NO. 101386-8

SUPREME COURT OF THE STATE OF WASHINGTON

ADELINA GABRIELA SUAREZ,

Appellant,

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,

Respondent.

STATE'S PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

KARL D. SMITH,
WSBA No. 41988
Deputy Solicitor General
OID No. 91087
PO Box 40100
Olympia, WA 98504-0100
360-753-6200

NICHOLAS ULRICH
WSBA No. 50006
Assistant Attorney General
OID No. 91106
1116 W. Riverside, Suite 100
Spokane, WA 99201-1106
509-456-6390

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I. INTRODUCTION

The Court of Appeals decision conflicts with a decision of this Court in a manner that affects all employers in Washington. In *Kumar v. Gate Gourmet Inc*., 180 Wn.2d 481, 500-01, 325 P.3d 193 (2014), this Court held that, under the Washington Law Against Discrimination (WLAD), employers must reasonably accommodate an employee's religious practices. This Court also adopted a framework for such WLAD claims where "an 'undue hardship' results whenever an accommodation 'require[s an employer] to bear more than a *de minimis* cost.'" *Id*. at 502 (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977)). The Court of Appeals, adopting a theory that neither party had advocated, rejected this "more than a *de minimis* cost" standard and instead held that an undue hardship results only when an accommodation would cause an employer "significant difficulty or expense." App. at 16-17.

The Court of Appeals' basis for departing from this Court's *Kumar* decision is obviously flawed. The Court of Appeals relied on a regulation that interprets a statute that is not at issue here and that was adopted by an agency with no authority to interpret the WLAD. In essence, the Court of Appeals took a standard intended to apply only to public employees and only to the first two days of leave for religious purposes and broadly applied that standard to *all* Washington employers subject to the WLAD for *any* religious accommodation claim. The Court of Appeals' departure from this Court's decision in *Kumar* is unjustified and has far-reaching implications beyond this specific case.

Additionally, the Court of Appeals' misinterpretation of the WLAD taints its analysis of Ms. Suarez's common law claim for wrongful termination in violation of public policy because its application was incorporated into that claim. Notably, the common law claim applies to *all employers*, regardless of number of employees, to the extent the failure to accommodate

results in discharge. Thus, this new standard will change the manner in which all employers must operate in dealing with religious accommodations.

This Court should accept review of all the issues in this case pursuant to RAP 13.4(b)(1) and (4), reverse the Court of Appeals, and apply the correct legal standard to affirm the superior court's summary judgment order.

II. ISSUES PRESENTED FOR REVIEW

1. This Court recognized in *Kumar* that under the WLAD a religious accommodation involves an undue hardship if it imposes "more than a *de minimis* cost" on an employer. Did the Court of Appeals err when it departed from this standard and instead held that a religious accommodation involves an undue hardship only if it involves "significant difficulty or expense" for an employer?

2. In resolving Ms. Suarez's claim for wrongful discharge in violation of public policy, the Court of Appeals relied on its earlier holding that there was a question of fact as to whether

Ms. Suarez's request for time off amounted to an undue hardship. Did the Court of Appeals err when it incorporated its new undue hardship standard from the WLAD claim into the common law claim?

3. An employer need not accommodate an individual if it constitutes an undue hardship, which under *Kumar* is anything that imposes "more than a *de minimis* cost." Here, to ensure the safety of its disabled residents, a nursing facility denied a request for leave made on one day's notice when it was already confronting a staffing shortage. Did the requested time off involve an undue hardship?

4. An employer need not accommodate an individual where the accommodation conflicts with a collective bargaining agreement or seniority rights of other employees. Here, an employee's days off were tied to the specific position they were hired for, and an employee could seek different days off under the CBA only by bidding or applying for a different position. Did

the School face an undue hardship to move Ms. Suarez to a position with more preferred days off?

III. STATEMENT OF THE CASE

A. Ms. Suarez Worked for the Yakima Valley School, a Certified Nursing Facility that Cares for Vulnerable, Disabled Adults

The Yakima Valley School serves vulnerable disabled adults and is administered by the Department of Social and Health Services' (Department's) Developmental Disabilities Administration. CP at 164. Despite its name, Yakima Valley School is not a school in the traditional sense; rather, it is a certified residential nursing facility that serves vulnerable, disabled adults. CP at 164. It offers a full spectrum of clinical, therapeutic, and respite programs including medical, dental, nursing, pharmacy, and psychiatric services. *See* CP at 164.

Because of the vulnerability of the residents it serves, the facility is staffed 24 hours a day, seven days a week. CP at 319. Importantly, there are necessary minimum staffing levels to adequately care for the School's residents. CP at 165. Certain

residents require more intensive care including "one-to-one care, where there needs to be a dedicated staff for each individual." CP at 320. The School's staff consists largely of certified nursing assistants (CNAs). CP at 165. To ensure the School has necessary coverage each day for each shift, the School hires CNAs for a particular schedule. CP at 165. Their working hours and days off are explicitly tied to the specific position the CNA is hired for. CP at 125, 164-65, 319.

The position that Ms. Suarez accepted specified that it was a night shift with Mondays and Tuesdays off. CP at 123-24, 159. At the time she accepted the position, Ms. Suarez knew she would be required to work on Saturdays. CP at 125. Employees of the School are unionized and the CBA dictates how to request positions for more preferred days off. *See* CP at 165. Ms. Suarez's position was subject to the CBA and was designated "emergent" per the Department's Emergency Operations Plan. CP at 159, 161. Because it was an emergent position, it could require the employee to "Report for duty on

short notice for a specified timeframe" and engage in "duty outside of normally scheduled work hours and workdays." CP at 162-63.

Under the CBA, seniority controls whether a person is entitled to a position with more preferred days off. CP at 165. There is a bid system that allows permanent employees who are outside their probationary periods to bid on positions with different days off or different shifts. *Id.* An employee does not become eligible to bid on a new position until he or she completes the probationary period. CP at 165, 319. However, a probationary employee may apply for another position with different days off if a position opens and has no bids. CP at 165, 319, 357. An individual who has been at the School longer will generally have more preferred days off because of the seniority-based bid system. CP at 126, 165. Saturday is one of the most preferred days off. CP at 127.

Ms. Suarez failed to apply for a position that opened with Fridays and Saturdays off. A swing shift position came open that

had Fridays and Saturdays off. CP at 357. A swing shift position requires the employee to work on afternoon and evenings. CP at 357. When a position opens and there are no bids, an email is automatically sent out regarding the open position to every employee. CP at 357. Ms. Suarez, however, indicated that she was not interested in a swing shift position. CP at 357. Ms. Suarez could have applied for this position but did not. CP at 357.

The CBA also had a provision regarding time off for religious purposes. CP at 165, 169. Specifically, it provides employees with two days of unpaid leave per calendar year for religious reasons. CP at 169. Further, it requires the employee to submit written notice fourteen days in advance of the requested day off. *Id.*

B. The School Approved Additional Religious Leave for Ms. Suarez in 2019 But Denied Two Days Because of a Staffing Shortage

In 2019, the School granted Ms. Suarez substantial time off for religious purposes. In April 2019, Ms. Suarez requested

five days off related to her observance of Passover. CP at 227. The School approved her request. CP at133-34, 227.

On September 8, 2019, Ms. Suarez put in requests for time off on September 28 and 29, as well as October 5 and 6. CP at 229, 378. She made this request for paid time off. CP at 229. Per the CBA, availability for paid time off is based on seniority. CP at 224, 319. The four days that Ms. Suarez requested as paid time off had already been allotted to other employees per the CBA. CP at 229. Ms. Suarez's request for paid time off was therefore denied. CP at 229. On September 13, Ms. Suarez's supervisor, Tammy Masters, told Ms. Suarez that if she still wanted those days off, she needed to have a conversation with the appointing authority, Tammy Winegar, regarding leave without pay. CP at 229, 358. Only Ms. Winegar, as the appointing authority, could approve requests for leave without pay. CP at 229, 320, 358. Ms. Masters provided Ms. Winegar's contact information to Ms. Suarez. CP at 229.

Despite knowing she wanted time off beginning September 28, Ms. Suarez waited until September 27 to contact Ms. Winegar. CP at 138, 155, 166, 171. Ms. Suarez now requested not just two days off, but six: September 28 and 29; October 12 and 13; and October 19 and 20. *Id.* Ms. Winegar approved the request for October 12, 13, 19, and 20 for leave without pay. CP at 140, 166, 171. However, she denied the last minute request to have September 28 and 29 off because of staffing issues on that short of notice. *See* CP at 140, 166, 171. The School needed 21 staff to maintain staffing levels. While there were nominally 24 CNA positions assigned to work, four of those positions were unfilled. CP at 231, 233. Thus, the School was already short of staff for night shifts and had to get on-call or floating staff to cover the need. CP at 231, 233, 237. There were simply "too many staff down" with "too many vacant positions" given their staffing requirements to accommodate Ms. Suarez's full request. CP at 237-38. Though the CBA only required the School to approve two days off for religious

purposes each year, the School accommodated Ms. Suarez by approving four days in the month of October, which were in addition to the five days off approved in April. CP at 166.

C. Despite Knowing There was a Staffing Shortage and That Her Request Had Been Denied, Ms. Suarez Did Not Show Up for Work

Ms. Suarez reported for work on September 28, but then left town after her shift was over – despite knowing that her request for time off on September 29 had been denied. CP at 140-41, 166, 171. Shortly after Ms. Suarez missed her shift on September 29, the Department gave her notice that her probationary employment was ending effective October 4, 2019. CP at 166. The Department ended her probationary employment because she had a history of refusing mandatory overtime without justification and she elected to not show up when she knew the facility would be short-staffed without her. CP at 166, 379-80.

D. The Court of Appeals Adopts a New Legal Standard and Reverses Summary Judgment

The parties cross-moved for summary judgment. CP at 97-109, 199-213. The trial court denied Ms. Suarez's motion and granted the State's motion. CP at 402-05. Ms. Suarez appealed.

In a divided opinion, the Court of Appeals reversed in part the summary judgment order. App. A. The Court of Appeals reversed on two issues. First, it reversed dismissal of Ms. Suarez's WLAD reasonable accommodation claim. App. at 2. Second, the Court of Appeals reversed the dismissal of Ms. Suarez's wrongful termination in violation of public policy claim. *Id.*

In reversing summary judgment on Ms. Suarez's WLAD reasonable accommodation claim, the Court of Appeals adopted a new standard for what constitutes an undue hardship. While it acknowledged this Court's *Kumar* precedent, which defines an undue hardship as a requirement that subject an employer to "more than a *de minimis* cost," *Kumar*, 180 Wn. 2d at 502, the

Court of Appeals rejected that definition, in favor of a WAC definition of undue hardship adopted by the Office of Financial Management. *Id.* (citing WAC 82-56-020). Neither party had briefed or argued this WAC definition controlled or applied. Nonetheless, the Court of Appeals saw "no need to use a different definition." App. at 17.

Ultimately, the Court of Appeals held that an employer, in response to a religious accommodation claim, must meet this altered test: "To succeed on summary judgment, the School must present undisputed evidence that accommodating Suarez's request for unpaid leave on September 29 caused the School *significant* difficulty or expense." App. at 18 (emphasis added).

Regarding Ms. Suarez's common law claim, the Court again went beyond the briefing and argument. The Court went back to its analysis on "undue hardship" to conclude that summary judgment was inappropriate on the common law claim: "We have already determined that there are genuine issues of material fact as to whether accommodating Suarez's request for

leave on September 29 caused an undue hardship." App. at 29. Ultimately, the Court determined that questions of fact remained on that claim as well. App. at 30.

Judge Lawrence-Berry dissented. He would have held that because Ms. Suarez's proposed accommodations conflicted with the collective bargaining agreement, they amounted to an undue hardship. App. at 31. More specifically, he reasoned, "by April 2019, the School had permitted Ms. Suarez five days off for religious purposes, three more than permitted by the CBA." App. at 32. When it ultimately granted her four of the six days she subsequently requested, that "amounted to *nine* days in one year of approved time off for religious purposes." App. at 32. Ultimately, he determined that this was "far in excess of the two annual days off permitted by the CBA." App. at 35-36.

IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review of the Court of Appeals opinion under RAP 13.4(b)(1) and/or (4). The Court of Appeals' published decision conflicts with this Court's decision in *Kumar*

because it adopted a stricter standard for undue hardship under the WLAD in the religious accommodation context. Additionally, this is an issue of substantial public interest because it alters the standard for considering religious accommodation requests for all employers in Washington who are subject to the WLAD. By incorporating the flawed standard into the common law wrongful discharge analysis, the Court of Appeals heightened the public interest by extending the erroneous framework to *all* employers, not just those that are subject to the WLAD.

A. The Court of Appeals' Definition of Undue Hardship Conflicts with this Court's *Kumar* Opinion

The Court of Appeals decision in this case conflicts with this Court's decision in *Kumar*. Under *Kumar*, an employer has the burden of establishing that "an accommodation 'require[s] an employer to bear more than a *de minimis* cost.'" *Kumar,* 180 Wn.2d at 500-02 (quoting *Trans World Airlines*, 432 U.S. at 84). The Court of Appeals decision conflicts with *Kumar* by instead requiring that an employer must establish that an accommodation

would cause the employer "significant difficulty and expense." App. at 16-17. This Court should grant review under RAP 13.4(b)(1) to address this conflict.

In *Kumar*, this Court recognized an implied cause of action under the WLAD "for a failure to reasonably accommodate an employee's religious practice" and adopted a framework for analyzing such claims. *Kumar,* 180 Wn.2d at 500-02. An "employer can defend by showing . . . that an accommodation would be an 'undue hardship' on the employer.'" *Id*. at 502. Under the framework recognized by this Court in *Kumar*, "an 'undue hardship' results whenever an accommodation 'require[s an employer] to bear more than a *de minimis* cost." *Id*. (quoting *Trans World Airlines*, 432 U.S. at 84).

Here, the Court of Appeals recognized this Court's "more than a *de minimis* cost" standard, but then unjustifiably departed from it. Instead of applying the standard adopted by this Court in *Kumar*, the Court of Appeals adopted a "significant difficulty or expense" standard from a regulation that, by its terms, is plainly

inapplicable. The Court of Appeals relied on the definition of "undue hardship" in WAC 82-56-020, a regulation that implements a statutory right that is not at issue in this case.

For two reasons, WAC 82-56-020 does not provide a basis for departing from this Court's decision in *Kumar*. First, by its terms, WAC 82-56-020 does not purport to define what constitutes an "undue hardship" for purposes of the WLAD. The regulation is clear that it is providing a definition exclusively "[f]or purposes of chapter 168, Laws of 2014." WAC 82-56-020; *see also* RCW 43.41.109 ("The director of the office of financial management shall by rule establish a definition of 'undue hardship' *for the purposes of RCW 1.16.050*." (Emphasis added)).

That law, codified in relevant part as RCW 1.16.050(3), addresses the relationship between public employers and public employees. By adopting a more stringent undue hardship standard in that context, the State has committed, in its capacity as an employer, to provide more liberal accommodation of leave

"for a reason of faith or conscience" than the floor set by the WLAD. RCW 1.16.050(3). However, that standard is, by law, limited to the "two unpaid holidays per calendar year." *Id*. For any accommodation beyond the two days addressed by RCW 1.16.050, it does not apply.

The second reason that WAC 82-56-020 does not apply is that that regulation was adopted by the Office of Financial Management. The Office of Financial Management has no authority to interpret the WLAD. As this Court has recognized, "[s]ince its enactment, the WLAD has been administered by the Washington Human Rights Commission." *Kumar*, 180 Wn.2d at 489. While the Human Rights Commission has not adopted a regulation defining the term "undue hardship" in the specific context of this case,[1] guidance on the Commission's website reflects the "more than *de minimis*" standard from *Kumar*.

[1] The Human Rights Commission has adopted a definition of "undue hardship" in the context of disability discrimination. WAC 162-22-075; *see also* WAC 162-22-010 (limiting scope of chapter to "disability discrimination").

Wash. State Human Rights Comm'n, *Guide to Religion and Washington State Nondiscrimination Laws* at 3, https://www.hum.wa.gov/sites/default/files/public/99_Religion%20and%20non-discrimination.pdf ("In religious accommodation, the employer can generally show undue hardship if the cost or impact is more than *de minimis*.").

In short, the Court of Appeals decision conflicts with this Court's decision in *Kumar* because it adopts a very different standard for an employer to establish that a proposed accommodation would result in an undue hardship. The regulation relied on by the Court of Appeals provides no basis for the Court of Appeals' departure from this Court's decision in *Kumar*. By its terms, the regulation defines the term "undue hardship" in only a very narrow context and not for purposes of the WLAD at all. Whether to depart from *Kumar's* definition of undue hardship is a question for this Court, not the Court of Appeals. This Court should accept review to address the Court of Appeals' departure from this Court's precedent.

Additionally, the Court of Appeals' error here also taints the common law wrongful discharge in violation of public policy claim because it implicitly incorporated the same standard into that claim. Specifically, in determining whether there were questions of fact on the common law claim, the Court looked back to its analysis on WLAD: "We have already determined that there are genuine issues of material fact as to whether accommodating Ms. Suarez's request for leave on September 29 caused an *undue hardship*." App. at 29 (emphasis added). It ultimately concluded that there were questions of fact to the same extent as under its WLAD analysis: "As we noted above, whether the School's accommodations were reasonable or whether Suarez's request for unpaid leave on September 29 created an undue hardship are factual issues that cannot be resolved on this record." App. at 29-30. Thus, the Court should accept review and correct both issues.

Applying the correct standard, the School faced an undue hardship by Ms. Suarez's request for leave. The School, a

licensed nursing facility, with a vulnerable, disabled population, was confronted with the choice of whether to grant Ms. Suarez leave on one day's notice in the face of a staffing shortage. Granting that request would require the facility to force another employee, who was entitled to that day off under the collective bargaining agreement's seniority system, to work overtime. Denying Ms. Suarez leave in that situation was appropriate. *See Kumar*, 180 Wn.2d at 502 & n.33 (recognizing an undue hardship can occur when "other employees" "would be unduly burdened by the accommodation" such as requiring them "to work weekend shifts that they would otherwise have been exempt from under the seniority system").

Thus, in reviewing that issue, this Court should apply the correct standard, conclude that Ms. Suarez's requested accommodations would have created an undue hardship for the School, and affirm the superior court's summary judgment order.

B. The Court of Appeals' Dramatic Expansion of WLAD and Common Law Liability Presents an Issue of Substantial Public Interest

The Court of Appeals' erroneous interpretation of the undue hardship standard will affect many public and private employers across Washington. The Court of Appeals interpreted the meaning of "undue hardship" for purposes of the WLAD generally. Generally, the WLAD applies to all employers in Washington "who employ[] eight or more persons." RCW 49.60.040(11). However, Ms. Suarez's claim for wrongful termination in violation of public policy applies to *all employers.* App. at 26 (citing *Roberts v. Dudely*, 140 Wn.2d at 58, 900 P.2d 901 (2000)[2]). Because the Court of Appeals implicitly incorporated the same test into its analysis on that claim, its faulty analysis applies to all employers to the extent the inability to accommodate results in separation. *See* App. at 25, 29-30. As a result, the Court of Appeals decision represents a sea change in

[2] The Court of Appeals cited *Roberts* for the proposition that WLAD "provides the basis for wrongful discharge claim for employee who lacks statutory remedy." App. at 26.

law of religious accommodations in this state, affecting all employers regardless of size.

The Court of Appeals' decision, unlike the WAC it relied on, is not limited in context or scope. The definition in WAC 82-56-020 applies to a subset of religious accommodations in public employment. It applies only to "two unpaid holidays per calendar year." RCW 1.16.050. It applies equally to individuals needing time off for "faith" as well as "conscience." *Id.* Ms. Suarez did not bring an action for violation of RCW 1.16.050, and for good reason. As of the date that Ms. Suarez was denied leave, the School had already provided Ms. Suarez *five* days off for religious purposes in April 2019 and had approved four more days off in October 2019. CP at 133-34, 140, 166, 171, 227. As a result, RCW 1.16.050 is inapplicable, and Ms. Suarez relied on the WLAD and common law. Accordingly, the Court of Appeals' interpretation of "undue hardship" under WLAD applies to all employers covered by the WLAD not just the State. Additionally, the Court of Appeals'

incorporation of that standard into Ms. Suarez's common law claim affects all employers regardless of size to the extent the failure to accommodate results in separation. App. at 25.

This interpretation has potentially significant impacts beyond this case. For example, some employers, including the State, have made vaccination against COVID-19 a condition of employment and have considered requests for accommodations under the existing *Kumar* "more than a *de minimis* cost" standard. The Court of Appeals decision altering that standard may create liability for these employers, who made decisions based on this Court's decision in *Kumar*. Where the decision resulted in separation, the expanded liability will apply regardless of the size of the employer because the Court incorporated the same analysis into the wrongful discharge in violation of public policy claim. While an employer with fewer than eight employees need not comply with WLAD, any employer, regardless of size, would face liability under the common law claim if it discharged an employee for failing to

comply with the condition of employment surrounding the vaccine and could not satisfy the heightened standard of significant difficulty or expense.

More generally, religious calendars vary considerably based on denomination and time of year. Employers of first-responders and other essential workers—like the School here—will face expanded liability from the Court of Appeals decision each time an employee requests religious leave. These substantial public impacts warrant review by this Court under RAP 13.4(b)(4).

V. CONCLUSION

The Court should accept review of this matter. The Court of Appeals' opinion conflicts with undue hardship standard adopted by this Court in *Kumar*. The new test, taken from a plainly inapplicable WAC, is a stark change to the prior standard. In light of the conflict with this Court's decision in *Kumar* and the significant policy implications it poses, this Court should grant review and reaffirm the correct standard.

This document contains 4135 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 20th day of October, 2022.

ROBERT W. FERGUSON
Attorney General

s/ Nicholas Ulrich
KARL D. SMITH, WSBA No. 41988
Deputy Solicitor General
OID No. 91087
PO Box 40100
Olympia, WA 98504-0100
360-753-6200
karl.smith@atg.wa.gov

NICHOLAS ULRICH, WSBA#50006
Assistant Attorney General
OID No. 91106
1116 W Riverside, Suite 100
Spokane, WA 99201
509-456-3123
Nicholas.ulrich@atg.wa.gov

CERTIFICATE OF SERVICE

I certify that on the date below I electronically filed the **STATE'S PETITION FOR REVIEW** with the Clerk of the Court using the electronic filing system which caused it to be served on the following electronic filing system participant as follows:

Favian Valencia
Sunlight Law, PLLC
306 Holton Ave., Suite A
Yakima, WA 98902

info@sunlightlaw.com

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

EXECUTED this 20th day of October 2022, at Olympia, Washington.

s/ Beverly Cox
BEVERLY COX
Paralegal

APPENDIX

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FILED
September 20, 2022
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

ADELINA GABRIELA SUAREZ, Appellant, v. THE STATE OF WASHINGTON, TAMMY WINEGAR and her community property, JULIANNE MOORE and her community property, and TAMMY MASTERS and her community property, Respondents.	)	No. 38381-4-III PUBLISHED OPINION

STAAB, J. — Adelina Suarez sued her former employer, Yakima Valley School (School), alleging the School failed to accommodate her religious beliefs and practices in violation of the Washington Law Against Discrimination (WLAD), ch. 49.60 RCW, and terminated her employment in violation of public policy. Suarez contends that her work schedule conflicted with her practice of observing a weekly Sabbath and several religious festivals throughout the year. She contends that when she told the School about this conflict, the School failed to accommodate her beliefs and practices, and when she failed to report to work while exercising her beliefs, the School terminated her employment.

She appeals the superior court's order on summary judgment dismissing all of her claims against the School.

We reverse summary judgment dismissal of Suarez's statutory claim for failure to accommodate her religious beliefs and her tort claim for discrimination in violation of public policy. We hold that a "reasonable accommodation" is one that resolves the conflict between an employee's religious beliefs and their work duty without adverse impact on their job benefits or status. While an employer is excused from providing an accommodation that will cause undue hardship, for purposes of this case, we adopt the definition of "undue hardship" provided in WAC 82-56-020.

On this record, there are genuine issues of material fact as to whether the School provided a reasonable accommodation to eliminate the conflict with Suarez's weekly Sabbath, and whether accommodating Suarez's leave request to observe her religious holiday caused the School undue hardship. In addition, we find that Suarez has produced evidence sufficient to show a prima facie case of discrimination in violation of public policy and summary judgment on this claim was also improper. While we affirm the dismissal of Suarez's statutory claim for discrimination and retaliation, we reverse dismissal of her statutory claim of failure to accommodate and her tort claim of discharge in violation of public policy.

BACKGROUND

Because the court granted the School's motion for summary judgment, we consider the following facts in a light most favorable to Suarez as the nonmoving party. Yakima Valley School is a certified residential nursing facility in Yakima that serves vulnerable, disabled adults. The School is administered by the Department of Social and Health Services' (Department), Developmental Disabilities Administration and offers medical and therapeutic services. As a residential nursing facility for vulnerable adults, the School is staffed 24 hours a day, seven days a week. There are three shifts in a 24-hour period, the day shift, the swing shift, and the night shift. At least 21 certified nursing assistants (CNAs) must be present to staff the night shift adequately. To ensure the School has necessary coverage each day for each shift, the School hires CNAs for a particular schedule. Each position has specific work hours and work days. Supervisors cannot change the schedule or days off for a specific job.

Adelina Suarez is a Christian who observes Saturdays as the Sabbath and celebrates seven religious' holidays throughout the year called the Feasts of God. These holidays coincide with the Holy Days recognized by the Jewish faith. According to Suarez's religious belief, she is commanded not to work on the weekly Sabbath or religious holidays.

In 2018, Suarez was trained as a CNA and applied for a position with the School. During the hiring process, Suarez informed the School of her religious beliefs and that

she did not wish to work on Saturdays. When she applied, Suarez was told that there were no positions with Fridays and Saturdays off, but she could request a schedule change after working for some time. Suarez accepted a night shift position that worked Wednesday through Sunday, from 10:00 p.m. to 6:30 a.m., with Mondays and Tuesdays off starting October 8, 2018.

Employees at the School, including CNAs, are unionized, and the terms and conditions of their employment are governed by a collective bargaining agreement. Employees submit vacation and leave requests early in the year and these are granted based on seniority and staffing needs. To maintain adequate staffing, the collective bargaining agreement allows prescheduled leave for only one night-shift CNA at a time. In addition to vacation days, sick time, and holidays, the collective bargaining agreement provides each employee with two unpaid holidays for a reason of faith or conscience. The collective bargaining agreement requires at least 14 days advanced notice of the request for religious holidays and may be denied for undue hardship.

When an employee accepts a job, they are on probationary status for 12 months. During that time, the employee is not covered by the progressive discipline procedures of the collective bargaining agreement. Permanent employees can bid on different positions with different shifts and work days. Bidding for jobs is based on a seniority system under the collective bargaining agreement. Only permanent employees outside their probationary period can bid on different jobs. If a job does not receive bids from a

permanent employee, the position is opened to probationary employees who may apply for the open position. Shifts that do not work on Saturdays are more popular.

The position Suarez accepted was classified as an "emergent" position. Under the collective bargaining agreement, the School could require an emergent employee to report for duty on short notice within a specific timeframe outside of normally scheduled work days and hours. In addition, the collective bargaining agreement allows the School to require staff to work mandatory overtime under certain circumstances. The collective bargaining agreement allows a staff member to refuse mandatory overtime up to two days per quarter.[1] Suarez refused mandatory overtime on more days than allowed by the collective bargaining agreement for three of the four quarters she worked for the School. She was counseled on these refusals and advised that refusing mandatory overtime could result in additional disciplinary action, including dismissal.

Suarez declared that after she began working for the School, she requested a schedule change several times. Suarez explained to her supervisors that her religious beliefs were important and that her work schedule conflicted with the Sabbath and religious holidays. Although Suarez was working nights, it was difficult for her to work all night and attend church services all day Saturday and then work all night Saturday.

[1] Prior to July 1, 2019, the collective bargaining agreement allowed staff to refuse mandatory overtime one time per quarter.

While her requests to change her schedule were denied, the School allowed Suarez to take five days of unpaid leave for religious holidays in April 2019.

In September 2019, a CNA position on swing shift (1:45 p.m. to 10:15 p.m.) opened at the school with Fridays and Saturdays off. The position did not receive any bids from permanent employees and was opened to probationary employees. The position was posted and emailed to all Department staff. An employee with less seniority than Suarez applied for and was hired for this position. Because the employee was also a probationary employee when she was hired for the new job, the employee's 12-month probationary period started over.

Suarez did not apply for this position. In her declaration, Suarez indicated that she did not know she needed to apply for a new position to get a different schedule. Nor did her supervisor tell Suarez about the open position with Fridays and Saturdays off or tell Suarez how to apply for a job with Fridays and Saturdays off. She does not explicitly deny receiving the email sent to all employees with notice of the job opening. Nor does she specifically claim that had she been told about this position, she would have applied for it.

On September 8, 2019, Suarez requested four days of paid time off to attend religious festivals. Specifically, she requested leave on September 28, September 29, October 5, and October 6. Because another CNA had already scheduled to take leave on those days, Suarez's request was denied.

On September 13, Suarez's supervisor told Suarez that if she wanted unpaid leave on those days, she would need to speak to the appointing authority, superintendent Tammy Winegar, and gave Suarez Wingear's contact information. On September 27, Suarez contacted and emailed Winegar to request six days of unpaid leave for September 28, 29, and October 12, 13, 19, and 20. Although she had previously been approved for five days of leave for religious reasons, the appointing authority authorized four more days of leave for October. Suarez's unpaid leave request for the next two days, September 28 and 29, were denied because of staffing shortages and short notice.

Suarez reported for work on September 28. At 4:00 p.m. on September 29, a few hours before her shift began, Suarez called the School and said she would not be coming to work that day because she was at a church function.

On September 29, the School needed a minimum of 21 staff members to provide support safely. Ordinarily, the School scheduled 24 staff positions for the night. However, there were four vacant positions at the time. In addition, one CNA was prescheduled for leave per the collective bargaining agreement, and three other CNAs called in as "unavailable."[2] Clerk's Papers (CP) at 230-31.

In her deposition, Tammy Masters, the School's CR 30(b)(6) witness, testified that the School has "several call-ins every night," and there is a process for covering those

[2] The record does not indicate a specific reason that the employees were unavailable.

shifts. CP at 234. First, the School calls on a pool of employees who have volunteered for overtime. Then the School calls around the campus asking for volunteers. And if this is insufficient, they utilize the mandatory overtime list. Suarez testified that she was frequently called in to work mandatory overtime when "someone called in sick or did not show up to their shift." CP at 247. On September 29, the day Suarez failed to show up for work, a total of six staff members worked overtime, and one was required to work mandatory overtime.

Shortly after Ms. Suarez missed her shift on September 29, the Department gave her notice that her probationary employment was ending effective October 4, 2019. The Department ended her probationary employment because she had a history of refusing mandatory overtime without justification and she elected to not show up when she knew the facility would be short-staffed without her.

Suarez filed suit against the School, alleging violations of the WLAD, ch. 49.60 RCW, and a tort claim for wrongful discharge in violation of public policy. Following discovery, both parties filed competing motions for summary judgment. The superior court denied Suarez's motion and granted the School's motion, dismissing all of Suarez's claims. Suarez appeals the superior court's order granting the School's motion for summary judgment and dismissing her claims.

ANALYSIS

1. ISSUES PRESERVED FOR APPEAL

As a preliminary matter, we must determine which issues Suarez has preserved for appellate review. In her complaint, Suarez pleaded three statutory claims: adverse action, retaliation, and failure to accommodate. She also pleaded a tort claim of termination in violation of public policy. On appeal, the School argues that Suarez waived several of her claims by failing to plead them in her complaint or argue them below.

In responding to the School's motion to dismiss all of her claims on summary judgment, Suarez argued there were sufficient factual issues to preserve two of her claims: "Here, in the light most favorable to Suarez the Defendants discriminated against Suarez by (1) failing to accommodate Suarez's religious practice and (2) firing Suarez for practicing her religion." CP at 286-87. Within her briefing, Suarez challenged her termination as only a violation of public policy. While the public policy that she claims was violated is the WLAD, she did not argue that her termination was a direct statutory violation. Nor did she raise any argument or facts on her retaliation claims. *See* CP at 281-92. The trial court dismissed all of Suarez's claims on summary judgment.

On appeal, Suarez's first issue is that the trial court erred in dismissing her statutory claim of failure to accommodate her religious beliefs. In her second issue, Suarez raises two more statutory claims asserting that the trial court erred in dismissing her claims of discrimination and retaliation in violation of the WLAD. Appellant's

Opening Br. at 14. The State argues that Suarez waived the statutory discrimination and retaliation claims when she failed to assert them below. Br. of Resp't at 19, 35. We agree.

The general rule is that issues not raised before the trial court cannot be raised for the first time on appeal. RAP 2.5; *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978). More specifically, under RAP 9.12, "the appellate court will consider only evidence and issues called to the attention of the trial court." This rule aims to ensure that an appellate court reviewing an order on summary judgment engages in the same inquiry as the trial court. *Wash. Fed'n of State Emps., Council 28 v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993).

Here, Suarez did not assert any argument or present evidence to support her statutory claims of discrimination (disparate treatment) or retaliation to the superior court. As such, she has waived these claims on appeal. Like the trial court, we will only review Suarez's claims of failure to accommodate under the statute and her tort claim of discrimination in violation of public policy.

2. FAILURE TO ACCOMMODATE

The first issue preserved by Suarez is whether genuine issues of material fact preclude the dismissal of her statutory claim for failing to accommodate her religious beliefs. We review the trial court's order on summary judgment de novo. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Evidence is considered in a light

most favorable to the nonmoving party. *Id*. Summary judgment is only appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id*. A fact is "material" if it affects the outcome of the issue before the court. *Id*. at 370 n.8. "An issue of material fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." *Id*. at 370.

Summary judgment is appropriate when a plaintiff fails to raise a genuine issue of material fact on one or more of the prima facie elements of a WLAD claim. *Gibson v. Costco Wholesale, Inc.*, 17 Wn. App. 2d 543, 556, 488 P.3d 869, *review denied*, 198 Wn.2d 1021, 497 P.3d 391 (2021). WLAD is intended to eliminate and prevent discrimination in the workplace. RCW 49.60.010. To effectuate this remedial purpose, the chapter should be construed liberally. RCW 49.60.020. While the WLAD explicitly provides several causes of action for discriminatory treatment, our State Supreme Court has also recognized an implicit right to religious accommodations under the WLAD. *Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481, 501, 325 P.3d 193 (2014).

> [A] plaintiff establishes a prima facie claim of failure to accommodate religious practices by showing that (1) he or she had a bona fide religious belief, the practice of which conflicted with employment duties; (2) he or she informed the employer of the beliefs and the conflict; and (3) the employer responded by subjecting the employee to threatened or actual discriminatory treatment.

Id. Once established, an employer can defend the action by showing that it offered the employee a reasonable accommodation or that the accommodation would cause undue hardship to the employer. *Id*. at 502.

Suarez contends that the School failed to accommodate her religious beliefs in two ways: (1) by failing to accommodate her need for time off to observe religious holidays, and (2) by failing to accommodate her need for Saturdays off to observe her Sabbath. The School does not admit to discrimination, but for purposes of summary judgment, the School focuses on its defenses and contends that it either provided reasonable accommodations or rejected proposed accommodations that would cause an undue hardship. To address these issues, we need to define "reasonable accommodation" and "undue hardship."

Besides *Kumar*, there are no Washington cases interpreting or applying the recently recognized right to religious accommodations. In *Kumar*, the court looked to federal law as persuasive in developing the state right to religious accommodations. Although the court did not affirmatively define the term "reasonable accommodation," it did recognize that "a 'reasonable accommodation' need not be the precise accommodation the employee requests, even if the employer could provide that accommodation without suffering any undue hardship." *Kumar*, 180 Wn.2d at 502 (citing *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68, 107 S. Ct. 367, 93 L. Ed. 2d 305 (1986)). Federal courts have generally defined a "reasonable accommodation" as

one that resolves the conflict between an employee's work duties and religious beliefs. *See Ansonia*, 479 U.S. at 70. In addition, some courts have held that a reasonable accommodation must not impact the employee's benefits or status. See Dallan F. Flake, *Restoring Reasonableness to Workplace Religious Accommodations*, 95 WASH. L. REV. 1673, 1715 (2020).

In *Ansonia*, a teacher's religious beliefs required him to refrain from performing secular work on six designated Holy Days. The school's collective bargaining agreement allowed teachers to take up to three days of paid leave each year to observe mandatory religious holidays. Beyond that, the teacher could take unpaid leave. The bargaining agreement also provided three days of paid personal days that could be used for purposes not otherwise specified in the contract. After the teacher's request to use his paid personal days for religious purposes was rejected, the teacher filed suit alleging failure to accommodate.

The United States Supreme Court held that an employer has an obligation to provide a reasonable accommodation, but not necessarily the accommodation preferred by the employee. *Ansonia*, 479 U.S. at 68. Once an employer is found to have provided a reasonable accommodation, the inquiry stops, and there is no need to show that alternative accommodations requested by the employee would cause an undue hardship. *Id*. at 68-69.

Ultimately, the Court remanded the case for further factual findings on whether the school's leave policy constituted a reasonable accommodation. In doing so, the Court noted that generally a policy of allowing a teacher to take unpaid leave for holidays in excess of the leave granted by the collective bargaining agreement would be a reasonable accommodation because it "eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work." *Id*. at 70. The Court further noted that unpaid leave did not affect the employee's employment opportunities or job status. *Id*. at 70-71. However, the Court cautioned that if the benefit of paid personal days was provided in a discriminatory manner, i.e., available for any purpose except a religious holiday, then it was being applied in a discriminatory manner. *Id*. at 71.

Ansonia was cited with approval by our Supreme Court in *Kumar*, 180 Wn.2d at 502, and we find its reasoning persuasive. We adopt the federal definition and hold that a "reasonable accommodation" is one that resolves the conflict between the employee's work duties and religious beliefs and does not impact their benefits or job status.

Suarez asserts that her need to observe several religious holidays throughout the year conflicted with her work schedule. She declared that she told the School about this conflict, and the School failed to accommodate her religious beliefs by granting her leave for every holiday. The collective bargaining agreement provided each employee with

two days of unpaid leave to observe religious holidays.[3] Under the agreement, employees wishing to utilize their religious holidays must notify their supervisor in writing at least 14 days in advance of their intent to take unpaid leave for purposes of faith. The collective bargaining agreement requires the employer to grant the leave request unless it would impose an undue hardship as defined by chapter 82-56 WAC.

On this appeal, we do not decide whether two days of unpaid leave is a reasonable accommodation for seven religious holidays because the School does not make this argument. Instead, the School responds that it attempted to accommodate Suarez's religious holidays, even granting her more leave than the collective bargaining agreement allowed. But the School contends that granting Suarez leave on September 29 would have caused an undue hardship. Suarez disputes this assertion. She contends that employees frequently called in as unavailable for several reasons, and the School had a procedure for covering those shifts, including requiring employees to work mandatory overtime as provided in the collective bargaining agreement. Before deciding this issue, we must define "undue hardship."

[3] This provision mirrors RCW 1.16.050(3), which grants certain state employees "two unpaid holidays per calendar year for a reason of faith or conscience or an organized activity conducted under the auspices of a religious denomination, church, or religious organization." Under this statute, the employer shall grant the employee's leave request "unless the employee's absence would impose an undue hardship on the employer or the employee is necessary to maintain public safety."

In *Kumar*, the court recognized that "'undue hardship' results whenever an accommodation 'require[s an employer] to bear more than a *de minimis* cost.'" *Kumar*, 180 Wn.2d at 502 (alteration in original) (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977). Shortly after *Kumar* was decided, the legislature passed chapter 168, Laws of 2014. This legislation amended RCW 1.16.050 and granted certain State employees the right to two unpaid holidays per calendar year for reasons of faith. LAWS OF 2014, ch. 168, § 1. The bill provided that the State employer should grant the employee's leave request unless the absence would impose an undue hardship on the employer. *Id.* "Undue hardship" was to be defined by the office of financial management. LAWS OF 2014, ch. 168, § 2

In response to this directive, the office of financial management adopted a regulation defining "undue hardship" as an action requiring significant difficulty or expense to the employer. WAC 82-56-020. In considering whether to grant unpaid leave for religious purposes, a State employer should consider 10 factors:

> (1) The number, composition, and structure of staff employed by the employing entity or in the requesting employee's program.
> (2) The financial resources of the employing entity or the requesting employee's program.
> (3) The number of employees requesting leave for each day subject to such a request.
> (4) The financial impact on the employing entity or requesting employee's program resulting from the employee's absence and whether that impact is greater than a de minimus cost to the employer in relation to the size of the employing entity or requesting employee's program.

> (5) Impact on the employing entity, the requesting employee's program, workplace safety or public safety.
>
> (6) Type of operations of the employing entity or requesting employee's program.
>
> (7) Geographic location of the employee or geographic separation of the particular program to the operations of the employing entity.
>
> (8) Nature of the employee's work.
>
> (9) Deprivation of another employee's job preference or other benefit guaranteed by a bona fide seniority system or collective bargaining agreement.
>
> (10) Any other impact on the employing entity's operation or requesting employee's program due to the employee's absence.

WAC 82-56-020. While this regulatory definition applies when a state employer considers a leave request for the leave provided by statute, we see no need to use a different definition for the same leave granted beyond the two days provided in the statute.

Applying these factors to the circumstances in this case is a question of fact. *See Ansonia*, 479 U.S. at 70 (whether leave policy constituted reasonable accommodation was a question of fact). Here, the evidence raises a genuine issue of material fact as to whether accommodating Suarez's request for unpaid leave on September 29 would cause undue hardship for the School. In her deposition, Tammy Masters, the CR 30(b)(6) witness for the School, testified that the School has "several call-ins every night," and there is a process for covering those shifts by contacting volunteers first and then calling the mandatory overtime list. CP at 234-35. Suarez testified that she was frequently

called in to work mandatory overtime when "someone called in sick or did not show up to their shift." CP at 247.

To succeed on summary judgment, the School must present undisputed evidence that accommodating Suarez's request for unpaid leave on September 29 caused the School significant difficulty or expense. WAC 82-56-020. While the School contends that calling in an employee for mandatory overtime is more than a de minimus expense, nothing in the record demonstrates context. There is no evidence demonstrating the actual impact on the School's finances "in relation to the size of the employing entity or requesting employee's program." WAC 82-56-020(4). Nor is there evidence that the cost or inconvenience to the employees was more than de minimus. While the cost of calling in an employee on mandatory overtime might be significant to a smaller employer, the cost may very well be de minimus to a large employer.

The School also asserts that Suarez's request for leave on religious grounds cannot be compared to an employee who calls in sick. This issue is not sufficiently briefed in this case and we decline to decide whether a person seeking religious accommodation should be treated the same as a person calling in sick. Nevertheless, we note that the record only indicates that employees called in as "unavailable" without further explanation. This occurred so frequently that the School had a regular process for covering the shifts and negotiated mandatory overtime in the collective bargaining agreement. If the School is accommodating unplanned leave for secular reasons other

than sickness, it raises a question as to whether accommodating Suarez's request caused an undue hardship. On this disputed and undeveloped record, these questions should not be decided on summary judgment.

Suarez also brings a claim for failing to accommodate her weekly Saturday Sabbath. Again, we consider the facts in a light most favorable to Suarez. While acknowledging that she accepted a position that worked on Friday and Saturday nights, Suarez contends that she told her supervisor that her schedule conflicted with her Sabbath and asked to change schedules. She argues that the School should have changed her schedule to allow for Friday and Saturday nights off. In the alternative, Suarez asserts that the School should have told her to apply for another position with days off that did not conflict with her Sabbath. The School responded that these accommodations would cause undue hardship to the School and that it did invite Suarez to apply for another position when it included her in the mass email notice of the job opening.

We consider whether accommodating Suarez's beliefs by changing her scheduled days off would cause an undue burden. The School submits evidence that each CNA position has designated days off to maintain adequate staffing levels. Under the collective bargaining agreement, these days off cannot be rescheduled without changing positions. When positions with different days off become available, permanent employees outside their probationary period can bid on them based on seniority. If a job

does not receive bids from a permanent employee, the position is opened to probationary employees.

Suarez did not finish her probationary period and did not become a permanent employee. The School points out that the only way to change Suarez's days off was to change positions to one with days off that do not conflict with her Sabbath. But changing her position without going through the bidding system would violate the collective bargaining agreement. The School relies on *Hardison*, 432 U.S. 63, to support its position that an accommodation is an undue hardship if it causes the employer to violate a collective bargaining agreement.

In *Hardison*, the Court considered whether an employee's request to change his schedule to accommodate his religious beliefs would cause the employer undue hardship. Like the School, the employees were unionized and worked in a department that operated 24 hours a day, seven days a week. More senior employees had first choice of shift assignments, and less senior employees were often left with less desirable shifts. The employee in *Hardison* sought and obtained a job that required him to work on occasional Saturdays. The union was not willing to violate the seniority system, and the employee did not have enough seniority to bid for shifts having Saturday off. When the employee refused to work on Saturday, he was terminated for insubordination.

The United States Supreme Court held that the employer's duty to accommodate an employee's religious beliefs did not require the employer to take steps inconsistent

with a collective bargaining agreement. *Id*. at 79. In other words, an employer's duty to accommodate does not entitle an employee to preferences over other employees because of their religious practices:

> It would be anomalous to conclude that by "reasonable accommodations" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII [of the Civil Rights Act of 1964] does not require an employer to go that far.

Id. at 81. After concluding that an employer cannot be forced to violate a collective bargaining agreement to make religious accommodations, the Court rejected alternative accommodations that would have decreased efficiencies in other jobs or increased wages. *Id*. at 79, 84. Such accommodations would require Trans World Airlines, Inc. to bear more than a de minimus cost and constitute undue hardship. *Id*.; *see also Harrell v. Donahue*, 638 F.3d 975, 981 (8th Cir. 2011).

Similarly, under WAC 82-56-020(9), undue hardship is demonstrated when a proposed accommodation would deprive another employee of their job preference or other benefits guaranteed by a collective bargaining agreement.

Here, as in *Hardison*, changing scheduled days off requires changing positions, which is covered by the bidding system set forth in the collective bargaining agreement. Therefore, Suarez's proposed accommodation of simply changing her scheduled days off would require the School to violate the bidding system in the collective bargaining

agreement. We agree that requiring the School to accommodate Suarez's religious beliefs by violating the collective bargaining agreement would cause an undue hardship.

Next, we consider whether the School could have accommodated Suarez by advising her to apply for a position with scheduled days off that did not conflict with the observation of her Sabbath. As an example, Suarez points out that during her employment, a position opened up with Saturdays off that was filled by a probationary employee with less seniority than Suarez. She contends that the School had a duty to take "affirmative steps to allow [Suarez] to fill this position." Appellant's Opening Br. at 11. We agree that if this position would have resolved the conflict, the School should have suggested to Suarez that she apply for the position.

The School did not respond to this suggested accommodation in its brief on appeal. When asked at oral argument, the School acknowledged that taking these affirmative steps would not be an undue hardship. Nevertheless, the School contends that it provided this accommodation when it included Suarez in a mass email to all employees announcing the job opening. The School argues that it was not required to do more because its duty to accommodate does not include the level of "hand-holding" suggested by Suarez, citing *Porter v. City of Chicago,* 700 F.3d 944, 952 (7th Cir. 2012).

In *Porter*, the union employee's work schedule conflicted with her Sunday church services. The employee was told that her request to change to a job assignment with Sundays off would be accommodated when an opening became available. *Id*. at 949. In

the meantime, her supervisor suggested a watch (shift) change to different hours of work to accommodate the employee's church services. The employee expressed no interest in this accommodation and wanted her days off changed.

The *Porter* court recognized that a "reasonable accommodation" is "'one that "eliminates the conflict between employment requirements and religious practices."'" *Id.* at 951 (quoting *Wright v. Runyon*, 2 F.3d 214, 217 (7th Cir. 1993) (quoting *Ansonia*, 479 U.S. at 70)). The accommodation does not have to be the one preferred by the employee so long as it eliminates the conflict. *Id.* The court found that since the employer offered the employee a shift change that would have eliminated the scheduling conflict without any impact on the employee's pay or benefits, the employer had offered a reasonable accommodation. *Id*. at 952. The employer did not need to offer a position with different work days, as preferred by the employee.

The employee in *Porter* also argued that the employer's offer to change shifts was insufficient because her supervisor mentioned it to her, but did not invite her to apply or inform her how to make such a request. *Id.* at 953. In rejecting this argument, the court noted that, "[i]n requiring employers to 'offer reasonable accommodations,' we have encouraged 'bilateral cooperation' between the employee and employer and recognized that employers must engage in a dialogue with an employee seeking an accommodation." *Id*. While cooperation and dialogue are important, courts have not required the level of hand-holding suggested by the employee. *Id.* Thus, the court found that the supervisor's

suggestion to change shifts was sufficient and met the employer's obligation to provide a reasonable accommodation.

In this case, taken in a light most favorable to Suarez, the evidence shows that she informed the School that her weekly schedule conflicted with her church service. Unlike *Porter*, however, the School does not point to any attempts it made to eliminate this conflict. The School does not claim that it asked for volunteers to switch shifts or days off, and the School does not assert that Suarez was told she could apply for a different position to eliminate the conflict. The only claim made by the School is that it included Suarez in the notice of job openings emailed to all employees. This passive, generalized action was not an attempt to accommodate Suarez's scheduling conflict. It was neither dialogue nor an attempt at cooperation. Unlike the employer in *Porter*, there is no evidence that the School offered or suggested any accommodations.

We follow the federal courts in their application of Title VII and hold that an employer's obligation to provide reasonable accommodations for an employee's religious beliefs requires the employer to take active or affirmative steps to resolve a scheduling conflict if it can be done without undue hardship. *See Proctor v. Consol. Freightways Corp. of Del.*, 795 F.2d 1472 (9th Cir. 1986) (fact that employee applied for position that would require her to work on her Sabbath did not excuse employer from its statutory duty to initiate good faith efforts to accommodate employee's religious beliefs); *Cosme v. Henderson*, 287 F.3d 152, 161 (2d Cir. 2002) (employer's multiple offers to

accommodate employee's Sabbath observance were reasonable and employee was not entitled to skip work every Saturday after bidding on a position he knew would require work on Saturdays); *Wright*, 2 F.3d at 217 (employer accommodated employee's Sabbath observance by inviting the employee to bid on four open positions that had days off that were congruent with his Sabbath).

3. PUBLIC POLICY CLAIM

The second claim raised by Suarez is whether there are genuine issues of material fact sufficient to prevent her public policy claim from being dismissed on summary judgment. As we noted above, Suarez has preserved her tort claim for violation of public policy. The tort claim for discharge in violation of public policy is narrower than the statutory claims allowed under the WLAD. Whereas the statute provides damages for several adverse employment actions motivated by discrimination, the tort only applies to an employee discharged in violation of a public policy. *Roberts v. Dudley*, 140 Wn.2d 58, 76, 993 P.2d 901 (2000).

To demonstrate a prima facie case for wrongful termination in violation of public policy, the plaintiff must produce evidence that her "termination was motivated by reasons that contravene an important mandate of public policy." *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 258, 359 P.3d 746 (2015). "[T]he burden [then] shifts to the employer to prove that the dismissal was for reasons other than those alleged by the employee." *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232-33, 685 P.2d 1081

(1984). The tort for wrongful discharge in violation of public policy is generally limited to four scenarios:

> "(1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistle-blowing."

Martin v. Gonzaga Univ., 191 Wn.2d 712, 723, 425 P.3d 837 (2018) (quoting *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996)).

"'The question of what constitutes a clear mandate of public policy is one of law' and can be established by prior judicial decisions or constitutional, statutory, or regulatory provisions or schemes." *Martin*, 191 Wn.2d at 725 (quoting *Dicomes v. State*, 113 Wn.2d 612, 617, 782 P.2d 1002 (1989)). In this case, Suarez argues that she was fired in violation of the public policy against religious discrimination. She points to the WLAD as defining this public policy.

The public policy against discrimination as set forth in the WLAD can form the basis for a tort claim for wrongful discharges. *See Roberts*, 140 Wn.2d at 66 (statutory policy against discrimination provides the basis for wrongful discharge claim for employee who lacks a statutory remedy); *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 274, 358 P.3d 1139 (2015) ("the existence of alternative statutory remedies, regardless of whether or not they are adequate, does not prevent the plaintiff from

bringing a wrongful discharge claim"); *Mackey v. Home Depot USA, Inc.*, 12 Wn. App. 2d 557, 579, 459 P.3d 371, *review denied*, 195 Wn.2d 1031, 468 P.3d 616 (2020) (recognizing that WLAD provides a clear mandate of public policy). Specifically, in RCW 49.60.010, the legislature declared that "practices of discrimination" on the basis of creed are a matter of state concern.

Suarez contends that she was fired for practicing her religion, which is her legal right. She contends that she has a bona fide religious belief that requires her to participate in religious holidays, that the holidays conflicted with her work schedule, and that she told the School about the conflict and was nonetheless fired for failing to comply with a work schedule that conflicted with her religious practice. The School characterizes Suarez's argument as claiming an absolute privilege not to work on religious holidays and argues that the WLAD prohibits discrimination but does not grant an employee the absolute privilege of refusing to work a shift that conflicts with a religious belief. The School contends that reading the WLAD and public policy to grant such an absolute privilege would violate the establishment clause as noted by the Supreme Court in *In re Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710-11, 105 S. Ct. 2914, 86 L. Ed. 2d 557 (1985).

In *Thornton*, the Court considered a Connecticut law that granted employees the absolute privilege not to work on their Sabbath. Noting that the First Amendment to the United States Constitution prohibits a state from advancing or inhibiting religion, the

Court held that the statute in question violated the establishment clause because it granted employees the absolute right not to work regardless of the secular interests of the employer. However, despite the School's argument to the contrary, *Thornton* does not dramatically alter the requirement for religious accommodations under Title VII. *Int'l Ass'n of Machinists & Aerospace Workers, Lodge 751 v. Boeing Co.*, 833 F.2d 165, 171 (9th Cir. 1987). Instead the requirement for accommodation is flexible and only requires reasonable accommodations that do not create an undue hardship. *Id.*

We do not read Suarez's public policy argument as claiming an absolute right not to work on her religious holidays. Under the public policy identified within the WLAD, Suarez has the right to practice her religious beliefs free from discrimination. If her work schedule conflicts with her religious practices, she has a right to reasonable accommodations so long as the accommodations do not create an undue hardship.

Although Suarez has waived her statutory claim of discrimination, her tort claim of discharge in violation of the public policy against religious discrimination presents issues and analysis similar to a statutory claim. *See Mackey*, 12 Wn. App. 2d at 579-80. In *Mackey*, a former employee raised claims for statutory discrimination as well as discharge in violation of the public policy against discrimination as defined by the WLAD. Division Two of this court applied the *McDonnell Douglas*[4] burden-shifting

[4] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

framework to the plaintiff's statutory and tort claims to determine whether the evidence was sufficient to survive summary judgment. *Mackey*, 12 Wn. App. 2d at 571. Under this framework, the employee has the burden of demonstrating a prima facie case by producing evidence that she was within the protected class, discharged by the defendant, and doing satisfactory work. *Id*. If the employer can then demonstrate a legitimate nondiscriminatory reason for the termination, the burden shifts back, and the employee must show that this reason is a pretext. *Id*.

On appeal, the parties do not go through this analysis. Regardless, because there is rarely direct evidence of discriminatory motive, "[s]ummary judgment for an employer is rarely appropriate in a discriminatory discharge case." *Id*.

We have already determined that there are genuine issues of material fact as to whether accommodating Suarez's request for leave on September 29 caused an undue hardship. In *Ansonia*, the Court recognized that if a leave benefit provided in the collective bargaining agreement was being implemented in a discriminatory manner, this would give rise to a claim for discrimination. 479 U.S. at 71.

Here, Suarez alleges that she was terminated for exercising her religious beliefs. She claims that accommodating her beliefs by granting unpaid leave did not create an undue hardship because employees frequently called in as unavailable, and the School used a process for covering those shifts. She notes that three other employees also called in as unavailable on September 29, and there is no indication that they were disciplined or

terminated. This evidence is sufficient to raise a prima facie case of discrimination. As we noted above, whether the School's accommodations were reasonable or whether Suarez's request for unpaid leave on September 29 created an undue hardship are factual issues that cannot be resolved on this record.

CONCLUSION

We affirm the trial court's summary dismissal of Suarez's statutory claims for discrimination (disparate treatment) and retaliation. We reverse the summary dismissal of Suarez's statutory claim for failure to accommodate her religious beliefs and discharge in violation of public policy because unresolved factual issues in the record create genuine issues of material fact that preclude dismissal of those claims on summary judgment.

Affirm in part and reverse in part.

Staab, J.

I CONCUR:

Fearing, J.

No. 38381-4-III

LAWRENCE-BERREY, A.C.J. (dissenting) — This case presents excellent facts to address how the concepts of reasonable accommodation and undue burden apply to a claim of religious discrimination. In my view, the majority errs in its application of the law to these facts. I would affirm the summary dismissal of Adeline Suarez's claims because, as a matter of law, Yakima Valley School (School) reasonably accommodated her religious practices.[1]

Washington law supports a claim for failure to reasonably accommodate an employee's religious practices. *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 500-01, 325 P.3d 193 (2014). An employer can defend against such a claim "by showing that it offered the employee a reasonable accommodation or that an accommodation would be an 'undue hardship' on the employer." *Id.* at 502. An accommodation request that conflicts with the provisions of a collective bargaining agreement (CBA), thereby giving a plaintiff a benefit over other employees with more seniority, is an undue burden that is not required to be accommodated. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977).

[1] Ms. Suarez's tort claim that the School violated public policy is founded on the public policy expressed in the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW. Because her statutory discrimination claim fails, so does her tort claim.

Here, the School has a CBA that provides employees two days off per year for religious purposes. The agreement, however, requires employees to request days off at least 14 days in advance. The apparent reason for this is to give the School sufficient time to find an employee to cover the missed shift and to permit the covering employee time to adjust their personal plans. A last minute request for days off not only inconveniences the School, it impacts employees who need to alter their personal plans.

By April 2019, the School had permitted Ms. Suarez five days off for religious purposes, three more than permitted by the CBA. On September 8, 2019, Ms. Suarez requested four additional days off for religious purposes—September 28 and 29, and October 5 and 6. Her immediate supervisor had no authority to grant this request because Ms. Suarez had exceeded the two days permitted under the CBA. Her supervisor recommended Ms. Suarez make her request to the School superintendent. She failed to promptly do this. Instead, Ms. Suarez waited until September 27 and asked the superintendent for six days off for religious purposes—September 28 and September 29, as originally requested, and October 12, 13, 19, and 20. The superintendent denied the first two (September 28 and September 29) for insufficient notice, but granted the other four. This amounted to *nine* days in one year of approved time off for religious purposes.

Rather than accept this decision, Ms. Suarez worked September 28 (a Saturday) and, with only hours' notice, informed the School she would not be working September 29 (Rosh Hashanah)—one of the seven Holy Days recognized by the Jewish faith. Soon after, the School terminated her probationary status because of her history of missing

mandatory overtime without justification and because of her choice, with only hours' notice, to not work on September 29.

1. Undue burden to accommodate the September 29 absence

The majority concludes that summary judgment is precluded because a reasonable jury might find that the School, without undue burden, could have accommodated Ms. Suarez's absence on September 29. In so concluding, the majority ignores the fact that the accommodation conflicts with the parties' CBA and would give Ms. Suarez a benefit over other employees with more seniority. Specifically, the CBA permits all employees two days of annual unpaid leave for religious purposes. Here, Ms. Suarez had months earlier received five days of annual unpaid leave for religious purposes and September 29 would have been the sixth day. Accommodating a sixth day would provide Ms. Suarez a benefit over other employees who otherwise would not have had to work that shift. For this reason, the accommodation is an undue burden. *Trans World Airlines*, 432 U.S. at 79.

2. Reasonable accommodation does not require "hand-holding"

The majority also concludes that summary judgment is precluded because a reasonable jury might find that the School, without undue burden, could have assisted Ms. Suarez in finding an appropriate position. This conclusion is inconsistent with federal authorities.

Ms. Suarez asserts she did not know she had to apply for a different position to get a different position. The School could not have known of her supposed confusion.[2] After she commenced litigation, she asserted for the first time that the School should have assisted her in finding a position that suited her religious practices.

Notably, Ms. Suarez does not claim to have any unique difficulty in learning of an appropriate position or of completing an application. She could read e-mails and complete paperwork just like any other employee. Regardless, federal authorities do not require the type of "hand-holding" that Ms. Suarez first requested after she commenced litigation.

The majority discusses *Porter v. City of Chicago*, 700 F.3d 944, 953 (7th Cir. 2012), which holds that an employer's reasonable accommodation of offering a job change with a different shift did not require "the hand-holding" of being invited to or even informed of how to apply. The majority nonetheless distinguishes *Porter*, finding that the School did not reasonably accommodate Ms. Suarez because there is no evidence it told her to apply for a different job. Majority at 22-25.

But the *Porter* court's decision did not hinge on the supervisor's suggestion that the plaintiff switch jobs; indeed, it recognized that its prior decision had held that a reasonable accommodation could come from a CBA that gave an employee the option to

[2] Indeed, if during Ms. Suarez's employment, the School had sent out several e-mails to employees (and Ms. Suarez) making them aware of job postings and asking for applications, Ms. Suarez's confusion appears wholly unreasonable.

transfer assignments, even absent any direct communication with the employee. *Id.* (citing *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998)).

The Supreme Court has similarly opined that a union seniority system for preferred shifts and scheduling changes "represented a significant accommodation to the needs, both religious and secular, of all [ ] employees." *Trans World Airlines*, 432 U.S. at 78. *Wright v. Runyon*, 2 F.3d 214 (7th Cir. 1993), cited by the majority, goes further to confirm that such a system is a reasonable accommodation.

In *Wright*, the plaintiff's position was eliminated and he was invited, along with all other employees whose position was similarly eliminated, to bid for certain open jobs. *Id.* at 215-16. While the offered jobs did not accommodate the plaintiff's religious practices, as the eliminated position had, there were also four jobs open to bids by all employees that would have accommodated the employee's practices, and, based on seniority, he would have received at least two of those jobs. *Id.* at 216. The Seventh Circuit considered the bidding system itself the reasonable accommodation that would eliminate the conflict between the employer's requirements and the plaintiff's religious practices. *Id.* at 217. The court held that the bidding system allowed the plaintiff to select a position that would not interfere with his religion and that because the plaintiff "chose not to take full advantage of the bidding system," he was responsible for the consequences, not his employer. *Id.*

I would affirm the summary dismissal of Ms. Suarez's claims because the School fulfilled its duty to reasonably accommodate by offering her nine annual days off for her

religious practices, far in excess of the two annual days off permitted by the CBA. Any accommodation beyond the two days required by the CBA was an undue burden because it would give Ms. Suarez a benefit over more senior employees. Because the majority misstates the School's duty to accommodate, I dissent.

Lawrence-Berrey, A.C.J.

ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

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