substantial factor in Defendants' decision to terminate Plaintiff. […] Defendants gave more favorable treatment to employees that did not request religious accommodations, did not complain about unequal treatment based on her religion and who did not take time off to practice their religion by not terminating them.[…] Defendant violated the [WLAD] by undertaking adverse employment actions, retaliating against Plaintiff, and ultimately terminating her and failing to accommodate her." CP 5.

In her pleadings arguing for her affirmative motion for summary judgment and responding to Appellees counter motion, Appellant expressly argued: "The State of Washington Discriminated against Suarez in violation of [WLAD]." CP 203, 204, 206, 335. Similarly, Appellant's summary judgment pleadings consistently argued that she was terminated on October 4, 2019 for missing work on September 29, 2019 to attend her religious feast. CP 204, 206, and 335. Appellant's affidavits describe the fact that she complained and pleaded with her supervisors to not be terminated for practicing her religion. CP 248. Appellees' designee, Tammy Masters, expressly testified in her deposition that the reason for termination was

Appellants' request and taking of time off to attend her religious practice. CP 380.

With regards to disparate treatment, Appellant presented the deposition testimony of Ms. Masters describing that 3 other employees called in to request and were granted unscheduled leave on September 29, 2019—Appellees did not provide any evidence showing that these employees suffered any adverse action. CP 231-233. Furthermore, Appellees granted the schedule change that Appellant requested to another employee with less seniority. CP 239-242. Appellees argue that Appellant had notice of how to apply for this schedule change in the form of an email, but never produced this email. CP 241-242. Appellant affirms that she was never informed of the availability of this schedule change or how to apply. CP 246.

In its September 20, 2022, decision, the Court of Appeals held that Appellant had waived her statutory claims of discrimination and retaliation by not presenting argument or evidence to the superior court. As a result of the alleged waiver, the Court of Appeals affirmed the trial court's dismissal of Appellant's statutory claims for discrimination and retaliation.

V. ARGUMENT

A. RESPONSE TO APPELLEES' ISSUES PRESENTED

In its opinion, the Court of Appeals concluded, in part, that

genuine issues of material fact existed as to whether the accommodation of Appellant's leave request to observe her religious holiday caused the Appellees an "undue hardship." In reaching this conclusion, the Court of Appeals had to define the phrase "undue hardship." To define the phrase, the Court of Appeals consulted WAC 82-56-020, a regulation promulgated to effectuate a law that grants certain state employees the right to two unpaid holidays per year for reasons of faith, unless the absence would impose an "undue hardship" on the employer. (RCW 1.16.050.) The regulation, promulgated by the Office of Financial Management pursuant to legislative directive, defines an "undue hardship" as an action requiring a "significant difficulty or expense to the employer." WAC 82-56-020. To aid with this evaluation, the regulation further sets forth ten (10) factors a state employer should consider when evaluating whether a request imposes an undue hardship.

Here, Appellees argue that the Court of Appeals erred in its interpretation of the phrase "undue hardship" because it conflicts with this Court's case in *Kumar v. Gate Gourmet Inc.*, 180 Wash. 2d 481, 502, 325 P.3d 193, 203 (2014), where this Court recognized that an undue hardship results whenever an accommodation requires an employer to bear more than a *de minimis* cost. Appellees further argue that the Court of Appeals' decision to draw from the regulation was in

error because the regulation does not apply to the WLAD by its own terms; the Office of Financial Management has no authority to interpret the WLAD; and adoption of the undue hardship standard would have significant public policy ramifications. In sum, Appellees argue that the standard encapsulated by the regulation should not apply.

Appellees' arguments are unpersuasive. In *Kumar*, the Supreme Court of Washington did not actually define what constituted an "undue hardship" under the WLAD. Rather, the Supreme Court merely noted the existing jurisprudence regarding the term's definition in the context of federal discrimination laws. *Kumar*, 325 P.3d at 203. Given the procedural posture of that case, this Court did not need to decide whether an accommodation actually did constitute an undue hardship, and as such, did not define the phrase in the context of the WLAD.

Here, the Court of Appeals' opinion merely extrapolates, but does not supplant or contradict, *Kumar*. Indeed, as a matter of statutory interpretation, the Court of Appeals may draw from related statutes, such as the State's law governing religious accommodation requests and the regulation interpreting the same. *Matter of K.G.T.*, 16 Wash. App. 2d 787, 791, 483 P.3d 808, 811 (2021) ("We begin with the written text and endeavor to uncover the statute's plain meaning. This involves an analysis of not only specific words, but also context, including related

statutes."). As such, Appellees' arguments that the regulation does not apply to the WLAD by its own terms or that the Office of Financial Management has no authority to interpret the WLAD are unpersuasive because the Court of Appeals was free to consult the references in defining the phrase as a matter of first impression.

Appellees further argue that, in defining "undue hardship" via the regulation and applying that definition to both the statutory WLAD claim (which only applies to employers with 8 or more employees) and the public policy tort (which applies to all employers), the Court of Appeals' decision will represent a "sea of change" for all employers, regardless of size. Appellees fail to explain, however, why this is inherently bad. Indeed, having a uniform definition of "undue hardship" in the context of religious accommodation requests applied to all Washington employers, whether public and private employer, simplifies the law on subject. Appellees argument also seemingly ignores the inherent discretion each employer, regardless of size, has in evaluating for an undue hardship, given that the regulation contemplates ten discretionary factors. There is simply no compelling public policy reason why the ten-factor analysis set forth in the regulation would be unworkable if applied to all Washington employers.

Put simply, the Court of Appeals did not err in its interpretation

of the phrase "undue hardship" or in its conclusion that disputed material facts precluded summary judgment on Appellant's statutory failure-to-accommodate and public policy tort claims. As such, Appellant asks that this Court deny Appellees' Petition for Discretionary Review.

B. APPELLANT'S ISSUE PRESENTED FOR DISCRETIONARY REVIEW

The Court of Appeals' decision supplants unnecessary and unclear requirements to this Court's precedent. In its decision, the Court of Appeals concluded that Appellant did not assert any arguments or present evidence to support her statutory claims of discrimination or retaliation to the trial court, and as such, summary judgment was appropriate. The Court of Appeals relies on *Herberg v. Swartz,* 89 Wn.2d 916, 578 P.2d 17, 22 (1978) to support its decision. Pursuant to RAP 13.4(b)(1), Appellant respectfully asserts that this decision is misguided and misinterprets this Court's decision in *Herberg* and asks for discretionary review on this claim. In *Herberg,* this Court made the proper decision to deny allowing the appellant in that case to argue a completely new argument because it was brought up for the first time on appeal. In the present case, Appellant did argue her claims of WLAD discrimination and retaliation throughout the trial court proceedings.

Appellant's complaint itself alleges the elements of WLAD claims for discrimination and retaliation. CP 5. The fact that trial court's decision granting Appellees' motion for summary judgment was a complete summary judgment, implies that all of Appellant's claims were dismissed and thus addressed by the parties and the trial court.

To establish a claim of discrimination, an employee has to prove that (1) an employer took an adverse action against the employee and (2) that the employee's religion was a substantial factor in the decision to take the adverse action. WPI 330.01; *Scrivener v. Clark Coll.,* 181 Wn.2d 439, 444, 334 P.3d 541, 545 (2014). Appellant argued facts to support both of these elements of her claim starting with her complaint and supported by her pleadings and affidavits. Appellant argued and presented evidence that other employees were treated more favorably to establish her disparate treatment claim.

So, too, with Appellant's retaliation claim. An employee establishes a claim of retaliation in violation of WLAD by establishing that (1) she was opposing what she reasonably believed to be discrimination on the basis of her religion and (2) that a substantial factor in the decision to terminate her was the employee's opposition to the discriminatory practice. RCW 49.60.210(1); *Allison v. Hous. Auth.,* 118 Wn.2d 79, 821 P.2d 34 (1991). On September 11, 2019, when Appellees' denied Appellant's request to

take time off for her religious practices and Appellant complained and continued to request that Appellees reconsider their decision denying her time off, Appellant was engaging in opposing what she reasonably believed to be a discriminatory practice. After she was terminated, Appellant continued to plead for her job explaining that the reason she had to miss work was due to her moral obligation to attend to her religious practices to no avail. Appellant's overarching argument is that she was terminated on October 4, 2019 for engaging in a protected activity on September 29, 2019—this is the definition of a retaliation claim.

Simultaneously holding that Appellant presented sufficient evidence for a tort claim for wrongful termination in violation of the WLAD while holding that Appellant did not present sufficient evidence or argument for her statutory discrimination claim pursuant to WLAD is contradictory and warrants this Court's review. Construing these facts in the light most favorable to Appellant, the trial court erred in concluding that these claims were waived.

VI. CONCLUSION

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

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RESPECTFULLLY SUBMITTED this __10th__ day of November, 2022.

__/s/ Favian Valencia_____

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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:

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Executed this 10th day of November, 2022, at Yakima, Washington.

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