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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION III**

No. 328791-III

SHANNON KRIES and PETER KRIES

Appellants

vs.

WA-SPOK PRIMARY CARE, LLC

Respondent

BRIEF OF APPELLANTS

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I. INTRODUCTION

Plaintiff Shannon Kries (hereinafter “Kries”), was employed as a lead medical assistant for defendant, at the Deaconess Hospital Women’s Clinic (hereinafter “Hospital”). (CP 379, p. 24:15-24).¹ Although she had been released to return to work by her surgeon, the Hospital refused to allow her to return to work after abdominal surgery because she had drainage tubes in place. (CP 386, p. 84:18-25; CP 387, p. 85:1-7). When the tubes were eventually removed and the wound was covered and healing, she was again released, but again the Hospital refused. (CP 390, p. 97:7-13). It claimed this was an “open and draining wound” and the Hospital’s “Infection Control Policy” created a no exception, across the board exclusion for any employee (whether involved in patient care or not), from returning to work in any job position in the Hospital. (Id.; CP 248). However, the Infection Control Policy does not define what is “open or draining”. (CP 248). Nor does it

¹ Citation to the Clerk’s Papers page number will be cited as “CP ____”. Deposition sections designated in the Clerk’s Papers will be cited with the deposition page and line numbers as CP ____, p. ____:____. So for example, a deposition citation found at page 33 of the Clerk’s Papers which cites to deposition page 14, lines 22-25 will be cited as “CP 33, p. 14:22-25”.

prevent someone working with a covered wound. (Id.). Even under this policy, Kries presented facts which show that the wound was neither open nor draining, and she should have been allowed to return to work.

The Hospital also had a “Policy For Return To Work With Restrictions Following A Non-Work Related Injury, Surgery or Personal Medical Conditions” (hereinafter “Return to Work Policy”). (CP 445). This policy expressly allowed an employee to return to work with sutures or a covered wound, as long as it was not located on the hands or forearms. (Id). Kries was attempting to return to work with a covered wound that was allowed under both the Return to Work and Infection Control policies. (CP 248; 345).

The Hospital claims that the Infection Control Policy is sacrosanct and is applied without exception. (CP 261:18-20). This is inaccurate as it ignores employees who are allowed to work with covered wounds under the Return to Work Policy, notwithstanding the Infection Control Policy. (CP 445).

The Trial Court found that all positions in the Women’s Clinic required patient interaction and thus implicated the Infection Control Policy and even though released by her surgeon,

prevented her from working within the Clinic with or without accommodation. (CP 485-486). The Trial Court did not consider the Hospital's failure to enter into the interactive process to attempt to accommodate her to other positions within the Hospital while her surgical wound was healing.

The Hospital's Motion for Summary Judgment was granted by decision of the Honorable John O. Cooney, dated September 23, 2013, and an order Granting Defendant's Motion For Summary Judgment was entered on October 7, 2014. (CP 488-489). Kries appeals.

II. ASSIGNMENTS OF ERROR

1. The Trial Court erred by not addressing plaintiff's claim that the Hospital failed to accommodate her condition and enter into the interactive process.

2. The Trial Court erred in dismissing plaintiff's claims against the Hospital by finding that her physical condition prevented her from returning to work under the Infection Control Policy.

3. The Trial Court erred in holding that the Infection Control Policy was controlling and barred this action.

4. The Trial Court erred by ignoring the clear terms of the Return to Work Policy which allowed an employee to work with a covered wound.

5. The Trial Court erred in entering what it designated as “Undisputed Facts” (CP 483-485) that were, in fact, disputed.

More specifically, the Trial Court erred in entering Finding of Fact

No. 3:

Prior to her employment with the clinic, Ms. Kries had surgery which left her with an open wound. Unbeknownst to the clinic, Ms. Kries had this open wound from the time she began her employment through July 2010.

Short answer: This is disputed because Kries had a closed wound that was sutured and stapled shut after her surgery. Her surgeon opined she had a closed wound. The clinic was aware she had been packing her wound and covering it when she began employment with the Hospital. (CP 340, p. 25:18-24; p. 26:12-14; CP 343, p. 38:17-19; CP 351, p. 71:17-22; CP 384, p. 63:14-23).

6. The Trial Court erred in entering Finding of Fact

No. 4:

On July 14, 2010, Ms. Kries underwent surgery in an attempt to close the wound. This surgery resulted in drains being installed in the wound.

Short answer: This is disputed because drains were not installed in the wound. The wound was sutured and stapled shut. It was a closed wound. Drains were

placed by two separate quarter inch incisions in the skin and no drain was placed into the wound. (CP 340, p. 25:18-24; p. 26:12-14; CP 343, p. 38:17-19; CP 351, p. 71:17-22).

7. The Trial Court erred in entering Finding of Fact

No. 6:

On July 27, 2010, Ms. Kries' treating physician gave written notice clearing her to return to work. Despite the treating physician's clearance, the Clinic refused to allow Ms. Kries to return to work based upon the criteria of the Infection Control Policy and the fact that Ms. Kries had a draining wound.

Short answer: This is disputed since the refusal to allow Ms. Kries to return to work was discriminatory. She was perceived to be disabled because of her physical condition. The Hospital clearly ignored the Return to Work Policy which would have allowed her to return to work with a covered wound. (CP 445).

8. The Trial Court erred in entering Finding of Fact

No. 10:

Based upon the wound being closed, the drains being removed, and the treating physician's clearance allowing Ms. Kries to return to work, the Clinic accepted Ms. Kries back to work. She was scheduled to return the following Monday, September 13, 2010. The weekend prior to her return to work, Ms. Kries suffered an infection and drains were again inserted.

Short answer: This is disputed as although her drain had been removed, her wound was not "closed", yet she was cleared to return to work. (CP 390, p. 97:3-15; CP 408, p. 30:21-25; p. 31; p. 32:1-16; CP The clinic never "accepted" her back to work. Although

she was cleared to return to work on September 13, 2010, she was never “accepted” back to work between the time she was released on July 27, 2010 until she was terminated on November 16, 2010.

9. The Trial Court erred in entering Finding of Fact

No. 11:

On September 15, 2010, Ms. Kries presented another note to the clinic from her treating physician but this note stated that drains had been inserted. Unlike the two previous notes, this note was not a clearance to return to work.

Short answer: It is disputed that this note was not a clearance to return to work. Kries obtained this note from her surgeon’s office, and brought it to the Hospital in an attempt to return to work. The Hospital still took the position that since she had a drain in place, she could not return to work. (CP 345, p. 48:17-25; CP 346, p. 49:1-5; CP 391, p. 101:4-18; CP 401, p. 203:14-19).

10. The Trial Court erred in entering Finding of Fact

No. 12:

Following this note, Ms. Kries failed to provide any subsequent documentation from her treating physician authorizing her return to work.

Short answer: This is disputed since it was futile for her to try and bring any authorization to return to work unless her wound was healed. (CP 398, p. 189:16-22; CP 399, p. 194:22-25; p. 195:1-27; CP 400, p. 196:4-18).

11. The Trial Court erred in entering Finding of Fact

No. 16:

With the exception of the weekend of September 12, 2010, during Ms. Kries's entire employment with the Clinic, she had either an open wound or draining wound.

Short answer: This is disputed since there were times before she was terminated when she had no open or draining wound and could have worked with a covered wound. (CP 346, p. 50:13-25, p. 51:1-9; 394, p. 143:23-25, 144; CP 395, p. 145:1-8; CP 419, p. 23:15-25; p. 24:1-13).

12. The Trial Court erred in entering Finding of Fact

No. 17:

The Infection Control Policy and the Return to Work Policy are not in conflict with each other; the latter is a broad policy and the former narrows the scope based on safety concerns for patients and employees.

Short answer: This is disputed since the Return to Work Policy allows someone to return to work from surgery with a covered wound, even with a drain in place. (CP 445).

13. The Trial Court erred in entering Finding of Fact

No. 20:

While Ms. Kries may have been allowed to return to work with her wound covered it was not a guarantee and was restricted by the Infection Control Policy.

Short answer: This is disputed as no effort was made by the Hospital to participate in the interactive

process with Kries to determine what job positions or other alternatives existed. (CP 407, p. 26:23-25; CP 367, p. 14:7-11; CP 370, p. 26; p. 27:1-5) No risk assessment was undertaken even though the Hospital acknowledged that each matter was to be looked at on a case by case basis. (CP 410, p. 45:6-25; 46:1-23; CP 409, p. 41:24-25; 42:1-9; CP 335, p. 26:3-23).

III. STATEMENT OF THE CASE

This is a disability discrimination case stemming from the Hospital's termination of Kries and its failure to accommodate her and return her to work after a valid medical release was presented. Kries had been employed as the lead medical assistant at the Women's Clinic at Deaconess Hospital since December 31, 2009. (CP 379, p. 24:15-24). Her job duties at the clinic involved patient care including injections and taking blood. (CP 381, p. 37:24-25; p. 38; p. 39:1-6).

The Hospital maintains an "Infection Control Policy." (CP 248-255). It claims that this policy prohibits any employee from working in the Hospital with an open or draining wound, no matter what their occupation (janitor, kitchen aid, billing clerk or nurse) or which department they are employed (maintenance, kitchen, billing or inpatient care). (CP 261:18-20).

The Hospital also has a Return to Work Policy that allows an employee involved in patient care, to return to work from surgery and perform his or her job duties with sutures or wounds that can be completely covered, unless those sutures or wounds are on the hands or forearm. (CP 445). The wound does not have to be scabbed over or sutured shut. (Id). This policy does not limit or prevent an employee from returning to work with a drain in place or an open wound, as long as the wound is not on the hands or forearms. (Id.; CP 410, p. 45:10-25; p. 46:1-23) Even though the wound may be open, if it's covered and not on the hands or forearm, then a case by case assessment is supposed to be undertaken to determine whether or not the employee could work. (Id; CP 335, p. 26:19-23). Kries had an abdominal wound that could be covered and she could return to work. (CP 341, p. 31:14-25). No assessment was considered or even attempted in this case. (CP 367, p. 14:7-15).

The terms "open" and "draining" are not defined in either policy. (CP 248; CP 445). Dr. Stephen Olson, plaintiff's attending general surgeon, defined an "open" wound as one that had a break in the skin where the dermis and epidermis were not intact. (CP

337, p. 11:15-21). He defined a “draining” wound as one where drainage came out of the wound. (CP 337, p. 12:2-3). He opined that one could have a draining wound without it being an open wound. (CP 337, p. 11:8-14; p. 12:4-10). Not all open wounds have pus in them. (Id.)

Plaintiff’s expert, Dr. Francis Riedo, is an infectious disease physician. (CP 353, p. 8:14-25; p. 9: 1-7). He wears two hats at Evergreen Hospital in Kirkland Washington. (Id). He is both the Medical Director of Infection Control and Medical Director of Employee Health at the hospital. (Id). So he deals with both infection control issues and employees who return to work after surgery. (Id). He defined a “draining” wound as one that could not be contained and controlled. (CP 360, p. 44:11-18). A wound that was covered and the drainage controlled was not an open and draining wound. (Id.) One can have a draining wound without it being an open wound. (Id.) Dr. Riedo did not believe she was a risk to return to work as long as her wound was covered with an appropriate wound dressing and clothing. (CP 457-459).

Defense expert, Dr. Michael Gillum, a Spokane infectious disease physician is chair of the Deaconess Hospital Infection

Control Committee. He opined that any open wound was a draining wound, and any sutured wound was a closed wound. (CP 371, p. 32:12-22; CP 374, p. 43:9-11).

The defendant's Employee Health Coordinator, Mary Wise, was the person who assessed whether an employee was fit to return to work. (CP 403, p. 5:21-25; p. 6: 1-16; p. 8, 2-4). She felt that unless a wound was healed, it was considered "open". (CP 405, p. 14:2-14). It had to be scabbed over or healed over before she would allow someone to return to work. (Id.)

Before plaintiff Kries was employed at the Hospital, she worked for eight years at the CHAS Clinic in patient care as a lead medical assistant. (CP 379, p. 22:13-20; p. 23:10-12). While employed there, in 2007, she underwent a panniculectomy, which is the removal of excess skin around the abdomen after weight loss. (CP 382, p. 56:19-23; CP 383, p. 57:2-8). She was allowed to return to work as long as she packed and covered the wound as her doctor had instructed. (CP 384, p. 61:25; p. 62:1-11). She was allowed to work there with an open and covered wound. (Id.)

Her wound healed slowly, and when she accepted her job and started working at the Hospital on December 31, 2009, she

was still packing the wound with gauze before coming to work. (CP 385, p. 65:4-25; 66:1-3). Kries never packed or otherwise dressed the wound at work, and she never had any spillage or leakage from the wound. (Id.) She sealed the wound with tape and covered it with her clothing and continued to work. (Id.) The wound was covered and taped and not “open.” (CP 397, p. 166:12-15). To her knowledge, everyone at the clinic was aware she had a wound. (CP 384, p. 63:14-23). She never passed any infection onto any other employee or patient while working. (CP 366, p. 12:14-24; CP 385, p. 65:9-16; p. 66: 4-7; CP 393, p. 137:4-16; CP 393, p. 139:2-19; CP 397, p. 166:3-11).

On June 8, 2010, she came under the care of Dr. Stephen Olson because her wound had stopped healing. (CP 339, p. 21:10-22). Dr. Olson recommended surgery to stimulate healing in the wound. (Id.) Her original wound had been 32 centimeters in size, and had healed down to 6 inches but would not heal down any further. (CP 338, p. 19:12-19; p. 20:9-11). Surgery was performed on July 14, 2010, and in conjunction with fixing the wound, her gall bladder was also removed. (CP 339, p. 23:7-14). Dr. Olson inserted two drains through separate quarter inch in

diameter skin incisions so that the drains came out through two separate holes in the skin. (CP 340, p. 25:18-24; p. 26:12-14; CP 343, p. 38:17-19). The drains were not inserted directly into the wound, and the wound was sutured closed, then stapled shut. (Id.) Per Dr. Olson, Kries did not have an open wound; it was closed. (CP 343, p. 38:14-19; CP 351, p. 71:17-22).

On July 27, 2010, Dr. Olson gave Kries an unrestricted release to return to her job with both medical drains in place. (CP 433). In his opinion Kries was not a risk to herself or others as the wound was closed and her work clothes covered the drains. (CP 341, p. 30:13-25; p. 31; p. 32:1-22). The signed work release stated that Kries “may return to work,” and that “There should be no contraindication to working with drains in. There is no infection.” (CP 433). However, despite Dr. Olson’s unrestricted release, Mary Wise, the Employee Health Coordinator, refused to allow Kries to return to work until her wound was fully healed. (CP 404, p. 10:3-5).

When Kries was released to return to work on July 27, 2010, Kries’ immediate supervisor, Carolyn Commers, spoke with HR and Mary Wise in the Employee Health Department in an

attempt to figure out a way to get Kries back to work. (CP 419, p. 21:4-13) But they refused these requests, citing the Infection Control Policy. (Id.; CP 387, p. 88:9-25; CP 388, p. 89:1-16; p. 91:20-23). Ms. Commers had other jobs that Kries could have floated to while she was recovering. (CP 419, p. 23:15-25; p. 24:1-13). No one from the Hospital ever called Dr. Olson in an attempt to clarify any concerns. (CP 214:1-3; CP 404, p. 10:6-10). No one attempted to interact with Kries to explore other job possibilities or allow her additional leave time as an accommodation. (CP 423, p. 28:8-11; CP 424, p. 35:18-22; CP 414, p. 13:4-9). No one attempted to conduct a risk assessment of Kries to evaluate return to work options with a covered wound considering Dr. Gillum could only say she was a possible or potential risk to others as opposed to a probable risk. (CP 367, p. 14:7-11; CP 370, p. 26; p. 27:1-5; CP 407, p. 26:23-25; p. 27:1-9).

Kries desperately wanted to return to work in any capacity. (CP 388, p. 90:7-9; CP 395, p. 145:4-8). She was willing to take a cut in pay so she could be working. (CP 388, p. 90:21-25, p. 91:1-12). She made weekly calls to Mary Wise in Employee Health and her supervisor, Ms. Commers, in an attempt to return to work at

any job position. (CP 387, p. 88:9-25, CP 388, p. 89:1-16; p. 91:20-23).

Dr. Olson had given Kries an unrestricted release to return to work on July 27, 2010. (CP 341, p. 31:10-13; CP 433). Dr. Olson felt that if her clothing covered the wound or drains, it would not expose her or anyone to the drains or any drainage and she did not pose a risk to someone else. (CP 341, p. 31:14-25; CP 342, p. 35:4-25; 36:1-4). Kries would not infect any patients as she had no active infection. (CP 341, p. 32:12-22; CP 342, p. 36:5-25; 37:1-5). He felt that the drain would in no way limit her ability to perform her essential job functions. (CP 433).

Additionally, Dr. Olson did not consider Kries' wound to be an open wound. (CP 343, p. 38:12-22; CP 351, p. 71:17-25; p. 72:1-2). The wound was closed with a drain coming through the skin and not through the wound itself. (CP 340, p. 25:12-25; p. 26:1-14; CP 342 p. 33:22-25; 34:1-17; CP 343, p. 38:12-22) It was only after her second surgery in October, 2010 that she had an open wound that was being packed with gauze. (CP 348, p. 58:1-13) Despite this information, the Hospital barred Kries from returning

to work while the drain was in place. (CP 386, p. 84:18-25; CP 387, p. 85:1-7; ; CP 387, p. 88:9-22; CP 404, p. 10:3-5).

About three weeks after her July 27, 2010, release to return to work, her wound became infected. (CP 343, p. 39:14-19, CP 344, p. 41:3-8). On August 19, 2010, the fluid abscess was drained and once again, three weeks later, Dr. Olson released her to return to work on September 10, 2010. (CP 345, p. 45:17-20, p. 46; p. 47:1). But she developed another infection over the weekend so was unable to return to work. (Id.)

Five days later, September 15, 2010, Dr. Olson released Kries to return to work. (CP 390, p. 100:10-25; CP 391, p. 101:1-3; CP 434). She brought this form to the Hospital. (CP 391, p. 101:6-10). The Hospital claims that this form was not a release to return to work because it was simply marked "other." (CP 269). Although it is marked "other", Kries would not ask for something like this document without it being a return to work release. (CP 401, p. 203:14-19). This form was the form that Rockwood used for return to work. (CP 345, p. 48: 17-25; CP 346, p. 49:1-5) Kries viewed it as a release to return to work and brought it in to Mary

Wise. (CP 391, p. 101:4-7). But again, her request to return to work was refused. (CP 387, p. 88:9-22; CP 391, p. 101:8-16).

Regardless whether the Hospital considered it a release or not, Kries had previously been told there was no sense in bringing any more releases and not to bother coming back if she had an open wound. (CP 398, p. 189:16-22; CP 399, p. 194:22-25; p. 195:1-7; CP 400, p. 196:2-18; 197:3-11). So it was futile for her to continue to bring her employer a release to return to work when it had been ignored on other occasions. (Id.)

When she saw Dr. Olson on October 5, 2010, she had a closed wound with a drain. (CP 346, p. 51:14-25, p. 52; CP 347, p. 53:1-4). Dr. Olson tried to intervene on his patient's behalf to assist her in returning to work. (CP 341, p. 30:2-9; CP 343, p. 37:21-25; 38:1-4). On October 5, 2010, he spoke with Kries' supervisor and the Infection Control person, and they were unyielding. They would not allow Kries to return to work. (CP 346, p. 51:14-25; 52; 53:1). Dr. Olson was simply told that this was their policy. (CP 347, p. 53:2-4).

On October 21, 2010, she returned to Dr. Olson. The wound was completely closed and healed, but there was still

output from the drain. (CP 347, p. 54:14-16; 23-25). So she was taken to surgery where the drain tract was followed and an abscess was found. The drain tract was opened up and packed with gauze. (CP 348, p. 57:13-25). At this point, Dr. Olson felt that she had an open wound. (CP 348, p. 58:1-4).

Two weeks later she was seen on November 5, 2010. (CP 348, p. 60:18-25; CP 349, p. 61:1-6). A CT scan showed a pocket of fluid that was then drained on November 14, 2010. (Id.) By November 23, 2010, she was healing and doing well. (CP 349, p. 64:15-25). But she was terminated by the Hospital on November 16, 2010. (CP 435)

When she was last seen by Dr. Olson on February 14, 2011, the wound was healed and there was no discharge. (CP 350, p. 67:2-9). Dr. Gillum opined that based upon his review of the records, the wound was healed in November 2010 and she could have returned to work at that time. (CP 376, p. 52:8-20). He also felt it would have been reasonable to have input from himself or the Infection Control Committee which he chaired as to whether or not her physical condition constituted an unacceptable risk of

harm if she were to return to work. (CP 372, p. 34:17-25, p. 35:1-9).

Kries told the Hospital that she was willing to work anywhere. (CP 394, p. 143:23-25, p. 144, CP 395, p. 145:1-8). There were several positions available to Kries that she could have performed while healing. (CP 453-454). A medical records position was available in both December 2010 and January 2011. (Id). A receptionist position was available in January 2011. (Id). The medical records position did not involve direct patient care. (CP 419, p. 23:15-25, p. 24:1-23). Her supervisor, Ms. Commers, had jobs within the hospital she was willing to assign Kries to in order to keep her working. (Id).

Oral argument occurred on September 5, 2014, (CP 488) and on September 23, 2014, the Trial Court issued a written opinion. (CP 482). On October 7, 2014, the Trial Court entered an order granting the defense motion for summary judgment. (CP 488). Kries's Notice of Appeal was filed on October 17, 2014. (CP 490-499).

IV. STANDARD OF REVIEW

The appellate court applies de novo review to an appeal from summary judgment, engaging in the same inquiry as the superior court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004); *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 65, 837 P.2d 618 (1992). Summary judgment is only appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Kirby v. City of Tacoma*, 124 Wn.App. 454, 463, 98 P.3d 827 (2004). All facts and all reasonable inferences from those facts are construed in a light most favorable to the non-moving party. *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton Condo. Apartment-Owners Ass’n Bd. Of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)).

V. ARGUMENT

The Washington Law Against Discrimination (“WLAD”) specifically prohibits discrimination against disabled individuals because of “the presence of a sensory, mental, or

physical disability.” RCW 46.60.180(1). This includes an impairment that is perceived to exist whether or not it exists in fact. RCW 49.60.040(7)(a). The Hospital perceived that Kries had a disability based on her physical condition and was a risk to others or herself when she was not.

The WLAD is liberally construed to achieve the purpose of “eliminating and preventing discrimination.” *Griffith v. Boise Cascade, Inc.*, 111 Wn.App. 436, 442, 45 P.3d 589 (2002). Disability discrimination encompasses claims for disparate treatment because of a disability and failure to accommodate an employee’s disability. Kries’ action against the Hospital is a result of its failure to conduct the interactive process with her, perform any kind of risk assessment, and attempt to accommodate her.

A. The court erred in dismissing Kries’ reasonable accommodation claim against the Hospital (*Assignment of Error No. 1*).

The WLAD imposes an affirmative duty upon employers to provide reasonable accommodation to a disabled employee. RCW 49.60.180(1); WAC 162-22-080. Reasonable accommodation must be done through the “interactive process,” a process which

“envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between employee’s capabilities and available positions.”

Goodman v. Boeing Co., 127 Wash. 2d 401, 408, 899 P.2d 1265 (1995). This process is to determine the nature and extent of the disability in order to assist the worker in continuing to work at her current position or attempt to locate a position compatible with her limitations. *Dean v. Microsoft Corp.*, 149 Wash. 2d 521, 536-37, 70 P.3d 126 (2003).

The employee as well as the employer is expected to engage in the interactive process, and one of the employee’s duties is to keep the employer apprised of any change in disability status. *Wurzbach v. City of Tacoma*, 104 Wash. App. 894, 17 P.3d 707 (2001). Generally, “whether an employer made reasonable accommodations or whether an employee's request placed an undue burden on the employer is a question of fact for the jury.” *Harrell v. Washington State ex rel. Dep't of Soc. Health Servs.*, 170 Wn. App. 386, 398, 285; citing *Pulcino v. Fed. Express Corp.*, 141 Wash.2d 629, 639, 9 P.3d 787 (2000).

To establish a *prima facie* case of disability discrimination, the employee must show: (1) the existence of a disability, (2) he or she can perform the essential functions of the job with or without accommodation, and (3) he or she was not reasonably accommodated. *Easley v. Sea-Land Service, Inc.*, 99 Wash.App. 459, 468, 994 P.2d 271 (2000).

1. The Trial Court Erred in Determining that Kries Failed to Establish a *Prima Facie* Case of Failure to Accommodate. (Assignment of Error No.'s 1, 6, 7 and 8).

Kries established a *prima facie* case against the Hospital for its failure to accommodate her disability. The Hospital knew of her condition. They allowed Kries to take medical leave because of her condition. She attempted to return to work after her July 14, 2010, surgery with a healing and sutured wound with two drains. (CP 404, p. 10:3-5). She provided the Hospital with an unrestricted release to return to work on July 27, 2010. (Id.) This release clearly stated that she was not a risk even with her drains in place. (Id.)

The Trial Court erroneously found that Kries could not perform the essential functions of her position with the medical drains in place, stating:

“Although Ms. Kries may have been cleared by her treating physician to return to work, her open and/or draining wound prevented her from working in the clinic regardless of whether or not accommodations were made. (CP 485-486).

In so finding, the Trial Court weighed evidence that should properly have been weighed by a jury. *Harrell, supra*. While the Hospital did have an Infection Control Policy, it was a question of fact as to whether that particular policy even applied to bar Kries from working in her position with her covered wound. If the Infection Control Policy is to be harmonized with the Return to Work Policy, the Infection Control Policy has to be read to allow employees involved in patient care to work with a sutured or open wound, as long as it was covered. To hold otherwise would make the Return to Work Policy superfluous. And the fact the Hospital acknowledged that it should have done a risk assessment is itself evidence that the Infection Control Policy would allow a sutured or open wound, as long as it was covered. (CP 409, p. 41:24-25; 42:1-9; CP 410, p. 45:6-25; 46:1-23).

The Return to Work Policy allowed an employee returning from surgery whose job involved patient care, to work with sutures or wounds that could be completely covered. (CP 445). As long

as the wound was not on the hands or forearms and could be covered, this policy did not prevent or limit an employee from returning to work with a drain in place or an open wound. (Id.; CP 409, p. 41:24-25; 42:1-9; CP 410, p. 45:6-25; 46:1-23).

When Dr. Olson released Kries to return to work on July 27, 2010, he was aware of her job position and duties, and felt she was able to perform the essential functions of her job. (CP 341, p. 31:19-25). He did not believe that either her job tasks or contact with patients prevented her from working with her drains in place. (Id.) She was not infected, the incision was closed and her work clothes covered her incision. (CP 342, p. 35:17-25). She was draining into a closed system that would not expose others. (Id). Even taking into consideration hospital infection control policies, Dr. Olson did not feel Kries was a risk to herself or others, so gave her an unrestricted release. (Id). Dr. Olson did not feel that Kries' wound was "open or draining". (CP 351, p. 71:17-22).

The term "open or draining" is not defined in either policy. (CP 248, CP 445). It is subject to interpretation. It has been defined as a wound that "cannot be contained and the drainage controlled." (CP 360, p. 44:11-18). An "open" wound is a break in

the skin where the dermis and epidermis are not intact. (CP 337, p. 11:15-21). A draining wound is one in which drainage is coming out of the wound. (Id, p. 12:2-3). One can have a draining wound without it being open. (CP 360, p. 44:11-18). Even the Hospital's interpretations are inconsistent: Any sutured wound is a closed wound but any open wound is a draining wound. (Dr. Michael Gillum) (CP 371 p. 32:12-22; CP 374 p. 43:9-11). Compare: An "open" wound is one that isn't healed. (Mary Wise) (CP 405 p. 14:2-14).

Regardless of the definitions offered, under the Return to Work Policy, an employee is allowed to work with sutures or wounds that can be completely covered. (CP 445) Mary Wise of Employee Health, is responsible for placing an employee back to work at the Hospital. (CP 403, p. 5:21-25; p. 6:1-16; p. 8:2-4). Even she acknowledged that although a wound may be open, if it's covered and not on the hands or forearm, an assessment would be undertaken to determine whether or not the employee can work. (CP 409, p. 41:24-25, 42:1-9). Although she stated that each situation is looked at on a case by case basis, that was not done. No assessment was undertaken for Kries. (CP 367, p. 14:7-11; CP

370, p. 26; p. 27:1-5; CP 335, p. 26:19-23). No effort was made to accommodate Kries because the Hospital believed she had an open and draining wound. (CP 407, p. 26:23-25; 27:1-13). No one from the Hospital ever called Dr. Olson about any concern they had about Kries working with drains. (CP 214:1-3; CP 404, p. 10:6-10). No one from the Hospital ever contacted Dr. Gillum for his input. (CP 375, p. 45:21-25, p. 46:1-4). Despite an unrestricted work release, the Hospital refused to allow Kries to return to work, even under the Return to Work Policy. (CP 404, p. 10:3-5). Communication is the essence of the interactive process and the Hospital failed to engage in any form of communication with Dr. Gillum or Dr. Olson to review this case and determine what could be done. The Hospital only looked at what couldn't be done.

The Trial Court also ignored evidence that the Hospital failed to undertake any kind of risk assessment to see if Kries would be able to safely work or not. (CP 367, p. 14:7-11; CP 370, p. 26; p. 27:1-5). Dr. Gillum felt that it would have been reasonable to have input from himself or the Infection Control Committee as to whether or not an employee's medical condition

was an unacceptable risk to return to work. (CP 372, p. 34:17-25, p. 35:1-9). But the Hospital never contacted him even though he is the chair of the Hospital's Infection Control Committee. (Id.)

Even Dr. Riedo felt that Dr. Gillum should have been brought into the loop along with Dr. Olson to determine reasonable accommodation. (CP 357, p. 30:3-9, CP 458 ¶2) Dr. Gillum also felt it would have been reasonable for him to have been involved in a discussion with Sharyl Bergerud, the Deaconess Infection Control Director and Dr. Olson about whether Kries should have been allowed to return to work in some capacity. (CP 373, p. 37:6-11).

There is a factual issue in this case as to whether or not Kries posed an unreasonable risk of harm to herself or others by coming to work with drains or a packed wound. Did the Hospital unnecessarily restrict her from working with a covered wound? In Dr. Riedo's opinion, Kries did not pose a risk of infection to herself or others in the hospital. (CP 354, p. 18:23-25-CP 363, p. 85:1-17; CP 457-459). The wound was covered with a dressing as well as her clothing, and was not bleeding or oozing. (Id.) It was not on a part of her body that would have contact with patients, such as

hands or forearms. (Id.) It wasn't open and draining and any draining was contained. (Id.) Once an open wound was covered and the drainage contained, Dr. Riedo did not believe that an employee needed to be restricted from working. (Id.)

Dr. Riedo is in a particularly unique position to analyze these types of issues. He is both Medical Director of Infection Control and the Medical Director of Employee Health at Evergreen Hospital in Kirkland. In assessing risk, there is always a potential risk. For example, an employee with a colostomy stoma is open and draining and there is the potential risk that the colostomy bag could break. But employees with a colostomy are not prevented from working. (Id.) Likewise, every female employee who has a menstrual period is not going to be restricted because she is bleeding. (Id.) It's open and draining, the blood is contained, it's covered with a pad and undergarments, and the employee is allowed to work. (Id.) Likewise, 5% of women in the workplace carry Group B strep vaginally, but vaginal cultures aren't obtained on every female nurse each week to see if they are a carrier and exclude them from work. (Id.) Employees aren't screened for MRSA although it's a common bacteria found on the surface of the

skin. (Id.) The point being that Kries' covered wound did not put her at greater risk of infection to herself or others. (Id. ¶37 & 38) These were issues that should have been resolved by a jury.

Kries' wound site was no different than someone who worked with a colostomy bag. (CP 360, p. 44:7-18). There is a closed wound site, and the discharge goes into a sealed pouch for later disposal. (CP 357, p. 31:3-7, p. 32:9-13, CP 360, p. 44:7-18, CP 361, p. 49:6-21). Ms. Bergerud, the Infection Control Director, testified that an accommodation may be made for an employee who has a colostomy bag. (CP 334, p. 15:25; 16:1-18). No one can offer an explanation of why Kries posed a greater risk than someone with a colostomy bag that might break. Kries never worked with an active infection and as a health care provider, never would. (CP 397, p. 166:3-15). When she was not exhibiting an infection, she should have been allowed to work. (CP 389, p. 96:4-25; CP 390, p. 97:1-6).

Dr. Gillum could only say that Kries was a possible or potential risk as opposed to a probable risk of harm to herself or others. (CP 370, p. 26; p. 27:1-5). The risk was not imminent. He did not know if the hospital allowed someone to work with a

colostomy bag, a PICC line in place, an ileostomy bag, insulin or pain pump. (CP 371, p. 32:23-25; CP 372, p. 33; p. 34:1-6) All of these conditions are open and/or draining yet the Hospital doesn't screen these people and prevent them from working. The risk that Kries would transmit an infection or acquire an infection that would prevent her from working is a disputed issue of fact.

Dr. Olson opined that Ms. Kries was not a risk of infection when he released her to return to work. (CP 341, p. 31:14-25; CP 342, p. 35:4-25; 36:1-4). He was aware of her position and what it entailed. He was in the best position to judge whether she was a risk to return to the workplace. He has good common sense and Dr. Gillum did not believe Dr. Olson would allow a patient to return to work if there was a risk to others. (CP 365, p. 6:18-21).

2. The Court Erred in Finding that the Infection Control Policy "Narrows the Scope" of the Return to Work Policy (Assignment of Error No.'s 2, 3, 4, 12 and 13).

The Return to Work Policy modifies the Infection Control Policy. The two have to be read in conjunction with one another. Washington Courts have found that inconsistent employment policies provided by an employer are properly determined by a jury. *Swanson v. Liquid Air Corp.*, 118 Wn. 2d 512, 534, 826 P.2d

664, 675-676 (1992) *Citing Loffa v. Intel Corp.*, 153 Ariz. 539, 738 P.2d 1146 (Ct.App.1987).

In *Swanson*, the court determined that there was a question of fact as to whether at will employment language in a disclaimer was modified or contradicted by terms in a Memorandum of Working Conditions which the parties intended to be terms of the employment relationship.

The Return to Work Policy at the Hospital applies to an employee's return to work after surgery. It modifies the Infection Control Policy. The Hospital was aware that both policies existed and arbitrarily enforced one over the other. Like the policies at question in *Swanson*, the application of the Infection Control Policy and the contradictory Return to Work Policy are not appropriate for resolution at the summary judgment stage, but should have been determined by the trier of fact. The Trial Court erroneously determined at Undisputed Finding of Fact No. 17:

The Infection Control Policy and the Return to Work Policy are not in conflict with each other; the latter is a broad policy and the former narrows the scope based on safety concerns for patients and employees." (CP 485 ¶17).

In so finding, the Trial Court weighed evidence to reconcile the policies which should not have been decided as a matter of

law. While the Hospital argued that the Return to Work Policy was intended to supplement the Infection Control Policy, no evidence of such intention was in the record. The Hospital could produce no evidence as to who drafted the Infection Control Policy or what it was based upon. Dr. Gillum and his Infection Control Committee did not draft it. (CP 370, p. 28:23-25, CP 371, p. 29:1; 14-20, p. 30:18-25). Dr. Gillum was unaware of any other hospital or facility with the same or similar infection control policy that completely restricted an employee from working with covered wounds. (CP 375, p. 46:17-20). The Hospital adopted these policies and any ambiguities should be construed against them. *Lamar Outdoor Advertising v. Harwood*, 162 Wash. App. 385, 254 P.3d 208 (Div. 3 2011). But by determining that the Return to Work Policy “narrows” the scope of the Infection Control Policy, the Trial Court weighed the evidence and made a decision on a material issue in dispute in this case that was properly for the jury. (CP 485 ¶17). The jury, not the Trial Court, is the appropriate one to weigh evidence, intent and history of the Return to Work Policy, and whether it was intended to

supplement, modify, replace or explain the contrary Infection Control Policy.

In assessing the risk of allowing Kries to return to work, the Hospital focused solely on the blanket exclusionary provision of the Infection Control Policy that no one may work with an open or draining wound, and ignored the “Return To Work” policy (CP 445). The Return To Work Policy should have been considered and the failure to do so leaves disputed issues of fact that must be resolved by a jury. If followed, the Return To Work Policy would have allowed Kries to return to work with a covered wound. (Id.). Her wound was completely covered and was not open or draining because any draining was into a contained pouch. After her second surgery on October 21, 2010, when she was packing her wound, it was packed with gauze, sealed with tape and covered with her work clothes, all of which was allowed under both policies that were in effect at the time of Ms. Kries’ employment. (CP 436, CP 445).

The Infection Control Policy did not prevent Kries from working with a sutured covered wound. (CP 248) The Return to Work Policy allowed her to work with a sutured or open wound, as

long as it was covered and not on the hands or forearms. (CP 445). It didn't have to be scabbed over or sutured shut. (Id.) The fact that there were two different policies in play, one which would have allowed Kries to return to work far before her wound was fully healed is a disputed issue of fact that must be resolved by a jury. There is disputed evidence whether Kries was at greater risk to patients with an open, covered wound and could have worked under the Infection Control Policy or Return To Work Policy. (CP 248, CP 445, CP 457-459).

3. The Trial Court Failed to Address the Claim that the Hospital Did Not Engage in the Interactive Process (Assignment of Error No's 1, 2, 9, 10, 11, and 13).

Once an employee's disability becomes known to an employer, the employer is under an affirmative obligation to "reasonably accommodate" an employee's disability by offering a suitable position that the employee is qualified to perform.

Wurzbach v. City of Tacoma, 104 Wash. App. 894, 898, 17 P.3d 707, 710 (Ct. App. 2001). To reach a reasonable accommodation, employers and employees should seek and share information with each other "to achieve the best match between the employee's capabilities and available positions." *Goodman*, 127 Wash.2d at

409, 899 P.2d 1265. Employers have an affirmative duty under the interactive process to apprise employees on medical leave of job openings for which the employee might be qualified. *Dean v. Municipality of Metro. Seattle*, 104 Wn.2d 627, 639, 708 P.2d 393 (1985).

It is undisputed that the Hospital knew about Kries' disability because she had been granted medial leave and on July 27, 2010, was released by Dr. Olson to return to work. (CP 341, p. 30:13-25; p. 32:1-22; CP 433). This release clearly stated that she had drains in place, but was not a risk to others. (Id.) Rather than commence the interactive process, the Hospital refused to address and discuss alternatives taking the position that the Infection Control policy was controlling. (CP 405, p. 13:2-25; p. 14:1-14). Kries believed that she should have been allowed to return to work in her lead medical assistant position or some other position as there were other jobs available she could have performed or floated to while she was recovering. (CP 394, p. 143:23-25, p. 144; CP 395, p. 145:1-8; CP 419, p. 23:15-25; p. 24:1-23).

Nonetheless, the Hospital failed to entertain any of these options and terminated Kries. (CP 435). The Trial Court erred in failing to consider that the Hospital did not engage in the interactive process with Kries. The failure to engage in the interactive process is evidence that the Hospital did not offer a reasonable accommodation to Kries. (CP 407, p. 26:23-25; p. 27). The Trial Court erred when it failed to acknowledge that the Hospital did not offer reasonable accommodation to Kries. Instead, the Trial Court merely determined that the Infection Control Policy restricted her from returning to work. The Hospital had an affirmative obligation to evaluate her condition, conduct some risk assessment, and proactively look for ways to help her work with her condition. Instead, it ignored the interactive process and barred her from returning to work. As Dr. Riedo stated:

“...I think there’s also some common sense that applies too. I mean if you have an open, draining wound that can’t be contained, and your blood – your blood is soaking through your – your uniform, you know, you have uncontrolled diarrhea, I don’t think you should be working. On the other hand, you know, I think, as in this case, I think there are circumstances here that just sort of cry out for somebody to look at this, and give it some thought, and realize what exactly you’re asking this person to do.” (CP 354, p. 20:10-18).

The Hospital failed to look at any alternatives and in failing to do so, violated the WLAD.

4. The Trial Court Failed to Consider the Hospital's Continuing Duty to Accommodate Kries After Termination (Assignment of Error No. 1).

Under the WLAD, the duty to offer a reasonable accommodation does not cease with the termination of the employment relationship. See *Wheeler v. Catholic Archdiocese of Seattle*, 65 Wash. App. 552, 564, 829 P.2d 196, 203 (1992) (overruled on other grounds). In *Wheeler*, plaintiff took a leave of absence to have surgery on her hand. The employer indicated that her job would be held open for her until she was released. When she was released 8 months later, she met with her supervisor, who told her that the position was no longer available as they were only obligated to hold it for 60 days. Other positions became available that plaintiff was qualified for, but she was not notified of these positions. The court found that the employer had failed in its duty to reasonably accommodate the plaintiff by not taking affirmative steps to keep her apprised of positions for which she may be eligible. See also *Clarke v. Shoreline Sch. Dist. No. 412, King Cnty.*, 106 Wash. 2d 102, 720 P.2d 793 (1986)(stating in

dicta there is a duty to accommodate even after employment relationship has expired).

In this case, the Hospital failed to reasonably accommodate Kries not only by failing to offer her a non-patient care position temporarily that she was qualified to perform, but also by failing to inform her about available positions after she was terminated. (CP 415, p. 17:9-24; p. 18:9-12; CP 416, p. 22:23-25; p. 23:1-2). The Hospital claims that its termination letter encouraged her to apply for positions through the Hospital website. (CP 272). But there is no evidence that she was ever contacted before or after termination to assist with placement efforts. There were no affirmative steps undertaken to inform Kries of job positions she might be eligible to perform other than to mention the website. (CP 415, p. 17:9-24; 18:9-12; CP 416, p. 22:23-25; 23:1-2).

Additionally, the record indicates that no one was hired to replace Kries after she was terminated because of a hiring freeze. (CP 420, p. 37:23-25; p. 38:1-3). As a consequence, there is no reason why the Hospital could not have kept her on leave as an accommodation and then allowed her to return to work once she was fully healed as recognized in *Wheeler*. The Trial Court erred in

failing to consider that the Hospital ignored its duty to enter into the interactive process and continue to assess reasonable accommodation even after it terminated her.

5. A Blanket Exclusionary Policy Requiring That Kries be Fully Healed Before Returning To Work Violates the WLAD.

Before allowing her to return to work, Mary Wise, the Employee Health Coordinator, interpreted the Infection Control Policy to mean that no one could return to work unless the wound was healed. (CP 405, p. 13:2-25; p. 14:1-14). Policies that require “100% healed” are invalid and “per se” violations of the ADA. As the court noted in *McGregor v. Nat'l R.R. Passenger Corp.*, 187 F.3d 1113, 1116 (9th Cir. 1999):

“100% healed” policies are *per se* violations of the ADA. A “100% healed” or “fully healed” policy discriminates against qualified individuals with disabilities because such a policy permits employers to substitute a determination of whether a qualified individual is “100% healed” from their injury for the required individual assessment whether the qualified individual is able to perform the essential functions of his or her job either with or without accommodation.

The Hospital acknowledges that no individualized risk assessment was undertaken in this case. (CP 367, p. 14:7-11; CP 370, p. 26; p. 27:1-5; CP 409, p. 41:24-25; 42:1-9; CP 410, p. 45:6-25; 46:1-23). It did not contact Dr. Olson to determine if

Kries was a danger to others or to find out the extent of her wounds. (CP 406, p. 19:14-16). Neither Mary Wise nor Sharyl Bergerud looked at the wound for themselves. (CP 334, p. 16:19-22; CP 406, p. 20:20-23).

Per Dr. Olson's conversation with the Employee Health, since the Infection Control Policy prevented her from returning to work, that was the end of it. (CP 346, p. 51:14-25; 52: 53:1-4) Dr. Gillum felt that it would have been reasonable to have input from himself or the Infection Control Committee as to whether or not an employee's medical condition was an unacceptable risk to return to work. (CP 372, p. 34:17-25; p. 35:1-9). He also felt it would have been reasonable for him to have been involved in a discussion with Sharyl Bergerud, the Deaconess Infection Control Director and Dr. Olson about whether Kries should have been allowed to return to work in some capacity. (CP 373, p. 37:6-11). Enforcement of the Infection Control Policy excludes the Hospital from performing the legally required interactive process to determine whether Kries could return to work in some capacity. The fact that the Hospital excluded Kries until she was 100% healed presents a material issue of fact for the jury.

VI. ATTORNEY'S FEES AND COSTS

Pursuant to RAP 18.1(b), plaintiff/appellant respectfully requests his attorney's fees and costs. Attorney fees and costs are allowable to Kries in a claim for discrimination under RCW 49.60.030 and Kries respectfully requests same on appeal.

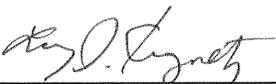
VII. CONCLUSION

Based upon the facts and argument set forth herein, this Court should reverse the Trial Court's decision of September 23, 2014, and the Order Granting Defendant's Motion For Summary Judgment dated October 7, 2014. This matter should then be remanded to the Trial Court for a determination on the merits.

Dated this 16th day of January, 2015.

Respectfully submitted:

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