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Court of Appeals
Division II
State of Washington
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COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

CATHERINE THORP,

Appellant,

vs.

NEW LIFE CHURCH ON THE PENINSULA,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

In this case, an employer, a Church, fired its bookkeeper, Ms. Thorp, because she was not married to Casey, the man with whom she was in love and with whom she was living. This employment decision was made based on consideration of Ms. Thorp's marital status vis a vis Casey. Washington statutory law (the Washington Law Against Discrimination, or WLAD) prohibits an employer from terminating an employee because of marital status. The employer clearly violated the statute. The WLAD, however, includes a provision which excludes non-profit religious organizations from the definition of an employer. Ms. Thorp sued under common law, alleging wrongful termination in violation of public policy, and pointing to the WLAD's prohibition against discrimination based on marital status in employment as establishing the public policy which was breached by the termination. When the Church argued that the WLAD specifically excluded churches from its enforcement provisions at summary judgment, the Trial Court dismissed the common law claim despite Ms. Thorp's having presented the Court with the Washington Supreme Court's decision from *Bennett v. Hardy* in which the Court found that, although the WLAD also excludes small employers with under eight employees from enforcement under the Act (in the same sentence of the statute which excludes nonprofit religious organizations), a Plaintiff who had been discriminated against based on age by an employer with fewer than eight employees could bring a common law claim for wrongful

termination, using the WLAD to establish that Washington Public policy prohibited age discrimination in employment decisions. (CP 386-389) The Appellant is asking the Court to Apply *Hardy v. Bennett* to this case, reverse the Trial Court's Order granting Summary Judgment, and remand this case to the Kitsap Superior Court for trial under the common law cause of action for wrongful termination in violation of public policy.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred in finding that summary judgment was appropriate regarding the Appellant's cause of action for wrongful termination in violation of public policy.
2. The Superior Court erred by failing to recognize the Washington Supreme Court's decision in *Hardy v. Bennett* which holds that the exclusion of a particular type of employer from coverage by the Washington Laws Against Discrimination (WLAD) does not exclude the employer from being a Defendant in the common law tort claim, wrongful termination in violation of public policy, even where the public policy alleged to have been violated is derived from the statute which excludes coverage of the employer.

III. APPELLANT'S STATEMENT OF THE ISSUES

1. Where an employer insists that an employee breach a residential lease with a tenant and terminates her for refusing to do so, has the employer wrongfully terminated the employee for refusing to participate in an illegal act under the Thompson test (wrongful termination where an employee is terminated for refusing to participate in an illegal act)?
2. Does the WLAD establish that Washington State has adopted a public policy against allowing employers to terminate an employee because of the employee's marital status?
3. Did New Life Church violate Washington public policy when it terminated Ms. Thorp because she was in love with, but not married to the man with whom she was living?

IV. APPELLANT'S STATEMENT OF THE CASE

Caty Thorp and Tanner Thorp were married in 2004. He is a chef and she is an accountant and professional bookkeeper. In 2011, the couple had a son named Adrian. Around 2012-2013 they opened a restaurant in Sequim, which was ultimately unsuccessful. In 2013, they moved to Silverdale, WA. Unfortunately, during that time, Tanner struggled with alcoholism, a problem which continued to affect him throughout the coming years. When they moved to Silverdale, Caty started attending a church called Crossroads. The Pastor there was Rick Burleson. Pastor Burleson eventually started his own church called Connections and Caty continued to attend there with Mr. Burleson as her pastor. During that time, the Thorp family, Caty, Tanner and Adrian, also began to attend New Life Church, a larger church in Silverdale which had a children's program that Adrian could participate in. The family would attend New Life Church on Saturday and Caty would go to Connections for Sunday services on her own. (CP 303-304, 297)

Caty observed that New Life Church had a large business side. She met and got to know Sarah Plumb, who worked in the business office. Eventually, she learned of a job opening for a bookkeeper position and applied for the job. There was a requirement that she fill out a consent form for the Church to conduct a background check on her, which she did. In order to submit the form online, she had to "click" a box which said "I accept." The page long boilerplate language gave consent for the Church

to conduct searches of her public financial records etc. It also included a phrase “Should my application be accepted, I agree to be bound by the Constitution and By-Laws and policies of NLC, and to refrain from unscriptural conduct in the performances of my services on behalf of the church.” (CP 302-303, 313-315) There was also a job description, which stated that the applicant would be expected to love Jesus, love the church, and participate in team meetings and special events of the church in the preamble. In the portion that actually described the job, it stated:

THE JOB | What you will do is...

The newlife Bookkeeper takes ownership of ensuring all A/P transactions (bills, reimbursements, credit and PEX card expenses, etc.) for the Network, Campuses, and Events are facilitated on time and recorded correctly in Quickbooks. This includes working with a wide variety of staff and volunteers; by guiding them through newlife's processes and helping them troubleshoot issues as they arise. The Bookkeeper also works together with the existing A/R team, including both staff and volunteers, to ensure that all incoming funds are accurately recorded in QuickBooks. This position is also responsible for Payroll, IRS Tax compliance, production and analysis of high quality financial reports to Campus and Ministry Leads at month-end, year-end, and other times as requested.

(CP 302-303, 316-317)

New Life Church hired Caty as its bookkeeper in March of 2015. She worked in that position until her termination on May 19, 2017. During the two years she worked for New Life Church, Caty worked in what was known as the “network office” which was the strictly business side of the church. It was a particular office area where all of the accounting, Human Resources work, and business meetings were held. There was a separate space for worship and religious/congregation-based activities. Although

she and the rest of the employees attended the church and participated in various church functions, she was never trained or asked to give any religious instruction. She was strictly a bookkeeper and did bookkeeping and accounting based work such as verifying and entering accounting related data, being responsible for accounts receivable, accounts payable, reconciling the books, and preparing financial reports for the Church's business management. (CP 303-305)

Sadly, Tanner's struggles with alcoholism grew worse. The couple talked about separating. In October of 2015, Tanner had to spend a month in a rehabilitation center out of state. This event marked the last straw for the marriage. Caty and Tanner talked it over and agreed that they would separate with Caty staying in the house and having primary custody of Adrian. They agreed that Tanner would move out in September of 2016. (CP 297, 306-307) This was a difficult time, of course, for Caty. She spoke with her co-workers, Jennifer Yost and Sarah Plumb, about it and received approval and moral support from them about her decision to pursue a divorce and separate from Tanner. (306-308) During the summer of 2016, Caty became pregnant with her and Tanner's son. This was an unplanned event and Caty did not know she was pregnant until July of 2016. (297,307) Tanner had been working towards moving out in September. This made things more complicated, but the couple discussed it and decided to continue with the plans for separation and for Tanner to move out, which he did on September 15, 2016. (CP 307)

After Caty and Tanner separated, Caty lived in the house with Adrian, but found that she felt afraid and was concerned about living in the house alone, pregnant, with a small child. She knew that Casey, a friend who she had known since middle school, and who had been living at his grandmother's house while remodeling it, was planning to move out of that house and was looking for a place to live. She discussed the possibility of having Casey move into the house as a tenant with Tanner, who was understandably somewhat reticent about the idea. They decided to seek counsel from Caty's pastor at Connections, Rick Burleson. He spoke with the couple and let them know that he did not think it would be objectionable to have Casey move into the house with Caty and Adrian. Tanner consented to the arrangement. (CP 297-298, 307-308) Caty also discussed the move with Mark Middleton, a pastor at New Life Church, as well as her co-workers, including Sarah Plumb, Jennifer Yost, Barb Judkins, and Jeff Welk. As with the decision to pursue a divorce, they were supportive of the decision at the time, especially considering that Tanner did not object. (CP 307-308) Caty and Casey signed a formal residential lease for a term of six months, from December through June of 2017 and Casey moved into the house. (CP 308, 318-328)

Over the next couple of months, Caty and Casey lived together compatibly and grew to begin to have romantic feelings for one another. Caty knew that she needed to be honest about her feelings with Tanner and told him that, although there had been no physical relationship, she

and Casey had developed feelings for each other and that she could see a future with him. (CP 308) Tanner had some emotional turmoil about the news, understandably. On New Year's Eve, he spoke, briefly, with Wes Davis, the founder and lead Pastor of New Life Church. Pastor Davis asked Tanner if he was having problems with alcohol again, and Tanner confided that he was having difficulty with Caty and Casey living together and accepting that his marriage to Caty was truly over. (CP 298) Pastor Davis is a very busy person, with about 3,000 people in his various congregations. He is the lead pastor of New Life Church, a position granted to him for life by its charter, and the last word on any decision made in the Church. (CP 271-273,284) Although they did have the brief meeting on New Year's Eve, he did not have time to devote much effort to counseling Tanner. Tanner reached out to another pastor in the New Life Church, Mark Middleton. The two met for coffee, which, apparently is a typical format for counseling, since, unlike, for example, the Catholic Church, there is no formal structure like a confessional for one on one pastoral counseling. (CP 277, 298-299)

At the meeting, Tanner shared the fact that he was having trouble with his emotions over Caty living with Casey and the news that they had feelings for each other. In response, Pastor Middleton told Tanner that he would have to report this immediately to Sarah Plumb, Caty's supervisor because it was wrong. (CP 298-299) Tanner did not know, at the time, that Pastor Middleton was engaging in an extra-marital affair with a youth

group counselor at New Life Church while his own wife was pregnant with twins. (CP 279-281) Thus the abject hypocrisy of the situation was lost on him, at least in the moment. Tanner did immediately remind Pastor Middleton that they were in a confidential setting for counseling and begged the Pastor not to breach his confidence. He told the Pastor that the last thing he had wanted was to cause trouble for Caty or for her to lose her job. Pastor Middleton refused, outright and immediately breached the confidentiality of the relationship to take the news of Caty's confession to Tanner about her feelings for Casey to Caty's supervisor and co-workers. (CP 298-299) Tanner felt horribly betrayed. His relationship with Caty was already strained because of the separation and divorce. With the betrayal from Middleton, he was sure that the result would be added stress on Caty at work, and possibly the loss of her job and income. Unable to stop Middleton, Tanner waited, with a heavy heart, for the inevitable phone call from Caty. (CP 298-299)

Caty was working, as usual, that Thursday (February 2, 2017) at the business office at New Life Church when, around noon, her supervisor, Ms. Plumb, called her into a private meeting. She immediately began to interrogate Caty, asking her why Caty had told Tanner that she (Ms. Plumb) had supported Caty's decision to pursue a divorce, demanding that Caty explain her living situation, and pressing her to admit that she and Casey had a romantic relationship, acting as if she had never known any of this. Caty was shocked, but realized, immediately, what

must have happened, and knew that Tanner's private conversation with Middleton had been shared with the office staff. (CP 308-309) The walk back from the private meeting with Plumb through the office was humiliating. The office was "buzzing" about her living with Casey. As she walked through the room, she actually saw one co-worker, Jeff Welk, looking at Casey's face book page on his computer. She went to her phone to call Tanner, as he had known she would. (CP 308-309) Tanner took the call that he had been dreading since Pastor Middleton had refused to keep his confidence that morning. He apologized, profusely, to Caty and assured her that he had demanded the Middleton keep their counseling session confidential and but that the Pastor had refused. (300,308-309)

That night, Sarah Plumb called Caty and ordered her to report to the New Life Church business office the following day, which was Caty's normal day off. She arrived that Friday and met with Josh Hinman, the CEO of the business side of the church, and Sarah Plumb, Caty's supervisor. They told Caty that she had until Monday to force Casey to move out of the house or she would be terminated. When she objected and said that they had a binding lease, the two told her they did not care about the lease. They began to brow-beat her, telling her that she was "wrong" and "un-Christian" for living with Casey. The meeting went on for about an hour. Caty, who, at this point was right about her eighth month of pregnancy, was extremely emotionally distressed and began crying, then started having painful contractions in the office. She told the two that they

were upsetting her and that she was starting to have contractions. Unphased, Hinman told her coldly, "I hope you don't go into labor this weekend" and left her with the ultimatum of moving Casey out by Monday or losing her job. (CP 309)

That weekend, Hinman called Caty at home and insisted that she drive to the Church on Saturday and to surrender her computer (on which she did her accounting work). Caty drove to the church and left the computer at the business office. By Monday, she had not moved Casey out of the house. At work, Hinson told her that she was granted an "extension" to move Casey out until that coming Wednesday. Hinson bombarded her with scripture on her cell phone. she was confronted with an unrelenting barrage of interrogation and harassment from Plumb and Hinson while in the office. When Caty explained that there was a binding lease, they insisted she ignore it. They told her that if she did not want to breach the lease, she could move out of her home herself. They offered bribes, telling her that the church would throw her a big baby shower and come together to support her and the baby if she would move Casey out, and followed that with the assurance that if she did not move Casey out she would receive no support from the church or the congregation. They offered to pay her money by raising her salary if she would force Casey to move out and told her that they would send the "mission boys" over to move him out (The Mission House is a program for recovering addicts who perform labor projects). As Caty insisted that she felt that she was doing nothing

wrong and that her “walk with Jesus was pure” the two continually told her that she needed to “submit” to them as higher authorities. Hinman shared stories of what he viewed as his own troubled childhood, explaining that her decision to live with Casey would make her a bad mother and condemn her new baby to a difficult life. They even went so far as to assure her that, if she submitted to their will and removed Casey from her home, the Church would find a more suitable mate for her. (CP 309-310) Tanner, when Caty told him about the treatment she was receiving at work, called Hinman and Plumb directly. He pleaded with them over multiple conversations not to hurt Caty. He told them that what she needed from the Church and from them was grace. He told them she deserved someone to “walk beside her right now.” Hinman and Plumb steadfastly insisted that Caty was not, in their opinion “walking the path with Jesus” and that unless Caty forced Casey to move out, she would lose her job. (CP 300-301) Caty was very emotional and, with the severe stress of the situation, feared for her health and for the baby. She contacted her doctor who immediately wrote a letter for her to take to her employer warning that undue stress in her home and work environment could cause complications in her pregnancy. (CP 300,309-310, 330)

At this point, New Life Church’s lead Pastor, Wes Davis, stepped in. He met with Caty. He assured her that he and the Church were most concerned with her health and the health of the baby. He ordered Hinman and Plumb to stop discussing the Casey living situation with Caty and told

her that the Church would grant her six weeks of paid maternity leave. He assured Tanner that Caty would not be fired. (CP 259-261,301,310) He did not initiate any kind of investigation into Hinman and Plumb's actions. (CP 261-262) After that meeting, Hinman and Plumb did stop haranguing Caty about Casey. However, they did take a series of adverse employment actions to let her know they had not forgotten. Plumb told Caty that she was being removed as head of the "counting team," a group of volunteers who met once a week to tally up the donations that the Church had taken in. whereas Caty had always worked from home about half of her work week (a good thing for a single mother of a small child who was well into a pregnancy), Plumb notified her that she would be required to spend all of her time at the Church's business office and not work from home anymore. Caty was moved from her large office to a small desk which was placed in the Human Resources offices right in front of the Human Resource director's desk, similar to the way school children who are naughty have to move their desk to the front of the classroom next to the teacher's desk. She was required to sit at this desk during all work hours. Ms. Plumb, who had been mentoring Caty, told Caty that she would no longer mentor her and that she would no longer be working with Caty. Caty was instructed to start putting together a "standard operating procedures" document so that someone else would be able to do her job. For the last couple weeks before she had her baby, Caty spent her time at her little desk in the Human Resources office either trying not to cry, or

trying to stop crying as she was shunned and humiliated in front of all her co-workers. (CP 310-311)

As it happened, Caty had her baby (a boy they named Sawyer) on the same day that Pastor Middleton's wife had twins. They were in the same hospital, even on the same floor after the births. Caty watched as a steady stream of well-wishing church members came by to visit Ms. Middleton and the twins, but not one member of the church stopped by to see her and Sawyer. (CP 301,311)

After 6 weeks of maternity leave, Caty returned to work on May 2, 2017. Hinman and Plumb told her that her job had changed. She was not going to be allowed to work from home, which presented child care issues. She was instructed to continue to work on instructions so that someone else could do her job. During this time, she found a posting online for her job. When she asked Plumb why they were advertising for her job, Plumb insisted it was a mistake and the posting disappeared. (CP 311, 332-333) Hinman and Plumb presented Caty with a new job description, which they wanted her to sign. This one included a requirement that the bookkeeper "Loves their family, is "on the mission with Jesus, and Loves His church." (CP 311, 335-336) Things were going well at home as Tanner, Casey, and Caty were all coming to grips with new baby in their lives. On May 19, 2017, Tanner came to see Caty and they had lunch together. Despite her misgivings about the new job description, hours, and the advertisement for her job, Tanner reminded Caty that Pastor Davis had promised she would

not lose her job and assured her that everything would be all right. (CP 300) That day, Josh Hinman and Sarah Plumb presented Caty with a termination letter. (311, 338-339) New Life Church terminated her employment as a bookkeeper because she was living with Casey, a man with whom she shared romantic feelings, but was not married to him. (CP 262-266) This apparently caused some “confusion” for some staff members, none of whom Pastor Davis could name, which led them to be “concerned” and “upset” about Caty’s living situation. (CP 274)

New Life Church, as a religious organization, is free to opt not to provide unemployment insurance for its employees, and, at least when Caty was an employee, the Church did not provide this protection for its employees. Thus, Caty was terminated with her new baby and no unemployment benefits. Its Lead Pastor claimed to be unaware that his church opted not to provide this protection for members of the flock. (CP 275-276) Jennifer Yost, the Church’s Human Resources person, and who had been a friend to Caty for a time, had assured Caty that she would write her a recommendation letter, but withdrew the offer and would not support Caty’s job search when she found out that Caty planned to challenge the termination.

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Because of the legal action you are pursuing I'm unable to write you a letter of recommendation. Best of luck.

Why? Even a personal letter??

I would not be able to offer you a personal recommendation either. Not with a clear conscience. I hope you find what you're looking for out there caty.

(CP 250)

Despite the total lack of support from her former employer, Caty had a promising job interview with a gentleman who, it turned out, was a member of New Life. After a brief conversation with Pastor Davis, which the Pastor admits to having had, but claims not to remember the content of, the potential employer withdrew his offer. (CP 275-276)

Epilogue

About nine months after Caty's termination, Tanner was at a New Life Church meeting, listening to Pastor Davis give a sermon when he was shocked to hear Mr. Davis announce that Pastor Middleton had been relieved of duty after it was discovered that he had been having an affair with someone from the youth group (an adult, not a minor). (CP 279-283, 302-303) This affair had ranged throughout the same time period that Mrs. Middleton was pregnant and when Pastor Middleton had so vehemently insisted on breaching pastoral confidentiality to expose Caty's relationship with Casey because it was "wrong." (CP 302-303) Apparently, when

Pastor Middleton had been sent to start a new church in the Tri-Cities area, the former lover had called Pastor Davis and reported the affair. After Middleton had confessed, he was dismissed, but Pastor Davis announced that the Church had decided to “walk beside” the Middletons and Mr. Middleton was paid a handsome severance. (CP 279-283, 302-303) New life Church videos and broadcasts Pastor Davis’ sermons. the Pastor decided to “edit” the part of the sermon about Middleton. (CP 278-279)

Caty started her own bookkeeping business. She and Tanner were granted a divorce by the County of Kitsap, noting the official date of the end of the marital community to be September 15, 2016, the date that Tanner moved out of their house. (CP 311-312,341 Caty and Casey were married about six months after Caty’s divorce was finalized. (CP 311-312, 363) Tanner gave them a very nice toaster oven as a wedding gift. Casey and Tanner have developed a healthy, amicable relationship and both participate fully in the children’s upbringing and daily lives. (CP 302,311-312)

Wes Davis, the self-appointed Lead Pastor for life of New Life Church (271-273) appears still somewhat confused regarding what Jesus has to say about grace and mercy, specifically about whether there is a business exception when it comes to employment:

A. I don't have any vendetta against her.

Q. But you also didn't show her mercy or grace, did you?

A. I -- I -- I would feel like I showed mercy and grace towards her.

MR. DOLAN: Objection; unfair characterization.

BY MR. JOHNSON:

Q. Mercy not being -- being, as we discussed earlier, not taking an action that the person deserved.

A. I'm not sure what your question is, but like as far as like her relationally, I'd be willing to grant grace and mercy. So I guess I -- I see a distinction between, in some ways, relational or relationship, and then there's a work relationship.

Q. So are the business and the church two different things?

A. They're connected. There's overlap.

(CP 268-269)

V. STANDARD OF REVIEW

This case was dismissed on the Respondent's motion for summary judgment. In reviewing an order granting summary judgment, the Appellate Court considers all facts and reasonable inferences in the light most favorable to the nonmoving party and reviews all questions of law de novo. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wash.2d 692, 698, 952 P.2d 590 (1998). *Erickson v. Chase*, 156 Wash.App. 151, 231 P.3d 1261 (Wash. App., 2010)

VI. ARGUMENT FOR REVERSAL

As the law stands now, there are two tests generally applied to determine whether a Plaintiff can present a claim for wrongful termination in violation of public policy. The first is a more general test, recognizing

four situations in which this tort can be applied: 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 on jury duty; 3) where employees are fired for exercising a legal right or privilege, such as filing a workers compensation claim; and 4) where employees are fired in retaliation for reporting employer misconduct i.e. whistleblowing. *Thompson v. St. Regis Paper Co.*, 102 Wash.2d 219, 276, 685 P.2d 1081 (1984). Citing *Gardener v. Loomis Armored Inc.*, 128 Wn.2d 931, P.2d 377 (1996).

Where the facts of the case present an issue, which does not readily fall into one of the four categories, the Courts will look to a four-part test known as the “Perritt” framework. When reviewing a case under this framework the main focus is on determining whether the reason for the termination and the termination itself would tend to jeopardize Washington State’s interest in seeing that one of its public policies is followed. In *Gardner v. Loomis Armored, Inc.*, 128 Wash.2d 931, 936, 913 P.2d 377 (1996) the court adopted a four-part framework based on a treatise written by Henry Perritt to resolve a wrongful discharge suit that did not fit neatly into one of those four recognized categories. *Id.* 128 Wash.2d at 941, 913 P.2d 377 (citing HENRY H. PERRITT JR., WORKPLACE TORTS: RIGHTS AND LIABILITIES (1991)). The Perritt test has four factors: "(1) The plaintiffs must prove the existence of a clear public policy (the clarity element). (2) The plaintiffs must prove

that discouraging the conduct in which they engaged would jeopardize the public policy (the jeopardy element). (3) The plaintiffs must prove that the public-policy-linked conduct caused the dismissal (the causation element). (4) The defendant must not be able to offer an overriding justification for the dismissal (the absence of justification element)." *Id.* (emphasis and citations omitted). *Martin v. Gonzaga Univ.*, 191 Wash.2d 712, 425 P.3d 8370 (Wash., 2018).

A. The Thompson Test: The Church's demands would have required Ms. Thorpe to breach a lease thus satisfying the Thompson test.

The evidence also shows that Ms. Thorp and Casey Drachenberg entered into a residential lease with a term of six months, running from December of 2016 to June of 2017. When Ms. Thorp brought this up, New Life insisted that she simply breach it. (CP 308,319) While this is not necessarily criminally "illegal" it is illegal in the sense that Washington law offers legal remedies for a breach of a residential lease under the Washington Residential Landlord Tenant Act and in common law. (See *Keron v. Namer Inv. Corp.*, 484 P.2d 1152, 4 Wn.App. 809 (Wash. App., 1971) for a brief discussion of statutes of limitations for breach of lease vs. wrongful eviction actions)

B. The evidence in the record satisfies the Peritt test, establishing Ms. Thorp's claim for wrongful termination in violation of public policy. The Peritt test

As set forth above, the Peritt test has four elements. They are addressed in order, below.

1) The plaintiffs must prove the existence of a clear public policy (the clarity element) - Washington has clearly opted to protect employees from discrimination by employers and landlords based on the employees' marital status.

It is well-established and crystal clear that the right to marry is a central aspect of the right to liberty, privacy, association, and identity. Fourteen times since 1888, the United States Supreme Court has stated that marriage is a fundamental right of all individuals. In these cases, the Court has reaffirmed that “freedom of personal choice in matters of marriage” is “one of the liberties protected by the Due Process Clause,” “essential to the orderly pursuit of happiness by free men,” and “sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect.” (CP 246)

Marital status, however, was not always a protected class under Washington law. In 1973 the WLAD was amended to prohibit discrimination on the basis of marital status. In addition to existing categories of race, creed, color and national origin that had been part of the original 1969 law. Although the federal anti-discrimination laws, specifically Title VII, protect classes of sex, race, national origin, and religion, it does not include a protected category for marital status. Washington State has clearly made it a matter of Washington State public

policy to include and recognize marital status as a protected category when it comes to discrimination in an employment relationship.

The instant case also provides an interesting twist in that it relates to housing as well as employment. The Church did not have any problem with the idea of Ms. Thorp having a romantic relationship with her future husband while they were not married to each other. It took exception to the two of them living together while their marital status was unmarried. Discrimination in housing based on marital status is illegal in Washington. The Washington State Law Against Discrimination (WLAD), found in the Revised Code of Washington (RCW) 49.60.222, makes it illegal to refuse to engage in a real estate transaction or provide different terms, conditions or privileges to a tenant, or prospective tenant, because of the tenant's marital status. After being added to the law, it was less than a year before marital status protection was being examined. Both the Washington State Human Rights Commission (HRC), the agency that enforces the WLAD, and the legislature further defined the law. In April 1974, the HRC issued Declaratory Ruling No. 9, which advised Evergreen State College that it was an unfair practice for Evergreen to permit occupancy of its student housing units by married couples, but not by unmarried couples of the opposite sex. *Washington State Human Rights Commission, Declaratory Ruling No. 9*, April 18, 1974.

A marital status case quickly came before the court in 1976 in the case of *Loveland v. Leslie*. In this case, Steve Leslie contacted the owners

of an apartment in North Bend, WA and told Ruby Loveland that he was interested in the 2-bedroom apartment for himself and a male roommate. Ms. Loveland's response was that the apartment would only be rented to married couples. The King County Superior Court agreed with the HRC's determination that marital status discrimination had occurred, and the property owners appealed the finding to the Washington State Court of Appeals. In 1978 Appeals Court agreed that the owners' refusal to rent to two men amounted to marital status discrimination. *Hugo Loveland, et al. v. Steve Leslie, et al.*, 21 Wn. App. 84; 583 P.2d 664 (1978) The owners argued that the term "marital status" was unconstitutionally vague, but the Court disagreed, finding that the term is commonly understood to relate to the existence or absence of a marriage bond.

As for the first element of the Perritt framework test, the Court should find that the State of Washington has wholeheartedly embraced, as a public policy, a strong respect for the individual's rights when it comes to marital status, and has made it the State's public policy that individuals may not be penalized in their employment or in their living situations for their choices as to marital status.

- 2) ***The plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy (the jeopardy element).*** – Allowing employers to dictate whether couples can live together while married, especially when housing is completely unrelated to the employee's job jeopardizes the State's interest in the protection of marital status in employment and housing.

Allowing employers to dictate whether their employees should be married or not, or to control their housing decisions based on marital status would certainly erode the State's public policy of supporting marital status as an individual's protected choice. Particularly because Ms. Thorp's housing has completely separate from her employment (she lived in her own house), the Church's desire to control Ms. Thorp's private and personal living arrangements by threatening her employment presents a starkly clear example of how the public policy of protecting citizens' rights to decide their marital status would be jeopardized by allowing employers to terminate employees who were unmarried and living together. This satisfies the second part of the Peritt test.

3) *The plaintiffs must prove that the public-policy-linked conduct caused the dismissal (the causation element).* – The Respondent has admitted that it terminated Ms. Thorp because she was living with a man to whom she was romantically attracted and to whom she was not married.

There is no question as to whether Ms. Thorp's marital status was the cause of her termination. New Live Church admits that her marital status as it related to her living situation was the reason for her termination. New Life Church terminated her employment as a bookkeeper because she was living with Casey, a man with whom she shared romantic feelings, but to whom she was not yet married. (CP 262-266) The third element of the Peritt test is satisfied.

- 4) *The defendant must not be able to offer an overriding justification for the dismissal (the absence of justification element).* – This is an affirmative defense that the Respondent has neither plead in the Answer nor asserted in this case.**

As for the final element of the Perritt test, the employer has not offered any overriding justification for its actions other than a general moral objection to Ms. Thorp living with a man to whom she was not married. As it stands, Washington law recognizes this as an affirmative defense and therefore a jury issue. WPI 330.51 is the practice instruction which applies to wrongful termination in violation of public policy and the affirmative defense of overriding justification. In the Commentary, it is noted that case law has yet to define what is an “overriding consideration.” This puts this element squarely into the realm of being a jury question.

COMMENT

This instruction is new for this edition.

The employer's affirmative defense if it terminated the employee is that the termination was justified by an overriding consideration. Rickman v. Premera Blue Cross, 184 Wn.2d 300, 314, 358 P.3d 1153 (2015) (citing Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 947–950, 913 P.2d 377 (1996)). Thus, there could be a mixed motive situation if the employer terminates for an allegedly proper reason yet a substantial factor in the decision involved a violation of public policy. The employer must prove not only a proper motive but that this motive was the “overriding consideration” in the termination.

What constitutes an “overriding consideration” is not defined in the case law.

New Life Church has asserted, without any doubt or hesitation, that the only reason for terminating Ms. Thorp was her marital status with Casey. She was in love with him and living with him, but not yet married to him. New Life Church has never offered any other reason for termination. Neither did it plead the affirmative defense of overriding justification in the Answer (CP 12-21) Washington is a notice pleading state and merely requires a simple, concise statement of the claim and the relief sought. CR 8(e). CR 8(c) requires a party to plead an affirmative defense in the party's answer or it is waived. A party must give the opposing party fair notice of the affirmative defense in its pleadings. *Gunn v. Riely*, 185 Wn. App. 517, 528, 344 P.3d 1225 (2015). *Smith v. Stout* (Wash. App., 2019) Because New Life Church failed to plead the affirmative defense of overriding justification, because it has never sought to argue that it had any reason for termination other than Ms. Thorp's marital status, and because the issue of what is or is not an overriding justification for a termination is a jury issue, the fourth and final factor of the Peritt test is satisfied. The record in this case and the current law in the State of Washington support Ms. Thorp's common law claim for wrongful termination in violation of public policy.

C. The Supreme Court, in *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (Wash., 1990) held that the WLAD's specific exclusion of employers with fewer than eight employees operated only to preclude a WLAD claim, but not to preclude a tort claim for wrongful termination based on the public policy that the WLAD asserted. The same applies to Religious nonprofits which are excluded in the same sentence in the statute.

One issue that should be addressed is the fact that the WLAD specifically excludes "any religious or sectarian organization not organized for private profit" from the requirements and prohibitions in the Act. The Trial Judge may have erred by deciding that, since the legislature intended to exclude nonprofit churches from the statute, the statute's prohibition against discrimination in employment and housing based on consideration of marital status cannot be used to establish the public policy element of the Peritt test where the Church is concerned. Fortunately, the Washington Supreme Court has considered and clearly and directly resolved this issue in Ms. Thorp's favor.

The instant case appears to square with the facts and findings in *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (Wash., 1990). In that case, the Washington Supreme Court reviewed a case where a woman sued a small employer (with fewer than 8 employees) under the WLAD and for wrongful termination in violation of public policy, as a tort. The WLAD specifically excludes coverage over employers who have fewer than eight employees (in the same sentence which excludes religious organizations):

"Employer" includes 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 46.60.040 (11)

The trial court had found that, because employers with fewer than eight employees were specifically excluded, the WLAD did not apply, and dismissed the common law tort claim for wrongful termination in violation of public policy as well. The Supreme Court agreed that the WLAD did not apply, however, the next question it considered was whether the fact that the legislature specifically excluded coverage for employers with fewer than 8 employees from the WLAD meant that the WLAD does not offer a basis for claiming that Washington Public Policy is against employment discrimination for small employers? Similarly, the Trial Court below was faced with the question, "Because the legislature specifically excluded non-profit churches from the WLAD, does that mean that Washington Public policy is not against allowing churches to engage in employment discrimination prohibited by the act?" The *Bennett* Opinion settles that matter by looking to the statute itself:

"Significantly, RCW 49.60.020 expressly states that nothing in this chapter shall be "construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his civil rights." "This language indicates legislative recognition that other means of redress than those in the state Statute should be available." *Seattle Newspaper-Web Pressmen's Union Local 26 v. Seattle*, 24 Wash.App. 462, 467, 604 P.2d 170 (1979).

Bennett at 927

The Court noted that “RCW Ch. 49.60 is a broad remedial statute evidencing the Legislature's desire to confront many forms of discrimination. See *Bulaich v. AT & T Information Sys.*, 113 Wash.2d 254, 258, 778 P.2d 1031 (1989). The statute's purpose section declares discrimination to be a "matter of state concern, that ... threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state." RCW 49.60.010.” The Court found that applying the statute’s limiting language outside of the WLAD statute itself would be inconsistent with the stated goals of the statute itself:

“Ultimately, in resolving a question of statutory construction, this court will adopt the interpretation which best advances the legislative purpose. *In re R.*, 97 Wash.2d 182, 187, 641 P.2d 704 (1982). It would be inconsistent with the express statements of broad purpose quoted above to apply any limiting aspect of RCW Ch. 49.60 outside the chapter itself.” *Bennett* at 928

The Holding on this issue was clear: “In conclusion we hold that the employer size definition of RCW 49.60.040 does not apply outside chapter 49.60 and so does not operate to bar either of the claims recognized above.” *Bennett* at 929 The same conclusion must apply to the question of whether the legislature’s decision to exclude non-profit church employers from the WLAD would preclude a tort claim for wrongful termination in violation of public policy based on the WLAD’s protection of marital status. Whereas the WLAD may not offer Ms. Thorp any relief directly, it

does set forth, as it did for Ms. Bennett, the grounds for a wrongful termination tort claim outside of the statute.

VII. CONCLUSION

The Trial Court erred in dismissing Ms. Thorp's common law claim for wrongful termination in violation of public policy. Washington has very clearly asserted a public policy in favor of protecting individuals' rights to determine their own marital status and against allowing discrimination against individuals by employers based on marital status. There never has been any doubt or even an assertion that Ms. Thorpe was fired because of anything other than her marital status, the fact that she was living with a man who she loved but was not married to. The Plaintiff respectfully requests that this case be remanded to the Kitsap Superior Court for a trial under the cause of action for wrongful termination in violation of public policy.

Respectfully submitted



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CERTIFICATE OF MAILING

SIGNED at Port Orchard, Washington

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 21st day of November, the document to which this certificate is attached, Brief of Appellant, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

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