No. 93260-3
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TERI CAMPBELL,

Petitioner,

and

TACOMA PUBLIC SCHOOLS, a.k.a. TACOMA PUBLIC SCHOOL DISTRICT NO. 10,

Respondent.

AMICUS CURIAE MEMORANDUM OF WASHINGTON EDUCATION ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

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I. IDENTITY OF AMICUS CURIAE

Amicus Curiae Washington Education Association (WEA) is a union representing over 90,000 members employed by school districts, community colleges, and universities in the State of Washington. The WEA represents over 69,000 certificated employees of school districts. Therefore, the employment rights of teachers and other certificated employees are of utmost importance to the WEA's interests.

II. BRIEF STATEMENT OF THE CASE

This case is an appeal from the decision of the Court of Appeals in Campbell v. Tacoma Public Schools, 192 Wn. App. 874, 370 P.3d 33 (2016) holding, in part, that Tacoma Public Schools (the District) had sufficient cause to suspend Teri Campbell for 15 days without pay because she allegedly failed to report the medications she was taking that could have affected her ability to work. Campbell, 192 Wn. App. at 878. Additional facts are set forth in Ms. Campbell's Petition for Review and are incorporated herein by reference.

III. ARGUMENT IN SUPPORT OF THE COURT ACCEPTING REVIEW

1. The sanction to be imposed against a teacher or other certificated employee for misconduct is not a policy decision to be made by a school district that is reviewed under the arbitrary and capricious standard.

In finding that the District had sufficient cause to suspend Ms. Campbell for 15 days without pay, the Court in Campbell held the following:

> Once sufficient cause is established, the choice of sanction is a policy decision made by the District that we review to determine if it is arbitrary, capricious, or contrary to law...An arbitrary and capricious action is "willful and unreasoning action, without consideration and in disregard of facts and circumstances."...
>
> The "harshness" of an agency's sanction is not the test for whether the sanction is arbitrary and capricious...Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached...Because we give an agency's choice of sanction considerable judicial deference, our scope of review here is narrow, and the challenger of the sanction carries a heavy burden.

Campbell, 192 Wn. App. at 889.

Although the Court initially states in its decision that the standard of review for the sanction imposed is arbitrary, capricious or contrary to law, the Court applies only the arbitrary and capricious standard in upholding the District's choice of sanction. Indeed, it states that, "Because we give an agency's sanction considerable judicial deference, our scope of review here is narrow." Campbell, at 889. If the Court had reviewed the sanction under the error of law standard, if would not have given the District "considerable judicial deference" in determining the sanction. Moreover, the Court would not even have considered whether

the District's choice of sanction was arbitrary and capricious because the contrary to law standard or *de novo* review is a higher standard of review.

The Court also states in its opinion that, "the challenger of the sanction carries a heavy burden." Campbell, at 889. In other words, the Court states that the burden is on the challenger, the certificated employee, to prove that the sanction proposed by the District is not arbitrary and capricious.

RCW 28A.405.310(8) provides the following:

> Any final decision by the hearing officer to nonrenew the employment contract of the employee, or to discharge the employee, or to take other action adverse to the employee's contract status, as the case may be, shall be based solely upon the cause or causes specified in the notice of probable cause to the employee and shall be established by a preponderance of the evidence at the hearing to be sufficient cause or causes for such action.

It is apparent for the terms of RCW 28A.405.310(8) that the burden is on the District, not the employee, to prove sufficient cause for discharge or "other adverse action" which includes a suspension without pay for 15 days. Further, this Court has held that the burden is on the District to show sufficient cause for discharge. Gaylord v. Tacoma School District No. 10, 85 Wn.2d 348, 350, 535 P.2d 804 (1975). Because the statute does not distinguish between discharge and "other adverse action," the burden is on the District to prove sufficient cause for a suspension without pay.

It has also been held that it is error for a court to give special deference to a school district on the issue of whether there is grounds for the sanction it proposes as the Court of Appeals has done in Campbell. Gaylord, 85 Wn.2d at 350, 535 P. 2d 804. Moreover, RCW 28A.405.310(8) expressly provides that the hearing officer, not the District, decides whether the proposed sanction for the misconduct is appropriate.

The logical extension of the Court's decision in Campbell is that if a District proves a certificated employee engaged in some form of misconduct, it can impose any sanction it chooses because, the "'harshness' of an agency's action is not the test for whether the sanction is arbitrary and capricious." Campbell, 192 Wn. App. at 889, 370 P. 3d 33. This Court rejected a similar analysis in Federal Way School District v. Vinson, 172 Wn.2d 756, 261 P. 3d 145 (2011). In Vinson, the Court rejected the test of sufficient cause as set forth in Federal Way School District v. Vinson, 154 Wn. App. 220, 225 P.3d 379 (2010), because

> the Clarke rule, as modified by Vinson holds that any time a teacher, in the course of his job, engages in conduct lacking any 'professional purpose' that teacher may be discharged. This creates a per se rule of discharge under which any school-day lapse, no matter how minor and no matter the context, will always constitute sufficient cause for a teacher's discharge.

Id. (internal citation omitted). If the decision of the Court of Appeals stands in Campbell, a teacher could be discharged for only a minor offense because, according to the Court, the sanction imposed is a policy decision made by the district subject only to a deferential arbitrary and capricious standard of review.

It was also noted by this Court in Vinson that the Clarke test and Hoagland factors "must be applied in all nonflagrant instances of misconduct." Vinson, 172 Wn.2d at 773-774. Although the Clarke test applies to discharges only, the Hoagland factors can be applied in cases involving other adverse action short of discharge. However, the Court in Campbell never considered the Hoagland factors to determine whether the District had sufficient cause to suspend Ms. Campbell because it ruled that "the choice of sanction is a policy decision made by the district . . . " Campbell, 192 Wn. App. at 889.

The decision of the Court of Appeals in Campbell also conflicts with this Court's decision in Clarke v. Shoreline School District No. 412, 106 Wn.2d 102, 720 P.2d 793 (1986). In Clarke, the Hearing Officer found that the District discharged Clarke for sufficient cause. On appeal to the Superior Court, the trial court entered a conclusion of law that the "clearly erroneous" standard applied in determining whether the Hearing Officer's findings of fact established sufficient cause for Clarke's

discharge. This Court held that the question of whether specific conduct constituted sufficient cause for discharge was subject to the error of law standard of review and that de novo review was appropriate because the determination involved a mixed question of law and fact. Clarke, 106 Wn.2d at 111. In Sargent v. Selah School Dist. No. 119, 23 Wn. App. 916, 919-920, 599 P. 2d 25 (1979), it was also held that the trial court erred when it applied the arbitrary and capricious and clearly erroneous standards of review to the sufficient cause determination by the hearing officer and that the court should have used the error of law standard. In Campbell, the court reviewed the sanction imposed by the District under the arbitrary and capricious standard instead of the error of law or *de novo* standard required by Clarke. Therefore, its decision conflicts with the Clarke case.

2. The District's policy is unlawful because it constitutes a prohibited medical inquiry under the Americans with Disabilities Act.

The Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (ADA or the ADA) prohibits certain inquiries unless job-related and consistent with business necessity.[1] Prohibited medical examinations or

[1] A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

inquiries constitute employment discrimination. 42 U.S.C. § 12112(d). This is true regardless of whether an employee is considered disabled under the ADA. Indergard v. Georgia-Pac. Corp., 582 F.3d 1049, 1052–53 (9th Cir. 2009).

In this case, the District suspended Ms. Campbell for violating a generally-applicable policy (Policy 5201):

> Any staff member who is taking a drug or medication whether or not prescribed by the staff member's physician, which may adversely affect that staff member's ability to perform work in a safe or productive manner is required to report such use of medication to his or her supervisor. This includes drugs which are known or advertised as possibly affecting judgment, coordination, or any of the senses, including those which may cause drowsiness or dizziness. The supervisor in conjunction with the district office then will determine whether the staff member can remain at work and whether any work restrictions will be necessary.

Campbell, 192 Wn. App. at 879–80. Thus, Ms. Campbell's petition involves an issue of substantial public importance because Policy 5201 has the potential to discriminate against "any staff member" of the District.[2]

The United States Equal Employment Opportunity Commission (EEOC) has addressed "disability-related inquiries" in enforcement

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42 U.S.C. § 12112(d)(4)(A). A "covered entity" includes "employer," and "'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of the 20 or more calendar weeks in the current or preceding calendar year . . . " 42 U.S.C. § 12111(2), (5)(A).

[2] Moreover, the language of Policy 5201 could be adopted by other Washington school districts.

guidance (EEOC Guidance).[3] EEOC Guidance provides that an employer generally may not ask all employees what prescription medications they are taking: "Asking all employees about their use of prescription medications is not job-related and consistent with business necessity." EEOC Guidance, B.8. Therefore, a generally-applicable policy, like Policy 5201, requiring employees to disclose prescription medications they are taking is a disability-related inquiry.

In Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1226 (10th Cir. 1997), the court considered a policy that mirrored parts of Policy 5201: "prescribed drugs may be used only to the extent that they have been reported and approved by an employee supervisor." The court concluded that the employer's policy violated the ADA as a prohibited disability-related inquiry. Like the unlawful policy in Roe, Policy 5201 requires employees to report their taking of medications to a supervisor. "[A]sking an employee whether he is taking prescription drugs or medication, or questions seek[ing] information about illnesses, mental conditions, or other impairments [an employee] has or had in the past[,]

[3] EEOC, *Enforcement Guidance: Disability–Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities* Act (ADA) (July 27, 2000), available at http://www. eeoc.gov/policy/docs/guidance-inquiries.html.

"When interpreting the ADA, [the United States Court of Appeals, Ninth Circuit] look[s] to the Equal Employment Opportunity Commission's interpretations for persuasive guidance." Leonel v. Am. Airlines, Inc., 400 F.3d 702, 709 n.12 (9th Cir. 2005), opinion amended on denial of reh'g, No. 03-15890, 2005 WL 976985 (9th Cir. Apr. 28, 2005).

trigger the ADA's . . . protections." Lee v. City of Columbus, Ohio, 636 F.3d 245, 254 (6th Cir. 2011) (internal quotations and citations omitted). Thus, unless "job-related and consistent with business necessity," 42 U.S.C. § 12112(d)(4)(A), Policy 5201 runs afoul of the ADA.[4]

"The 'business necessity' standard is quite high, and 'is not [to be] confused with mere expediency.'" Cripe v. City of San Jose, 261 F.3d 877, 890 (9th Cir. 2001) (quoting Bentivengna v. United States Dep't of Labor, 694 F.2d 619, 621-22 (9th Cir. 1982)). "The employer bears the burden of demonstrating a business necessity." Brownfield v. City of Yakima, 612 F.3d 1140, 1146 (9th Cir. 2010). It is an objective test. Id. The employer must have "significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job. An employee's behavior cannot be merely annoying or inefficient . . ." Id. (quoting Sullivan v. River Valley Sch. Dist., 197 F.3d 804, 811 (6th Cir. 1999)). "[T]here must be genuine reason to doubt whether that employee can perform job-related functions." Id.

[4] Additionally, the EEOC and an employee recently settled with an employer, Product Fabricators, Inc., in a consent decree. E.E.O.C. v. Prod. Fabricators, Inc., 666 F.3d 1170, 1171 (8th Cir. 2012). The employer's "drug policy"—strikingly similar to Policy 5201—"required employees to report to their supervisor when they took any medication causing dizziness or drowsiness, or otherwise affecting their senses, motor ability, judgment, reflexes, or ability to perform their jobs. Failure to comply could result in termination." Id. The decree enjoined "an ongoing pattern of practice of medical inquiries that violate the ADA . . . " Id. at 1172.

Here, Policy 5201's mandated disclosure is not based upon "significant evidence" or "genuine reason." Rather, it is based upon the District's speculation that its inquiry is job-related. Significantly, Policy 5201 requires employees to disclose medications even if the medication is *advertised* as "*possibly* affecting judgment, coordination, or *any* of the senses" (emphasis added). It also requires disclosure when the drug or medication *may* affect "productivity." Yet *possible* "inefficiency" or "mere expediency" are insufficient reasons under the ADA. Therefore, Policy 5201 is an unlawful disability-related inquiry under the ADA.

IV. CONCLUSION

For the reasons stated above, *Amicus Curiae* WEA requests that this Court grant Ms. Campbell's petition for review.

Respectfully submitted this 5th day of August, 2016.

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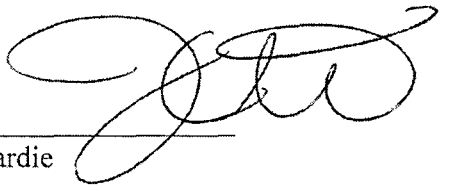
Washington Education Association

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I delivered via email and U.S. first class mail, postage prepaid, a true and accurate copy of the foregoing Motion of *Amicus Curiae* Washington Education Association for Leave to File *Amicus Curiae* Memorandum in Support of Petition for Review and *Amicus Curiae* Memorandum of Washington Education in Support of Petition for Review to the following:

Joseph W. Evans Law Offices of Joseph W. Evans PO Box 519 Bremerton, WA 98337-0124 joe@jwevanslaw.com	Gregory E. Jackson Freimund Jackson & Tardiff PLLC 701 Fifth Avenue, Suite 3545 Seattle, WA 98104 Email: gregj@fjtlaw.com

Dated this 5th day of August, 2016, at Federal Way, Washington.



John C. Hardie

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TERI CAMPBELL

NO. 93260-3

PLAINTIFF/PETITIONER,

VS.

TACOMA PUBLIC SCHOOLS a.k.a. TACOMA PUBLIC SCHOOLS DISTRICT NO 10

DEFENDANT/RESPONDENT,

DECLARATION OF ELECTRONICALLY RECEIVED DOCUMENTS (DERD)

Pursuant to the provisions of GR 17, I declare as follows:

1. I am the party who received the foregoing electronically transmitted for filing.
2. My address is: 1517 S. Fawcett Ave #100 Tacoma WA 98402.
3. My phone number is 253-383-1791
4. The facsimile number where I received the document is 253-272-9359 and or e-mail address is tac@abclegal.com.
5. I have examined the foregoing document, determined that it consists of 16 Pages, including this Declaration page.

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

Dated: 8/5/16
At Tacoma, Washington.

Signature: Lana Sheldon

Print Name: Lana Sheldon