

**FILED
Court of Appeals
Division II
State of Washington
11/20/2019 10:51 AM**

No. 53303-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

KIMBERLY RITCHEY,

Appellant,

v.

SOUND RECOVERY CENTERS, LLC,

Respondent.

APPELLANT'S REPLY BRIEF

Matthew J. Ley, WSBA #46074
McGavick Graves, P.S.
Attorney for Appellant
1102 Broadway, Suite 500
Tacoma, WA 98402
Telephone (253) 627-1181
Facsimile (253) 627-2247

TABLE OF CONTENTS

I. ARGUMENT1

 A. The evidence does not support the conclusion that there was not a wrongful termination of employment.1

 B. Summary Judgment should not be affirmed based on an alleged lack of proof that an accommodation was necessary.8

 C. The Court erred in vacating an Order of Default on the basis of inexcusable neglect.....9

II. CONCLUSION.....11

TABLE OF AUTHORITIES

State Cases

<i>Hwang v. McMahill</i> , 103 Wn.App. 945, 15 P.3d 172 (2000).....	10
<i>In re Estate of Stevens</i> , 94 Wn.App. 20, 971 P.2d 58 (1999).....	10
<i>Johnson v. Cash Store</i> , 116 Wn.App. 833, 68 P.3d 1099 (2003).....	10
<i>Martin v. Gonzaga Univ.</i> , 191 Wn.2d 712, 425 P.3d 837 (2018).....	1
<i>Morin v. Burns</i> , 160 Wn.2d 745, 161 P.3d 956 (2007).....	10
<i>Peiffer v. Pro-Cut Concrete Cutting & Breaking Inc.</i> , 6 Wn.App. 2d 803, 431 P.3d 1018 (2018).....	2, 4
<i>Prest v. American Bankers Life Assur. Co.</i> , 79 Wn.App. 93, 900 P.2d 595 (1995).....	11
<i>Reid v. Pierce County</i> , 136 Wn.2d 195, 961 P.2d 333 (1998).....	6
<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 138, 94 P.3d 930 (2004).....	8, 9
<i>Roe v. Quality Transp. Servs.</i> , 67 Wn.App. 604, 838 P.2d 128 (1992).....	5
<i>State v. Sweeney</i> , 56 Wn.App. 42, 782 P.2d 562 (1989).....	7
<i>TMT Bear Creek Shopping Cntr., Inc. v. Petco Animal Supplies, Inc.</i> , 140 Wn.App. 191, 165 P.3d 1271 (2007).....	10
<i>Wahl v. Dash Pt. Fam. Dental Clinic, Inc.</i> , 144 Wn.App. 34, 181 P.3d 864 (2008).....	2

Youker v. Douglas County,
178 Wn.App. 793, 327 P.3d 1243 (2014) 6, 7

Federal Cases

BNSF Ry. Co. v. U.S. Dept. of Transp.,
566 F.3d 200 (D.C. Cir. 2009) 5

Statutes

RCW 10.79.070 6, 8
RCW 10.79.130 7

COMES NOW Appellant, Kimberly Ritchey, and hereby submits Appellant's Reply Brief.

I. ARGUMENT

A. The evidence does not support the conclusion that there was not a wrongful termination of employment.

The initial point of contention is whether the evidence from trial is sufficient to support the jury's determination that the Appellant Kimberly Ritchey's employment was neither terminated, nor constructively discharged, by the Employer, Sound Recovery Center, LLC ("Employer"). The Employer claims that she abandoned her employment. The Trial Court's ruling, refusing a grant of new trial, should be reversed because Ms. Ritchey's loss of employment was substantially due to the imposition of a testing procedure that requires such a gross intrusion on her privacy that there is no rational basis to conclude that the testing procedure is reasonable.

Wrongful termination occurs when a person's employment is terminated for reasons that contravene public policy. *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 723, 425 P.3d 837 (2018). Relief is available when a person is forced to quit her job because the employer has made the working conditions intolerable, rather than only when she is fired from her employment. *Wahl v. Dash Pt. Fam. Dental Clinic, Inc.*, 144 Wn.App. 34,

43, 181 P.3d 864 (2008). Such constructive discharge is established by showing that (1) the employer deliberately made working conditions intolerable, (2) a reasonable person in the employee's position would be forced to resign, (3) the employee resigned because of the intolerable condition and not for any other reason, and (4) the employee suffered damages as a result of being forced to resign. *Peiffer v. Pro-Cut Concrete Cutting & Breaking Inc.*, 6 Wn.App. 2d 803, 829, 431 P.3d 1018 (2018), *review denied*, 193 Wn.2d 1006, 438 P.3d 115 (2019). In turn, the wrongful termination is established when (1) the employee's discharge may have been motivated by reasons that contravene a clear mandate of public policy, and (2) the public-policy-linked conduct was a significant factor in the decision to discharge the worker. *Id.* at 830. The focus is always on whether the actions of the employer contravene a clear public policy. *See id.* at 830.

The drug testing procedures demanded by the Employer are at the heart of this case. Although the Employer repeatedly argues that workplace drug testing is the issue, it is not. The key issue is whether the extremely intrusive and demeaning method used by the Employer to collect testing samples violates a clear mandate of public policy: Whether the strip search of an employee in the course of drug testing is reasonable.

The Employer urges the Court to hold that the jury's decision was supported by sufficient evidence. The key premise to this conclusion is that submission to the strip search is a reasonable condition of employment. If this premise is true, then the employer is correct: Ms. Ritchey's employment was ended voluntarily because she refused to submit to drug testing administered through reasonable means. If the premise is false, then Ms. Ritchey's employment came to an end under the cloud of the Employer's imposition of an intolerable condition of employment.

Ms. Ritchey urges the Court to hold that an employer's general use of a strip search for drug testing is unreasonable per se. In its opposition to her argument, the Employer substantially justifies its testing procedure by reference to language from a Technical Assistance Publication issued by the Substance Abuse and Mental Health Services Administration, a sub-agency of the U.S. Department of Health and Human Services notes the value of directly observation of specimen provision.

The SAMHSA guidance the Employer relies upon does not support its position. The Employer calls the Court's attention to a technical document published by SAMHSA which describes recommended safeguards for the collection of urine specimens for drug testing. The Employer highlights that direct observation is an example of

measures that may be taken to prevent adulteration. Clinical Drug Testing in Primary Care – SAMHSA Technical Assistance Publication Series 32, U.S. Department of Health and Human Services Center for Substance Abuse Treatment, HHS Publication No. (SMA) 12-4668 (1012), p. 30. The Employer fails to highlight that the preventative measures are only called for if adulteration or substitution is suspected. *Id.*

The SAMHSA publication is not directed to the testing of an employee. *Id.* at p. 1. Rather, the guidance is addressed to clinical practitioners providing primary care in office settings and community health centers. *Id.* It specifically notes that there are critical distinctions between workplace and clinical drug testing. *Id.* at p. 6. Most critically: any recommendation that direct observation be used in workplace drug testing is contrary to the regulations for Federal Workplace Testing Programs. 49 C.F.R. § 40.67.

As noted by the SAMHSA publication, Federal Mandatory Workplace Drug Testing is a substantial source of experience relied upon to define an effective drug testing practice. Clinical Drug Testing in Primary Care – SAMHSA Technical Assistance Publication Series 32, U.S. Department of Health and Human Services Center for Substance Abuse Treatment, HHS Publication No. (SMA) 12-4668 (1012), p. 3. But, drug testing mandated by Federal Law may not involve direct observation

unless there is specific basis to suspect that a sample has been adulterated, substituted, or other subject to tampering. 49 C.F.R. § 40.67.

For drug testing mandated by the Federal Government, direct observation is not permitted as a general practice. This is due to privacy interests that are protected by the Fourth Amendment to the U.S. Constitution. *BNSF Ry. Co. v. U.S. Dept. of Transp.*, 566 F.3d 200, 206 (D.C. Cir. 2009). The use of observed testing procedures is only permissible where there has been some individualized conduct that diminished an employee's privacy interests. *Id.* at 207. It takes more than mere suspicion of drug use to overcome the extreme invasion of a person's privacy interest by direct observation of a urine sample. *Id.* at 208.

Ms. Ritchey's claim is based on common law protections of a person's right to privacy, rather than Constitutional protections, in part because the Employer is not a government actor. The Employer claims that there is no clear right to privacy, relying on a case that found that no clear mandate of public policy existed to protect an employee objecting to any drug testing. *Roe v. Quality Transp. Servs.*, 67 Wn.App. 604, 838 P.2d 128 (1992). The assertion is that there is no intrusion on a person's privacy that could support a claim of wrongful termination of employment.

The common law right to privacy was not fully recognized until 1998. *Reid v. Pierce County*, 136 Wn.2d 195, 206, 961 P.2d 333 (1998). The Court at that time held that individuals have a common law claim against persons who commit a tortious invasion of privacy. *Id.* The Court also confirmed that there is no independent right of for relief based on the privacy protections afforded by the Washington State Constitution. *Id.* at 213. This is because it found that the protections afforded by the State Constitution are fully protected by the common law right of action. *Id.* The primary effect of this ruling is that there is no difference between government or private actors who infringe upon privacy rights. It is the judicially recognized policy of this state that a person shall not be subjected to deliberate acts intruding into her seclusion in a manner that is objectionable to a reasonable person. *Youker v. Douglas County*, 178 Wn.App. 793, 797, 327 P.3d 1243 (2014).

The scope of this right to privacy is further elucidated by statute. The Washington State Legislature has defined a strip search as “having a person remove or arrange some or all of his or her clothes so as to permit an inspection of the genitals, buttocks, anus, or undergarments of the person.” RCW 10.79.070. It has specifically limited strip searches unless there is specific probable cause or reasonable suspicion. RCW 10.79.130. Division Three of this Court has noted that it “cannot conceive of anything

more intrusive to a person's right to privacy than a strip search." *State v. Sweeney*, 56 Wn.App. 42, 49, 782 P.2d 562 (1989). Yet, the Employer claims that the required strip search was a completely reasonable condition of employment.

The Employer's persistent misrepresentation of this case is that Ms. Ritchey objected to drug testing. It uses this misrepresentation to make its argument that there is no clear public policy protecting Ms. Ritchey from the invasion of privacy demanded by the Employer. The Court has made clear: an individual has the right to be free from unreasonable intrusions into her seclusion as a matter of common law. *Youker v. Douglas County*, 178 Wn.App. 793, 797, 327 P.3d 1243 (2014). The use of a strip search as a matter of course as a condition of employment is certainly an unreasonable intrusion on Ms. Ritchey's privacy. The Employer claims that it should be free from any responsibility simply because she chose not to be subjected to such an invasion.

This Court should hold that the evidence does not support the jury's conclusion that Ms. Ritchey's employment was not terminated with either actual or constructive discharge, because requiring an employee to submit to a strip search as part of drug testing procedures without reasonable suspicion of tampering or adulteration of samples is an

unreasonable intrusion onto someone's privacy as a matter of law, and therefore that Ms. Ritchey was wrongfully terminated by her Employer. Based on such holdings, this matter should be remanded to the trial court of determination of damages due to the wrongful termination.

B. Summary Judgment should not be affirmed based on an alleged lack of proof that an accommodation was necessary.

The Employer has rehashed its summary judgment argument regarding the reasonable accommodation requested by Ms. Ritchey. It urges the Court to affirm the Summary Judgment finding on the basis of a lack of proof that accommodations were medically necessary.

The Employer bases its argument in part on the false distinction between observed testing and observation prior to provision of a sample. This is a distinction without difference: either option requires a strip search, as we have defined above. RCW 10.79.070. In spite of this, the Employer claims that the procedure itself provided any necessary accommodation.

The substantive point of dispute is the nexus between Ms. Ritchey's condition and the accommodation that was requested. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147-48, 94 P.3d 930 (2004). Ms. Ritchey had made known to management level staff of the Defendant that her issues stemmed from traumatic abusive episodes during her childhood.

CP 118, 173-74, 181. The question then becomes whether or not this is sufficient to establish that there was an obvious need for accommodation. *See id.* at 148.

The thrust of Ms. Ritchey's argument regarding summary judgment is that the Employer should be estopped from denying the existence of her disability based on previous acceptance of a doctor's note. Such a note would generally be sufficient to establish the medical nexus for an accommodation. *Id.* Conversely, given the description that Ms. Ritchey had provided to her employer, there is an apparent nexus between her history of abuse and need for an accommodation to avoid the strip search required by the employer.

Thus, presuming that the Court agrees that the Employer should not be permitted to deny the existence of her disability, there is no basis to grant summary judgment on the basis of a missing nexus between her disability and the accommodation requested.

C. The Court erred in vacating an Order of Default on the basis of inexcusable neglect.

The Employer urges the Court to find that Mr. Cid's failure to forward the summons and complaint to his attorney is excusable neglect. The Court has historically maintained a very liberal outlook on vacating an order of default. *Hwang v. McMahon*, 103 Wn.App. 945, 950, 15 P.3d

172 (2000). There is clearly a preference to determine cases on their merits rather than by default. *Id.* But, there is also some expectation that parties will follow the court's rules. *Id.* The failure to ever enforce the timeline for a response would empty the rule of any meaning. Therefore, the party seeking relief from an order of default must show at least excusable neglect for failing to respond in a timely manner. *In re Estate of Stevens*, 94 Wn.App. 20, 30, 971 P.2d 58 (1999).

In this case, a default order was requested, and granted. Ms. Ritchey did not move for entry of an order of default. The Employer was granted relief from the order of default. The Trial Court's determination that relief from default was appropriate will be reviewed for an abuse of discretion. *Morin v. Burns*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *Id.*

The trial Court did in fact abuse its discretion in this case. The owner of the Employer, Frank Cid, received the summons and complaint from the agent of service, and failed to forward it to counsel. This is a breakdown of internal procedure. *See Johnson v. Cash Store*, 116 Wn.App. 833, 849, 68 P.3d 1099 (2003). Case law is clear that such a breakdown is not excusable neglect. *TMT Bear Creek Shopping Cntr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn.App. 191, 212-13, 165 P.3d

1271 (2007). The Motion to Vacate should not have been granted where there was not excusable neglect. *Prest v. American Bankers Life Assur. Co.*, 79 Wn.App. 93, 99-100, 900 P.2d 595 (1995). The finding of excusable neglect in this case was an abuse of discretion.

Because the finding was an abuse of discretion, the Trial Court's order vacating the order of default should be reversed, and this matter should be remanded to the Trial Court for proof of damages and entry of judgment.

II. CONCLUSION

For the reasons set forth in this brief, along with the arguments set forth in her opening brief, Ms. Ritchey requests the Court to reverse the trial court's decisions, and to remand this case for a new trial on the issue of damages.

DATED this 20th day of November 2019.

MCGAVICK GRAVES, P.S.

By: 
Matthew J. Ley, WSBA #46074
Of Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I served a copy of the foregoing Appellant's Opening Brief to:

Richard H. Wooster
Kram & Wooster, P.S.
1901 South I St.
Tacoma, WA 98405

Signed at Tacoma, Washington this 20th day of November 2019.

McGAVICK GRAVES, P.S.

By: 
Matthew J. Ley

MCGAVICK GRAVES, P.S.

November 20, 2019 - 10:51 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53303-1
Appellate Court Case Title: Kimberly Ritchey, App v. Sound Recovery Centers, LLC, Resp
Superior Court Case Number: 16-2-07384-6

The following documents have been uploaded:

- 533031_Briefs_20191120105033D2696914_9905.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Reply Brief.pdf

A copy of the uploaded files will be sent to:

- Connie@kjmmlaw.com
- rich@kjmmlaw.com

Comments:

Sender Name: Matthew Ley - Email: Mjl@mcgavick.com

Address:

1102 BROADWAY STE 500

TACOMA, WA, 98402-3534

Phone: 253-627-1181

Note: The Filing Id is 20191120105033D2696914