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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CATHERINE THORP,

Appellant,

v.

NEW LIFE CHURCH ON THE PENINSULA,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Can a church be liable for terminating an employee who rejects the church's religious beliefs and practices? The trial court properly ruled that the answer is "no," and dismissed the case. This Court should affirm its ruling.

II. STATEMENT OF THE CASE

A. New Life's History, Mission and Purpose

Respondent New Life Church on the Peninsula is an evangelical Christian church with seven locations in the western Puget Sound region, including in Bremerton, Silverdale, Poulsbo, and Bainbridge Island. It is registered with the State of Washington as a nonprofit corporation. New Life was launched out of a church called Gateway Fellowship in Poulsbo in 2003. CP 408.¹ New Life's beliefs and teachings are centered around the power of the Bible, the goodness of God, the dual nature of Jesus Christ, the sinfulness of all humankind, and the grace of God as the savior of humanity. CP 408. New Life welcomes approximately 3,700 worshippers across its various locations on a weekly basis. CP 408.

¹ CP 408, 409, and 410 are part of the Declaration of Wes Davis in Support of Defendant's Motion for Summary Judgment, which was not part of the initial designated Clerk's Papers. Respondent New Life designated additional Clerk's Papers pursuant to RAP 9.6 and presumes the Declaration of Wes Davis will constitute CP 408, 409, and 410 for the purposes of this brief.

As an evangelical church that appeals directly to the Bible as religious authority, New Life adheres to a traditional view of marriage and sexuality. Although today's culture readily accepts sexual relationships outside of marriage, most Christian churches, including Protestant, Catholic, and Orthodox churches, hold to the belief that sex outside of marriage is contrary to the teachings of the Bible. This is the case regardless of whether the participant in the extra-marital relationship is already married to someone else; that is, adultery is wrong but premarital sexual relationships are also wrong. CP 409.

Like most faith-based employers, New Life requires its employees to abide by certain lifestyle requirements and to refrain from "unscriptural conduct" while employed by the church. This means living in accordance with the Bible's teachings, as interpreted by New Life. CP 409. Among other things, New Life's lifestyle expectations require that employees abstain from sexual relationships outside of marriage. CP 409. This is true regardless of whether an employee is married or single, or male or female. CP 409. Indeed, New Life would treat an employee who was married and living in an adulterous relationship with someone other than his or her spouse in the same way it would treat an unmarried employee engaged in an extra-marital sexual relationship. CP 409.

To ensure that its employees properly represent its religious beliefs, New Life regularly trains new employees in a process called “onboarding.” CP 213. Onboarding includes training and teaching new employees regarding New Life’s vision, mission, values, and theological beliefs, in addition to any job responsibilities specific to a particular position. CP 213. New Life’s mission, values and core beliefs are detailed in its “Playbook,” a copy of which is made available to all employees. CP 214. New Life identifies itself as a “Jesus-centric” church, and one that adheres to a set of absolute theological beliefs, which it defines as “the core, Biblical beliefs shared by all followers of Jesus, at all times, in all places, and in all cultures.” CP 58–62. New Life explicitly asks its employees to refrain from “unscriptural conduct.” CP 77–78.

B. Background of Ms. Thorp’s Claim

1. Ms. Thorp’s job responsibilities included a religious aspect.

New Life hired Appellant Catherine Thorp as a bookkeeper in 2015. CP 65. The bookkeeper job description requires the employee to be “[o]n the mission with Jesus,” “devoted to pointing to Jesus in all circumstances,” to “love Jesus and love the church,” and to desire to “become more like Jesus.” CP 75. When she was hired, Ms. Thorp also agreed to be bound by the Constitution, Bylaws, and employment policies

of New Life, and to refrain from “unscriptural conduct” while employed by the church. CP 77–78. Ms. Thorp acknowledged that she checked the appropriate box on her employment authorization form and agreed to these hiring conditions. CP 102. She conceded during her deposition that there was a religious requirement for her job as a bookkeeper:

Q: You concede that there is some sort of religious requirement, qualification for the [bookkeeper] job?

A: Correct.

CP 97.

Ms. Thorp’s job responsibilities included bookkeeping, accounting, administrative support, and guiding staff and volunteers through New Life’s processes. CP 77–78. But her job responsibilities also involved more overtly spiritual practices. Ms. Thorp attended a weekly staff meeting with others from New Life, which included time for prayer. CP 127. She supervised volunteers who helped with accounting at New Life, and she was seen to have a leadership role within that accounting team. CP 98. Another requirement for New Life’s employees was attendance at monthly meetings, which included a worship component. CP 99. Attendance at these worship meetings, which included singing and praying, was expected, and Ms. Thorp frequently attended these meetings with the volunteer accounting team. CP 99–101. At these meetings,

“[t]here was not usually conversation about business, it was [just] the church side of it.” CP 100.

Thus, though Ms. Thorp was not a pastor, the record is clear that her job had explicit religious qualifications and duties.

2. Ms. Thorp separated from her husband and began a sexual relationship with her live-in boyfriend.

Ms. Thorp and her husband Tanner Thorp separated and began living apart on September 15, 2016. CP 82. They planned to get divorced, but because Ms. Thorp was unexpectedly pregnant with Mr. Thorp’s child, they decided to wait to file for divorce until after their baby was born. CP 113–14.

Ms. Thorp invited an acquaintance she knew from high school, Casey Drachenberg, to move into her home in December 2016, ostensibly to help pay the rent. CP 104–06. Ms. Thorp later admitted she had a romantic attraction to Mr. Drachenberg as soon as he moved into her home in December 2016. CP 108. When questioned about this relationship by New Life, Ms. Thorp characterized her relationship with Mr. Drachenberg as that of “an old family friend.” CP 109. Ms. Thorp’s relationship with Mr. Drachenberg became sexual in late January to mid-February 2017. CP 154–55.

3. After becoming aware of Ms. Thorp’s relationship situation, New Life immediately

responded to reiterate its lifestyle expectations for a church employee.

On February 2, 2017, Ms. Thorp's estranged husband, Mr. Thorp, requested a meeting with Mark Middleton, a pastor at New Life. CP 110–11. Mr. Thorp informed Mr. Middleton of his concerns regarding Ms. Thorp living with and being in a romantic relationship with Mr. Drachenberg. CP 110–12. Mr. Middleton told New Life's leadership of Mr. Thorp's concerns regarding Ms. Thorp's living situation. CP 112. After becoming aware of the romantic nature of this relationship, Ms. Thorp's immediate supervisors, Sara Plumb and Josh Hinman, met with Ms. Thorp on February 3, 2017, where Ms. Thorp admitted she had romantic feelings for Mr. Drachenberg. CP 112.

Despite the documents she signed when she was hired, Ms. Thorp was surprised New Life disapproved of her living with a man to whom she was not married and for whom she had feelings. CP 115. Ms. Thorp told Mr. Hinman and Ms. Plumb "[m]y walk with Jesus has been pure and I am confident I am not doing anything sinful." CP 116. New Life disagreed. Mr. Hinman and Ms. Plumb immediately made clear to Ms. Thorp that she could not continue to work at New Life while in such a relationship. CP 214. To further explain New Life's beliefs on sexuality, Mr. Hinman and Wes Davis, New Life's lead pastor, provided scriptural references to Ms.

Thorp to help her understand the church's beliefs on this core issue. CP 117–20.

Mr. Hinman texted Ms. Thorp on February 4, 2017, and told her “[a]s an employee of the church, you are called to be on the mission with Jesus and have your life match what that means. Having a man live in your home that you are not married to – that goes past a simple ‘arms-length’ roommate – isn’t ok.” CP 199. Ms. Thorp replied “[t]his I fully understand.” CP 199. “Mr. Hinman responded “I want you on our team. However, you are in an inappropriate living situation with a man to whom you are not married . . . I have moved quickly to communicate with you our expectations of a newlife (sic) staff member.” CP 199.

New Life told Ms. Thorp she could either have Mr. Drachenberg move out of her home or find an acceptable alternative living arrangement, and it offered its help in doing so. CP 126. New Life even offered to increase Ms. Thorp’s pay to offset the lost rent if Mr. Drachenberg moved out. CP 126. Mr. Davis met with Ms. Thorp during the week of February 6, 2017, to give her guidance, provide additional Biblical references for New Life’s beliefs regarding sex outside of marriage, and to reassure Ms. Thorp that New Life’s primary concern at that time was “getting [Ms. Thorp’s] baby out healthy.” CP 123–24.

4. New Life postponed its decision on Ms. Thorp's employment situation until after her baby was born.

Roughly a week after the initial discussions about her living situation, Ms. Thorp's doctor wrote a letter to New Life, stating "[d]ue to the complications of [Ms. Thorp's] home and work environment, [she] should [not] have undo stress in these areas of her life." CP 203. On the same day, Ms. Plumb texted Ms. Thorp and asked if she needed to take a leave of absence from work because of her pregnancy. CP 200. Ms. Thorp declined, replying "[m]y job is not stressful." CP 200. Instead, this stress came from "home," which Ms. Thorp elaborated meant "[h]ome was Casey [Drachenberg] living in my home." CP 121–22. Nevertheless, New Life took a "hands off" approach after February 13, 2017, prioritizing the health of Ms. Thorp and her unborn child and agreeing to revisit her living situation after she gave birth. CP 130. Ms. Thorp agreed that New Life did not put pressure on her regarding her living situation from February 13, 2017, until she went on maternity leave in early March 2017. CP 131–33.

Ms. Thorp's initial plan was to accept New Life's offer of six weeks of paid maternity leave and then to resign once her maternity leave was over. CP 128. After the birth of her child, Ms. Thorp spent six weeks on paid maternity leave from New Life. CP 83. New Life did not have a written policy regarding maternity leave for part-time employees, but it

felt giving Ms. Thorp paid time off to be with her new child was the right thing to do. CP 214. During her maternity leave, Ms. Thorp made it public that she was in a “serious relationship” with Mr. Drachenberg. CP 129. Ms. Thorp, still married to Mr. Thorp and employed by the church, was again surprised when New Life did not celebrate her new relationship. CP 129.

5. Ms. Thorp’s return to New Life after maternity leave.

Ms. Thorp returned from maternity leave in May 2017. CP 134. On May 19, 2017, Ms. Thorp was terminated in a meeting with Mr. Hinman and Ms. Plumb CP 136. They gave Ms. Thorp a termination letter explaining the rationale and offering severance. CP 337-38. Ms. Thorp described the meeting as respectful and that Mr. Hinman “had very nice things to say . . . he said it was really hard for him to do this but . . . key volunteers and some other employees had brought concern (sic) to them about [my] relationship with Casey [Drachenberg] and that [I] could no longer be employed there.” CP 137. Throughout the termination meeting, “[Mr. Hinman and Ms. Plumb] were very nice, very kind about it as far as that goes in a termination, respectful about it, I should say.” CP 137. Ms. Plumb told Ms. Thorp “we’re really happy your baby is healthy, we’re really happy you’re healthy, but we can no longer have this here.” CP 138.

C. Ms. Thorp’s Lawsuit and Procedural History

Ms. Thorp filed the present suit on November 16, 2017, asserting violation of Chapter 49.60 RCW (the Washington Law Against Discrimination or WLAD), outrage, and wrongful discharge in violation of public policy. CP 64. New Life moved for summary judgment on all three claims, and the trial court dismissed all three claims on May 22, 2019. Ms. Thorp moved for reconsideration, which was denied, and this appeal followed. CP 400–01. Ms. Thorp abandoned the WLAD and outrage claims and limited this appeal to her claim for wrongful discharge in violation of public policy.

III. ARGUMENT

A. Ms. Thorp’s common law claim for wrongful termination in violation of public policy does not meet the necessary legal standard and must fail.

Ms. Thorp’s sole claim on appeal is wrongful discharge in violation of public policy. Specifically, she alleges wrongful discharge under the *Thompson* test² for refusal to evict her roommate, and wrongful

² *Thompson v. St. Regis Paper Co*, 102 Wn.2d 219, 685 P.2d 1081 (1984).

discharge under the Perritt framework³ due to marital status discrimination.

New Life agrees with Ms. Thorp that these are the correct analytical frameworks for her tort claim. New Life further agrees with Ms. Thorp that the standard of review on appeal is *de novo*, notes that Ms. Thorp alleges no dispute of fact: the parties agree she was terminated for her refusal to abide by New Life’s doctrinal practice that sexual activity should be restricted to marriage.

The issues are therefore whether Ms. Thorp has established a viable tort claim under either the *Thompson* test or the Perritt framework. She has not, and the trial court’s entry of summary judgment must be upheld.

1. The wrongful termination in violation of public policy tort is a narrow exception to employment at will and will only be applied in “very clear” cases.

The tort for wrongful termination in violation of public policy “is a narrow exception to the at-will doctrine and must be limited only to instances involving very clear violations of public policy.” *Rose v. Anderson Hay and Grain Co.*, 184 Wn.2d 268, 276, 358 P.3d 1139 (2015).

³ *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996) (adopting a four-part framework from Henry H. Perritt Jr., *Workplace Torts: Rights and Liabilities* (1991)).

The exception “should be narrowly construed in order to guard against frivolous lawsuits.” *Gardner*, 128 Wn.2d at 936. Therefore “a court may not sua sponte manufacture public policy but rather must rely on that public policy previously manifested in the constitution, a statute, or a prior court decision.” *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 309, 358 P.3d 1153 (2015) (quoting *Roberts v. Dudley*, 140 Wn.2d 58, 65, 993 P.2d 901 (2000)).

There is no clear public policy here and Ms. Thorp’s claim fails under either the *Thompson* test or the Perritt framework. Ms. Thorp is suggesting a never-recognized public policy to circumvent the religious employer exemption in the Washington Law Against Discrimination. To recognize her proffered public policy would not only be unprecedented, but would infringe upon New Life’s constitutional right to choose employees who reflect its religious teachings.

2. Ms. Thorp’s claim fails under the *Thompson* test because New Life did not terminate her for refusing to commit an illegal act.

Washington courts first recognized the wrongful discharge tort in *Thompson*. 102 Wn.2d at 219 (1984). The tort is narrow and recognized only under four different situations:

- (1) where employees are fired for refusing to commit an illegal act;
- (2) where employees are fired for performing a public duty or obligation, such as serving jury duty;
- (3) where employees are fired for exercising

a legal right or privilege, such as filing workers' compensation claims; and (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing.

Rose, 184 Wn.2d at 276 (citing *Gardner*, 128 Wn.2d at 936). “Under each scenario, the Plaintiff is required to identify the recognized public policy and demonstrate that the employer contravened this policy by terminating the employee.” *Rose*, 184 Wn.2d at 276.

Ms. Thorp alleges that she was fired for refusing to perform an illegal act. The “illegal act” here would have been Ms. Thorp asking her boyfriend to move out of her house with a few months remaining on his lease.⁴

Even if negotiating an early lease termination would have breached the lease agreement, Ms. Thorp cites no authority for the proposition that a civil breach of contract is recognized as “illegal” for purposes of the tort. “Illegal” means “forbidden by law; unlawful.” *Illegal*, Black’s Law Dictionary (9th Ed. 2009). The Washington cases upholding application of the tort in the case of an illegal act all involve commands to engage in conduct that would be criminal or threaten public safety.

⁴ New Life offered to help Mr. Drachenberg move out of the house, and also suggested increasing Ms. Thorp’s pay to make up for the lost rent money as a potential solution. CP 149.

In one recent example, the employer “directed [the employee] to commit a crime for which he would be personally responsible.” *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 261, 359 P.3d 746 (2015) (CFO of publicly-traded company refused to falsify reports to SEC). In another, the employee, a truck driver who feared he would fall asleep at the wheel, was fired for refusing to violate federal law restricting truck drivers to no more than 60 hours per week. *Rose*, 184 Wn.2d at 287 (“termination for refusing to break the law contravenes a legislatively recognized public policy.”). In a third case, the employee was fired for refusing to illegally bypass the fire alarm system at a public sports stadium. *Ellis v. City of Seattle*, 142 Wn.2d 450, 457, 13 P.3d 1065 (2000).

Ms. Thorp has not cited (and New Life has not found) any case applying the “illegal act” prong of the *Thompson* test outside of criminal law or regulations involving public safety. The wrongful discharge tort exception would not be “narrow” if an employee could set up a retaliation claim on a mere subjective belief that the employer’s requested conduct might result in breach of a civil contract.

Ms. Thorp does not allege that her claim satisfies any of the other *Thompson* exceptions to employment at will. Since New Life did not terminate Ms. Thorp for refusing to perform an illegal act, her claim must fail under the *Thompson* analysis.

3. Ms. Thorp’s claim must also fail under the Perritt framework because she cannot satisfy the strict clarity element and New Life’s constitutionally-protected right to have its employees follow its religious practices provides overriding justification.

Where a case does not fit neatly into one of the four *Thompson* exceptions discussed above, a more refined analysis known as the Perritt framework is utilized to examine a public policy wrongful discharge claim. *Gardner*, 128 Wn.2d at 941 (adopting a four-part framework based on Perritt Jr., *supra* note 3). The Perritt framework requires the court to examine:

(1) the existence of a “clear public policy” (clarity element), (2) whether “discouraging the conduct in which [the employee] engaged would jeopardize the public policy” (jeopardy element), (3) whether the “public-policy-linked conduct caused the dismissal” (causation element), and (4) whether the employer is “able to offer an overriding justification for the dismissal” (absence of justification element).

Rose, 184 Wn.2d at 277 (citing *Gardner*, 128 Wn.2d at 941).

Ms. Thorp cannot satisfy the first three factors; on the fourth, New Life has consistently offered an overriding justification for its decision.

(a) Strict clarity element: there is no clear public policy protecting the right of a church employee to reject the church’s religious practices on marriage and sexuality.

Ms. Thorp must show a “clear mandate of public policy” to satisfy the first element. She cannot. Her argument merely engages in a series of

highly debatable suppositions and ignores the countervailing free exercise rights of her employer.

The strict clarity element requires that the public policy not be manufactured by the court but come from the “constitution, a statute, or a prior court decision.” *Rickman*, 184 Wn.2d 300 at 309. Ms. Thorp relies solely on the Washington Law Against Discrimination, Chapter 49.60 RCW, as the basis for her public policy claim. But New Life is not an “employer” under the WLAD because the definition of employer “does not include any religious or sectarian organization not organized for private profit.” RCW 49.60.040(11). Ms. Thorp’s statutory claim under RCW 49.60 was dismissed on summary judgment and she has not appealed that decision.

(i) *Bennett v. Hardy does not recognize a public policy tort based on the WLAD.*

Because New Life is exempt from the WLAD, Ms. Thorp cites *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990), to support a public policy tort notwithstanding the statutory exemption. *Bennett* held that there could be an implied cause of action for age discrimination under RCW 49.44.090 (a statute without an overt remedy): “[w]e hold that a cause of action for age discrimination is implied under RCW 49.44.090.” *Id.* at 917. It also held that a second plaintiff’s termination for

whistleblowing satisfied the public policy test in *Thompson*. *Id.* at 924. It reached these conclusions despite the small employer exemption in RCW 49.60: “In conclusion we hold that the employer size definition in RCW 49.60.040 does not apply outside chapter 49.60 and so does not operate to bar either of the claims recognized above.” *Id.* at 929. But because the court found an implied cause of action in RCW 49.44, it “decline[d] to address whether defendant’s [alleged age discrimination] provides the basis for a wrongful discharge tort.” *Id.* at 923. Put another way, *Bennett* does not hold that RCW 49.60 establishes a public policy that supports the wrongful discharge tort as Ms. Thorp alleges.

(ii) *No other Washington case recognizes a marital status public policy tort and marital status does not encompass cohabitation.*

Although never cited by Ms. Thorp, *Roberts v. Dudley* indicates that public policy can be inferred *at least in part* from the WLAD. That said, it still does not support her case. *Roberts* involved a wrongful discharge claim based on sex where the employer was excluded from the WLAD because it had fewer than eight employees. *Roberts*, 140 Wn.2d at 60. Relying on several judicial decisions, RCW 49.12.200 (an industrial welfare statute providing that women may pursue all vocations open to men), *and* RCW 49.60, the *Roberts* court permitted a public policy

wrongful discharge claim based on gender despite the statutory exclusion from RCW 49.60. *Id.* at 77.

Roberts is distinguishable from the present case for several reasons. First, it involved sex, not marital status. No Washington case has inferred a public policy against disparate treatment based on marital status solely from the WLAD. While marital status is a protected class under the WLAD, the law draws explicit marital status distinctions in countless other areas, such as the tax code, intestacy and survivorship statutes, and community property.

Moreover, the WLAD's prohibition of marital status discrimination does not even encompass the conduct at issue in this case, which is cohabitation. "[C]ohabiting or dating relationships are not aspects of 'marital status' as these terms are used in the [WLAD]." *Waggoner v. Ace Hardware Corp.* 134 Wn.2d 748, 750, 953 P.2d 88 (1998) (holding that employees terminated for cohabiting did not have a claim against their employer under the WLAD).

Second, *Roberts* is distinguishable in that it relied on several prior judicial decisions and the industrial welfare statute in addition to the WLAD. Here, Ms. Thorp cites solely to the WLAD, but *Waggoner* holds the WLAD's marital status protection does not extend to cohabitation.

Third, and most importantly, *Roberts* involved the small employer exemption to RCW 49.60, whereas this case involves the religious employer exemption. For the reasons described below, this is a critical distinction.

(iii) *No Washington case extends a WLAD-based public policy tort against a religious nonprofit.*

The small employer exemption to the WLAD is grounded in administrative burden and the breadth of impact. *Griffin v. Eller*, 130 Wn.2d 58, 68, 922 P.2d 788 (1996). The *Roberts* court recognized this, noting that following its holding, small employers would still be exempt from the jurisdiction of the Human Rights Commission and not subject to attorneys' fees or expanding remedies. *Roberts*, 140 Wn.2d at 76.

But the religious employer exemption serves to protect a religious employer's constitutional free exercise rights, not ease a mere administrative burden. Religious employers may make religious-based employment decisions under both state and federal law for all categories of employees. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336, 107 S. Ct. 2862, 2868, 97 L. Ed. 2d 273 (1987) (upholding the application of the religious exemption in Title VII of the Civil Rights Act to the building engineer at a nonprofit affiliated with the Mormon church); *Farnam v. CRISTA Ministries*, 116

Wn.2d 659, 663, 807 P.2d 830 (1991) (upholding application of WLAD religious employer exemption to nurse); *see generally Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 317 P.3d 1009 (2014) (discussing application of the religious employer exemption to race discrimination for which no religious rationale was offered). “Exemptions for religious organizations are common in a wide variety of laws, and they reflect the attempts of the Legislature to respect free exercise rights by reducing legal burdens on religion.” *State v. Arlene's Flowers, Inc.*, 193 Wn.2d 469, 520, 441 P.3d 1203, *petition for cert. filed*, _ U.S.L.W. _ (U.S. Sept. 11, 2019) (No. 19-333) (*quoting Elane Photography, LLC v. Willock*, 309 P.3d 53, 74–75 (N.M. 2013)).

Ms. Thorp argues for a public policy that would directly contravene the free exercise rights of her religious employer. As discussed below in Section III.B at page 23, that would violate the First Amendment and Article I, Section 11 of the Washington constitution. But particularly under the strict clarity element of the wrongful discharge tort, she has hardly met her burden of demonstrating a statutory or judicially-recognized public policy.

(b) Jeopardy element: Ms. Thorp cannot prove that a church dismissing an employee in an extra-

marital sexual relationship jeopardizes an important public policy.

The second Perritt factor, whether discouraging the conduct the employee engaged in would jeopardize an important public policy, also cannot be met in this case. “To establish jeopardy, plaintiffs must show they engaged in particular conduct and the conduct *directly relates to enforcement of the public policy* or was *necessary* for the effective enforcement of the public policy.” *Rose*, 184 Wn.2d at 277 (emphasis in original). “This burden requires the plaintiff to ‘argue that other means for promoting the policy . . . are inadequate.’” *Id.* at 277–78 (citing *Gardner*, 128 Wn.2d at 945). In other words, “the plaintiff must show the actions he or she took were the *only adequate means* to promote the public policy.” *Rose*, 184 Wn.2d at 278 (emphasis added).

Ms. Thorp has not met her burden. She would have to establish that her decision to cohabit with her boyfriend against her church employer’s request would be the only way she could promote an important public policy. She halfheartedly makes this argument in her brief. Brief of Appellant, at 23. But it contradicts Washington law. In *Waggoner*, the Court of Appeals originally ruled for the co-habiting plaintiffs, holding that a purpose of the WLAD was “to prevent an employer’s unnecessary intrusion into an employee’s private affairs such as sexual relationships

and living arrangements.” *Waggoner v. Ace Hardware Corp.*, 84 Wn. App. 210, 927 P.2d 251 (1996), *rev’d*, 134 Wn.2d 748, 953 P.2d 88 (1998). The Washington Supreme Court rejected this rationale and reversed, stating “Whether social relationships deserve protection under RCW 49.60.180 is a decision for the Legislature, not this court.” *Waggoner*, 134 Wn.2d at 91. In so holding, the Washington Supreme Court has explicitly rejected Ms. Thorp’s argument. Ms. Thorp has not met the second Perritt factor.

(c) Causation element: Ms. Thorp has not proved that her public-policy-linked-conduct caused her dismissal.

Ms. Thorp did not engage in any sort of “public-policy-linked” conduct that caused her dismissal because her termination was not based on whether she was single or married. New Life would have terminated her for her refusal to stop co-habiting with her boyfriend regardless of whether she was still married to her husband. Ms. Thorp has not met the third Perritt factor.

(d) Absence of justification element: New Life has consistently offered a First Amendment protected reason for its decision to terminate Ms. Thorp.

Finally, New Life has been consistent in its explanation for why it terminated Ms. Thorp: her persistent refusal to abide by the church’s teaching that that Bible prohibits extra-marital sexual activity. New Life

explained its concerns in early February 2017 when it first learned of Ms. Thorp's living arrangement and confronted her.⁵ The church explained its position again in the letter it gave Ms. Thorp when she was terminated in May 2017. CP 207–208. When she sued six months later, New Life pled affirmative defenses of organizational necessity and constitutional religious free exercise. CP 19–20. The constitutional protection for New Life's stated reason is discussed in Section III.B below, at page 23.

Given that the wrongful discharge in violation of public policy tort is to be applied sparingly and only in the case of a clear and recognized public policy, Ms. Thorp's claim cannot survive. Even if she could prove a recognized public policy that protects cohabitation, which she cannot and has not, it would be unconstitutional when applied to New Life for the reasons described below.

B. The relief sought by Ms. Thorp would violate New Life's free exercise of religion guaranteed by the First Amendment and Article I, Section 11 of the Washington Constitution.

1. A church has a constitutional right to limit employment to those that properly reflect the church's religious teachings.

When it legalized same-sex marriage in 2015, the U.S. Supreme Court stated that churches had the continued right to hold and to teach

⁵ See discussion *supra* at pp. 6–8.

traditional views about marriage and sexuality: “it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction” their views on marriage and sexuality and that “[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.” *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584, 2607, 192 L. Ed. 2d 609 (2015).

New Life’s religious beliefs are expressed not just through the written and oral teaching of its pastors, but also through the conduct and lifestyle requirements of its employees and members. Justices Kagan and Alito put it this way:

When it comes to the expression and inculcation of religious doctrine, there can be no doubt that *the messenger matters*. Religious teachings cover the gamut from *moral conduct* to metaphysical truth, and both the content and credibility of a religion’s message depend vitally on the character *and conduct of its teachers*. *A religion cannot depend on someone to be an effective advocate for its religious vision if that person’s conduct fails to live up to the religious precepts* that he or she espouses. For this reason, a religious body’s right to self-governance must include the ability to select, and to be selective about, those who will serve as the very “embodiment of its message” and “its voice to the faithful.”

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171, 201, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012) (Alito, J., concurring) (emphasis added).

For these First Amendment reasons, courts will refuse to hear Title VII claims asserting non-religious discrimination, such as sex discrimination (marital status is not protected by federal law), where the defendant employer asserts a religious reason for its employment decision. *See Curay-Cramer v. Ursuline Acad. of Wilmington, Delaware, Inc.*, 450 F.3d 130 (3d Cir. 2006); *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) (“We conclude that the permission to employ persons ‘of a particular religion’ includes permission to employ only persons whose beliefs and conduct are consistent with the employer’s religious precepts.”); *Equal Employment Opportunity Comm’n v. Mississippi Coll.*, 626 F.2d 477, 485 (5th Cir. 1980) (if employer provides religious reason for action, First Amendment bars EEOC of jurisdiction to determine whether employer’s reason was pretextual).

To do as Ms. Thorp requests and require a church to choose between substantial financial liability or retaining an employee who overtly and publicly rejects the church’s doctrinal practices is to chill the free exercise of religion and interfere in the internal affairs of the church.

Article I, Section 11 of the Washington State Constitution goes even further, providing that “Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed.” Wa. Const. art. I, § 11. The Washington Supreme Court has made clear that its protection is “significantly different and stronger than” the First Amendment. *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 224, 840 P.2d 174 (1992).

To conclude, even if Ms. Thorp could state a public policy claim, it would violate New Life’s free exercise rights to grant her the relief she requests.

2. The trial sought by Ms. Thorp on the fourth Perritt factor would violate New Life’s constitutional rights regardless of the outcome.

Ms. Thorp wants to hold a trial on New Life’s “general moral objection to Ms. Thorp living with a man to whom she was not married.” Brief of Appellant, at 24. A trial in this case is both unnecessary and constitutionally forbidden.

First, the public policy tort follows a traditional employment burden shifting test. *Rose*, 184 Wn.2d at 274. Because New Life has offered a legitimate reason for its decision to terminate Ms. Thorp, she must in turn offer specific evidence of pretext to defeat summary judgment, even if she has made a prima facie case. *Fulton v. State, Dep’t*

of Soc. & Health Servs., 169 Wn. App. 137, 149, 279 P.3d 500 (2012). “A plaintiff cannot create a pretext issue without some evidence that the articulated reason for the employment decision is unworthy of belief.” *Kuyper v. State*, 79 Wn. App. 732, 738–39, 904 P.2d 793 (1995). To prove pretext, “a plaintiff must show, for example, that the reason has no basis in fact, that it was not really a motivating factor in the decision, it lacks a temporal connection to the decision or it was not a motivating factor in employment decisions for other employees in the same circumstances.” *Id.* Ms. Thorp has offered no evidence of pretext.

Second, and more importantly, neither a court nor a jury can constitutionally determine the legitimacy of New Life’s religious reasons for its decisions. *Mississippi Coll.*, 626 F.2d at 485; *see also Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 887, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (The Supreme Court will not “question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”) (internal quotations omitted); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969) (holding that “the First Amendment forbids civil courts from” interpreting “particular church doctrines” and determining “the importance of those doctrines to the religion”).

IV. CONCLUSION

The First Amendment, the Washington Constitution, and the WLAD all uphold a church's right to select employees that express the church's beliefs and teachings. Ms. Thorp does not share New Life's beliefs but wants this Court to invent a public policy to hold New Life Church liable for the free exercise of religion. The wrongful discharge in violation of public policy tort in Washington is narrow and can only be applied in the case of a clear public policy. There is no such public policy here and the trial court's order of summary judgment should be affirmed.

DATED this December 23, 2019.

Respectfully submitted,

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I hereby certify that I directed the Brief of Respondent to be served by e-filing on December 23, 2019, to the following:

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