

No. 86177-3

Appeal from Benton County Cause No. 08-2-01534-1

SUPREME COURT OF THE STATE OF WASHINGTON

VENKATARAMAN SAMBASIVAN, an individual,
Appellant/Cross-Respondent,

v.

KADLEC MEDICAL CENTER, a corporation,
Respondent/Cross-Appellant.

60:00 AM 8:09
b/h

BRIEF OF RESPONDENT/CROSS-APPELLANT
KADLEC MEDICAL CENTER

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ORIGINAL

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I. INTRODUCTION

This case concerns a straightforward issue of whether a hospital may require a physician specialist—here, an interventional cardiologist—to perform a minimum number of procedures in order to be eligible to have clinical privileges at the hospital. On August 14, 2008, the Board of Directors (“Board”) of Kadlec Regional Medical Center (“Kadlec”) adopted a requirement that an interventional cardiologist must have performed at least 150 acute interventions during the previous two years in order to be eligible for interventional cardiology privileges. This is the credentialing standard recommended to ensure proficiency by the American College of Cardiology (“ACC”), the American Heart Association (“AHA”) and the Society for Cardiovascular Angiography & Interventions (“SCAI”),¹ and is substantially identical to the standard the Washington State Department of Health requires for credentialing where certificate of need approval is sought for interventional cardiology programs. WAC 246-310-725.²

¹ CP 1990 (ACC/AHA/SCAI, 2007 *Update of the Clinical Competence Statement on Cardiac Interventional Procedures* (recommending “that the operator volume threshold [for interventional cardiologists] continue to be 75 procedures per year”). The ACC/AHA/SCAI renewed their recommendation of a 75 procedure/year proficiency standard based upon a scientific data that assessed the relationship between operator activity level and success rates in PCI procedures. (CP 1988)

² The regulation provides, in its entirety, that: “Physicians performing adult elective PCI procedures at the applying hospital must perform a minimum of seventy-five PCIs per year. Applicant hospitals must provide documentation that physicians performed

In adopting this standard, Kadlec's volunteer Board members voted to institute that standard effective immediately, rather than phase it in over a two-year period, as a physician executive committee had recommended in order to protect incumbent medical staff members. In their sworn declarations, the Board members cited concerns for patient safety and the hospital's reputation if a patient were injured by a low-volume cardiologist during the recommended phase-in period. Appellant Venkataraman Sambasivan, M.D. ("Sambasivan") would have preferred a phase-in period, as his procedure volumes for the two years prior to August 14, 2008 were too low for him to be eligible for interventional privileges upon adoption of the standard.

Three years after the proficiency threshold was adopted, Sambasivan continues to challenge the Board's authority to institute this requirement, and maintains that the Board members' adoption of the universal requirement was actually retaliation against him for having sued the hospital for allegedly discriminating against him on the basis of his national origin. (He eventually dropped the discrimination claim after conceding there was no evidence to support it.) As discussed below, the trial court concluded that he raised no genuine fact issue that would entitle

seventy-five PCI procedures per year for the previous three years prior to the applicant's CON request."

him to a trial on his claims of express breach of contract, tortious interference, and retaliation, all of which were based upon the Board's August 14, 2008 action. Sambasivan's appeal concerns those trial court rulings.

Kadlec's cross-appeal concerns Sambasivan's unjust enrichment claim that he was entitled to be paid a stipend for taking call to assist in providing interventional cardiology coverage in the Kadlec emergency department during a time when Kadlec did not contract with him.

Finally, this appeal concerns the costs and attorney fees the trial court awarded to both parties. Citing contractual fee-shifting cases, Sambasivan argues that neither party should be entitled to attorney fees because each prevailed on a major issue, notwithstanding the fee-shifting mandate in RCW 7.71.030, Washington's peer review statute. In its cross appeal, Kadlec maintains that Sambasivan should not have been awarded costs and fees for his unjust enrichment claim because there is no basis in law or equity to award the same. Kadlec also argues that the fees awarded were excessive and unsupported by appropriate documentation.

II. COUNTER-STATEMENT OF THE ISSUES

The issues presented by the trial court's various orders that Sambasivan appeals are:

1. Whether summary judgment dismissal of his breach of express contract claim was appropriate.

Issue: Whether Sambasivan raised a genuine issue of material fact that the Kadlec Board's adoption of a minimum eligibility standard for interventional cardiologists based upon proficiency was unlawful.

2. Whether summary judgment dismissal of Sambasivan's tortious interference claim was appropriate.

Issue: Whether Sambasivan raised a genuine issue of material fact as to the existence of any improper interference by Kadlec in adopting the eligibility standard related to proficiency.

3. Whether summary judgment dismissal of Sambasivan's retaliation claim was appropriate.

Issues: (i) Whether Sambasivan raised a genuine issue of material fact that there was a causal connection between the filing of his lawsuit on June 23, 2008 that included a claim for discrimination, and the decision of the Board on August 14, 2008 to adopt an eligibility requirement for interventional cardiology privileges based upon proficiency; and (ii) Whether Sambasivan put forth sufficient evidence to rebut Kadlec's evidence of a non-retaliatory reason for adopting the proficiency requirement.

4. Whether the trial court abused its discretion in denying Sambasivan's motion to compel discovery related to his abandoned discrimination claim.

Issues: (i) Whether the court should create an exception to the statutory peer review privilege codified at RCW 4.24.250(1) and RCW 70.41.200(3) where a physician has alleged discrimination; and (ii) Whether the discovery issue is mooted by Sambasivan's abandonment of his discrimination claim.

5. Whether the trial court properly concluded Kadlec was entitled to attorney fees for prevailing on claims that arose under the Washington peer review statute, RCW 7.71 *et seq.*

Issue: Whether contractual fee-shifting principles should be applied to cancel out the awards of attorney fees and costs to both parties, despite the fact that neither fee award arises under a contract.

III. CROSS-APPELLANT KADLEC'S ASSIGNMENTS OF ERROR AND ISSUES

1. The trial court erred in implying a contract at law for call coverage payment where doing so results in an illegal financial arrangement under the federal Stark law, and where Sambasivan failed to establish the elements of a claim for unjust enrichment.

Issues: (i) Whether implying a contract at law and ordering Kadlec to pay Sambasivan for taking uncompensated emergency department call violates the federal Stark law, rendering the arrangement unlawful; and (ii) Whether the trial court's findings as to the elements of unjust enrichment were based on substantial evidence.

2. The trial court erred in awarding attorney fees to Sambasivan for prevailing on his unjust enrichment claim.

Issue: Whether an award of damages to a non-employee and non-contracting physician under an unjust enrichment theory triggers an award of attorney fees under a wage claim statute, RCW 49.48.030.

3. The trial court erred in awarding Sambasivan attorney fees in the amount awarded.

Issue: Whether the trial court abused its discretion in awarding fees where the time entries did not detail the nature of the work performed, did not segregate includable time from non-includable time, and reflected work on issues not subject to the fee award.

IV. COUNTER-STATEMENT OF THE CASE

A. Facts Relevant to Issues in Sambasivan's Appeal

Kadlec is a non-profit private hospital in Richland, Washington. Sambasivan is a cardiologist with a solo medical practice in Pasco, Washington. (CP 74) Sambasivan has held admitting and treating

privileges as a member of the Kadlec medical staff since 1994, and remains on the medical staff to this day with privileges in general cardiology. From the inception of Kadlec's interventional cardiology³ program in 2001 until August 14, 2008, Sambasivan held privileges in interventional cardiology at Kadlec. (CP 27, 75) After August 14, 2008, Sambasivan was ineligible for renewal of his interventional cardiology privileges because he had not performed a sufficient number of procedures during the previous two years to meet an eligibility requirement that was recommended by the Kadlec Medical Staff, through its governing Medical Executive Committee ("MEC"), and was adopted by the Kadlec Board. (CP 1618) The requirement that Sambasivan failed to meet was performing 150 or more interventional procedures during the two years prior to credentialing. (CP 1896) Nevertheless, Sambasivan remains on the Kadlec medical staff having obtained renewed privileges for general (but not interventional) cardiology. (CP 1617)

On July 7, 2008, one month before the Kadlec Board adopted the proficiency threshold, Sambasivan served Kadlec with his initial

³ "Interventional" or "invasive" cardiology, as opposed to general cardiology, generally consists of the performance of percutaneous coronary interventions ("PCI") primarily by use of balloon tipped catheterization ("angioplasty" or "PTCA") or placement of metal stents into patients with blocked (or "stenosed") coronary arteries, both in acute situations (e.g. to relieve symptoms from myocardial infarctions) and on an elective basis. General or noninvasive cardiology involves performance of diagnostic procedures and assessments of patients, and management of coronary pathology through pharmacologic or other medical means not involving PCI.

complaint (CP 61), which contained claims for (i) breach of the covenant of good faith and fair dealing, arising out of an alleged contract between Sambasivan and Kadlec by virtue of the Kadlec Medical Staff Bylaws (related to alleged undefined restrictions of or interference with his medical staff privileges); (ii) unjust enrichment for failure to pay Sambasivan for being on call in the emergency department; (iii) tortious interference; (iv) discrimination based on national origin; and (v) state antitrust law violations. (CP 3)

Five days *before* Sambasivan's Complaint was served, a physician subcommittee of Kadlec's Medical Staff Quality ("MSQ") committee met to discuss Sambasivan's cases and outcomes, and interventional cardiology privileges generally. At that July 2, 2008 meeting, the subcommittee elected to "bring a recommendation to the MEC to increase PCI [i.e., interventional cardiology] volume requirements for credentialing to 75/year, beginning 1/2009, based on an average of 75/year over a 2 year credentialing period." (CP 1941) The MEC, consisting of all physician departmental chairpersons and some *ad hoc* physician members, considered this recommendation at its August 7, 2008 meeting and voted to recommend to the Kadlec Board that it adopt the proficiency threshold.⁴

⁴ The MEC, which made the recommendation, voted during its August 7, 2008 meeting in favor of the following resolution: "In order to be credentialed to do PCI, candidates

(CP 1610) The MEC also separately recommended that, to address Sambasivan's quality issues, his interventional cardiology privileges be limited to elective, non-acute procedures. (*Id.*) This recommendation followed an external review of interventional cases performed by all Kadlec interventional cardiologists that was requested by the Kadlec Credentials Committee. (*Id.*; *see also* CP 1246)⁵

When the Board met on August 14, 2008, it voted to adopt the proficiency threshold recommended by the MEC, and seeing no reason to delay implementation of a quality standard, gave it immediate effect. (CP 1614-15) Because Sambasivan had performed significantly fewer such procedures than the 150 required by the proficiency standard, he was ineligible to renew his interventional cardiology privileges. The Board did not act on the MEC's second recommendation (to limit Sambasivan's interventional cardiology privileges), because its adoption of the proficiency standard with immediate effect rendered that recommendation moot.

must document 150 cases every 2 years beginning January 1, 2009." There was then recorded MEC discussion that "[i]f a physician currently on staff does not meet that number, they are given one year to make that number. Therefore, if a candidate did not meet the numbers at reappointment in 2009, they would be given until 2010 to get up to that number of cases." (CP 1610)

⁵ The external reviewer found that three of Sambasivan's seventeen cases "deviated from the standard of care," and a fourth case had "inadequate documentation." (CP 1611)

Following the Board's August 14 action, Sambasivan amended his original complaint to include a claim for injunctive relief that sought to prevent Kadlec from enforcing the proficiency requirement. After a two day evidentiary hearing on his motion for preliminary injunction, the trial court denied the motion finding that Sambasivan failed to demonstrate that he was likely to succeed on the merits. (CP 239-40) Specifically, the court found that Washington law vests private hospitals with broad discretion to impose medical staff eligibility requirements and that, given its adoption of standards recommended by national experts in the field, Sambasivan had not "made a showing that in this case the hospital Board was arbitrary or tyrannical or made their decision on a fundamentally wrong basis." (*Id.*)

Sambasivan continued to challenge the Board's August 14, 2008 action as a breach of contract, ostensibly arising from the Bylaws. He also continued to litigate his other claims, including his discrimination claim, about which he sought discovery concerning the "peer review" treatment of other interventional cardiologists, information that he hoped would reveal whether Kadlec discriminatorily applied the peer review process to him during his tenure at Kadlec. (CP 30-52) When Kadlec objected to providing such peer review records due to the unqualified statutory

privilege that exists, Sambasivan unsuccessfully moved to compel their production. (CP 72-73)

Sambasivan subsequently voluntarily amended his complaint to drop certain claims, including the discrimination claim. Though he dropped the allegation that that Kadlec discriminated against him based on his national origin, his Second Amended Complaint, filed on August 17, 2009, claimed that the Board adopted the proficiency threshold in order to retaliate against him for having earlier filed a complaint against Kadlec that contained a claim of discrimination. (CP 74-80)

B. Proceedings Below

Sambasivan commenced this action in June 2008, and twice amended his complaint. As noted, his Second Amended Complaint abandoned, *inter alia*, a discrimination claim in favor of a retaliation claim. (CP 78-79) In March 2010, Kadlec moved for summary judgment on all claims. After a hearing, the trial court granted Kadlec's motion with respect to his claims for breach of express contract, tortious interference, and retaliation. (CP 860-64, 868-73) It declined to dismiss only Sambasivan's breach of implied contract claim relating to providing uncompensated call coverage services in the emergency department. (CP 965-67) The call coverage claim was valued at about \$74,000 (CP 2092), while Sambasivan claimed damages of nearly \$2 million for the claims

that the court dismissed.⁶ A two-day bench trial was held on the call coverage claim, and Sambasivan prevailed.

On May 26, 2011, the trial court entered final judgment, which included an award of attorney fees to Kadlec under the mandatory fee-shifting requirements of Washington's peer review statute, RCW 7.71.030(3), for prevailing on the breach of express contract, tortious interference and retaliation claims, to the extent those claims involved allegations that Kadlec acted against Sambasivan's privileges in peer review proceedings. The court also awarded Sambasivan attorney fees for prevailing on his unjust enrichment claim for call coverage based upon an employment wage statute, RCW 49.48.030, despite the fact that Sambasivan was never an employee of Kadlec, and did not plead a violation of that statute in his complaint. (CP 2082-2102)

On June 22, 2011, Sambasivan filed his notice of appeal, requesting review of "all components of the [May 26, 2011] judgment,"⁷ except for the awards for damages for unjust enrichment and associated prejudgment interest and attorney fees and costs. (CP 895-96) He did not appeal the trial court's denial of his motion to compel discovery with respect to his abandoned discrimination claim, nor did he preserve the

⁶ See Verbatim Report of Proceedings, Motion for Attorney's Fees (Aug. 11, 2010) at 19:2-19.

⁷ CP 895-900.

discrimination claim in his complaint for purposes of appealing that discovery ruling.

C. Facts Relevant to Cross-Appellant Kadlec's Appeal of Call Coverage Claim.

Sambasivan's unjust enrichment claim asserted that he should have been paid for taking emergency department call for interventional cardiology from July 2005 through October 2006, a period during which he did not have an agreement—written or oral—with Kadlec to receive a stipend for taking call. (CP 2084-85) His call coverage claim is limited to this fifteen month period because he had voluntarily agreed not to exercise his interventional cardiology privileges (and thus was not eligible to be on the call schedule) prior to this period, and again relinquished them between October 2006 and March 2007. (CP 1312) Following the reinstatement of his privileges on April 1, 2007, Kadlec entered a written contract with Sambasivan to pay him a stipend in return for taking call. (CP 1094-104) He thereafter began invoicing Kadlec for call services and was duly paid. (CP 1105-11)

The Kadlec Medical Staff Bylaws require physicians to participate in emergency call as a condition of staff membership, with no provision for payment:

1.5 Basic Obligations Accompanying Staff Appointment.

Each physician, regardless of his/her assigned staff category,...is expected to:

... (f) participate in an emergency room on-call schedule and hospital consultation call schedule, if a member of the active physician staff...

12.3.8 Emergency On-call Participation. Failure by a physician to participate in an emergency on-call schedule unless excused by the Medical Executive Committee or appropriate clinical department upon showing of good cause, may result in suspension of all or such portion of the physician's clinical privileges as the Medical Executive Committee may direct, and such suspension shall remain in effect until the matter is resolved through any mechanism that may be appropriate, including corrective action, if necessary.

(CP 388, 431).

Historically, hospitals such as Kadlec did not pay physicians for being available to take call in the emergency department.⁸ Instead, medical staff rules required staff physicians to take call, and physician were willing to do so and were compensated through payment from the patients whom they see in the emergency department while on call and their insurers.⁹ In January 2005, Kadlec's Board decided that the hospital should pay physicians in certain specialties a stipend for taking call once a contractual agreement was reached that called for, among other things, the physicians to support Kadlec's efforts to become a regional referral center

⁸ Trial Tr. 117:3-23 (Testimony of Kadlec CEO Rand Wortman).

⁹ *Id.* at 116:21-117:2.

for emergent issues. (CP 482, §1.5) This came about after certain physician specialties, namely orthopedists, general surgeons and neurosurgeons, threatened to stop taking call unless the hospital began paying them a stipend, a phenomenon that was occurring around the country.¹⁰ In February 2005, when interventional cardiologists began signing agreements so that they too could be paid for taking call, Sambasivan was not eligible to take call because he had voluntarily relinquished his interventional privileges pending a review of his clinical care.¹¹

V. ARGUMENT IN RESPONSE TO SAMBASIVAN'S APPEAL

A. Standard of Review

Trial court rulings on summary judgment motions are reviewed *de novo*. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). In reviewing a summary judgment order, an appellate court engages in the same inquiry as the trial court—whether the pleadings, affidavits, depositions, and admissions on file demonstrate “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). A material fact “is a fact upon which the outcome of the litigation depends, in whole or in part.” *Lamon*

¹⁰ *Id.* at 119:6-120:4 (Testimony of Kadlec CEO Rand Wortman).

¹¹ *Id.* at 256:19-24 (Testimony of Sambasivan).

v. McDonnell Douglas Corp., 91 Wn.2d 345, 349, 588 P.2d 1346 (1979).

All evidence must be considered in the light most favorable to the nonmoving party, and summary judgment may be granted only where there is but one conclusion that could be reached by a reasonable person. *Id.* at 349–50.

B. The Trial Court Appropriately Dismissed Sambasivan’s Breach of Express Contract Claim for Failure To Establish a Breach.

Although Sambasivan’s breach of express contract claim initially concerned three events—two “collegial interventions” where he voluntarily relinquished his privileges in 2005 and 2006–2007, and the August 14, 2008 decision of the Board to adopt an interventional cardiology proficiency threshold—his appeal concerns solely the third event, *i.e.*, the Board’s adoption of the proficiency standard.¹² As an initial matter, Sambasivan inexplicably devotes considerable attention to his argument that hospital bylaws create a binding contract between the hospital and a physician medical staff member. This Court need not reach that novel

¹² The trial court dismissed his breach of contract and tortious interference claims relative to the two earlier collegial interventions as being time-barred under the one-year statute of limitations in Washington’s peer review law, RCW 7.71.030(4). (CP 870) Sambasivan’s assignments of error do not include the statute of limitations dismissal of these claims.

issue,¹³ however, because even if the contractual nature of the Bylaws is assumed for purposes of analyzing his breach of contract claim, the claim still fails as Sambasivan presented no evidence that Kadlec breached any Bylaw provision when it adopted the proficiency standard.¹⁴

Sambasivan argues he was not afforded a hearing following the MEC's vote to recommend restricting his privileges on August 7, 2008 (CP 383, 434), a recommendation that was not ultimately adopted by the Board when it decided, seven days later, to adopt the proficiency threshold with immediate effect, rendering moot any restriction on interventional cardiology privileges for which Sambasivan was no longer eligible. As the trial court observed: "it is uncontested that the [MEC] recommendation was not acted upon by the board, and Plaintiff's privileges were not lost, reduced or restricted due to the [MEC's] recommendation."¹⁵ (CP 871) Rather, he became ineligible for the privileges because he had not performed the requisite number of procedures in the previous two years. "Therefore," the court concluded, "Plaintiff could show no causal relationship between any damage suffered and the [MEC's]

¹³ Should this Court decide to reach the issue of whether hospital medical staff bylaws create an enforceable contract, Kadlec maintains they do not. *See* Kadlec's trial court briefing at CP 109-111 and CP 688.

¹⁴ The trial court assumed, but did not decide, that the Bylaws create a contract between Kadlec and Sambasivan, and concluded that Sambasivan failed to raise a material fact issue that any breach occurred. (CP 871)

¹⁵ *Id.*

recommendation.” (*Id.*)

Sambasivan tries to resurrect the hearing issue by maintaining that the Board adopted the proficiency threshold with immediate effect as a back-handed way to target him and ensure that he would not be able to practice interventional cardiology. (Appellant’s Br. at 30-31) No evidence was presented to support that contention, however,¹⁶ and even if a pretext could be inferred, he does not explain what a hearing on the moot recommendation would accomplish. He argues that at a hearing, he would have presented testimony that he “managed his patients with a proficiency that met or surpassed the governing standard of care.” (Appellant’s Br. at 29). Even if Sambasivan had such evidence to present, an MEC hearing on it is irrelevant to the Board’s adoption of a specialty-wide proficiency threshold that applies to all applicants, present and future. The Board’s decision raises only the issues of: (i) whether the Board had the authority to adopt such a requirement with immediate effect; and (ii) whether the requirement was properly applied to Sambasivan. Sambasivan does not dispute that he had not performed enough interventional procedures to satisfy the threshold. (CP 2056) Thus, his only issue could be the Board’s

¹⁶ For example, Sambasivan presented no evidence that rebutted the declarations of each voting Board member describing the Board’s reasons for adopting the proficiency standard, in which they attested that they adopted the eligibility criteria with immediate effect to protect the safety of hospital patients, protect the hospital itself, and to conform to the recommendations made by the ACC, AHA, SCAI, Kadlec’s consultants, and the Washington Department of Health for purposes of certificate of need laws. (CP 171-97)

authority to adopt the requirement. As discussed below, the trial court correctly decided, as a matter of law, that a hospital board of directors has authority to establish such a requirement for clinical privileges.

Sambasivan obviously disagrees with the Board's decision, and does not believe that a proficiency threshold should be applied to him.¹⁷ While he presented evidence that certain of his peers, and his own expert, "had never seen action of this sort taken before" (Appellant's Br. at 33), these opinions do not vitiate the law in Washington that private hospitals have plenary authority to determine eligibility standards for obtaining clinical privileges, particularly where those standards plainly relate to patient care and safety.

Washington law requires hospital governing bodies to establish standards and procedures for determining which practitioners should be given privileges to practice medicine within the institution. *See* RCW 70.43.010 ("[T]he governing body of every hospital licensed under chapter 70.41 RCW shall set standards and procedures to be applied by the hospital and its medical staff in considering and acting upon applications for staff membership or professional privileges.") (emphasis added).

¹⁷ Over three years have passed since the Board adopted the proficiency requirement, and Sambasivan has not reapplied for interventional cardiology privileges based upon having performed a sufficient number of procedures elsewhere, such as at other Washington facilities where he has privileges and has provided services since August 14, 2007.

In recognition of this statutory scheme, the Washington Supreme Court has held that private hospitals like Kadlec have the right to decide which physicians practice at their facilities. This principle was first articulated in *Group Health Cooperative of Puget Sound v. King County Medical Society*, 39 Wn.2d 586, 667, 237 P.2d 737, 780 (1952), which held that “[p]rivate hospitals have the right to exclude licensed physicians from the use of their facilities, such exclusion resting within the discretion of the managing authorities.” Based upon that reasoning, the Court held that the Group Health physicians could not establish a cause of action against Swedish Hospital for denying them medical staff privileges. *Id.*

The hospital’s right to determine medical staff membership was reaffirmed in another case involving a physician/hospital dispute over medical staff privileges. In *Rao v. Board of County Commissioners (Pierce)*, 80 Wn.2d 695, 497 P.2d 591 (1972) (“*Rao I*”), a physician sought by mandamus to compel the governing board of a private hospital to admit her to the hospital’s medical staff. The hospital denied her application because she failed to provide an evaluation from the hospital where she previously practiced, and provided no other satisfactory reference. In denying her claim, the Court recognized the duty of hospitals to protect public safety by ensuring the quality of the medical staff:

It cannot seriously be questioned that a hospital, whether private or public, has legitimate interest in the quality of its medical staff. It is in its interest to maintain its accreditation, and its economic success depends in large degree upon its good reputation. . . . We think it not improbable, too, that the members of the staff of a hospital consider that when they protect the reputation of the hospital of whose staff they are members, they serve their individual reputations as well.

Id. at 698. After emphasizing the unique position of hospitals with respect to the public, the Court went on to affirm *Group Health*:

And of course the most vital interest in the quality of medical care received in a hospital is that of the public which it serves. Assuming, without deciding, that private hospital authorities have no legal duty to examine into the qualifications of application for admission to the institution's medical staff, they have toward this group at least the ethical duty to do so. We are aware of no legal principle which would prompt this court to say that they have no right to pass upon the competence of such applicants. As we recognized in *Group Health Cooperative of Puget Sound v. King County Medical Society*, supra, even the governing bodies of public hospitals are vested with discretion in admitting doctors to staff privileges, and the courts will interfere with the exercise of this discretion only if it is shown to be "arbitrary, tyrannical, or predicated upon a fundamentally wrong basis."

Id. (emphases added). Again, the "arbitrary and capricious" standard applies to public hospitals. *Rao v. Auburn Gen. Hosp.*, 10 Wn. App. 361, 367, 517 P.2d 240, 244 (1973) ("*Rao II*"). For private hospitals like Kadlec, "the law as it now stands declines to impose upon private hospitals the need to explain their actions (which could be based upon a

myriad of valid reasons) or thrust on them the necessity of conducting extensive hearings at their expense.” *Id.* at 368, 517 P.2d at 244.

The *Rao* case was litigated for over six years, and culminated with a second opinion by the Court of Appeals affirming summary judgment dismissal of the physician’s claim against Auburn General Hospital. 19 Wn. App. 124, 573 P.2d 834 (1978) (“*Rao III*”). There, the Court affirmed the interest of hospitals in protecting the quality of their medical staffs notwithstanding the fact that it sometimes is at odds with the financial interests of individual physicians:

In any case involving the grant or denial of staff privileges in a hospital, the doctor applicant, hospital and public all have an interest. Sometimes, as here, those interests are conflicting. The doctor depends on the hospital for specialized equipment, trained health care professionals and also for the opportunity for consultation and continuing education. If the doctor is denied these privileges, it can result in a loss of income and professional prestige. Similarly, hospitals have a legitimate interest in the quality of their medical staffs upon which they are largely dependent for their accreditation, good reputation and economic success; and last but certainly not least “the most vital interest in the quality of medical care received in a hospital is that of the public which it serves.”

Rao III, 19 Wn. App. at 127 (quoting *Rao I*, 80 Wn.2d at 698). After weighing these interests, the court concluded:

In its own interest and in the public interest, a hospital does have the discretionary right to exclude doctors from staff privileges, whether based on the doctor’s lack of proficiency or upon the concern that the doctor has a

personality which will be detrimental to the working of the hospital.

Id. at 127 (emphasis added).¹⁸

Sambasivan argues that *Group Health* and *Rao* are not controlling. (Appellant's Mem. at 37) He claims that *Group Health* "antedates the development of much of the law against discrimination, particularly the law and policy against retaliation," and is distinguishable because the physicians in *Group Health* were not established members of the Swedish Hospital medical staff, whereas Sambasivan is a Kadlec medical staff member. Neither argument has merit.

First, *Rao* expressly considered *Group Health* in light of discrimination allegations based on sex or race. At most, *Rao I* suggests that a private hospital might not enjoy unfettered discretion to deny a physician privileges on the basis of sex or race, if "there were the slightest suggestion in the record that the plaintiff's application was tabled because of her sex or race." *Rao I*, 80 Wn.2d at 700. Here, Sambasivan dropped his discrimination claim because he had no evidence to support it. In

¹⁸ Case law around the country is consistent. Courts recognize that hospitals have "wide discretion to make decisions about their medical staffs," which necessarily involves decisions regarding the requirements for holding particular privileges. *Baqir v. Principi*, 434 F.3d 733, 742 (4th Cir. 2006). Indeed, some courts have held that a private hospital's decision regarding its medical staff membership is not subject to any form of judicial review. *Samuel v. Herrick Mem'l Hosp.*, 201 F.3d 830, 834-35 (6th Cir. 2000). This is because "decisions concerning whether a physician is entitled to staff privileges should be left to the expertise of the hospital's staff and administration." *Owens v. New Britain Gen'l Hosp.*, 643 A.2d 233, 241 (Conn. 1994).

deposition, he admitted that he “[doesn’t] have any personal knowledge” of any discriminatory intent of Kadlec in adopting the proficiency threshold:

Q. Do you have an understanding as to why administration might want to eliminate the privileges of a qualified, board certified interventional cardiologist, in interventional cardiology in your case?

A. I don’t have any personal knowledge. I think it may be discrimination because I’m Indian, and they may not like it. I don’t know. We’re trying to figure out because there is no reason for that, in my opinion, because I am board certified. I’m extremely qualified.

Q. So the only reason that you think that they would want to do so is based upon some discriminatory motive because of your national origin?

A. One of the reasons.

Q. What are the other reasons?

A. We are trying to figure out.

Q. But as you sit here today you have no idea?

A. No.

Q. Right?

A. No.

Q. No what?

A. No idea.

Q. You have no idea. Has anybody ever made, from the administration, said anything to you that would strike you as discriminatory based upon your national origin?

A. Not personally, no.¹⁹

Sambasivan also did not dispute that two of the three other interventional cardiologists who practice at Kadlec are also, to use Sambasivan's word, "non-white"—Drs. Saad Tabbara and Iyad Jamali are Lebanese and Syrian, respectively, and satisfied the proficiency threshold, entitling them to maintain interventional privileges.²⁰ In short, Sambasivan asks the Court to ignore the clear precedent of the *Group Health* and *Rao* decisions based on the mere utterance of the word "discrimination" in his original complaint, a claim he later abandoned and for which he admitted he had no evidence.

Second, Sambasivan contrasts himself as a medical staff member at Kadlec with the plaintiffs in *Group Health* who were medical staff applicants. That is a distinction without a difference, particularly in this case. While Sambasivan maintains that his medical staff membership afforded him additional rights under the Bylaws, he produced no evidence

¹⁹ CP 255-57. *See also* CP 262 (agreeing he has "no sufficient proof" of Kadlec discriminating against him).

²⁰ CP 2xxx (physician profiles for Drs. Tabbara and Jamali from their practice group's website, www.inlandcardiology.com) (provided as Attachment 2 to Kadlec's Opposition to Sambasivan's Motion to Compel Discovery; CP pages to be identified following Kadlec's submission of its supplemental designation of Clerk's Papers)

that any such rights were violated by the Board's adoption of the proficiency threshold. His privileges were up for renewal in 2007, and were not renewed on the basis of a professional society-recommended proficiency requirement that he failed to meet.²¹ To accept his argument that the Board is prohibited from changing membership requirements for physicians who are already medical staff members would eviscerate the Board's authority under RCW 70.43.010 to "set standards and procedures" for staff membership and professional privileges.

Assuming, as the trial court did, that the Bylaws constitute a contract between a physician staff member and the hospital, Sambasivan cannot establish a breach as a matter of law because those Bylaws plainly permit the Board to adopt eligibility requirements like the proficiency threshold. For example, the preamble states that the Board has ultimate authority and responsibility to ensure quality of care in the hospital. (CP 381) ("[I]t is recognized that the Medical Staff is responsible for the provision of quality care in the Medical Center according to regional standards and must accept this responsibility, subject to the ultimate authority of the Medical Center's Governing Body") (emphasis added). That undiminished authority is affirmed in a provision stating that

²¹ Sambasivan, who is board certified by the American Board of Internal Medicine, is a fellow of the ACC, one of the professional organizations that recommended the proficiency standard. (Trial Tr. at 245:11-17)

appointment is “subject to final review and decision by the Governing Body.” (CP 384) (Bylaws, § 1.1). In other words, as a medical staff member, the Bylaws entitle Sambasivan to “exercise only those clinical privileges specifically granted to the physician by the Governing Body.” (CP 399, Bylaws, § 3.1.1).

Nowhere do the Bylaws prevent the Board from adopting eligibility criteria, or cede that authority to the medical staff (*e.g.*, the MEC). Nor do the Bylaws diminish the Board’s responsibility to ensure quality patient care and make final decisions regarding medical staff appointment. Finally, the Bylaws do not require a hearing when the Board adopts an eligibility requirement that all staff members must meet, even if the requirement results in a medical staff member becoming ineligible to renew or continue with the associated privileges. Thus, the trial court correctly concluded that there is no basis for a breach of contract claim, as the plenary authority of the Board is expressly recognized by law and the alleged contract itself.²²

²² Sambasivan’s further contention that he was “the victim of unlawful discrimination” (CP 554; Appellant’s Mem. at 34), in derogation of Section 1.4 of the Bylaws (which prohibits discrimination of medical staff member applicants) is not relevant to this appeal as he dropped his discrimination claim and the record contains no supporting evidence.

C. Sambasivan's Tortious Interference Claim Was Properly Dismissed Because He Failed to Raise a Genuine Fact Issue of Illegal or Improper Interference by Kadlec in Adopting the Proficiency Requirement.

Without evidence of intentional interference by Kadlec, Sambasivan cannot establish the elements of a tortious interference claim. Because the trial court correctly concluded that the Board's adoption of the proficiency requirement was lawful, it necessarily follows that Sambasivan's "tortious interference claim relative to the board's August 14, 2008 action also fails as a matter of law" because he fails to "raise a genuine issue of material fact as to the existence of any illegal or improper interference by Kadlec in adopting the eligibility standard."²³ (CP 872)

D. Summary Judgment Dismissal of the Retaliation Claim Was Proper Because Sambasivan Failed to Raise a Genuine Fact Issue of a Causal Nexus Between the Board's Action and His Earlier Lawsuit Alleging Discrimination, and Failed to Rebut Evidence of Non-Retaliatory Reasons for Adopting the Proficiency Threshold with Immediate Effect.

Sambasivan argues that a causal nexus between his filing of a lawsuit in June 2008 (which alleged, among others, a claim for discrimination), and the Board's August 14, 2008 action "must be inferred," apparently solely due to temporal proximity. That is, because Kadlec's CEO informed the Board members at the August 14, 2008

²³ The trial court did not reach the issue of the application of the economic loss rule to Sambasivan's tortious interference claim. That issue is fully briefed in Kadlec's Memorandum in Support of its Partial Motion for Summary Judgment (Breach of Express Contract / Tortious Interference) and Reply in support. (CP 121 & 690)

meeting that a physician had recently sued the hospital, and identified the various claims Sambasivan brought against the hospital, the court should somehow infer, with nothing more, that the Board's decision to adopt a facially neutral proficiency requirement at that same meeting was in retaliation for bringing a discrimination claim.

There is no basis in law for such a far-fetched inference. Cases that Sambasivan cites are hardly dispositive. *See, e.g., Vasquez v. State*, 94 Wn.App. 976, 985 (1999) (in a retaliatory discharge case, the court noted simply that “proximity in time between the discharge and the protected activity” is “[a]mong the factors suggesting retaliatory motivation”) (emphasis added); *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 505 (9th Cir. 1989) (“timing of layoffs” was but one factor cited by the court from which “a jury could infer retaliatory motivation” in a wrongful discharge case; other factors are also listed).

The fact that the causal nexus prong of a retaliation claim involves a party's motivation does not mean summary judgment dismissal of retaliation claims is inappropriate, as Sambasivan suggests. While evidence of motive is often circumstantial, such evidence must be “specific and substantial in order to create a triable issue with respect to whether the employer intended to [retaliate].” *Goodwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998). Circumstantial evidence must

also “[t]end to show that the employer’s proffered motives were not the actual motives because they are inconsistent or otherwise not believable.”

Id.

Here, the sole proffered piece of evidence, circumstantial or otherwise, is a single entry in the Board minutes that reflects the Kadlec CEO informed the Board of a multi-claim lawsuit filed against the hospital. (CP 69) This can hardly create a material fact issue as to whether Sambasivan has “specific and substantial” circumstantial evidence of retaliation. Nor does this evidence “tend to show” that the proffered motives of the voting Board members (as expressed in each member’s sworn declaration) are “not believable.” *Id.*

The notion that a court should nonetheless “infer” a retaliatory motive is without merit. As stated in *Hollenback v. Shriner’s Hospitals for Children*, 149 Wn. App. 810, 206 P.2d 337 (2009), any “inference” or presumption of retaliatory motive that may be afforded to a prima facie claim of retaliation is removed when the “employer meets its burden and produces some evidence of a nonretaliatory reason” for its action. *Id.* at 823. At that point, the burden shifts back to the plaintiff to “establish a genuine issue of material fact by showing that the employer’s stated reason for the adverse employment action was a pretext for a discriminatory or retaliatory purpose.” *Id.* If that burden cannot be met,

then summary judgment dismissal is appropriate. *Barker v. Advanced Silicon Materials, L.L.C.*, 131 Wn. App. 616, 625, 128 P.3d 633 (2006).

Sambasivan put forth no competent evidence to satisfy his burden. He ignores the fact that the MSQ recommendation to adopt the proficiency standard originated before the lawsuit was served. (CP 1941) He further ignores that the standard applied to, and was satisfied by, other physicians of varied national origins. He argues that, despite the recommendations of national cardiac care trade associations and independent consultants and the requirements of State regulators, the Board's decision has "contrary to its own practice and medical science." (Appellant's Br. at 32) Whether the Board was "right" from a "medical science" point of view, however, is irrelevant. The relevant inquiry is whether the board acted with a non-retaliatory purpose. Here, the Board members' uncontroverted sworn statements indicate that they did.²⁴

"[W]hen the employee's evidence of pretext is weak or the employer's non-retaliatory evidence is strong, summary judgment is appropriate." *Milligan v. Thompson*, 110 Wn. App. 628, 42 P.3d 418 (Div. II 2002).

²⁴ Each Board member testified: "Mr. Wortman's statements about the litigation were brief and informational only," and that the Board members were "concerned that a delay in implementing the nationally-recognized standard that was recommended by the MEC would not serve the interest of optimal patient care and safety that the Board sets as its first priority." (CP 178-79 (Cowan Declaration, adopted by all voting Board members, *see, e.g.*, CP 187, ¶3))

Perhaps because Sambasivan has no evidence to refute the Board's reasons for adopting the proficiency requirement, he implores the court to apply the esoteric doctrine expressed in *In re Estate of Black*, a proof of lost will case where the court refused to grant summary judgment as to the validity of a second will. The court found that "the entry of summary judgment at the initial probate hearing was incompatible with [the statutory probate] scheme [RCW 11.24.010]." 116 Wn. App. 476, 485 66 P.3d 670 (Div. III 2003). In other words, because summary judgment is a final judgment on the merits, it would "inadvertently short circuit[] the statutory probate scheme" which allows for both an initial probate hearing and a separate proceeding to address any will contests. *Id.* Obviously, no such scheme exists in this litigation, and *Black's* summary judgment holding has never been applied outside the probate setting.²⁵

In any event, *Estate of Black* involved witness credibility issues, which led the court to consider the value of witness cross-examination at trial. *Id.* at 487. Here, no credibility issues have been raised as to the

²⁵ More persuasive is the Court of Appeal's decision in *Clawson v. Corman*, 154 Wn. App. 1018 (Div. I 2010), which rejected a summary judgment defense based on *Estate of Black*. The court pointed out that "the opposing party may not merely recite the incantation, 'Credibility' and have a trial on the hope that a jury may disbelieve factually uncontested proof." *Id.* The court also observed that the availability of discovery vitiates any argument that information is particularly within the knowledge of the defendants: "Despite full access to the tools of discovery, Clawson does not identify any specific disputed facts or evidence that tend to undermine the material declarations supporting summary judgment." *Id.*

sworn testimony of Kadlec's voting Board members. Indeed, their testimony is entirely consistent with the minutes of the Board meeting, which state that the purpose of adopting the proficiency requirement was to protect patients and the hospital by immediately adopting a credentialing criteria recommended by the Medical Executive Committee and the ACC, the AHA, the SCAI, and the Department of Health, among others. (CP 177-78) The only thing that Sambasivan can offer is the bald assertion that the Board's action "must have been" retaliatory (and in response to the lawsuit's discrimination claim rather than the other claims he asserted) because he doesn't understand what else it could be. That is not enough. *See Vakharia v. Swedish Covenant Hosp.*, 987 F. Supp. 633, 647 (N.D. Ill. 1997) (noting that "it is not enough . . . to raise the possibility that suspension of privileges may have been the result of base motives when the evidence corroborates the reasons given," and granting summary judgment for defendant on § 1981 claim).

Sambasivan had access to the full range of discovery tools to establish his case and indeed took depositions of Board members. He has no basis to request a free ticket to a trial on the merits of factually uncontested proof. The trial court's summary judgment dismissal of the retaliation claim was proper.

E. The Trial Court Properly Denied Sambasivan’s Motion to Compel.

1. Standard of Review

Denial of a motion to compel discovery is reviewed for an abuse of discretion. *Briggs v. Nova Services*, 135 Wn. App. 955, 967, 147 P.3d 616, 622 (2006) *aff’d*, 166 Wn.2d 794, 213 P.3d 910 (2009). A court abuses its discretion when it exercises that discretion in a way that is manifestly unreasonable, or on untenable grounds, or for untenable reasons. *Nakata v. Blue Bird, Inc.*, 146 Wn. App. 267, 277, 191 P.3d 900, 905 (2008) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). Trial courts have broad discretion under Civil Rule (“CR”) 26 to limit the scope of discovery. *Id.*; CR 26(b), (c).

2. Trial Court Did Not Abuse Its Discretion in Denying Sambasivan’s Motion to Compel.

Sambasivan seeks to reverse the trial court’s early discovery ruling, which prevented him from accessing statutorily privileged peer review records of the three other interventional cardiologists that held privileges at Kadlec. The trial court properly concluded that the requested documents were privileged peer review records under RCW 4.24.250(1) and RCW 70.41.200(3) and no exception permits production. (CP 72-73)

Washington’s physician peer review privilege provides unqualified protection for the documents Sambasivan seeks. These documents, which

are maintained as part of Kadlec's coordinated quality improvement program, are "not subject to review or disclosure, or subpoena or discovery proceedings in any civil action[.]" RCW 4.24.250(1) (emphasis added). *See also* RCW 70.41.200(3)(c).

In his motion to compel discovery, and again in his appellate brief, Sambasivan argues that the privileged materials fall under two statutory exceptions. (CP 39; Appellant's Br. at 53) He claims first that RCW 4.24.250(1) creates an applicable exception for materials related to "actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider." Appellant's Br. at 53; RCW 4.24.250(1). Sambasivan mischaracterizes the exception by truncating the statutory provision. Read in its entirety, the exception only permits a physician litigant to discover his or her own peer review materials as that is the only circumstance when the litigation "arises out" of a recommendation on the provider's privileges.²⁶ The exception does not permit discovery of, and has never been interpreted to apply to, the peer review records of other

²⁶ The complete sentence reads: "The proceedings, reports, and written records of such committees or boards, or of a member, employee, staff person, or investigator of such a committee or board, are not subject to review or disclosure, or subpoena or discovery proceedings in any civil action, except actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider as defined in RCW 7.70.020(1) and (2) ." RCW 4.24.250(1) (emphasis added).

physicians. The trial court properly concluded that this exception does not apply to the privileged records sought by Sambasivan.

Similarly, the second statutory exception cited, RCW 70.41.200(3)(c), by its plain language, does not apply to the peer review records of other physicians. That exception provides:

“This subsection does not preclude ... (c) in any civil action by a health care provider regarding the restriction or revocation of that individual’s clinical or staff privileges, introduction into evidence information collected and maintained by quality improvement committees regarding such health care provider[.]”

(emphasis added). “Such health care provider” in the instant case can mean only Sambasivan himself. The trial court thus did not abuse its discretion in determining that this exception does not permit production of peer review materials related to the three other physicians.

Finally, the trial court properly rejected Sambasivan’s argument that the statutory peer review privilege should be ignored where the physician litigant has alleged discrimination. No exception exists in the statutes for physicians asserting discrimination claims against hospitals, and no Washington court has interpreted the statute to include such an exception. If the Washington Legislature wished to permit production of such documents in discrimination cases, it would have constructed an entirely different – and substantially broader – exception. The Legislature did not do so. Beyond that, it would be devastating to create a judicial

exception in this case, where Sambasivan did nothing more than establish that he is, in his words, “non-white” and plead the word “discrimination.” Such an exception would eliminate the statutory protection for health care peer review materials of an undefined range of alleged comparators in every case where the litigant claims to be in a protected class, irrespective of whether there is any evidentiary basis to allege discrimination. *See Doe v. St. Joseph’s Hosp. of Fort Wayne*, 113 F.R.D. 677, 680 (N.D. Ind. 1987) (the “delicate balance” in physician discrimination cases “requires that the plaintiff allege facts which create more than an inference that the actions of the peer review committee were discriminatory, before the court will permit even an *in camera* inspection of the communications to, and records of or determinations of the peer review committee”).

The trial court’s refusal to create a broad judicial exception to the statutory privilege is further buttressed by the fact that Sambasivan made no showing as to how the peer review records of three other interventional cardiologists at Kadlec, two of whom are “non-white,” could possibly be relevant to his claim. The only issue relevant to this appeal, the Board’s proficiency threshold, is facially neutral and was applied uniformly to all interventional cardiologists. (CP 1986) While Sambasivan was unable meet the threshold, there is no dispute that it was satisfied by the other three cardiologists. As the Court of Appeals found in *Morgan v.*

PeaceHealth, Inc., 101 Wn. App. 750, 774-75, 14 P.3d 773, 786-87 (2000), a case involving a physician / hospital dispute over clinical privileges where the plaintiff physician sought discovery on “whether the hospital’s actions were reasonable, indicated bias, were procedurally different than like action taken against others, or were retaliatory in nature[,]” neither the hospital’s review of other physicians, nor the competency of other doctors, was “relevant to whether the hospital conducted a reasonable review” of the physician litigant.²⁷ Similarly, the peer review records of other Kadlec interventional cardiologists have no bearing upon the ultimate issue here—whether the Board had the authority to adopt the proficiency standard.

3. The Discovery Motion Is Moot Because Sambasivan Amended His Complaint and Abandoned His Unlawful Discrimination Claim.

Sambasivan appeals the trial court’s discovery ruling despite the fact that he never sought interlocutory appeal of the denial of his motion, and subsequently abandoned his unlawful discrimination claim when he voluntarily amended his complaint. *See* CP 1283 (“The plaintiff

²⁷ Because Sambasivan does not appeal the trial court’s discovery ruling on the basis that federal cases related to a federal peer review privilege dictate reversal in this case, Kadlec does not address that issue on appeal. As Kadlec demonstrated in its Opposition to Sambasivan’s Motion to Compel Discovery, state (not federal) privilege law applies where an individual brings a state law discrimination claim. *See* (CP 2xxx) (CP pages to be supplied following Kadlec’s submission of its supplemental designation of Clerk’s Papers); *Pardo v. General Hosp. Corp.*, 841 N.E.2d 692 (Mass. 2006).

relinquished his claim of primary discrimination. Instead, he is pursuing a retaliation claim.”).

The trial court’s discovery ruling is irrelevant now because no discrimination claim is currently before this Court for review. *See* RAP 2.5(a) (“The appellate court may refuse to review any claim of error which was not raised in the trial court.”); *Univ. Vill. Ltd. Partners v. King County*, 106 Wn. App. 321, 328, 23 P.3d 1090, 1094 (2001) (refusing to consider appellant’s equal protection claim where the claim was abandoned in the first amended complaint because “arguments or theories not presented to the trial court will not be considered on appeal”); *Perry v. Rado*, 155 Wn. App. 626, 637, 230 P.3d 203 (2010) (refusing to consider physician’s medical staff reinstatement claim because he failed to retain it when amending his complaint).

Because the information Sambasivan sought pertained only to the abandoned discrimination claim, and not to claims that are part of the instant appeal, a challenge to the lower court’s discovery ruling is not proper. In *Brown v. Vail*, 169 Wn.2d 318, 237 P.3d 263 (2010), the Supreme Court addressed a nearly identical issue, finding that when the appellants’ substantive, constitutional claims were deemed moot, the discovery rulings relevant only to those claims were also moot:

When originally retained, this appeal challenged several of the trial court's rulings regarding discovery and trial management, particularly with regard to the trial court's decision not to allow discovery about past executions and execution teams. However, these rulings impacted the Appellants' ability to build their constitutional challenge and are therefore linked to the Appellants' constitutional claim; because the constitutional claim is moot, a challenge to these [discovery] rulings is also moot.

Id. at 336 n.11 (emphasis added). Similarly here, the trial court's denial of Sambasivan's motion to compel became moot when he amended his complaint and voluntarily dropped the discrimination claim.

Sambasivan's argument to the contrary is unpersuasive. It is irrelevant whether the "[t]he [unlawful discrimination] claim as initially pled was never dismissed [... or] was never the subject of an agreement between the parties." (Appellant's Br. at 51) In his Second Amended Complaint, filed on August 17, 2009, Sambasivan voluntarily and without any compulsion dropped the unlawful discrimination claim (along with his antitrust claim and claim for injunctive relief) and claimed instead that the Board adopted the proficiency threshold in retaliation for having earlier filed a complaint (which included a claim of discrimination) against Kadlec. (CP 78-79) A claim of unlawful discrimination is distinct from a claim of retaliation—the retaliation claim asserts only that the Board adopted the proficiency threshold in retaliation for his filing a lawsuit

against Kadlec that included a discrimination claim.²⁸ The peer review records of other physicians are not relevant to that claim.

F. The Trial Court Properly Awarded Kadlec Attorney Fees and Did Not Apply the “Prevailing Party” Analysis of Contractual Fee-Shifting Cases.

Sambasivan’s argument that neither party should be awarded attorney fees because “both parties prevail[ed] on major issues” is easily addressed. Neither case Sambasivan cites supports his position, as they both involve attorney fees awarded under a contract, where the court was required to determine which party substantially prevailed for purposes of determining each party’s threshold entitlement to fees.

First, in *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 797 P.2d 477 (1990), the parties brought competing claims under a contract that awarded attorney fees to the prevailing party in the event of a dispute. *Id.* at 221. Indian Wells recovered under the contract and the trial court awarded it attorney fees. The propriety of the trial court fee award was not challenged. Both parties, though, prevailed on “major issues” presented on appeal, and thus the court of appeals declined to award either party its fees on appeal as a

²⁸ Sambasivan recognized the distinction between his discrimination and retaliation claims when he refused to respond to Kadlec’s interrogatory seeking evidence regarding discriminatory animus by objecting that “[t]he Plaintiff relinquished his claim of primary discrimination. Instead, he is pursuing a retaliation claim.” (CP 1283)

“prevailing party” under the their contract. *Id.* at 234-35 (“because both parties have prevailed on major issues [in the appeal], neither qualifies as the prevailing party under the contract”) (emphasis added). Notably, Sambasivan does not cite the “under the contract” language when citing *Indian Wells* for the proposition that “Where, as here, both parties prevail on major issues, neither should be awarded attorney fees.”

Here, by contrast, the parties’ claims for attorney fees do not arise under a contractual fee-shifting provision. Kadlec’s entitlement to fees arises under a mandatory fee-shifting statute, RCW 7.71.030, where Kadlec was the prevailing party with respect to Sambasivan’s claim arising under that statute. To the extent that Sambasivan is entitled to attorney fees for prevailing on a wholly distinct claim for breach of implied contact, there is no authority that these two separate fee awards somehow cancel each other out, regardless of their relative value, and the differing legal bases under which they arose.

The second case cited, *Marassi v. Lau*, 71 Wn. App. 912, 859 P.2d 605 (1993), is similarly inapposite. Like *Indian Wells*, the case involved a contractual dispute where the contract awarded costs and reasonable attorney fees to the “successful party.” *Id.* at 913. Both parties brought affirmative claims. While Marassi received a judgment with respect to two claims, the majority of his claims were dismissed, and thus defendant

Dynasty Corporation argued that Marassi was not the “prevailing party,” and cited *Indian Wells* for the proposition that “if both parties prevail on major issues, an attorney fee award is not appropriate.” *Id.* at 916.

Given that Marassi prevailed on two claims but Dynasty successfully defended a greater number of claims, the court determined that a “proportionality approach” was necessary to determine entitlement to attorney fees under the contract. *Id.* at 917. The court noted that awarding attorney fees to successful defendants, as an offset to the fees awarded to plaintiffs for successful claims “is consistent with the underlying philosophy of fee-shifting; to discourage weak cases, encourage settlements, and restore a wronged party to its original position.” *Id.* at 918.

In short, the *Marassi* court did (in the context of a contractual attorney fee provision) exactly what the trial court did here—award Kadlec its attorney fees as required under RCW 7.71.030 for successfully defending Sambasivan’s peer review claims, and offset those fees by amounts owed to Sambasivan as the prevailing party on his separate and distinct breach of implied contract claim:

[W]hen several distinct and severable breach of contract claims are at issue, the defendant should be awarded attorney fees for those claims it successfully defends, and the plaintiff should be awarded attorney fees for the claims it prevails upon, and the awards should then be offset.

Id. Neither *Marassi* nor any other authority²⁹ supports Sambasivan's unprecedented notion that two distinct fee awards simply cancel out entitlement to each.

Accordingly, the trial court properly awarded attorney fees to Kadlec and properly rejected Sambasivan's position that neither party should be awarded fees because both prevailed on separate claims.³⁰

VI. ARGUMENTS ON CROSS-APPEAL

A. The Trial Court Erred in Finding Sambasivan Was Entitled to Payment for Call Coverage Under a Quasi-Contract Theory.

1. Standard of Review

Review of a bench trial decision is a two-step inquiry: (1) whether substantial evidence supports the trial court's challenged findings of fact; and (2) whether those findings of fact support the court's conclusions of law. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Substantial evidence is a quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. Conclusions of law are reviewed *de novo*. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

²⁹ *Sardan v. Morford*, 51 Wn. App. 908, 756 P.2d 174 (1988) is similarly inapposite as an application of a contractual prevailing party clause.

³⁰ As argued below, Sambasivan is not entitled to attorney fees in the first instance for prevailing on an implied breach of contract claim, as there is no basis for awarding fees in statute, equity, or contract.

2. The Trial Court’s Ruling Does Not Take Into Account the Federal Stark Law, Which Renders the Implied Contract Payments Illegal.

Although Kadlec extensively briefed the Stark law regulatory issue at summary judgment and in its trial brief, the trial court’s conclusions of law do not address the application of the federal physician self-referral law, commonly known as the “Stark law,” to Sambasivan’s implied contract theory. That law and its state law analogue, prohibit the payment of compensation by a hospital to a physician in the absence of a written contract where the physician refers Medicare and Medicaid patients to the hospital. 42 U.S.C. § 1395nn; RCW 74.09.240(3).

The Stark law prohibits a hospital from submitting Medicare claims for payment for certain services (including inpatient and outpatient hospital services) that are referred by a physician who has a “financial relationship” with the hospital, unless a statutory or regulatory exception applies. 42 U.S.C. § 1395nn.³¹ “Financial arrangement” includes a compensation arrangement between the physician and a hospital. *Id.* § 1395nn(a)(2). A physician or entity that enters into a relationship that violates Stark is subject to severe penalties and fines, including repayment

³¹ “The oft-stated goal of the [Stark] Act is to curb overutilization of services by physicians who could profit by referring patients to facilities in which they have a financial interest.” *United States ex rel. Kosenske v. Carlisle HMA, Inc.*, 554 F.3d 88, 95 (3d Cir. 2009) (internal quotations and citation omitted).

of all Medicare services referred to the hospital by the physician. *Id.* “The Stark law is a strict liability statute, which means proof of specific intent to violate the law is not required.”³² Washington State law has an identical prohibition relating to Medicaid services, which incorporates the federal law exceptions. RCW 74.09.240(3).

Compensating Sambasivan for furnishing call services would plainly constitute a “compensation arrangement” between a hospital and physician. Because Sambasivan refers Medicare and Medicaid patients to Kadlec) (CP 170; Trial Tr. at 83:19-24), such an arrangement is permissible under Stark (and state law analogue) only if the requirements of a Stark exception are satisfied. The relevant exception here, the exception for “personal service arrangements,” requires, *inter alia*, that “the arrangement is set out in writing, signed by the parties, and specifies the services covered by the arrangement.” 42 U.S.C. § 1395nn(e)(3)(A)(i) (emphasis added).

Because this exception requires a signed, written agreement, this exception cannot be satisfied by an implied agreement to pay Sambasivan for call services. *See Kosenske*, 554 F.3d at 96–98 (Stark law implicated in part because no written contract existed covering the services for which

³² HHS-OIG, A Roadmap for New Physicians, Fraud & Abuse Laws, *available at*: <http://oig.hhs.gov/compliance/physician-education/01laws.asp>.

payment was made by hospital to a referring physician group); *see also* <http://www.whidbeynewstimes.com/news/37937489.html?period=W&mpStartDate=09-07-2011> (newspaper article describing Whidbey General Hospital's recent self-disclosure of Stark law issues to the federal government, which included the fact that "the hospital compensated physicians for call coverage without the existence of a written agreement") (Addendum).

As noted above, as soon as the parties executed a signed written agreement that met all of the Stark requirements for a "personal service arrangement," Kadlec began paying Sambasivan for interventional call coverage services in April 2007. Compelling the hospital to pay him prior to such an agreement being in place (particularly where he lacks even an equitable basis to assert a right to payment, as discussed below) would force the hospital to enter into a financial arrangement that is forbidden by both federal and state law.³³ Because the Stark law is a strict liability statute, ordering Kadlec to pay Sambasivan under this claim would be

³³ The trial court noted that some physicians received payment for call for brief periods of time before their written agreement took effect, or were signed. (CP 878; CP 980) Evidence of retroactive payments authorized for physicians who had already entered into written and signed contracts is irrelevant to a claim for payment where no written agreement has ever existed covering the period in question.

illegal. Therefore, in addition to lacking any substantial basis in fact, Sambasivan's implied contract claim fails as a matter of law.³⁴

3. The Trial Court's Findings That Sambasivan Established the Elements of an Unjust Enrichment Claim Are Not Supported by Substantial Evidence.

In addition to the Stark law illegality issue, the trial court's judgment must also be reversed because its findings as to the elements of unjust enrichment are not supported by substantial evidence. Unjust enrichment allows a party to recover the value of a benefit it has conferred on another party where, absent any contractual relationship, notions of fairness and justice require such recovery. *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). To recover under an unjust enrichment claim, Sambasivan must show that (1) Kadlec received a benefit from him, (2) Kadlec appreciated or knew of the benefit, and (3) the circumstances make it unjust for Kadlec to retain the benefit without payment. *Id.* at 484-85. The trial court's findings of fact relative to each of the unjust enrichment elements are not supported by substantial evidence and therefore should be reversed.

³⁴ The trial court's ruling never offered any explanation as to why it ignored this issue, despite the fact that it was repeatedly argued.

a. No Substantial Evidence That Sambasivan's Taking Uncompensated Call from July 1, 2005 to October 26, 2006 Conferred a Benefit on Kadlec.

The trial court concluded that “[b]y providing call coverage on the defendant’s emergency call coverage list, the plaintiff provided an economic benefit to the defendant.” (CP 915) None of the cited evidence supports this finding. First, the trial court cites to testimony (from Dr. Ravage) that Sambasivan’s taking call during this period “lightened the load of the other interventional cardiologists, by providing them a better opportunity to rest.” (CP 916) This is a benefit to the other cardiologists (none of whom are employed by Kadlec), not a benefit enjoyed by the hospital. (Trial Tr. at 37:3-12) The additional finding that “[w]ithout sufficient physicians to provide these services, the defendant must hire from outside the area to provide these services,” *id.*, also does not support a finding of a “benefit” to Kadlec, as there was no evidence whatsoever that Kadlec had difficulty finding a sufficient number of interventional cardiologists to take call. In fact, Dr. Ravage provided uncontroverted testimony that the other interventional cardiologists shared call during the times that Sambasivan relinquished his clinical privileges, and no testimony was offered that the hospital was forced to “hire from outside the area” when Sambasivan was not taking call. (*Id.* at 36:14-37:12)

The court’s additional finding that Kadlec “would have had to pay

other physicians for providing services that were provided by [Sambasivan]” (CP 916) is also speculative and without an evidentiary basis. No Kadlec executive or officer testified as to this proposition. Kadlec was under no independent obligation to pay any medical staff physician to take call; the only evidence before the court on this point was that each medical staff member was required by the Bylaws to take call, without compensation from the hospital. (CP 388, 431)

b. No Substantial Evidence That Kadlec Knew and Appreciated Any Benefit Conferred By Sambasivan’s Uncompensated Call.

The trial court’s findings of fact do not identify any evidence in support of the second element of unjust enrichment. They state, with no elaboration, that “[t]he above-described benefit conferred by the plaintiff on the defendant was known and appreciated by the defendant,” and, that “[t]he defendant was aware that it received considerable value by reason of interventional cardiologists’ provision of call coverage services.” (CP 916-17) The only evidence that could possibly be cited to support these conclusions, however, are the findings that one former Kadlec executive, Suzanne Richins, was aware that Sambasivan was added to the call coverage roster in 2005, and that Sambasivan “on several occasions” approached another Kadlec officer, William Wingo, and asked to be paid for call. (CP 916)

The finding concerning Richins' knowledge of the call schedule is clearly erroneous, and in any event does not support Kadlec's knowledge of any benefit of receiving call services without paying for them. Richins did not testify at trial nor was she deposed. The only evidence offered as to her knowledge and authorization of Sambasivan being placed on the call schedule following the restoration of his privileges was testimony of former Kadlec Chair of Cardiac Services Christopher Ravage, who testified that he asked Richins for permission to add Sambasivan to the call schedule in July 2005 and "[s]he said yes." (Trial Tr. at 31:22-32:11) Dr. Ravage also testified, however, that he did not know whether Richins thought Sambasivan was being paid for call coverage. (*Id.* at 32:12-15) He testified that later in 2005, he ran into Richins who asked him "how long Dr. Sambasivan had been taking call and why." (*Id.* at 37:17-26) He stated that she "seemed to have no recollection of" their earlier conversation about adding him to the call schedule. (*Id.* at 37:38:2-3) He also testified that he did not speak to any other member of the Kadlec administration about Sambasivan taking call. (*Id.* at 38:4-7)

As to the finding concerning Sambasivan's conversations with Wingo about being paid for call, the evidence consists of testimony from Sambasivan (both at trial and in his published deposition) and Wingo regarding their conversations. None of this testimony could lead a rational

finder of fact to conclude that Kadlec “knew and appreciated” any benefit that was being conferred to it by not compensating Sambasivan for taking call between July 2005 and October 2006, particularly where these individuals testified that:

- Sambasivan never sent Kadlec an invoice for payment. (Trial Tr. at 106:9-16)
- Sambasivan never told Kadlec he would not take call unless he was paid, or gave Kadlec a deadline for offering him a contract. (*Id.* at 238:3-11)
- The Cardiac Services Chief, Dr. Ravage, testified that he never spoke to anyone at Kadlec concerning lack of payment to Sambasivan, even though he knew Sambasivan was providing call services. (*Id.* at 38:4-7)
- Physicians at Kadlec did not receive compensation for taking call unless they had signed a contract, with concomitant contractual obligations to the hospital,³⁵ and submitted requests for payment. (*Id.* at 231:18-24)

³⁵ For example, call coverage contracts required physicians to “participate in, cooperate with and support the Medical Center’s Transfer Center, its policies and procedures, including the transfer coordination process via conference call and respond to the Transfer Center in a timely manner.” (CP 482)

- During the time frame that Sambasivan took call, the Kadlec Board was re-evaluating the payment-for-call program in general. Wingo, who was responsible for physician contracting at Kadlec, testified that the Board's discussions raised doubts as to whether he would be able to enter into a contract with Sambasivan for a term of at least a year, which is a requirement under the Stark law. (*Id.* at 236:11-237:19)

- Although Sambasivan's interventional cardiology privileges were reinstated sometime in 2005, which permitted him to take call, he was subject to a further review of his clinical care by an outside reviewer, which was to occur six months following reinstatement. (*Id.* at 234:16-236:4) Wingo testified that the pendency of this outside review was relevant in deciding whether to enter into a contract with Sambasivan to pay him for call, particularly over the one-year timeframe required by the Stark law. (*Id.* at 182:3-13; 184:2-7; 235:11-14)

c. No Substantial Evidence That Not Paying Sambasivan for Emergency Department Call Would Be Unjust Under the Circumstances.

Like the second element of unjust enrichment, the findings of fact cite no evidence supporting the finding that "the acceptance and retention of the benefit of the plaintiff's professional services provided to the defendant is inequitable." (CP 918) Even if the trial court could conclude that Sambasivan established the first two elements of an unjust enrichment

claim, it offered no explanation as to how leaving the parties where they stand would be unjust under the circumstances.

At most, the findings suggest that Sambasivan was “treated unfairly” because Kadlec did not approach him and offer him a contract to pay him for emergency department call when his privileges were restored and his privileges were restored in 2005. While other interventional cardiologists were paid for taking call during this time period, the trial court’s finding is manifestly unreasonable in light of the substantial evidence that explained why Sambasivan was not offered a contract, and why, therefore, failure to pay him was not unjust. In addition to the circumstances noted above, the testimony shows:

- When the other cardiologists signed contracts, carrying obligations that Sambasivan had not undertaken, Sambasivan had no interventional cardiology privileges, having previously relinquished them, and therefore was ineligible to be included on a call schedule for interventional cardiology. In addition, when Sambasivan first approached Wingo about a call coverage contract in the fall of 2005, Wingo was not certain whether Sambasivan’s interventional privileges had been restored. [*Id.* at 180:8-16]
- Historically, Kadlec never paid physicians for taking call. It was not until certain physician specialists began demanding payment

for call in late 2004 that the Kadlec Board decided to pay certain physicians for call, if and only if they signed contracts in which they agreed to support certain hospital endeavors and offered other consideration. (CP 482 (call contract, § 1.5)) Cardiologists were not among the groups of physicians demanding payment for call.

- Sambasivan earned income from treating patients seen in the emergency department by billing patients and their insurers for his services. (Trial Tr. 80:13-19) Call coverage also afforded him the opportunity to develop long-term relationships with new patients.³⁶ Sambasivan could not say how much he earned through that work or how that compared to physicians who were paid for call. (*Id.* at 97:13-98:9)
- Sambasivan's privileges were under review after he had voluntarily relinquished them, and even when he was reinstated, additional external reviews of his clinical care were pending, casting doubt on whether he would continue to have acute interventional privileges into the future, and therefore whether the

³⁶ Sambasivan relied on these future patient relationships garnered from providing call to support his tortious interference claim. *See* CP 334-40 (discovery responses identifying patients who presented at the Kadlec emergency department needing interventional cardiology services whom he was unable to treat because he lacked interventional cardiology privileges). *See also* Trial Tr. at 40:11-14 (testimony of Dr. Ravage that patients he sees in the emergency department "usually" come to his office for follow-up care); *id.* at 95:19-96:3 (Sambasivan provides follow-up services in his own office to "quite a few patients" whom he sees in the Kadlec emergency department).

hospital could enter into a contract that it believed in good faith would be at least a year in duration (a regulatory requirement under the Stark law, discussed above). (*Id.* at 180:2-185:24; *see also id.* at 144:17-145:17).

- Sambasivan, before filing a lawsuit, never demanded to be paid for call during the relevant time frame, never sent Kadlec an invoice for his call services, and never stated he would not provide call unless he was paid. (*Id.* at 103:21-106:16)
- Sambasivan was required, as a member of the Kadlec medical staff, to take call without compensation. (CP 388)
- Sambasivan was given a contract to be paid for call when his privileges were reinstated for the second time in April 2007 and he was no longer under review. (CP 481)
- Sambasivan took uncompensated call at another area hospital, Lourdes Hospital, and didn't begin receiving payment for call at Lourdes until after Kadlec started paying him for call. (*Id.* at 242:9-20)

* * *

The trial court's finding of unjust enrichment also sets a dangerous precedent on a more global basis. It compels a finding that any physician who takes uncompensated call is entitled under a *quantum meruit* theory

to be paid for taking call, so long as the hospital pays some physicians for taking call. This would vitiate a hospital's freedom to contract with physicians of its choosing, and would nullify standard hospital bylaw requirements that staff members take emergency department call without compensation.³⁷ Finally, as discussed above, the trial court's analysis would force hospitals to make payments to physicians who lack written contracts in violation of the Stark law and the equivalent state statute, which imposes strict liability if a written agreement between the hospital and the physician for the payment of compensation does not exist and the physician refers Medicare and Medicaid patients to the hospital. Essentially, the trial court implied a contract in law that is patently illegal and would be unenforceable on that basis. *Brower v. Johnson*, 56 Wn.2d 321, 325, 352 P.2d 468 (1982).

Under these circumstances, the trial court's factual finding that not paying Sambasivan for taking call between July 2005 and October 2006 is "unjust" is not supported by substantial evidence.

³⁷ Kadlec, to this day, does not pay all physicians for taking call. (Trial Tr. at 124:21-24, testimony of Kadlec CEO Rand Wortman)

B. The Trial Court Erred in Awarding Sambasivan Attorney Fees for Prevailing on His Call Claim.

Washington courts do not award attorney fees as part of the cost of litigation absent a contract, statute, or recognized ground in equity. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). If none of those three exceptions apply, the court must deny a claim for attorney fees. *See generally Farmers Ins. Co. of Wash. v. Rees*, 27 Wn. App. 369, 617 P.2d 747 (1980). A trial court's decision to award fees and costs is a question of law and is reviewed to determine if the relevant statute or contract provides for an award of fees. *Id.* at 126.

The trial court awarded Sambasivan attorney fees for the call coverage issue based on RCW 49.48.030 and unspecified “principles of equity.” (CP 899) RCW 49.48.030 provides:

In any action in which any person is successful in recovering judgment for wages or salary owed to him, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

RCW 49.48.030 (emphasis added).

1. Sambasivan’s Alleged Quasi-Contractual Relationship with Kadlec is Not a Relationship That Triggers RCW 49.48.030.

RCW 49.48.030 allows assessment of attorney fees only against an “employer or former employer.” *City of Kennewick v. Board For Volunteer Firefighters*, 85 Wn. App. 366, 933 P.2d 423 (1997) (RCW 49.48.030 “does not authorize an assessment of attorney fees against a party who is not an employer.”). No evidence was adduced that Sambasivan was Kadlec’s employee in any capacity, nor was there any evidence that the other contracted cardiologists were Kadlec’s employees for purposes of call coverage.

Wise v. City of Chelan, 133 Wn. App. 167, 135 P.3d 951 (2006), where the court of appeals held that an independent contractor may recover attorney fees, is distinguishable. *Wise* dealt with the narrow question of whether an attorney who had a four-year contract to serve as a municipal judge for the City of Chelan, but whose position was eliminated halfway through the term, could recover attorney fees under RCW 49.48.030 along with lost wages, notwithstanding the fact that she was not an “employee” of the city (her position was created by statute). The court agreed she was entitled under her contract to be paid for the unexpired term of her appointment and thus, her claim for compensation was “salary” for purposes of RCW 49.48.030.

Wise is inapplicable for two reasons. First, the factual circumstances that led the court to apply RCW 49.48.030 do not exist here. *Wise* actually had a contract to perform services for a fixed term at a set “salary,” which the city breached by cancelling the contract. Because “the legislature consistently used the term ‘salary’ in enacting the statutes governing the compensation of municipal judges,” the court felt that applying RCW 49.48.030 to award attorney fees, which specifically addresses “wages and salary,” was justifiable.

Here, by contrast, Sambasivan’s call payment claim did not involve any contractual relationship, either as an employee or independent contractor. The entire basis of his claim was that no contract existed that required Kadlec to pay him for taking call. Nor is there any authority, such as the statute governing compensation of municipal judges in *Wise*, that supports a characterization of call coverage payments as “wages” or “salary.” Nor was any testimony offered that anyone referred to call compensation as “salary” or “wages,” and the trial court made no findings that support such a characterization.

Second, *Wise* is unpersuasive in that it focuses solely on the “any person” language in RCW 49.48.030, and did not consider the requirement that attorney fees can be obtained only from an individual’s “employer or former employer.” As the Ninth Circuit observed:

We [] reject Plaintiff's reliance on the Washington Court of Appeals' decision in *Wise v. City of Chelan*, 133 Wash.App. 167, 135 P.3d 951 (2006). There, the court held that attorney fees may be awarded to "any person," *id.* at 954-55, but it did not consider the text at issue here, which directs that attorney fees may be "assessed *against* [an] employer or former employer," RCW section 49.48.030 (emphasis added).

Leslie v. Cap Gemini Am., Inc., 319 Fed.Appx. 689, 691 (9th Cir. 2009).

As discussed above, Kadlec and Sambasivan did not have the necessary relationship to permit an award of attorney fees under RCW 49.48.030.

Awarding fees under this statute is also improper as no iteration of Sambasivan's Complaint plead RCW 49.48.030 as a basis for recovery. He did not raise the potential applicability of statute until the first day of trial, which did not allow for a meaningful response by Kadlec or adequate time to address his claim or the applicability of the statute. *See Warren v. Glascam Builders, Inc.*, 40 Wn. App. 229, 232, 698 P.2d 565 (1985), *overruled on other grounds by Beckmann v. Spokane Transit*, 107 Wn. 2d 785, 733 P.2d 960 (1987) (upholding denial of fee award because plaintiff, by failing to plead RCW 49.48.030 fee recovery in his complaint, did not allow application of the statute to the case).

2. No "Principle of Equity" Supports a Fee Award in an Unjust Enrichment Case.

The trial court's decision to award attorney fees was also based on unspecified "principles of equity." There is no recognized "ground of

equity” to award fees here. To recover attorney fees on an equitable claim, Washington courts must recognize the specific equitable basis as a ground for awarding attorney fees. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). These narrowly-construed, judicially-created grounds typically apply only in the area of insurance and bad faith cases where courts have ordered fee-shifting to remedy the perceived inequities in bargaining power between the parties. The recognized grounds are: (1) bad faith, (2) equitable indemnity, (3) common fund, and (4) dissolving an injunction.³⁸ None of these grounds applies here. *See also Lynch v. Deaconess Med. Ctr.*, 113 Wn.2d 162, 167, 776 P.2d 681 (1989) (citing with approval the general trend in other jurisdictions to reject attorney fee requests based on theories of unjust enrichment, *quantum meruit* and equitable subrogation); *Nelson v. McGoldrick*, 127 Wn.2d 124, 140, 896 P.2d 1258 (1995) (rejecting plaintiff’s claim to attorney fees under his equitable claims of unjust enrichment and *quantum meruit* because he failed to provide any legal authority that either of these theories would support such an award).

* * *

³⁸ *See, e.g., Brock v. Tarrant*, 57 Wn. App. 562, 789 P.2d 112 (1990) (bad faith); *Brotten v. May*, 49 Wn. App. 564, 744 P.2d 1085 (1987) (equitable indemnity); *Interlake Porsche & Audi Inc. v. Buchholz*, 45 Wn. App. 502, 728 P.2d 596 (1986) (common fund); and *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 758, 958 P.2d 260 (1998) (dissolution of injunction).

Because there is no basis in contract, statute, or equity to award Sambasivan attorney fees for prevailing on his unjust enrichment claim, and no factual findings support such an award, the trial court's decision to award fees should be reversed.

C. The Amount of Fees Awarded by the Trial Court Was Unreasonable.

Even if Sambasivan was entitled to attorney fees as a matter of law, the Court should nevertheless reverse the fee award as unreasonable. The amount of the trial court's fee award is reviewed for manifest abuse of discretion, and may be reversed if the trial court exercised its discretion on untenable grounds or for untenable reasons. *Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). The trial court must provide an adequate record upon which to review a fee award. *Estrada v. McNulty*, 98 Wn.App. 717, 723, 988 P.2d 492 (1999). In addition, "attorney fees should be awarded only for those services related to the causes of action which allow for fees." *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 66, 738 P.2d 665 (1987); *see also Absher Const. Co. v. Kent School Dist. No. 415*, 79 Wn.App. 841, 847, 917 P.2d 1086 (1995).

Sambasivan's attorney fee request prompted numerous motions,

alternative motions, and Kadlec's objections thereto.³⁹ The court held a hearing on attorney fees on August 11, 2010, and issued a Memorandum Decision on March 9, 2011, in which it agreed with a number of Kadlec's objections and ordered Sambasivan to revise his fee petition. Sambasivan's revised fee petition, however, did not comply with the court's instructions, and included mathematical errors. (CP 2036) Notwithstanding these deficiencies, the court awarded the full amount of fees (\$65,978.35) and expenses (\$4,183.82) sought in the revised petition.⁴⁰ (CP 899)

The trial court's award is a manifest abuse in discretion not only for Sambasivan's non-compliance with the court's March 2011 memorandum decision, but also for its inclusion of many time entries lacking proper foundational support. Specifically, the trial court's award did not exclude: (i) time clearly spent on matters unrelated to the call claim (*e.g.*, depositions of witnesses whose testimony was not related to this claim, work done on unrelated and unsuccessful discovery motions, etc.); (ii) entries that failed to carve out time spent on matters unrelated to prosecuting the call claim; (iii) travel time, which the trial court

³⁹ Kadlec's objections included a detailed table listing each of Sambasivan's time entries and its specific objections thereto. (CP 1404-14, 1470-82, 2058-68)

⁴⁰ CP 2051-58.

specifically ordered Sambasivan to remove, but was left embedded in many of Sambasivan's time entries; and (iv) inappropriate costs.

1. Failure to Segregate

Sambasivan is "required to segregate [his] attorney fees between successful and unsuccessful claims that allow for the award of fees." *Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 501, 859 P.2d 26 (1993). "If the claims are unrelated, the court should award only the fees reasonably attributable to the recovery." *Id.* at 502 (trial court erred in refusing to award plaintiff fees only for her successful claim). *See also Pham*, 159 Wn.2d at 538-39 (trial court properly declined to award fees for hours spent on an unsuccessful claim).

"The burden of segregating, like the burden of showing reasonableness overall, rests on the one claiming such [attorney] fees." *Loefelholz v. Citizens for Leaders with Ethics & Accountability Now*, 119 Wn. App. 665, 690, 82 P.2d 1199 (2004). Here, Sambasivan made no attempt to segregate his time, even after Kadlec's numerous objections. While his fee petition did not include all work performed for the case, the entries do not reflect any effort to segregate time spent on litigating the call claim from time spent on other (unsuccessful) claims. The trial court's March 2010 Memorandum Opinion (CP 2036) only partially dealt with this deficiency. The court ordered that Sambasivan reduce certain

discovery work to two-fifths of the amount claimed, but only called out “deposition time as well as preparation time and also costs associated with the depositions of Drs. Isaacson, Ravage, Bowers, Schwartz, Hazel, Foss and Rado and Mr. Cowan, Wortman and Savitch and Ms. Campbell.” (CP 2040)

The court did not order Sambasivan to segregate other time entries with ambiguous descriptions that did not specify that the work was performed for the call claim (*e.g.*, “legal research”; “tel con client” “prep deps”). Nor did the court enforce its own instruction that he revise fee requests that clearly included work done on other claims (*e.g.*, “prep opposition to motion for summary judgment”, “prep IRFP” where there was only one discovery request related to call payments, time spent defending Kadlec’s CR 12 motion to dismiss, and time spent preparing for and attending the summary judgment hearing). *See Pearson v. Schubach*, 52 Wn. App. 716, 724, 763 P.2d 834 (Div. III) (1988) (remanding fee award to trial court where “court failed to distinguish between the attorney fees incurred as a result of the contract action . . . and those which were the result of various tort claims”).

Specifically, the trial court noted that Sambasivan’s adjustments to his time entries relative to the summary judgment motions were inadequate because they did not “include only that portion of his fees

related to the on-call claim.” (CP 2040) Sambasivan only adjusted his fees for two dates (March 18, 2010 and April 1, 2010), and did not make any apportionment to summary judgment work on other dates.⁴¹ Although Kadlec brought this omission to the trial court’s attention, it nevertheless awarded Sambasivan the unadjusted fees.⁴²

2. Failure to Specify Nature of Work Performed

The trial court’s fee award also ignored the fact that Sambasivan’s time records lack any specificity to support the fees, and deprive Kadlec and the finder of fact of the ability to determine whether the work performed is includable. Although the trial court appeared to recognize this deficiency,⁴³ Sambasivan did not augment his time entries as the court requested, and the court ultimately awarded fees based on his counsel’s vague and generic descriptions. For example, entries such as “review of documents”; “legal research”; “consultation with client”; and “tel con client” provide no assurances that the time claimed was devoted exclusively to his call claim, as opposed to his various unsuccessful claims, particularly where his unsuccessful claims predominated in the

⁴¹ Un-adjusted dates include March 6-7, 2010 (4.5 hours), March 10, 2010 (.5 hour), March 12, 2010 (1 hour), March 24, 2010 (.5 hour), March 26, 2010 (4 hours), and March 29, 2010 (1 hour).

⁴² CP 2065-66.

⁴³ Motion for Attorney’s Fees, Verbatim Report of Proceedings (Aug. 11, 2010) at 62: 4-21 (“So I’m going to direct him to review his attorney fees and be more specific in the – in his description of them; for instance, legal research, the same thing. Did it all relate to the wage loss claim or was some of it peer review?”).

litigation. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983) (“[A]ttorneys must provide reasonable documentation of the work performed.”). The trial court’s failure to require Sambasivan to meet his attorney fee documentation burden was a manifest abuse of discretion. *Int’l Union of Operating Engineers, Local 286 v. Port of Seattle*, 2011 WL 4912830, -- P.3d -- (Oct. 17, 2011) (attorneys fees denied where attorney failed to provide reasonable documentation of work performed) (Addendum).

3. Inclusion of Unrelated Work

The fees awarded also include time clearly unrelated to his call coverage claim that should have been excluded. *See Travis v. Wash. Horse Breeders Ass’n*, 111 Wn.2d 396, 759 P.2d 418 (1988) (“The Court must separate the time spent on those theories essential to [the cause of action for which attorneys’ fees are properly awarded] and the time spent on legal theories relating to the other causes of action This must include, on the record, a segregation of the time allowed for the [separate] legal theories.”).

Although the trial court asked Sambasivan to properly segregate his time, it ultimately allowed fees for unrelated work, and also let stand time entries that were not apportioned per the court’s instructions. For example:

- Sambasivan's (1) 9-09-08 entry "Prep dep notice and subpoena" (.50 hour); and (2) 11-19-08 entry for "Letter and tel con D. Robbins, preparation of notices of deposition" (.50 hour) should both be reflected at .20 hours given the 40% apportionment ordered by the trial court corresponding to the depositions in question. (CP 2064)

- His 12-3-08 entry for deposition time reflects an improper apportionment. Given the start and end times of the depositions that day, at most his counsel could ascribe 3.0 hours to Sambasivan's deposition (assuming he included lunch in his time entry, which would be odd because the deposition was over before lunch), 1.5 hours to the Savitch deposition, and the rest to travel (there is no entry for deposition prep on that day). Thus, given the time entries, and the demand that travel be backed out, Sambasivan should have reduced the 6.0 hours by 2.40 hours, instead of by .60.⁴⁴

- Sambasivan's two time entries for 3-30-10, which are for unspecified "Legal research; legal research, preparation of objection and memo re: credibility, tel con court, tel con client," are clearly for work which the court ordered to be backed out the fee petition. (CP 2040) ("Plaintiff will not be allowed attorney fees for time allocated to research,

⁴⁴ Sambasivan's fee award is also based upon mathematical errors. For example in his 3-17-09 entry, application of the 40% credit would result in a reduction in time to .20 rather than .30 as he requested.

motion preparation and argument relating to 'strike praecipe' and credibility of Donna Zulauf as it related to by-law provisions concerning the collegial intervention of Plaintiff.”). These two time entries, which combine for 8.0 hours, immediately preceded the hearing on the matter related to the credibility of declarant Donna Zulauf, and as no detail is given of the work that would suggest the time was spent on other issues, the work is not properly includable in the fee petition.

4. Inclusion of Travel Time

In its March 16, 2010 Memorandum Decision, the trial court directed that Sambasivan exclude travel time to and from Walla Walla and the Tri-Cities. Although he adjusted his entries for trial days (to reflect a “flat fee” he charges for trial days), no other time entries with embedded travel time were adjusted. For example, for the day Sambasivan’s counsel deposed Rand Wortman and Dr. Foss – depositions that took place in Richland, collectively totaled 2 hours and 20 minutes, and ended at 3:25 in the afternoon, Sambasivan claimed 10 hours of attorney time. Sambasivan never disputed that this entry included travel time, which was the basis for Kadlec’s original objection. (CP 1467) At least three hours should be removed from this time entry. Kadlec estimates that at least 20 additional hours of travel time have not been backed out, a fact which is obscured by

Sambasivan's failure to provide reasonably detailed time records. That time should have been eliminated.

5. Fees for Alternative Motion Preparation

Finally, the trial court should not have awarded Sambasivan fees for revising his fee petition to comply with the court's instructions and respond to Kadlec's objections. His final fee petition included an additional 14.5 hours of time for work related to his Alternative Motion re: Attorney Fees and Statement of Counsel, all post-dating the trial court's Memorandum Decision of June 8, 2010, which directed him to back out certain time, and also includes an additional ten hours of time to deal with the revised motion. The trial court's fee award including these 24.5 hours of time was a manifest abuse of discretion.

For the foregoing reasons, the trial court abused its discretion in the awarding fees and costs to Sambasivan in the amount awarded.

VII. CONCLUSION

For the foregoing reasons, the Court should (i) affirm the trial court's summary judgment dismissals of Sambasivan's breach of express contact, tortious interference, and retaliation claims; (ii) affirm the trial court's award of attorney fees to Kadlec; (iii) reverse the trial court's judgment on Sambasivan's emergency department call coverage claim; and (iv) reverse the trial court's award of attorney fees to Sambasivan.

DATED this 17th day of November, 2011.

BENNETT BIGELOW & LEEDOM, P.S.

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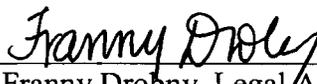
DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the 17th day of November, 2011, I caused a true and correct copy of the foregoing BRIEF OF RESPONDENTS/CROSS-APPELLANT to be delivered via U.S. Mail to the following counsel of record at his last-known address:

Counsel for Appellant/Cross-Respondent:

Michael de Grasse
59 South Palouse Street
Walla Walla, WA 99362

DATED this 17th day of November, 2011, at Seattle, Washington.



Franny Drobny, Legal Assistant

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ADDENDUM

Whidbey General Hospital runs afoul of law

By **JESSIE STENSLAND**

Whidbey News Times Assistant editor

JANUARY 20, 2009 · 4:18 PM

No serious consequences are foreseen

Whidbey General Hospital officials hired a Chicago law firm to help investigate and resolve instances in which the hospital may have broken a complicated federal law.

Joe Vessey, the hospital's chief financial officer, said he's aware of rumors that the hospital committed Medicaid fraud and may face penalties that could bankrupt the institution, but he said that's a vast exaggeration. The truth, he said, isn't so dramatic or cut-and-dry.

But officials are taking the difficult matter seriously. In fact, the issue was a factor in former hospital CEO Scott Rhine's decision to resign, Vessey said.

The legal issue in question, Vessey explained, is called the Stark Law, which is actually three different provisions that went into effect at different times. The law is designed to limit or prevent doctors from referring Medicare or Medicaid patients to a hospital where they have a "financial interest," which is considered a conflict of interest.

Vessey said hospital administrators realized that they may have violated the Stark Law in several "compensation arrangements with physicians" and started looking into the matter in-house.

"The investigation is a collaborative effort with the hospital and legal counsel, as well as the Office of the Inspector General," he said.

He added that the hospital is not being investigated by the federal government or any outside entity, but administrators alerted the Inspector General about the possible non-compliance issue.

The hospital's attorney in the matter, Steven Ortquist of Meade & Roach, outlined three possible problems with contracts in a Sept. 15, 2008, letter to the Inspector General.

The hospital contracts with internal medicine and family practice physicians to work at the hospital. In 2006, it redesigned its contract to reflect changes in the hospital's program and to comply with changes in the Stark Law.

Hospital officials discovered last summer that the contracted doctors were being paid under the new contract, but not all the doctors had signed the new documents.

Also, the hospital has been paying extra to medical staff who take leadership roles, but there was no finalized contract that met the requirements of the Stark Law.

"The hospital's failure to formalize medical staff leadership arrangements in written agreements appears to have been an oversight on the hospital's part," the letter states.

In addition, the hospital compensated physicians for call coverage without the existence of a written agreement.

"As part of its corrective action plan the hospital intends to conduct an appropriate review of its payments to physicians and other physician relationships to confirm that it has discovered and cured all instances of non-compliance with the Stark Law," Ortquist wrote.

If it turns out the hospital did violate the Stark Law, Vessey said he is uncertain whether the hospital would face penalties. He doesn't believe the rumor that the hospital could be bankrupted by the penalties.

Price tag soars for Whidbey General Hospital violations

By **NATHAN WHALEN**

Whidbey News Times Staff reporter

FEBRUARY 9, 2011 · UPDATED 9:38 AM

Whidbey General Hospital's violations of a federal law will cost millions of dollars.

The publicly owned hospital had to forego approximately \$1.7 million worth of Medicare billings. In addition, the hospital is also paying hundreds of thousands of dollars to resolve the violations.

Hospital Chief Financial Officer Joe Vessey said the hospital had to hold off billing Medicare from doctors involved with the hospital's Stark Law violations.

"Stark Law prohibits billing from a physician involved in a non-compliant service," Vessey said in a telephone interview last week.

The hospital self-disclosed its violations in 2008 to the Health and Human Services Office of the Inspector General. Stark Law is a set of guidelines meant to control a hospital's financial relationship with its physicians. If a contract doesn't get signed or hospital staff can't locate a written copy in the files, then the hospital has to resolve the situation and report the incident to the government, hospital spokesperson Trish Rose said in an email.

Whidbey General Hospital has been working to resolve the violations with the Office of Inspector General. Hospital officials initially offered a \$230,000 settlement, however, after it was rejected, the amount climbed to \$854,000. There is no word yet on whether the settlement amount will be accepted by the Office of Inspector General.

An OIG spokesperson said as a matter of public policy, staff doesn't comment on matters that may or may not be under investigation by the Office of Inspector General.

Rose highlighted the work hospital staff has done to guarantee future violations don't take place. Staff reviewed all its contracts with physicians and overhauled the way contracts are tracked.

She added new processes are in place to avoid unintentional contract expirations and ensure physician compensation is consistent with the work performed.

The hospital also underwent several leadership changes since the hospital reported the violations. Tom Tomasino was named chief executive officer, Vessey was named chief financial officer, and hospital commissioners Anne Tarrant and Grethe Cammermeyer were elected to their current positions.

Vessey said that \$4.85 million worth of Medicare billings were affected by the Stark Law. Because of the complicated process used to figure out how much a hospital will receive, the hospital only expects to be reimbursed 35 percent of the amount billed.

Whidbey General Hospital billed approximately \$72 million to Medicare in 2010, but only received \$25 million in reimbursements.

In 2011, the hospital is budgeting to bill Medicare approximately \$85 million, which means, if the 35 percent reimbursement rate stays consistent, the hospital will receive nearly \$30 million from Medicare.

Contact Whidbey News Times Staff reporter Nathan Whalen at nwhalen@whidbeynewsqroup.com or 360-675-6611 ext. 5058.

[Comment on this story.](#)

--- P.3d ---, 2011 WL 4912830 (Wash.App. Div. 1), 191 L.R.R.M. (BNA) 3093, 113 Fair Empl.Prac.Cas. (BNA) 963

(Cite as: 2011 WL 4912830 (Wash.App. Div. 1))

Only the Westlaw citation is currently available.

Court of Appeals of Washington,
Division 1.
INTERNATIONAL UNION OF OPERATING EN-
GINEERS, LOCAL 286, Appellant,
v.
PORT OF SEATTLE, Respondent.
Port of Seattle, Respondent,
v.
Anthony D. Vivenzio and Mark Cann, Defendants,
International Union of Operating Engineers,
AFL-CIO, Local 286, Appellant.

No. 65037-8-I.
Oct. 17, 2011.

Background: Employer petitioned for certiorari review of arbitration award that reinstated employee who was terminated for hanging a noose at work and instead imposed 20-day retroactive suspension, arguing that award violated public policy. After accepting review, the Superior Court, King County, Steven C. Gonzales, J., vacated award and entered order determining discipline for employee. Union appealed.

Holdings: The Court of Appeals, Leach, A.C.J., held that:

- (1) as a matter of first impression, Washington Law Against Discrimination (WLAD) contains an explicit, well-defined, and dominant public policy;
- (2) as a matter of first impression, arbitration award violated well-defined, explicit, and dominant public policy against racial discrimination articulated in WLAD; and
- (3) superior court's determination of discipline for employee exceeded scope of superior court's authority.

Affirmed in part and remanded.

West Headnotes

[1] Alternative Dispute Resolution 25T 374(7)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk366 Appeal or Other Proceedings for Review
25Tk374 Scope and Standards of Review
25Tk374(7) k. Questions of Law or Fact. Most Cited Cases

Whether an arbitration award conflicts with an explicit, well-defined, and dominant public policy is a question of law, which appellate court reviews de novo.

[2] Alternative Dispute Resolution 25T 113

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk113 k. Arbitration Favored; Public Policy. Most Cited Cases

Public policy strongly supports alternative dispute resolution and favors the finality of arbitration awards.

[3] Alternative Dispute Resolution 25T 374(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award

25Tk366 Appeal or Other Proceedings for Review
25Tk374 Scope and Standards of Review
25Tk374(1) k. In General. Most Cited Cases

Labor and Employment 231H 1620

--- P.3d ----, 2011 WL 4912830 (Wash.App. Div. 1), 191 L.R.R.M. (BNA) 3093, 113 Fair Empl.Prac.Cas. (BNA) 963

(Cite as: 2011 WL 4912830 (Wash.App. Div. 1))

231H Labor and Employment
 231HXII Labor Relations
 231HXII(H) Alternative Dispute Resolution
 231HXII(H)5 Judicial Review and Enforcement
 231Hk1618 Scope of Inquiry
 231Hk1620 k. Deference in General. Most Cited Cases
 Appellate court show great deference to arbitration decisions, particularly in the labor management context.

[4] Labor and Employment 231H ↪1619

231H Labor and Employment
 231HXII Labor Relations
 231HXII(H) Alternative Dispute Resolution
 231HXII(H)5 Judicial Review and Enforcement
 231Hk1618 Scope of Inquiry
 231Hk1619 k. In General. Most Cited Cases

Labor and Employment 231H ↪1621

231H Labor and Employment
 231HXII Labor Relations
 231HXII(H) Alternative Dispute Resolution
 231HXII(H)5 Judicial Review and Enforcement
 231Hk1618 Scope of Inquiry
 231Hk1621 k. Merits of Award. Most Cited Cases

Labor and Employment 231H ↪1624(1)

231H Labor and Employment
 231HXII Labor Relations
 231HXII(H) Alternative Dispute Resolution
 231HXII(H)5 Judicial Review and Enforcement
 231Hk1618 Scope of Inquiry
 231Hk1624 Findings of Fact
 231Hk1624(1) k. In General. Most Cited Cases
 Appellate court limits its review of arbitration

awards to whether the arbitrator acted illegally by exceeding his or her authority under the collective bargaining agreement and does not review the merits of the underlying dispute; the arbitrator is the final judge of both the facts and the law, and no review will lie for a mistake in either.

[5] Alternative Dispute Resolution 25T ↪312

25T Alternative Dispute Resolution
 25TII Arbitration
 25TII(G) Award
 25Tk312 k. Conformity to Public Policy. Most Cited Cases
 Court may vacate an arbitration award that violates a well-defined, explicit, and dominant public policy.

[6] Alternative Dispute Resolution 25T ↪312

25T Alternative Dispute Resolution
 25TII Arbitration
 25TII(G) Award
 25Tk312 k. Conformity to Public Policy. Most Cited Cases
 When deciding whether to vacate an arbitration award based on violation of an explicit, well-defined, and dominant public policy, court determines whether a public policy is explicit, well-defined, and dominant by reference to laws and legal precedents, and not simply from general considerations of supposed public interests.

[7] Alternative Dispute Resolution 25T ↪312

25T Alternative Dispute Resolution
 25TII Arbitration
 25TII(G) Award
 25Tk312 k. Conformity to Public Policy. Most Cited Cases
 When deciding whether to vacate an arbitration award based on violation of an explicit, well-defined, and dominant public policy, court does not examine whether the employee's underlying conduct violates a public policy, but whether the arbitrator's decision does.

--- P.3d ---, 2011 WL 4912830 (Wash.App. Div. 1), 191 L.R.R.M. (BNA) 3093, 113 Fair Empl.Prac.Cas. (BNA) 963

(Cite as: 2011 WL 4912830 (Wash.App. Div. 1))

[8] Alternative Dispute Resolution 25T ↪312

25T Alternative Dispute Resolution

25TII Arbitration

25TII(G) Award

25Tk312 k. Conformity to Public Policy.

Most Cited Cases

The Washington Law Against Discrimination (WLAD) contains an explicit, well-defined, and dominant public policy with the dual purpose of ending current discrimination in the workplace and preventing future discrimination such that court may vacate an arbitration award made in violation of WLAD. West's RCWA 49.60.

[9] Civil Rights 78 ↪1736

78 Civil Rights

78V State and Local Remedies

78k1734 Persons Protected, Persons Liable, and Parties

78k1736 k. Employment Practices. Most Cited Cases

Through the Washington Law Against Discrimination (WLAD), the legislature imposed liability upon an employer for both its own discrimination and that of any of its employees who are acting directly or indirectly in its interest. West's RCWA 49.60.

[10] Labor and Employment 231H ↪1609(2)

231H Labor and Employment

231HXII Labor Relations

231HXII(H) Alternative Dispute Resolution

231HXII(H)5 Judicial Review and Enforcement

231Hk1607 Grounds for Impeachment or Enforcement

231Hk1609 Public Policy

231Hk1609(2) k. Particular Decisions. Most Cited Cases

Arbitration award that reinstated with benefits an employee who was terminated for hanging a noose at work, instead imposing 20-day retroactive suspension of employee, violated well-defined, ex-

plicit, and dominant public policy against racial discrimination articulated in Washington Law Against Discrimination (WLAD); sanction on employee's conduct was not sufficiently substantial to discourage repeat behavior, minimized society's overriding interest in preventing such conduct from occurring, and interfered with employer's interest in preventing further acts of discrimination. West's RCWA 49.60.

[11] Alternative Dispute Resolution 25T ↪312

25T Alternative Dispute Resolution

25TII Arbitration

25TII(G) Award

25Tk312 k. Conformity to Public Policy.

Most Cited Cases

Public policy exception permitting court to vacate arbitration award made in violation of Washington Law Against Discrimination (WLAD) does not require that employer receive prior offenses and warnings before exception can apply, as an employer has a duty under WLAD to take corrective action once it has actual knowledge of any illegal discrimination. West's RCWA 49.60.

[12] Labor and Employment 231H ↪1628

231H Labor and Employment

231HXII Labor Relations

231HXII(H) Alternative Dispute Resolution

231HXII(H)5 Judicial Review and Enforcement

231Hk1627 Determination

231Hk1628 k. In General. Most Cited Cases

Superior court's determination of discipline for employee who was terminated for hanging a noose at work after court vacated arbitration award that reinstated employee and that instead imposed 20-day retroactive suspension exceeded scope of superior court's authority, as superior court substituted its own determination of appropriate discipline for arbitrator's.

[13] Alternative Dispute Resolution 25T ↪

--- P.3d ----, 2011 WL 4912830 (Wash.App. Div. 1), 191 L.R.R.M. (BNA) 3093, 113 Fair Empl.Prac.Cas. (BNA) 963

(Cite as: 2011 WL 4912830 (Wash.App. Div. 1))

363(9)

25T Alternative Dispute Resolution

25TII Arbitration

25TIII(H) Review, Conclusiveness, and Enforcement of Award

25Tk360 Impeachment or Vacation

25Tk363 Motion to Set Aside or Vacate

25Tk363(9) k. Determination and Disposition. Most Cited Cases

A reviewing court that vacates an arbitration award should not then make its own determination on the merits.

[14] Labor and Employment 231H ↪1631

231H Labor and Employment

231HXII Labor Relations

231HXII(H) Alternative Dispute Resolution

231HXII(H)5 Judicial Review and Enforcement

231Hk1631 k. Costs and Attorney Fees. Most Cited Cases

Labor and Employment 231H ↪2204

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(A) In General

231Hk2192 Actions

231Hk2204 k. Costs and Attorney Fees. Most Cited Cases

In-house union attorney who represented employee in arbitration dispute did not submit documentation required for court to make adequate determination about reasonableness of fees requested under statute providing for the award of reasonable attorney fees and costs for employees who prevail in a wage claim civil action, where attorney submitted only an estimate of hours worked without contemporaneous time records documenting those hours. West's RCWA 49.48.030.

[15] Appeal and Error 30 ↪984(5)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k984 Costs and Allowances

30k984(5) k. Attorney Fees. Most

Cited Cases

Appellate court reviews the reasonableness of the amount of an attorney fee award for an abuse of discretion.

[16] Courts 106 ↪26(3)

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General

106k26 Scope and Extent of Jurisdiction in General

106k26(3) k. Abuse of Discretion in General. Most Cited Cases

A court abuses its discretion if its decision is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons.

[17] Labor and Employment 231H ↪2204

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(A) In General

231Hk2192 Actions

231Hk2204 k. Costs and Attorney Fees. Most Cited Cases

Attorney requesting fees under statute providing for the award of reasonable attorney fees and costs for employees who prevail in a wage claim civil action has the burden of proving the reasonableness of the requested fees. West's RCWA 49.48.030.

[18] Labor and Employment 231H ↪2204

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(A) In General

231Hk2192 Actions

231Hk2204 k. Costs and Attorney Fees. Most Cited Cases

--- P.3d ----, 2011 WL 4912830 (Wash.App. Div. 1), 191 L.R.R.M. (BNA) 3093, 113 Fair Empl.Prac.Cas. (BNA) 963

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Attorney requesting fees under statute providing for the award of reasonable attorney fees and costs for employees who prevail in a wage claim civil action must provide reasonable documentation of the work performed, including contemporaneous records documenting the hours worked; the documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work. West's RCWA 49.48.030.

Appeal from Superior Court, King County; Hon. Steven C. Gonzales, J.Dmitri L. Iglitzin, Sean M. Leonard, Schwerin Campbell Barnard Iglitzin & Lav, Seattle, WA, Terry A. Roberts, Renton, WA, for Appellant(s).

Diana S. Shukis, Michael S. Burnet, Cairncross & Hempelmann PS, Seattle, WA, for Respondent(s).

PUBLISHED OPINION

LEACH, A.C.J.

*1 ¶ 1 A Washington court may vacate an arbitration award that violates a well-defined, explicit, and dominant public policy.^{FN1} The International Union of Operating Engineers, Local 286 (Union) appeals a superior court order vacating an arbitrator's decision under this public policy exception. The arbitrator reinstated a Port of Seattle (Port) employee fired for hanging a noose at work, reducing his discipline from termination to a retroactive 20-day suspension. We agree that the arbitration award violated Washington's well-defined, explicit, and dominant public policy against discrimination. However, we hold the superior court did not have the authority to determine the appropriate discipline for the employee. We therefore affirm the superior court's decision to vacate the arbitrator's decision, reverse the superior court's revised award, and remand for further proceedings consistent with this opinion.

FACTS

¶ 2 In December 2007, Port employee Mark Cann tied a noose in a length of rope and hung it on a rail overlooking a high traffic work area. Rafael Rivera, an African American employee with whom Cann "had a recent falling out," was working within 30 feet of the noose. Rivera saw and reported it. After a lengthy investigation, the Port concluded that Cann had violated its zero-tolerance antiharassment policy and terminated him.^{FN2}

¶ 3 The Union initiated a grievance under its collective bargaining agreement with the Port. Following unsuccessful attempts to settle the grievance, the matter proceeded to arbitration. The parties stipulated to these issues: "Did the Employer have just cause for their [sic] termination of Mark Cann on February 11, 2008, and, if not, what shall the remedy be?"

¶ 4 To guide his decision, the arbitrator considered the collective bargaining agreement between the Union and the Port, the Port's antiharassment policy, the Port's work rules, and the aviation maintenance work rules, all of which inform employees that workplace harassment and discrimination are prohibited. The Port's work rules state that the Port "does not tolerate illegal harassment in the workplace," including "[d]isplaying or circulating pictures, objects, or written materials ... that demean or show hostility to a person because of the person's age, race, color, national origin/ancestry ... or any other category protected by law." The Port's rules warn employees that it has "zero-tolerance" for workplace harassment, meaning "[a]ny alleged violation of this (anti-harassment) policy will generate an investigation and, if verified, will be considered 'gross misconduct' and can subject an employee to immediate termination."

¶ 5 In addition to these rules and policies, the arbitrator also considered Cann's testimony. Cann admitted that he received a copy of the Port's rules, underwent antiharassment training, and understood the Port's zero-tolerance policy. Nevertheless, Cann admitted that he tied nooses in ropes at the workplace "a few times" due to his "twisted sense of hu-

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mor.” Cann claimed he was unaware of the noose’s discriminatory symbolism. Instead, he linked nooses to “Cowboys and Indians.” Cann said he intended the particular noose to be a prank on Dick Calhoun, a 75-year-old employee with whom he had a “joking relationship.” According to Cann, when he tied the noose, he remarked, “This is for Dick Calhoun, to put him out of his misery.”^{FN3}

*2 ¶ 6 When Cann heard that the noose had offended Rivera, he apologized. Wallace Mathes, Cann’s supervisor, testified that Cann tried to apologize to Rivera “while trying to preserve his macho image,” opining, “He did his best.” During the apology, however, Cann produced the page from the dictionary defining “noose,” “apparently to counter the notion that he had tied a noose.”

¶ 7 Although Rivera and Calhoun did not testify, leaving the arbitrator “with less than solid impressions of the impacts upon [them],” the arbitrator reviewed documents from the Port’s investigation, including interviews and e-mails from Rivera. In one interview, Rivera recounted that Cann remarked to Rivera that Martin Luther King Day was “take a nigger to lunch day.”^{FN4} In an e-mail, Rivera told the Port that seeing the noose made him feel “not threatened, but angry.” Rivera explained that as a member of the military in the 1960s, he had been stationed in the South, where he “witnessed firsthand and lived daily with racism.” After Rivera saw Cann’s noose, he experienced “many sleepless nights” and “relieve[d] a time in [his] life that was demeaning, degrading, humiliating, and de-humanizing.”

¶ 8 Following a two-day hearing, the arbitrator issued a written decision. The arbitrator found, “a noose is an object of a nature such that its display would reasonably be expected to be demeaning or show hostility to people of a protected class within the purview of the policies of the Employer.” By hanging the noose, Cann “performed acts constituting a violation of the Employer’s anti-harassment policy.”^{FN5} The arbitrator also noted that he doubted the sincerity of Cann’s apology to Rivera.

When assessing the reasonableness of the Port’s policies, the arbitrator observed that the Port had several interests at stake when it disciplined Cann. Those interests included “the elimination of discrimination in the workplace, protecting itself from costly lawsuits that could arise from discrimination, and the preservation of its reputation.” However, when assessing the reasonableness of the Port’s discipline, the arbitrator stated, “[I]n this matter, [Cann] was more clueless than racist.” Therefore, the arbitrator concluded that Cann’s conduct warranted substantial discipline but did not provide just cause to terminate him. The arbitration award reinstated Cann with lost earnings and benefits and reduced his discipline from termination to a retroactive 20-day suspension.^{FN6}

¶ 9 The Port petitioned King County Superior Court for a writ of certiorari, alleging that the arbitrator exceeded his jurisdiction and acted contrary to public policy. The superior court accepted review and found in the Port’s favor, vacating the arbitration award because it violated Washington’s public policy prohibiting discrimination in the workplace. The superior court explained,

Employers have an affirmative duty to provide a workplace free from racial harassment and discrimination. Employees have a right to such a workplace. The Award undermined the well-defined, explicit and dominant public policy expressed in WLAD because it was excessively lenient. Under the Award, Mr. Cann was ordered back to work with back pay and without significant consequence, without training or other warning.

*3 The court ordered the Port to reinstate Cann but lengthened his suspension from 20 days to 6 months. The court also ordered Cann to “write a sincere letter of apology” and attend diversity and antiharassment training. Finally, the court imposed a 4-year probationary period, during which Cann would be subject to immediate and final termination for any additional policy violations.

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¶ 10 The Union appeals.^{FN7}

ANALYSIS

[1] ¶ 11 We must decide whether the arbitration award here conflicts with an explicit, well-defined, and dominant public policy. This involves a question of law, which we review de novo.^{FN8}

[2][3][4] ¶ 12 Cases like this one necessarily involve competing public policy concerns: here, the finality of arbitration awards competes with the elimination and prevention of discrimination. Because Washington public policy strongly supports alternative dispute resolution and favors the finality of arbitration awards,^{FN9} we show great deference to arbitration decisions, particularly in the labor management context.^{FN10} We limit our review to whether the arbitrator acted illegally by exceeding his or her authority under the collective bargaining agreement.^{FN11} We do not review the merits of the underlying dispute; “the arbitrator is the final judge of both the facts and the law, and ‘no review will lie for a mistake in either.’”^{FN12} “[A] more extensive review of arbitration decisions would weaken the value of bargained for, binding arbitration and could damage the freedom of contract.”^{FN13}

[5][6][7] ¶ 13 Despite this public policy in favor of finality, we may vacate an arbitration award that violates an “ ‘explicit,’ ‘well defined,’ and ‘dominant’ public policy.”^{FN14} We determine whether a public policy is explicit, well-defined, and dominant by reference to laws and legal precedents, and not simply from “ ‘general considerations of supposed public interests.’”^{FN15} We do not examine whether the employee's underlying conduct violates a public policy, but whether the arbitrator's decision does.^{FN16}

[8] ¶ 14 First, we ask whether Washington has an applicable explicit, well-defined, and dominant public policy. The Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, is, indisputably, such a policy. When the Washington Legislature exercised the State's police power to fulfill our state constitution's provisions concerning

civil rights by enacting the WLAD, it declared that “discrimination ... threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.”^{FN17} The Washington Legislature directed that the WLAD “shall be construed liberally for the accomplishment of the purposes thereof.”^{FN18}

[9] ¶ 15 The WLAD also declared the right to be free from discrimination in employment to be a civil right: “The right to be free from discrimination because of race ... is recognized as and declared to be a civil right. This right shall include, but not be limited to: (a) The right to obtain and hold employment without discrimination.”^{FN19} In addition, through the WLAD, the legislature imposed liability upon an employer for both its own discrimination and that of any of its employees who are acting directly or indirectly in its interest.^{FN20}

*4 ¶ 16 According to our Supreme Court, the WLAD embodies “ ‘public policy of the highest priority,’”^{FN21} the “ ‘overarching purpose’” of which is “ ‘to deter and to eradicate discrimination in Washington.’”^{FN22} It has also stated that the WLAD “clearly condemns employment discrimination as a matter of public policy.”^{FN23} And we have interpreted the WLAD to impose upon an employer with affirmative knowledge of its violation in the workplace an obligation to take remedial measures adequate to persuade potential violators to refrain from unlawful conduct.^{FN24} We have cautioned that a punishment that fails to take into account the need to maintain a discrimination-free workplace may subject the employer to suit.^{FN25} In light of the foregoing, we conclude that the WLAD contains an explicit, well-defined, and dominant public policy with the dual purpose of ending current discrimination and preventing future discrimination.

[10] ¶ 17 Next we must decide whether the arbitration award violated this public policy by improperly limiting the Port's ability to comply with the WLAD. Specifically, we must decide whether the arbitrator's decision to reinstate Cann with back

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pay and benefits, subject only to a 20-day retroactive suspension, impermissibly conflicts with the Port's efforts to fulfill its affirmative duty to eliminate and prevent racial discrimination in the workplace. Because this case presents an issue of first impression in Washington, we find some guidance from other jurisdictions that have considered the scope of the public policy exception in the discrimination context.

[11] ¶ 18 In *City of Brooklyn Center v. Law Enforcement Labor Services, Inc.*,^{FN26} a police officer was terminated for repeated acts of sexual harassment. The arbitrator concluded that much of the alleged conduct was time barred and that “the remaining conduct, while serious, did not warrant outright dismissal.”^{FN27} He reinstated the officer without back pay, noting that the period between termination and reinstatement would constitute the appropriate discipline.^{FN28} The Minnesota Court of Appeals vacated the arbitration award in light of Minnesota's “well-defined and dominant public policy that imposes upon governmental units an affirmative duty to take action to prevent and to sanction sexual harassment and sexual misconduct by law enforcement officers”^{FN29} and the employer's “duty to prevent sexual harassment in the workplace.”^{FN30} Allowing the officer to continue his employment, according to the court, would have been “tantamount to exempting the city from its duty to enforce its own policy and the public policy against sexual harassment.”^{FN31}

¶ 19 Similarly, in *State v. AFSCME, Council 4, Local 387*,^{FN32} an on-duty corrections officer directed an obscene racial epithet to a state legislator in a telephone message. The employer terminated the officer's employment, and the arbitrator reduced the termination to an unpaid, 60-day suspension.^{FN33} The Connecticut Supreme Court found that the arbitrator's attempts to rationalize the officer's conduct “‘minimize[d] society's overriding interest in preventing conduct such as that at issue in this case from occurring.’”^{FN34} The court vacated the arbitrator's decision because a “‘lesser sanction ...

would, very simply, send the message that ... poor judgment, or other factors, somehow renders the conduct permissible or excusable.’”^{FN35}

*5 ¶ 20 The Union cites two cases, *Way Bakery v. Truck Drivers Local No. 164*^{FN36} and *Gits Manufacturing Co. v. Local 281 International Union*,^{FN37} where courts upheld arbitration awards reinstating employees who had engaged in discriminatory conduct. The arbitration awards in those cases, however, have an important, distinguishing characteristic: the arbitrator imposed a penalty far harsher than 20 days. In both cases, the employees received a 6-month suspension from work, and in *Way Bakery* the arbitrator imposed a 5-year probationary period.^{FN38} Given the significant sanctions in those cases, we find they support the position advanced by the Port—that compliance with the WLAD requires more discipline than occurred here—not that of the Union.^{FN39}

¶ 21 However, “American courts differ in their application of the public policy exception.”^{FN40} Cases from other jurisdictions provide some guidance but rely on analyses of the public policies of other jurisdictions. They do not analyze what is at issue in this case, the public policy of the State of Washington. Therefore, our analysis depends largely upon the Legislature's expression of an explicit, well-defined and dominant public policy. Here, the arbitrator applied seven considerations to determine that Cann violated the Port's antiharassment policy but that a 20-day suspension was the appropriate sanction:

1. Did the Employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business and (b) the performance that the Employer might properly expect of the employee?

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3. Did the Employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. Was the Employer's investigation conducted fairly and objectively?

5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

6. Has the Employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?

7. Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Employer? ^{FN41}

¶ 22 The arbitrator answered the first five questions "yes ." He characterized question 6 as an affirmative defense that the Union failed to prove. The arbitrator relied primarily upon his answer to question 7 to decide whether to modify the discipline of termination. He answered question 7 "no." However, none of the seven questions or the arbitrator's analysis of the appropriate discipline take into account the dominant public policies of the WLAD, including a Washington employer's affirmative duty to impose sufficient discipline to "send a strong statement" ^{FN42} adequate to persuade both Cann and potential violators to refrain from unlawful conduct. By imposing such a lenient sanction, the arbitrator minimized society's overriding interest in preventing this conduct from occurring ^{FN43} and interfered with the Port's ability to discharge its duty under the WLAD to prevent future acts of discrimination. By describing Cann's conduct as "more clueless than racist," the arbitrator "Very simply, sen[t] the message that ... poor judgment, or other factors, somehow render[ed] the conduct permissible or excusable." ^{FN44} This message and decision violate the public policy of the

State of Washington. We recognize that a second chance may be warranted, but the policies of the WLAD require that an arbitration award be substantial enough to discourage repeat behavior. Because the arbitration award failed to provide an adequate sanction for the employee's conduct and did not allow the Port to fulfill its affirmative legal duty to provide a discrimination-free workplace, we vacate it.

*6 ¶ 23 The Union asserts that our Supreme Court's decision in *Kitsap County Deputy Sheriffs Guild v. Kitsap County*,^{FN45} requires a different result because the WLAD is not "a public policy prohibiting the remedy ordered by the arbitrator." The Union reads *Kitsap County* too narrowly. There, Kitsap County terminated a deputy sheriffs employment for 29 documented incidents of misconduct, including dishonesty to his employer. ^{FN46} An arbitrator determined that termination was not the appropriate remedy, reinstated the deputy, and reduced his penalty to three written warnings. ^{FN47} On appeal, the county argued that the arbitrator's award violated criminal statutes and the *Brady* rule,^{FN48} which together prohibit public officers from knowingly making false statements and require prosecutors to disclose exculpatory evidence, including an officer's dishonesty.^{FN49} The court held that those laws were inadequate to establish a public policy sufficient to vacate the award because they did not "prohibit[] the reinstatement of any officer found to violate these statutes." ^{FN50}

¶ 24 Under the Union's analysis, the legislature must mandate specific penalties for particular acts of discrimination before we can find that an arbitration award violates the WLAD. The Union's position virtually eliminates the public policy exception to judicial enforcement of an arbitration award. Neither the Washington Legislature nor Congress has acted to eliminate reviewing enforcement of arbitration awards for this purpose. We decline the Union's invitation to judicially adopt a rule requiring such a restrictive standard.

¶ 25 Notably, the *Kitsap County Deputy Sher-*

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iffs Guild court offered examples of statutes from other jurisdictions that have qualified as explicit, well-defined, and dominant public policies in comparable cases. Citing *City of Brooklyn Center*, the court included “the affirmative duty under federal statute to prevent sexual harassment by law enforcement officers” in its list of explicit, well-defined, dominant public policies.^{FN51} Accordingly, our Supreme Court distinguished statutes like the WLAD from those it considered in *Kitsap County Deputy Sheriffs Guild* and thus suggested that the WLAD expresses the type of policy required for application of the public policy exception.^{FN52}

¶ 26 In sum, the WLAD constitutes an explicit, well-defined, and dominant public policy, which creates an affirmative duty on the part of an employer to eradicate racial discrimination in the workplace. We do not attempt to define the outer limits of the enforceability of labor arbitration awards or adopt any requirement for a specific discipline for violation of the WLAD. “The judicially created public policy exception to labor arbitration awards is a fact-specific, contextually sensitive doctrine and therefore well suited to development through the common law mode of adjudication. Only in the light of concrete cases will the precise contours of the public policy exception become visible.”^{FN53} We hold that the arbitration award here violates Washington State public policy by preventing the Port from effectively discharging its duties under the WLAD. Accordingly, we vacate the arbitration award.

*7 [12] ¶ 27 However, we also hold that the superior court exceeded the scope of its authority when it substituted its own determination of appropriate discipline for the arbitrator's. After vacating the arbitration award, the trial court imposed a six-month suspension, awarded back pay for the additional time Cann was off work, ordered Cann to write a sincere letter of apology that included a promise to never again engage in similar conduct, required that Cann attend diversity and antiharass-

ment training, and placed Cann on a probationary status for four years, during which any of his conduct that violated the Port's antiharassment policy would result in his termination.

[13] ¶ 28 As explained by the United States Supreme Court, a reviewing court that vacates an arbitration award should not then make its own determination on the merits:

[A]s a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for in the collective-bargaining agreement. Instead, the court should simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement. The court also has the authority to remand for further proceedings when this step seems appropriate.^{FN54}

Considering the arbitration award is an extension of the parties' contract, the superior court here should have interfered to the least possible degree while upholding public policy. This limited interference could have been achieved by remanding the case for further arbitration. Accordingly, we affirm the trial court's decision to vacate but remand for further proceedings consistent with this opinion.

Attorney Fees

[14][15][16] ¶ 29 The Union also claims that the superior court erred by partially denying its request for attorney fees under RCW 49.48.030. This court reviews the reasonableness of the amount of an award for an abuse of discretion.^{FN55} “A court abuses its discretion if its decision is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons.”^{FN56}

¶ 30 In the superior court, the Union requested \$123,780 in attorney fees under RCW 49.48.030 for work performed by Dimitri Iglitzin, the Union's retained counsel, and Terry Roberts, the Union's in-

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house counsel. In support of its motion, the Union submitted Iglitzin's and Roberts's declarations. Iglitzin accompanied his declaration with time records. Roberts's declaration, in contrast, contained only a statement of the total number of hours with no supporting documentation. According to Roberts, he

[c]onservatively ... spent one hundred and twenty eight hours of time working on the Arbitration aspects of this case and seventy three hours working on legal issues related to the vacation and confirmation of the Arbitrator's award. The fair value of my time is \$350.00 per hour and I spent at least two hundred and one hours on this matter.

*8 The superior court denied Roberts's fees. The court explained that the Union's request was not supported by adequate documentation:

In-house counsel are entitled to reasonable fees if adequate documentation accompanies the request. The Union provides only an estimate of Terry Roberts' fees. The court is not able to evaluate the reasonableness of the fees given the quality of the information provided. Any calculation would be arbitrary. Therefore, the court has deducted \$70,350 from the award representing Terry Roberts' fees.

[17][18] ¶ 31 RCW 49.48.030 provides for the award of reasonable attorney fees and costs for employees who prevail in a wage claim civil action. The attorney requesting fees has the burden of proving the reasonableness of the requested fees.^{FN57} This attorney must provide reasonable documentation of the work performed,^{FN58} including "contemporaneous records documenting the hours worked."^{FN59} The "documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work."^{FN60}

¶ 32 Here, the superior court awarded attorney fees for Iglitzin's work but denied Roberts's attorney fees because it received only an estimate of the

hours Roberts worked. Without contemporaneous time records documenting Roberts's hours, the superior court lacked the documentation required to make an adequate determination about the reasonableness of the fees requested. Therefore, the trial court did not abuse its discretion in denying part of the Union's request.

CONCLUSION

¶ 33 We affirm the superior court's decision to vacate the arbitration award and to partially deny the Union's request for attorney fees. However, because the superior court should not have fashioned its own award, we remand for further proceedings consistent with this opinion.

WE CONCUR: SPEARMAN and COX, JJ.

FN1. *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wash.2d 428, 435, 219 P.3d 675 (2009) ("[L]ike any other contract ... an arbitration decision arising out of a collective bargaining agreement can be vacated if it violates public policy." (citing *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 67, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000))).

FN2. Cann had been a Port employee for 12 years. At the time, Cann held the position of maintenance operating engineer and was a Union shop steward.

FN3. E-mails in the record between Port employees during the investigation mention that age discrimination is also prohibited by the Port's antiharassment policy, although that does not appear to have been a factor in the Port's decision to terminate Cann.

FN4. Another represented Port employee told an investigator that Cann had "race problems" but later retracted his statement.

FN5. In light of this finding, we find inaccurate appellant's insistence that "Mr.

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Cann was expressly found *not* to have engaged in racially harassing misconduct.”

FN6. The arbitrator relied on a federal arbitration decision, *Federal Aviation Administration*, 109 Lab. Arb. Rep. (BNA) 699 (1997) (Briggs, Arb.). In that decision, an air traffic controller, who had not received any diversity training, hung a noose as a Halloween prank in a location where it went unnoticed. 109 Lab. Arb. Rep. at 700, 701, 704. He received a two-day suspension, while another employee, who, a month later, threatened African American employees with a different noose, received only a written warning. 109 Lab. Arb. Rep. at 700–701, 705. The arbitrator, finding that the employee meant no harm by making and displaying the noose and did not understand its racial significance, reduced the employee's suspension to a written admonishment. 109 Lab. Arb. Rep. at 705–06. We note that as an arbitration decision, it necessarily does not address public policy considerations or the public policy exception.

FN7. The Washington State Labor Council filed an amicus curiae brief in support of the Union.

FN8. *Kitsap County Deputy Sheriff's Guild*, 167 Wash.2d at 434, 219 P.3d 675.

FN9. *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wash.App. 304, 317, 237 P.3d 316 (2010) (citing *Davidson v. Hensen*, 135 Wash.2d 112, 118, 954 P.2d 1327 (1998)).

FN10. *Klickitat County v. Beck*, 104 Wash.App. 453, 460, 16 P.3d 692 (2001).

FN11. *Clark County Pub. Util. Dist. No. 1 v. Int'l Bhd. of Elec. Workers, Local 125*, 150 Wash.2d 237, 245–46, 76 P.3d 248

(2003).

FN12. *Clark County Pub. Util. Dist.*, 150 Wash.2d at 245, 76 P.3d 248 (internal quotation marks omitted) (quoting *Dep't of Soc. & Health Servs. v. State Pers. Bd.*, 61 Wash.App. 778, 785, 812 P.2d 500 (1991)).

FN13. *Kitsap County Deputy Sheriff's Guild*, 167 Wash.2d at 435, 219 P.3d 675.

FN14. *Kitsap County Deputy Sheriff's Guild*, 167 Wash.2d at 435, 219 P.3d 675 (internal quotation marks omitted) (quoting *E. Associated Coal Corp.*, 531 U.S. at 62).

FN15. *Kitsap County Deputy Sheriff's Guild*, 167 Wash.2d at 435, 219 P.3d 675 (quoting *E. Associated Coal Corp.*, 531 U.S. at 62).

FN16. *E. Associated Coal Corp.*, 531 U.S. at 62–63.

FN17. RCW 49.60.010.

FN18. RCW 49.60.020.

FN19. RCW 49.60.030(1); *see also Roberts v. Dudley*, 140 Wash.2d 58, 69–70, 993 P.2d 901 (2000).

FN20. *Brown v. Scott Paper Worldwide Co.*, 143 Wash.2d 349, 360 n. 3, 361, 20 P.3d 921 (2001); *see also Perry v. Costco Wholesale, Inc.*, 123 Wash.App. 783, 793, 98 P.3d 1264 (2004) (“Once an employer has actual knowledge through higher managerial or supervisory personnel of a complaint of sexual harassment, then the employer must take remedial action that is reasonably calculated to end the harassment.”).

FN21. *Antonius v. King County*, 153 Wash.2d 256, 267–68, 103 P.3d 729

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(2004) (internal quotation marks omitted) (quoting *Xieng v. Peoples Nat'l Bank of Wash.*, 120 Wash.2d 512, 521, 844 P.2d 389 (1993)).

FN22. *Brown*, 143 Wash.2d at 360, 20 P.3d 921 (quoting *Marquis v. City of Spokane*, 130 Wash.2d 97, 109, 922 P.2d 43 (1996)).

FN23. *Roberts*. 140 Wash.2d at 69–70, 993 P.2d 901.

FN24. *Perry*, 123 Wash.App. at 793, 98 P.3d 1264 (quoting *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir.1991)).

FN25. *Perry*, 123 Wash.App. at 793, 98 P.3d 1264 (quoting *Ellison*, 924 F.2d at 883).

FN26. 635 N.W.2d 236, 238–39 (Minn.Ct.App.2001).

FN27. *City of Brooklyn Ctr.*, 635 N.W.2d at 240.

FN28. *City of Brooklyn Ctr.*, 635 N.W.2d at 240.

FN29. *City of Brooklyn Ctr.*, 635 N.W.2d at 242.

FN30. *City of Brooklyn Ctr.*, 635 N.W.2d at 243. We acknowledge that the repeat nature of the officer's conduct was important to the Minnesota Court of Appeals' holding in *City of Brooklyn Center*. But Washington's public policy exception does not require prior offenses and warnings because an employer has a duty to take corrective action once it has actual knowledge of any illegal discrimination. *Perry*, 123 Wash.App. at 793, 98 P.3d 1264. “ ‘If 1) no remedy is undertaken, or 2) the remedy attempted is ineffectual, liability will attach.’ “ *Perry*, 123 Wash.App. at 794, 98

P.3d 1264 (quoting *Fuller v. City of Oakland*, 47 F.3d 1522, 1528–29 (9th Cir.1995)). If we were to hold that the public policy exception is applicable only when an employee is a repeat offender, it would directly interfere with an employer's ability to appropriately discipline its employees and eliminate discriminatory acts in the workplace.

FN31. *City of Brooklyn Ctr.*, 635 N.W.2d at 244.

FN32. 252 Conn. 467, 747 A.2d 480, 482 (Conn.2000).

FN33. *AFSCME*, 747 A.2d at 483.

FN34. *AFSCME*, 747 A.2d at 486 (alteration in original).

FN35. *AFSCME*, 747 A.2d at 486.

FN36. 363 F.3d 590 (6th Cir.2004). In that case, an employee told a black co worker to “relax Sambo.” 363 F.3d at 592.

FN37. 261 F.Supp.2d 1089 (S.D.Iowa 2003). In *Gits*, a supervisor called another employee a “fucking nigger.” 261 F.Supp.2d at 1092.

FN38. *Way Bakery*, 363 F.3d at 595; *Gits*, 261 F.Supp.2d at 1092.

FN39. In a statement of supplemental authority, the Union cites *City of Richmond v. Service Employees International Union, Local 1021*, 189 Cal.App.4th 663, 118 Cal.Rptr.3d 315 (2010). *review denied* (Jan. 12, 2011), where the California Court of Appeals upheld an arbitrator's decision to reinstate an employee accused of sexual harassment because the employer failed to act on the accusation within the time limit set forth in the collective bargaining agreement. The court held that public policy did

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not preclude arbitration enforcement of the limitation period. 189 Cal.App.4th at 671–72, 118 Cal.Rptr.3d 315. Because the *Service Employees International Union* court was asked to decide a different issue than the one presented here, it is inappos- ite.

FN40. *Serv. Emps. Int'l Union*, 189 Cal.App.4th at 674–75, 118 Cal.Rptr.3d 315 (“[C]ase law on [the] public policy exception to arbitral finality ‘is not just unsettled, but also is conflicting and indicates further evolution in the courts.’ “ (quoting 1 Jay E. Grenig, *Alternative Dispute Resolution* § 24:19, at 622 (3d ed.2005))).

FN41. The arbitrator cited *Enterprise Wire Co.*, 46 Lab. Arb. Rep. (BNA) 359 (1966) (Daugherty, Arb.), as the source for these considerations, known as the “Seven Tests.”

FN42. *Perry*, 123 Wash.App. at 803, 98 P.3d 1264.

FN43. *See AFSCME*, 747 A.2d at 486.

FN44. *AFSCME*, 747 A.2d at 486.

FN45. 167 Wash.2d 428, 219 P.3d 675 (2009).

FN46. *Kitsap County Deputy Sheriff's Guild*, 167 Wash.2d at 431, 219 P.3d 675.

FN47. *Kitsap County Deputy Sheriff's Guild*, 167 Wash.2d at 432–33, 219 P.3d 675.

FN48. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (holding that a prosecutor's suppression of evidence violates due process where the evidence is material to guilt or punishment).

FN49. *Kitsap County Deputy Sheriff's Guild*, 167 Wash.2d at 436, 219 P.3d 675.

FN50. *Kitsap County Deputy Sheriff's Guild*, 167 Wash.2d at 436, 438, 219 P.3d 675.

FN51. *Kitsap County Deputy Sheriff's Guild*, 167 Wash.2d at 437, 219 P.3d 675.

FN52. *Kitsap County Deputy Sheriff's Guild*, 167 Wash.2d at 437, 219 P.3d 675 (“Washington has no similar statute ... placing an affirmative duty on counties to prevent police officers from ever being untruthful.”).

FN53. *State v. Pub. Safety Emps. Ass'n*, 257 P.3d 151, 162 (Alaska 2011).

FN54. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 n. 10, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987).

FN55. *Hulbert v. Port of Everett*, 159 Wash.App. 389, 407, 245 P.3d 779 (2011), *review denied*, 171 Wash.2d 1024, 257 P.3d 662 (2011).

FN56. *Hulbert*, 159 Wash.App. at 407, 245 P.3d 779.

FN57. *Scott Fetzer Co. v. Weeks*, 122 Wash.2d 141, 151, 859 P.2d 1210 (1993).

FN58. *Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 597, 675 P.2d 193(1983).

FN59. *Mahler v. Szucs*, 135 Wash.2d 398, 434, 957 P.2d 632 (1998).

FN60. *Bowers*, 100 Wash.2d at 597, 675 P.2d 193.

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