

65167-6

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NO. 65167-6-I

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

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ANGELA HARRIS,

Appellant,

v.

PROVIDENCE EVERETT MEDICAL CENTER,

Respondent.

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PROVIDENCE EVERETT MEDICAL CENTER'S RESPONSE BRIEF

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## I. INTRODUCTION

Respondent PEMC respectfully moves the Court for an order affirming the trial court's dismissal of Appellant Angela Harris's lawsuit. On December 3, 2009, the trial court granted PEMC's Motion to Dismiss Harris's Washington Law Against Discrimination (WLAD) claim.

Harris worked for PEMC from 2004-2007 as a staff nurse represented by a union. She contends that she was improperly terminated based on sex discrimination and raised one claim under the WLAD. PEMC denies that Harris's claim has merit and asserts that PEMC is exempt from liability under the WLAD based on its status as a religious organization. The trial court dismissed the case based on the statutory religious exemption in the WLAD.

Harris's argument that the WLAD religious organization exemption is unconstitutional is untimely and lacks merit. First, Harris never raised the issue to the trial court. Second, the Washington Court of Appeals recently upheld the constitutionality of the WLAD's religious exemption under an equal protection analysis. Similarly, Harris's establishment clause argument has no merit as the WLAD exemption has a secular purpose, neither inhibits nor promotes religion nor their non-profit activities, and does not cause any government entanglement with religion.

Harris's collateral estoppel and equitable estoppel arguments also fail. Collateral estoppel based on a prior, distinguishable federal district court decision is unavailable, and Harris has presented no evidence of detrimental reliance to meet her burden to establish equitable estoppel. PEMC is a religious organization exempt from the WLAD and this lawsuit was properly dismissed.

## **II. COUNTERSTATEMENT OF ISSUES**

1. Should the Court decline to consider Harris's argument that PEMC is not a religious organization and that the WLAD religious exemption is unconstitutional where the arguments are raised for the first time on appeal?

2. Did the trial court properly reject Harris's equitable estoppel argument where she failed to present evidence to establish detrimental reliance?

3. Did the trial court properly dismiss the case without allowing Harris to amend her Complaint, where Harris never made a motion to amend the Complaint and never submitted a proposed amended complaint?

4. Did Harris waive oral argument on PEMC's Motion to Dismiss by failing to request oral argument?

### **III. STATEMENT OF FACTS**

#### **A. Providence Everett Medical Center.**

Providence Everett Medical Center (“PEMC”) is part of Providence Health and Services (“PHS”), a health care ministry of the Catholic Church. CP 22. Providence Health and Services is a not-for-profit organization that extends its mission of caring across a five-state area: Washington, Oregon, Alaska, Montana, and California. *Id.* In Washington, Providence Health and Services is sponsored by the Sisters of Providence religious community. *Id.*; CP 26-52. PEMC is a faith-based organization, and its mission specifically states: “As People of Providence we reveal God's love for all, especially the poor and vulnerable through our compassionate service.” CP 54-55. PEMC’s Core Values also reflect its religious purpose. CP 57. At PEMC, there are weekly religious services, devotionals are read periodically through the public address system, the logo for the organization includes a cross, and the hospital conforms to guidelines established by the Catholic Church. CP 23 and CP 59.

#### **B. Appellant Angela Harris.**

Harris was hired to work at PEMC in 2004. CP 2. She initially worked as a nurse until she was terminated in August 2007. CP 2-3. Harris alleges that she was discriminated against in violation of the

WLAD “because of her pregnancy and/or pregnancy related maternity leave.” CP 3. PEMC denies her claim. CP 10.

**C. Procedural History.**

Harris filed her Complaint alleging only one cause of action for discrimination under the WLAD, on July 17, 2009. CP 1-5. PEMC filed its Answer on September 30, 2009. CP 8-13. On October 1, 2009, PEMC filed a Motion to Dismiss the Complaint. CP 16-21. The Motion was noted for hearing without oral argument on October 28, 2009. CP 14. Harris filed an opposition to PEMC’s Motion on October 26, 2009. CP 65-72. PEMC filed a Reply in Support of Motion to Dismiss on October 27, 2009. CP 92-96.

On October 29, 2009, Harris filed a Motion to Strike PEMC’s Reply brief, alleging that PEMC improperly alleged facts outside the pleadings. CP 118-121. PEMC opposed the Motion to Strike. CP 185-187. On November 12, 2009, the trial court denied Appellant’s Motion to Strike. CP 122-123. The trial court treated the motion to dismiss as a motion for summary judgment and indicated that PEMC had noted the motion for hearing 28 days after it was filed, allowing sufficient notice under the Civil Rules. *Id.* The trial court further stated that Harris could file a surreply by November 30, 2009. *Id.* No surreply was filed. On December 3, 2009, the trial court granted PEMC’s motion and entered an

order dismissing the case, noting that Appellant never filed a surreply.  
CP 126.

On December 14, 2009, Harris filed a Motion for Reconsideration claiming that her attorney had not read the second page of the trial court's order allowing her to file a surreply. CP 190-198. PEMC opposed the Motion for Reconsideration. CP 210-215. The trial court denied Appellant's Motion For Reconsideration on March 16, 2010. CP 173-174. On April 5, 2010, Appellant filed the Notice of Appeal. CP 175-176.

#### IV. ARGUMENT

##### A. Standards of Review.

##### 1. Motion to Dismiss and Summary Judgment.

This Court reviews a trial court's decision to grant summary judgment *de novo*. A motion to dismiss is also reviewed *de novo*. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). The trial court characterized the motion as one for summary judgment. PEMC believes that dismissal is appropriate under the standards for either a motion to dismiss or a motion for summary judgment.

A motion to dismiss under 12(b)(6) is properly granted where "it appears beyond a reasonable doubt that no facts exist that would justify recovery." *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). Summary judgment is properly granted when the

pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Teller v. APM Terminals Pacific, Ltd.*, 134 Wn. App. 696, 704, 142 P.3d 179 (2006). Although the burden initially is on the party moving for summary judgment to demonstrate there is no genuine issue of material fact and reasonable inferences from the evidence must be resolved against the moving party, Appellant *must* respond with “specific facts” demonstrating that there is a material issue for trial. *See, e.g., Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001).

The “mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Harris may not survive a summary judgment motion based on conclusory allegations, speculations, personal beliefs, and unsupported assertions. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992). Finally, this Court may affirm the trial court’s decision on any basis supported by the record. *Deveny v. Hadaller*, 139 Wn. App. 605, 616, 161 P.3d 1059 (2007).

**2. Motion to Strike.**

This Court reviews a trial court’s denial of a motion to strike for an abuse of discretion. *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 248, 178 P.3d 981 (2008).

**3. Motion for Reconsideration.**

This Court reviews a trial court’s denial of a motion for reconsideration for an abuse of discretion. *Weems v. North Franklin School Dist.*, 109 Wn. App. 767, 37 P.3d 354 (2002).

**B. The Court Properly Granted PEMC’s Motion to Dismiss.**

Under either a summary judgment or motion to dismiss standard, dismissal of Harris’s claim was correct and should be affirmed.

**1. PEMC is Exempt as a Matter of Law.**

PEMC is a religious organization that is exempt from the WLAD as a matter of law. The WLAD expressly exempts non-profit religious organizations from liability under the statute. According to the WLAD, an “employer” is “any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does **not** include any religious or sectarian organization not organized for private profit . . .” RCW 49.60.040(3) (emphasis added). Thus, certain types of employers, such as small businesses and non-profit religious organizations, are not “employers” for purposes of RCW 49.60 and are not subject to the

statute's provisions. PEMC is a non-profit religious organization and is not subject to RCW 49.60.

An entity can establish that it is an exempt religious organization by pointing to its affiliation, stated purpose and related data. *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 677, 807 P.2d 830, 839 (1991); *Hazen v. Catholic Credit Union*, 37 Wn. App. 502, 503-05, 681 P.2d 856, 857-858 (1984). In *Farnam*, the Washington Supreme Court identified the following factors as indicia of exemption under RCW 49.60: (1) the organization is affiliated with a particular church; (2) the articles of incorporation, bylaws, and related documents express a religious purpose; (3) brochures express a religious purpose; (4) the organization was founded by members of a particular religion; (5) the directors must belong to a particular religion; (6) employee manuals and related documents express a religious purpose; (7) the organization employs members of the clergy; and (8) the organization conducts prayer services or provides religious counseling. *See Farnam*, 116 Wn.2d at 677-78, 807 P.2d at 839; *Hazen*, 37 Wn. App. at 503-05, 681 P.2d at 857-858. The undisputed facts available in the public record demonstrate that PEMC qualifies as an exempt, non-profit religious organization under this test.

Providence Health and Services is a non-profit corporation that owns and oversees several health care entities, including PEMC, as part of

its mission to continue the healing ministry of Jesus Christ in the world of today, with special concern for those who are poor and vulnerable.

Providence Health and Services is affiliated with the Roman Catholic organization sponsored by the Sisters of Providence Mother Joseph Province, a religious order of Catholic women. CP 22 and CP 54-55. It is a non-profit corporation operated exclusively for religious, charitable, educational and scientific purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code. CP 61-64.

Providence Health and Service's exemption as a religious organization applies to PEMC. When a health care facility is run by a religious organization, there is no need to determine whether the facility itself qualifies for the exemption. A parent organization's status as a religious organization applies to its facilities. *Farnam*, 116 Wn.2d at 677, 807 P.2d at 839. In *Farnam*, the court evaluated the religious status of CRISTA Ministries, the corporate parent, and not of the nursing home, which was one of CRISTA's subdivisions. *Id.* at 677-78, 807 P.2d at 839. Similarly, PEMC is a wholly owned subsidiary affiliated with Providence Health and Services as a Catholic health care services provider. CP 22.

For the first time on appeal, Harris raises the argument that PEMC failed to establish that it is a religious organization. Opening Brief at 8. Harris never raised this argument to the trial court. In her opposition to

PEMC's Motion to Dismiss and in her Motion to Reconsideration, Harris never challenged PEMC's religious origins and nature. CP 65-72; CP 190-198. Arguments that were not made at the trial court level are not considered on appeal. *Sneed v. Barna*, 80 Wn App. 843, 912 P.2d 1035 (1996); RAP 2.5(a) (Court of Appeals does not consider claims raised for the first time on appeal). Moreover, there is substantial and uncontested evidence that PEMC has religious origins and purpose. CP 22-64. PEMC is exempt from the WLAD as a matter of law, and the trial court properly dismissed Appellant's claim.

## **2. Religious Exemption is Constitutional.**

For the first time on appeal, Harris also argues that the WLAD religious exemption violates the equal protection of the Fourteenth Amendment and the establishment clause of the First Amendment to the United States Constitution. Harris never raised a constitutional argument to the trial court. In her opposition to PEMC's Motion to Dismiss and in her Motion to Reconsideration, Harris never challenged the constitutionality of the WLAD exemption. CP 65-72; CP 190-198. Again, Harris raises this argument for the first time on appeal, and the argument need not be considered. *Sneed v. Barna*, 80 Wn App. 843, 912 P.2d 1035 (1996); RAP 2.5(a) (Court of Appeals does not consider claims

raised for the first time on appeal). In any event, neither argument has merit.

**a. The exemption does not violate the equal protection clause.**

Last month, the Washington Court of Appeals again upheld the constitutionality of the religious exemption in the WLAD, finding that it did not violate the equal protection clause of the Fourteenth Amendment. The Court expressly held that “the WLAD’s religious employer exemption would be subject to and would survive a rational basis review under the federal equal protection clause.” *Erdman v. Chapel Hill Presbyterian Church*, \_\_\_ P.3d \_\_\_, 2010 WL 2590590, \*10 (Wn.App.Div.2, June 29, 2010). The Court explained that in *Farnam*, the Washington Supreme Court observed that the United States Supreme Court upheld the federal counterpart to Washington’s religious employer exemption under a rational basis standard “because the exemption created employer classes based on religion and provided a ‘uniform benefit to all religions’ rationally related to the ‘legitimate governmental purpose’ of prohibiting significant government interference with the free exercise of religion.” *Id.* citing *Farnam*, 116 Wn.2d at 681, 807 P.2d 830.

**b. Courts have consistently applied the statutory exemption.**

There are three additional published Washington state decisions that address the religious exemption in the WLAD and, in each case, the Washington courts have upheld the religious organization exception. *Farnam*, 116 Wn.2d at 677 (Washington Supreme Court affirms exemption and develops seven factors to consider in evaluating religious organizations); *City of Tacoma v. Franciscan Foundation*, 94 Wn. App 663, 669, 972 P.2d 566 (1999) (Tacoma ordinance invalidated because it failed to exempt nonprofit religious employers); and *Hazen*, 37 Wn. App. at 503-505 (credit union without organizational, structural or financial ties to the Roman Catholic Church is not exempt from the WLAD).

More recently, in *MacDonald v. Grace Church Seattle*, 457 F.3d 1079, 1087-1088 (9<sup>th</sup> Cir. 2006), the Ninth Circuit recognized the WLAD exemption for religious organizations, finding that the “WLAD exempts nonprofit religious organizations, such as the defendants, from the definition of “employer” and “[b]ecause MacDonald alleges that the defendants were her “employer,” her charges against them as employers are exempt from the Washington Commission’s subject matter

jurisdiction....”<sup>1</sup> It is well established under Washington law that the religious exemption does not violate the equal protection clause.

**c. The exemption does not violate the free exercise clause.**

To survive an establishment clause challenge, a statute must:

(1) have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster “an excessive government entanglement with religion.” *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).

Harris claims that the exemption fails to meet all three prongs of the test.

Harris’s arguments are without merit.

First, Harris argues that the first element is not met because the stated secular purpose has no logical application to Harris’s case. Harris misunderstands the application of the test. Harris argues that “the main reason advanced for a religious exemption from claims of religious discrimination is to protect the values reflected in the Free Exercise Clause, by preventing excessive government entanglement.” Appellant’s Opening Brief, 16. Harris then claims that the justification has “no logical application to a claim like Plaintiff’s here, because adjudicating her

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<sup>1</sup> 457 F.3d at 1085. In *MacDonald*, the Ninth Circuit court declined to consider plaintiff’s constitutional objection, finding that the issue was improperly raised for the first time on appeal. 457 F.3d at 1086.

claim . . . would not involve the Medical Center's alleged religious beliefs." *Id.* Harris then argues that PEMC has not shown and cannot show that her claims would inhibit or burden its free exercise of religious beliefs. *Id.*

Harris's argument is entirely misplaced. To establish the first element of the three part test the purpose of the statute must only be secular. There is no question that the WLAD has a secular purpose – to avoid discrimination. The test does not require that the stated purpose be accomplished in every subsection of the statute.

Harris further argues that the statute fosters excessive government entanglement because courts will have to decide which employers are and are not religious organizations. This argument is without merit. Asking a court to occasionally decide whether an organization constitutes a religious organization when that issue is disputed is not the type of involvement that the Establishment Clause is meant to protect against. In *Lemon v. Kurtzman*, the seminal case on this issue, the United States Supreme Court explained that “the three main evils against which the Establishment Clause was intended to afford protection [are] sponsorship, financial support, and active involvement of the sovereign in religious activity.” 403 U.S. 602, 612-613 (1971). A court's determination as to an

organization's status as a religious organization, does not fall into any of these categories.

Harris next argues that the primary effect of the religious exemption is to give religious organizations an advantage over their competitors because they will not be subject to liability for employment discrimination claims. However, the WLAD exemption does not authorize wholesale discrimination by a religious employer. Employees of religious organizations are free to seek remedies for discrimination through other processes. For example, employees of non-profit religious organizations such as PEMC are protected from unlawful discrimination by federal statutes, provided they make timely claims. *See e.g.* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e) and 2000(e)(2), prohibiting employers with 15 or more employees from discriminating in employment; *McClure v. Salvation Army*, 460 F.2d 553 (5<sup>th</sup> Cir. 1972) (holding that the Salvation Army was an employer subject to the employment discrimination provisions of Title VII). Washington courts have also identified other common law theories that may be asserted in appropriate circumstances. Religious organizations do not have an advantage over their competitors. Moreover, the WLAD's primary purpose is to prevent discrimination, and it does not promote any religion.

Finally, numerous states have adopted similar statutes exempting religious organizations from their respective Civil Rights Acts and Anti-Discrimination Acts. Such states include Arkansas, Colorado, Florida, Indiana, Missouri and Montana. *See* A.C.A. §16-123-103(a); F.S.A. §760.10(9); I.C. §22-9-1-3(h)(1)-(2); C.R.S.A. §24-34-401(3); M.C.A. §49-2-101(11); V.A.M.S. §213.010(7). None of these statutes have been overturned on constitutional grounds.

For all the foregoing reasons, this Court should reject Harris's argument that the WLAD exemption for religious organizations is unconstitutional.

### **3. Estoppel Argument Fails.**

It is unclear whether Harris is asserting equitable estoppel or collateral estoppel in support of her claim that PEMC should not be allowed to claim a religious exemption under the WLAD. The party asserting estoppel bears the burden of persuading the court. *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 57 P.3d 300 (2002). Harris cannot establish either collateral estoppel or equitable estoppel.

#### **a. Collateral Estoppel Does Not Apply.**

Collateral estoppel "prevents a second litigation of issues even though a different claim or cause of action is asserted." P. Trautman, "Claim and Issue Preclusion in Civil Litigation in Washington," 60 Wash.

L. Rev. 805, 829 (1985). Courts apply collateral estoppel to prevent “the endless relitigation of issues already actually litigated by the parties and decided by a competent tribunal.” *Reninger v. State*, 134 Wn.2d 437, 449, 938 P.2d 819 (1998). Importantly, collateral estoppel “promotes judicial economy and prevents inconvenience, and even harassment, of parties.” *Id.*

Collateral estoppel bars the re-litigation of material factual issues, but does not bar the re-litigation of legal issues. *Nims v. Washington Bd. Of Registration*, 113 Wn. App. 499, 53 P.3d 52 (2002), *as amended*, Oct. 14, 2002. Collateral estoppel does not bar an appellate court, for example, from re-litigating important issues of law that were already determined by a trial court. *Id.* To establish collateral estoppel, a party must prove all four prongs of the following: (1) that the issue decided in the prior action was identical to the issue presented in the second action; (2) that the prior action ended in a final judgment on the merits; (3) that the party to be estopped was a party or in privity with a party in the prior action; and (4) that application of the doctrine would not work an injustice. *State v. Vasquez*, 148 Wn. 2d 303, 59 P.3d 648 (2002); *Pederson v. Potter*, 103 Wn. App. 62, 11 P.3d 833 (2000). Harris cannot meet this burden.

**(1) The Issues Are Different.**

The issue decided in the *French v. Providence Medical Center* case is not identical to the issue decided by the trial court in the instant case. In *French*, the issue was whether PEMC was estopped from arguing that it was exempt under the WLAD because that specific plaintiff, Julie French, had allegedly reasonably relied on a specific EEO policy. *French v. Providence Everett Medical Center*, 2008 US Dist. Lexis 80125, 21 Am. Disabilities Cas. (BNA) 366 (W.D. Wash. September 8, 2008) (“*French*”). The federal district court determined that Ms. French had established reasonable reliance on the specific policy. The federal district court considered Ms. French’s testimony regarding her reliance and the specific policy submitted by Ms. French, facts that have no bearing on the issue in this case. Harris cannot establish her own reasonable reliance on a policy based on Ms. French’s testimony. The issue before the trial court was not the same as the issue before the federal district court in *French*.

**(2) The U.S. District Court’s determination of a legal issue in *French* does not preclude re-litigation of that legal issue.**

Even if all of the elements of collateral estoppel were met, collateral estoppel would only preclude PEMC from arguing that it was exempt from **Ms. French’s** WLAD cause of action. Because collateral

estoppel only precludes re-litigation of factual and not legal issues, the doctrine would not prevent PEMC from making the legal argument to the trial court that it was exempt from the WLAD. *Nims v. Washington Bd. of Registration*, 113 Wn. App. 499, 53 P.3d 52 (2002), *as amended*, Oct. 14, 2002. Harris must prove equitable estoppel based on her experience and her own evidence. This she cannot do.

**b. Equitable Estoppel Does Not Apply.**

To prove equitable estoppel, Harris must establish:

- (1) an admission, statement, or act inconsistent with the claim afterwards asserted,
- (2) action by the other party on the faith of such admission, statement, or act,
- and (3) injury to such other party resulting from allowing the party to contradict or repudiate such admission statement, or act.

*Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 678-79, 807 P.2d 830 (1991) (“Estoppel focuses on the justifiable reliance of the person asserting it”). Harris must demonstrate that she, in fact, relied on a statement by PEMC, that her reliance was justifiable, and that it caused injury. Harris has not presented any evidence of a statement by PEMC that she relied on in taking any action to her own detriment.

First, Harris’s only evidence in support of her equitable estoppel argument is a vague declaration in which she states that during her employment with PEMC, she “was aware of and relied upon PEMC’s

employee policies concerning anti-discrimination.”<sup>2</sup> CP 90-91. Here, there is **no** evidence that Harris actually ever saw or relied upon PEMC’s EEO policy (or any other policy). Unlike the plaintiff in the *French* case, there is no declaration from Harris that establishes that she was aware of any EEO policy or ever relied upon it or any other evidence to her detriment. Harris attached no policy or other document to her declaration that could support an estoppel argument. CP 90-91. There is no way for the trial court to determine what policy Harris may have relied upon. Rather, Harris alludes to a vague general policy of complying with all local, state and federal discrimination laws. *Id.* Unsupported assertions are insufficient to defeat summary judgment. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992).

Second, nothing in Harris’s declaration indicates that PEMC ever held itself out as not being a religious organization or that it would specifically not assert a religious exemption from the WLAD.

Third, Harris has not presented any testimony that she relied to her detriment on statements made by PEMC with respect to its anti-discrimination policy. To demonstrate that she detrimentally relied on PEMC’s statement, Harris would need to show that, in the absence of

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<sup>2</sup> All Harris’s references to evidence in the *French* case should be disregarded as that was an entirely different case litigating the issue of whether Julie French, a non-union employee, relied on statements to her detriment. The evidence in that case has no bearing on whether Ms. Harris relied on statements to her detriment.

PEMC's alleged statements, she would have made a different employment decision, chosen not to take protected leave or taken some other action. She does not include any such testimony in her declaration. Indeed, any such testimony would make little sense because Harris's cause of action is for sex-based pregnancy discrimination. CP 1-5. The protections in this area are virtually identical under the WLAD and the Title VII. *Valdez-Zontek v. Eastmont Sch. Dist.*, 154 Wn. App. 147, 175, 225 P.3d 339 (2010). As such, Harris was not provided with any lesser or greater protections from discrimination, dependent upon whether PEMC was subject to the WLAD. The only difference this fact would make for Harris is the location where she files a charge of discrimination and not in the quality or nature of the protections she is afforded. Harris has not, and will not, be able to demonstrate that she detrimentally relied on statements that she claims led her to believe that PEMC was subject to the WLAD.

Fourth, Harris cannot demonstrate injury as a result of PEMC being able to repudiate any alleged statement that it was subject to the WLAD. As described above, the protections for a sex-based pregnancy discrimination are identical under Title VII and the WLAD. Harris is entitled to all of the protections from discrimination under Title VII and is not injured as a result of her alleged reliance on PEMC's statements

regarding the WLAD.<sup>3</sup> Harris alone elected not to pursue any federal Title VII claim.

Finally, unlike Ms. French, Harris was a union employee subject to a union contract that contained specific anti-discrimination protections. A copy of the 2008-2011 collective bargaining agreement was submitted to the trial court. CP 102-110. PEMC is required under the contract to provide Harris with a copy of the collective bargaining agreement. Article 6.1, “Nondiscrimination,” addresses the equal employment policy agreed to between PEMC and the Union. Article 6.1 specifically references only “applicable” state law and also provides that nondiscrimination will be “interpreted consistent with the requirements of the Employer under state and federal law.” CP 103. Thus, even though the WLAD does not apply to PEMC, Harris was afforded protection from discrimination under the contract. Given this express language of Article 6.1, Harris cannot establish reasonable reliance on any policy other than the policy expressed in the Union contract that governs her employment.

For all these reasons, equitable estoppel does not apply and the court should confirm the trial court’s dismissal.

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<sup>3</sup> In *French*, the Plaintiff brought a disability discrimination claim. The protections for disability discrimination under the WLAD are more broad than the protections afforded under Title VII.

**C. The Court Properly Denied Harris's Motion to Strike.**

The trial court has discretion in deciding whether to consider or exclude evidentiary materials submitted in support of or in opposition to a motion. *Powell v. Rinne*, 71 Wn.App. 297, 857 P.2d 1090 (1993). Harris does not make any specific argument that the trial court abused its discretion. There is nothing in Appellants' Opening Brief that provides a basis for setting aside the trial court's decision to consider evidence submitted with the Motion to Dismiss. Civil Rule 12(c) expressly provides authority for the trial court to consider evidence beyond the complaint. CR 12(c).

**D. The Court Properly Denied Harris's Motion for Reconsideration.**

The trial court did not abuse its discretion in denying Appellant's Motion for Reconsideration. A trial court's ruling on a motion for reconsideration is discretionary. *Lilly v. Lynch*, 88 Wn. App. 306, 945 P.2d 727 (1997); *Kleyer v. Harborview Medical Center of University of Washington*, 76 Wn. App. 542, 887 P.2d 468 (1995). CR 59 provides that a motion for reconsideration may only be granted for one of nine reasons enumerated in the rule. Harris did not present new evidence, new legal arguments, or point to any procedural deficiencies in the trial court's order

to dismiss. There was no basis for reconsideration of the order of dismissal, and the trial court properly denied the motion.

**1. No New Evidence or Legal Arguments.**

Harris's Motion for Reconsideration raised the same arguments previously stated in her Opposition to Defendant's Motion to Dismiss and Motion to Strike (which was denied). Appellant's Motion was properly denied for all of the reasons the original motion to dismiss was granted.

**2. Failure to Read an Order is Not a Proper Basis for Reconsideration.**

Appellant contends that her counsel did not properly read the Order Denying Motion to Strike, which allowed Appellant to file a surreply by November 30, 2009. The narrow grounds for a court setting aside its prior orders do not include errors by counsel. Appellant's attorney admits that he failed to read the judge's order giving him notice that the motion to dismiss was converted into a summary judgment motion. Counsel's failure to read the order is not grounds for reconsideration.<sup>4</sup>

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<sup>4</sup> Regardless, the trial court specifically stated in its Order Denying Motion for Reconsideration that it granted PEMC's Motion to Dismiss based solely on the merits, and not on Harris's failure to file a surreply.

**3. No Error in Ruling on Motion for Summary Judgment without Oral Argument.**

Harris argues that the trial court erred in not granting her oral argument pursuant to the local court rule. King County Local Rule 56(c)(1) provides in pertinent part: “All summary judgment motions shall be decided after oral argument, *unless waived by the parties.*” KCLR 56(c)(1).

However, Harris never requested oral argument when she responded to PEMC’s Motion to Dismiss. King County Local Rule 7(b)(4)(B) permits oral argument on dispositive motions, of which a motion to dismiss would qualify. Additionally, KCLR 7(b)(4)(C) states that any party may request oral argument in its motion or opposition. Harris was afforded an opportunity to request oral argument when she filed her Opposition to Defendant’s Motion to Dismiss, but she did not do so. Further, Harris was afforded an opportunity to request oral argument in her surreply, had counsel read the court’s order and filed a brief. Harris waived oral argument by failing to request it.

Finally, a party does not have a due process right to oral argument. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn. 2d 674, 41 P.3d 1175 (2002) (an employee’s due process rights were not violated when trial court refused to hear oral argument on the motion to

dismiss discrimination claim as a discovery sanction, where the trial court considered the employee's memorandum in opposition.). Oral argument is a matter of discretion for the trial court, so long as the parties are given the opportunity to argue in writing his or her version of the facts and law. *State v. Bandura*, 85 Wn. App. 87, 931 P.2d 174 (1997); *Parker v. United Airlines, Inc.*, 32 Wn. App. 722, 649 P.2d 181 (1982).

**E. Harris Never Made a Proper Motion To Amend Her Complaint.**

The trial court properly denied Harris's informal request to amend her complaint. Harris made vague statements, suggesting that she had potential claims that she could bring outside of the WLAD, in her response to PEMC's Motion to Dismiss and in her Motion for Reconsideration. CP 65-72 and CP 190-198. However, Harris never filed a motion requesting leave to file an amended complaint. In addition, Harris never submitted a copy of any proposed complaint as required by Civil Rule 15(a). *See* CR 15(a) ("If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated 'proposed' and unsigned, shall be attached to the motion"). The trial court did not err because Harris failed to make a proper motion to amend.

V. CONCLUSION

For the reasons stated above, PEMC respectfully requests that the Court deny Harris's appeal and uphold the trial court's dismissal of the case.

RESPECTFULLY SUBMITTED this 21 day of July, 2010.

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By



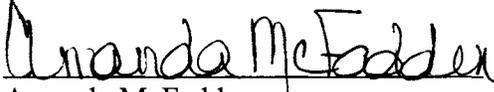
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**CERTIFICATE OF SERVICE**

I hereby certify that on this day I filed the foregoing document with the Clerk of the Court of Appeals and served a copy via electronic mail and hand delivery upon the following:

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DATED this 22<sup>nd</sup> day of July, 2010.

  
Amanda McFadden