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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 328791

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

SHANNON KRIES and PETER KRIES,

Plaintiffs/Appellants,

vs.

WA-SPOK PRIMARY CARE, LLC,

Defendant/Respondent.

**BRIEF OF RESPONDENT
WA-SPOK PRIMARY CARE, LLC**

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I. INTRODUCTION

Defendant/Respondent is WA-SPOK Primary Care, LLC a/k/a The Women's Clinic at Deaconess Hospital ("Clinic"). The Clinic, a women-specific healthcare clinic, operated under an Infection Control Policy ("ICP") that prohibited employees from working with open or draining wounds because such wounds pose an unacceptable risk of transmitting infection to patients, employees, vendors and others. Pursuant to the ICP, Plaintiff/Appellant Shannon Kries was prevented as an employee from working while she had an open and/or draining wound. The Clinic provided four months of leave to Ms. Kries to allow time for her wound to heal, but eventually terminated her employment when she continued to be unable to return to work.

Plaintiffs/Appellants Shannon and Peter Kries ("Kries") sued the Clinic alleging disability discrimination under the Washington Law against Discrimination, RCW 40.60 ("WLAD"). (CP 1-7) The Clinic's motion for summary judgment requested dismissal of Kries' Complaint with prejudice pursuant to CR 56, or, alternatively, an order limiting the damages that Kries could seek at trial. (CP 294-96; 259-96; 460-473)

The Superior Court granted the Clinic's motion and dismissed Kries' Complaint with prejudice. (CP 488-89) Kries filed a timely Notice of Appeal. (CP 490-99)

II. STATEMENT OF FACTS

A. The Clinic

The Clinic was a clinical healthcare entity that operated the Women's Clinic at Deaconess Hospital ("Deaconess") until July 12, 2012. (CP 25, ll.19-24)¹ The Clinic provided women-specific medical care to pregnant women throughout the term of pregnancy, delivered babies, and provided post-delivery care to mothers and their babies who are highly susceptible to infection. (CP 26, ll.3-18; CP 27, ll.11-16)

B. The Compelling Need for an Infection Control Policy at Deaconess

The Centers for Disease Control and Prevention ("CDC") reports that hospital acquired infections pose significant threats to patients treated in healthcare institutions and add billions of dollars to healthcare costs. (<http://www.cdc.gov/HAI/research/research.html>) Approximately 1 out of 25 patients are infected as a result of his or her care while at a hospital. (CP 160, ll.8-12) Accordingly, healthcare facilities like Deaconess Hospital and the Clinic have a responsibility to keep patients, employees and others safe from infections. (CP 148, l.13-CP149, l.4)

Employees at the Clinic were subject to the Deaconess ICP, which

¹ Citations to portions of the record containing deposition testimony will include specific references to the lines containing the cited testimony. Where the single page of the Clerk's Papers includes several pages of deposition testimony, a specific page will also be referenced, as was done by Kries in her Brief of Appellants.

states: “No one is allowed to work with an open or draining wound.” (CP 211, ll.3-11; CP 248) The reasons for this policy are two-fold: first, the wound can become infected from a source at the Clinic (CP 133, ll.12-17; CP 218, l.23-CP 219, l.5); and, second, infection can be transmitted to a patient, co-workers or others through the wound drainage. (*Id.*)

The ICP was drafted by the Deaconess Infection Control Committee, which is made up of professionals with infectious disease credentials and backgrounds. (CP 207, l.11-CP 208, l.2; CP 221, l.17-CP 222, l.4) Dr. Michael Gillum is the current chair of the Deaconess Infection Control Committee and has served in that role for the last 24 years. (CP 130, ll.10-14) Dr. Gillum is an infectious disease specialist on the medical staff of Deaconess and is as an expert witness in this case. (CP 129, ll.8-13) The ICP is based on medical information from sources like the CDC. (CP 214, l.23-CP 216, l.8; CP 255) The ICP also includes jobsite safety requirements for employees exposed to blood-borne pathogens and other potentially infectious materials that are mandated by the Washington Industrial Safety and Health Act. (CP 217, ll.2-12)

C. Kries’ Job Duties

Kries was hired to work at the Clinic as a Lead Medical Assistant starting in January 2010. (CP 23, l.23-CP 24, l.10; CP 28, ll.21-24; CP 29, ll.18-22) Kries answered a “Preplacement Assessment Questionnaire”

during her employment orientation at the Clinic that included a section for her to disclose current medical issues. (CP 32, 11.11-19; CP 86-87) However, Kries did not disclose her open and draining wound on the form. (CP 32, 1.20-CP 33, 1.4; CP 33, 11.23-25)

The Lead Medical Assistant position at the Clinic was classified as “Blood Borne Pathogen Exposure II”, which meant the position involved exposure to blood-borne pathogens. (CP 34, 1.25-CP 35, 1.14) Exposure to blood-borne pathogens creates a risk of infection to both the patient and the healthcare provider. (CP 35, 1.21-CP 36, 1.13)

Kries worked hands-on at the Clinic with pre- and post-birth mothers and their newborn babies. (CP 30, 1.24-CP 31, 1.10) Her Lead Medical Assistant duties and responsibilities required direct patient interaction, including checking patients in, checking a patient’s vitals, blood pressure and weight, and using syringes to give patients injections or take blood draws. (*Id.*)

D. Kries’ Open and Draining Wound

Kries had surgery in 2008 to remove excess skin after she lost a lot of weight. (CP 37, 1.19-CP 38, 1.8) The surgery left a 12.6 inch open and draining wound in Kries’ abdomen. (CP 176, 11.12-19) Unbeknownst to the Clinic when she was hired, Kries was packing her large open wound cavity with gauze, placing a piece of gauze over the wound opening, and

taping the gauze in place. (CP 39, l.25-CP 40, l.25) The gauze was meant to absorb the wound drainage, but there was risk that the wound drainage fluid could escape. (CP 138, l.22-CP 139, l.4; CP 220, ll.6-21)²

In May 2010, a few months after she was hired, Kries consulted with Dr. Stephen K. Olson of Rockwood Clinic because her open and draining wound was not healing properly. (CP 41, ll.8-14; CP 89) At that time, Kries' wound was between 6 and 8 inches long and 4 inches deep. (CP 176, l.22-CP 177, l.11) Kries informed her supervisor at the Clinic, Carolyn Barnes, that she needed time off from work to have surgery. (CP 42, ll.18-25) The Clinic granted Kries a leave of absence for her surgery even though Kries lacked any vacation time, and was not qualified for any other leave of absence under Deaconess' employment policies because of her short tenure at the Clinic. (CP 43, ll.8-12; CP 238, ll.1-4)

Kries underwent surgery on July 14, 2010 during which Dr. Olson attempted to close her open and draining wound. (CP 42, ll.2-9; CP 44, ll.17-18; CP 91-92; CP 178, ll.12-14) Dr. Olson stapled the wound shut and made incisions in Kries' stomach through which he placed drains into her wound in order to drain the fluid. (*Id.*; CP 183, ll.17-25) After surgery, Kries' wound became infected --- it was inflamed and cloudy

² Because Kries worked with an open and draining wound in violation of the ICP without the Clinic's knowledge, it is unknown whether she transmitted infection to a patient, fellow employee or others. (CP 136, ll.1-11).

liquid drained from the wound. (CP 179, ll.15-25) Kries was given an antibiotic for the infection. (*Id.*)

E. Kries Was Not Allowed to Return to Work

The Clinic's policy required Kries to provide a return to work release from her physician and be cleared through Deaconess' Employee Health Department ("Employee Health") before she could return to work. (CP 81, ll.18-25; CP 234, ll.9-16) All employees returning from leave receive an individualized return-to-work evaluation. (CP 213, ll.19-21) Kries provided a note dated July 27, 2010 from Dr. Olson to Employee Health. (CP 46, l.5-CP 47, l.13) The note stated, "May return to work. There should be no contraindication to working with drains in. There is no infection. If any concern about working with drains in, please call me." (CP 45, ll.8-19; CP 94)

Upon reviewing Kries' note, Employee Health Coordinator Mary Wise, who is a nurse, did not believe Kries was eligible to return to work under the ICP because she had an actively draining wound. (CP 208, l.16-CP 209, l.8) Ms. Wise contacted Sharyl Bergerud, the Director of Deaconess' Infection Control Department, to discuss whether Kries was eligible to return to work under the ICP. (CP 206, ll.15-20; CP 209, ll.2-20) Ms. Wise described Kries' draining wound to Ms. Bergerud, who agreed that Kries was not eligible to return to work under the guidelines in

the ICP. (CP 212, ll.8-14) Although Ms. Bergerud considered Dr. Olson's note stating Kries could work with her drains in, Ms. Bergerud concluded that an outside physician's opinion could not override the ICP. (CP 210, ll.8-17) It was clear to Ms. Bergerud that Kries had a draining wound and was ineligible to return to work under the ICP. (CP 208, ll.4-23) Ms. Wise told Kries that the ICP prevented her from returning to work with her open or draining wound. (CP 48, ll.8-13)

Between July 27 and August 19, 2010, Kries claims she made weekly calls to either Ms. Wise or to Kries' supervisor, Carloyn Barnes, in an attempt to return to work as Lead Medical Assistant, or in some other position. (CP 50, l.9-CP 51, l.16) Ms. Barnes consulted with Employee Health about whether Kries could be allowed to return to work in a non-patient care position. (CP 235, l.17-CP 236, l.18) Because non-patient care positions still involve patient contact, Kries was advised that the ICP prohibited her from working in any job at the Clinic or any other Deaconess entity while she still had an open and/or draining wound. (CP 242, ll.1-12; CP 52, ll.20-23; CP 211, ll.3-17)

On August 19, 2010, one of Kries' wound drains was pulled out while getting out of bed and she required medical treatment. (CP 49, l.17-CP 50, l.8) Kries' wound then became infected because when the drain was pulled out, fluid built up inside her wound and allowed bacteria to

colonize. (CP 184, ll.5-CP 185, l.20; CP 186, ll.16-23) On August 30, 2010, Kries called Dr. Olson and was prescribed an antibiotic because her wound was infected again, and she experienced pain and redness around the drain site, cloudy drainage, chills, and nausea. (Ex. CP 187, ll.6-14)

F. Kries Was Approved to Return To Work but Her Wound Became Infected Over the Weekend

On September 10, 2010, Dr. Olson removed Kries' wound drain. (CP 54, ll.4-14; CP 98-99) He signed a note that same day stating "The drain is out. May return to work." (CP 54, ll.18-22; CP 101) Kries gave the September 10 note to Ms. Wise in Employee Health. (CP 55, ll.2-3) Ms. Wise completed the internal paperwork to return Kries to work, including a notation that "Drain is out! ☺" (CP 246, ll.18-25; CP 258)

Despite approval to return to work, Kries did not return to work on Monday, September 13, 2010 as expected, because her wound again became infected over the weekend. (CP 188, l.4-CP 189, l.1; CP 57, ll.7-16; CP 103-104) When Dr. Olson treated Kries on September 13 for her wound infection, Kries was hospitalized with pain, nausea, vomiting, and a fever of 103 degrees. (*Id.*) Dr. Olson drained 200 cc of purulent fluid from her wound and placed new drains in Kries' wound. (CP 58, l.16-CP 59, l.5) Kries admits she was unable to work on September 13th when her wound was infected and required surgery to insert a drain. (CP 58, ll.3-5)

G. Kries Did Not Present another Release to Return to Work

Kries admits that she knew she was required to provide a return to work release from Dr. Olson to be able to return to work at the Clinic. (CP 81, ll.18-25) Kries presented a note from Dr. Olson's office on September 15, 2010 which stated: "Patient had drainage tube placed surgically in the abdominal wall on Monday, September 13, 2010. Per Stephen K. Olson." (CP 59, ll.10-21; CP 106) The "Return to Work" box on the note was not checked, and Dr. Olson testified by deposition that *the September 15, 2010 note was not a return to work authorization.* (CP 59, 1.22-CP 60, 1.3; CP 190, 1.16-CP 192, 1.6; CP 106) Kries acknowledged that the September 15, 2010 Rockwood note did not have the "May return-to-work" box checked --- instead, the "Other" box was checked. (CP 82, ll.5-14) Because Kries continued to have a draining wound, Ms. Wise advised her that she could not return to work. (CP 60, ll.4-18)

The Clinic's policy required Kries to provide a return to work release from her physician before she could return to work (CP 81, ll.18-25; CP 234, ll.9-16), but Kries never provided a written return-to-work release (or any other note for that matter) to the Clinic after the September 15, 2010 note. (CP 78, ll.14-21) Dr. Olson's records are maintained electronically and all notes are scanned into that system. (CP 191, 1.11-CP

192, l.4) Dr. Olson confirmed that there would be a record of a written return-to-work release for Kries in the electronic system if such a release actually existed. (*Id.*) No such release exists. (*Id.*)

H. Kries Continued To Have a Draining Wound

Kries' wound was still producing a high volume of drainage on September 24, 2010. (CP 192, ll.9-24) A culture of Kries' wound drainage revealed two forms of bacteria growing in the wound which were sources of infection --- *beta strep* and *Peptostreptococcus*. (*Id.*)

Kries saw Dr. Olson again on October 5, 2010. (CP 61, ll.10-14) Dr. Olson noted the volume of drainage from Kries' wound had not subsided and her drain output was at 35 cc's a day, which he believed was too high to remove her drains. (CP 61, l.15-CP 62, l.2; CP 108)

On October 21, 2010 Kries returned to Dr. Olson because her wound drainage turned foul and had an output of 30 cc's a day. (CP 63, ll.1-14; CP 110-112; CP 194, ll.14-24) During the two days prior to this visit, Kries had foul drainage from the drain exit site, i.e. the skin around the drain itself. (*Id.*) On October 22, 2010, Dr. Olson cut a 6 centimeter hole in Kries' wound in order to pack the wound with gauze. (CP 64, l.5-CP 65, l.2; CP 114, 116-117; CP 195, ll.9-22) Dr. Olson confirmed in his deposition that as of October 22, 2010, Kries had an open (in addition to a draining wound) wound. (CP 196, l.19-CP 197, l.14)

Kries still had an open and draining wound when she next saw Dr. Olson on November 5, 2010. (CP 198, 1.20-CP 199, 1.14) Dr. Olson noted there was still a fair amount of drainage from the wound --- more than what would be normal at that stage in Kries' treatment. (*Id.*) Dr. Olson stated, "Due to the ongoing drainage and the obesity compromising the exam, we'll obtain a CT scan to rule out any undrained fluid collection;" and, "If that's okay and the wound continued to heal, I feel the patient may return to work and will recommend that." (CP 66, 11.5-12; CP 119) Dr. Olson recommended a complete drain of Kries' wound given her "*history of severe infection*" during her November 12, 2010 visit. (CP 67, 11.5-17; CP 121-123) (emphasis added).

I. The Clinic Terminated Kries' Employment on November 16, 2010

As of November 16, 2010, it had been over four months since Kries last worked at the Clinic. (CP 73, 11.2-3) Kries did not have any accrued vacation or sick days, and did not qualify for FMLA or any other leave. (CP 237, 1.25-CP 238, 1.4)

With no communication from Kries since September 15, 2010, the Clinic terminated Kries' employment by letter dated November 16, 2010. (CP 68, 11.3-9; CP 125) The termination letter informed Kries she was being terminated because of her inability to perform the essential functions

of her position. (*Id.*) Kries was advised she was eligible for rehire, and she was encouraged to submit her resume through Deaconess' electronic applicant system for any position she believed she was qualified for. (*Id.*; CP 68, l.21-CP 69, l.1) After receiving her termination letter, Kries never provided a release to return to work to the Clinic, and she never applied for any position. (CP 69, ll.2-14; CP 72, ll.10-23; CP 78, ll.14-21)

J. The Clinic Closed In January 2012

The Clinic closed in January 2012, and Deaconess no longer offered women's care after that date. (CP 226, ll.4-14; CP 240, ll.8-10) All Clinic employees were terminated when it closed. (CP 241, ll.4-11) Terminated Clinic employees were encouraged to apply for any open job positions within the Rockwood Health System, (Rockwood Clinic, Deaconess Hospital, Spokane Valley Hospital) but they could not transfer to Rockwood Clinic or Spokane Valley Hospital because they are wholly separate legal entities over which Deaconess has no control or authority. (CP 227, ll.13-19)

Several Clinic employees applied for open positions at the women's clinic at Rockwood Clinic. (CP 228, ll.10-14) Applicants submitted their applications online and Rockwood Clinic interviewed the applicants. (CP 241, ll.4-11) Some of the Clinic employees were hired to work at the Rockwood Clinic. (CP 228, ll.10-14; CP 241, ll.4-24)

K. Kries' Wound Finally Healed

On February 14, 2011, nearly three months after Kries' employment with the Clinic terminated (and after the Clinic had closed) Kries saw Dr. Olson for the last time, during which he noted that, "The wound appears to have healed well." (CP 70, 1.23-CP 71, 1.7) At that time, the wound was finally closed, and there were no drains in the wound. (CP 200, 1.15-CP 201, 1.5)

L. Physician Testimony in This Case

Three physicians provided testimony in this case: (1) the Clinic's expert Dr. Gillum, (2) Kries' outside expert, Dr. Riedo, and (3) Kries' treating physician, Dr. Olson. (CP 129, 11.8-13; CP 155, 11.6-11; CP 171, 11.8-15) Dr. Riedo is a solo practitioner in infectious disease. (CP 145, 11.10-15) Dr. Riedo is also a medical director of infection control at Evergreen Healthcare in Kirkland, Washington, serving as chairman of its infection control committee for the past 18 years. (CP 146, 11.1-5)

Unlike Dr. Riedo, Dr. Olson is not an infectious disease specialist. (CP 171, 11.23-24) Dr. Olson is a general surgeon. (*Id.*) Dr. Olson has never written an infection control policy and has had only "token" experience as an infection control officer for two years in 1996. (CP 172, 1.8-CP 173, 1.23)

Dr. Gillum, Dr. Riedo, and Dr. Olson agree that employees cannot

work at a healthcare facility like Deaconess with an open wound that is not covered, or a draining wound with drainage that cannot be contained. (CP 150, ll.9-13; CP 157, ll.3-7; CP 165, ll.6-16; CP 131, ll.4-7; CP 182, ll.5-15) They also agree that employees cannot work with an active infection because there is an unacceptable risk of infection caused by the increased bacteria present during an active infection. (*Id.*; CP 161, ll.6-12; CP 342, p. 36, ll.12-15; CP 367, p. 16, ll.12-18)

Wounds are normally colonizing with a variety of organisms and the risk of infection stems from whatever bacteria or disease might be colonizing within the wound. (CP 133, l.18-CP 134, l.7) Infection can spread through the wound drainage by way of anything that the wound drainage comes in contact with. (CP 192, l.22-CP 193, l.1; CP 133, ll.12-17; CP 141, ll.1-11)

Dr. Olson explained that he wrote “there is no infection” on Kries’ July 27, 2010 note because the drainage from Kries’ wound was “serous drainage versus an infected drainage”. (CP 181, ll.17-22) However, Dr. Olson later testified that serous fluid can still have bacteria in it which is a source of infection. (CP 202, ll.11-14; CP 192, l.22-CP 193, l.1)

The three physicians disagree as to whether an employee with an open wound that has been covered, or a draining wound with drains intended to collect the wound drainage, poses an unacceptable risk of

infection in a healthcare facility. (CP 152, 1.19-CP 153, 1.8; CP 180, 11.19-25; CP 131, 11.4-7) Both Dr. Riedo and Dr. Olson opined that Kries posed no threat of infection because her clothing covered her wound, and the drains in her wound would have eliminated exposure of the wound's fluid drainage. (CP 152, 1.19-CP 153, 1.8; CP 180, 11.19-25) Dr. Gillum is of the opinion that an open wound poses a risk of infection that is unacceptable in a health care setting regardless of whether it is covered or has drains. (CP 138, 1.22-CP 139, 1.4; CP 220, 11.17-21)

Dr. Gillum's opinion is that dressing a wound and sealing it with tape reduces the risk of spreading infection, but the risk of infection is not eliminated, and poses an unacceptable risk of spreading infection in a healthcare facility. (CP 138, 1.22-CP 139, 1.4) A taped and covered wound can still leak. (CP 139, 11.5-12) Wound dressings can fail even if they are prepared by the most competent healthcare professional. (CP 140, 11.8-18) If Kries touched her wound or the draining fluid while at the Clinic, she could have passed on an infection. (CP 141, 11.1-18)

Dr. Riedo agreed that the seal to a wound covering can break or become totally saturated with wound drainage, and that wound drainage is an infection issue when it is not contained. (CP 156, 11.5-13; CP 164, 11.21-22) Dr. Riedo's position is that Kries' wound did not pose a risk of infection --- so long as there was no leakage around the dressing, and the

drainage did not saturate through the dressing. (CP 156, ll.3-13)

Dr. Riedo testified that the Clinic should not have precluded Kries from returning to work, but rather should have taken cultures of Kries' wound to test for bacteria, if the Clinic was worried about infection. (CP 158, ll.3-15) However, he admitted that taking a culture requires 48 to 72 hours to get the results. (CP 158, ll.16-20) Infection can develop in between the time the culture was taken and when the results are reviewed. (CP 158, l.24-CP 159, l.3) Stated another way --- although there may be no infection today, there could be an infection tomorrow. (CP 166, ll.11-13) Any type of bacteria could have been colonizing in Kries' wound at any time. (CP 192, ll.21-22) This is demonstrated by the fact that Dr. Olson released Kries to return to work on September 10, but she was hospitalized with an infection just three days later on September 13. (CP 188, l.4-CP 189, l.1; CP 57, l.7-CP 58, l.5; CP 103-104)

III. STANDARD OF REVIEW

Motions for summary judgment are reviewed *de novo*. *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). The "appellate court engages in the same inquiry as the trial court." *Id.* Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* A court will consider all facts and any reasonable inferences in the light most favorable

to the nonmoving party. *Id.* A motion for summary judgment should be granted if, from all the evidence, reasonable persons could reach but one conclusion. *Id.*; *Hubbard v. Spokane County*, 146 Wn.2d 699, 706-707, 50 P.3d 602, 606 (2002).

IV. LAW AND ARGUMENT

A. Undisputed Facts Establish the Superior Court Was Correct In Granting Summary Judgment to the Clinic

Kries incorrectly asserts that the Superior Court erred in entering Findings of Fact. (Brief of Appellants, pp. 4-7) In reality, the court merely recited the facts it found to be undisputed after reviewing the evidence submitted by both parties. Regardless of Kries' objections to the Superior Court's recitation of undisputed facts (Brief of Appellants, pp. 4-8), on appeal the summary judgment is reviewed *de novo* and findings of fact (if any) would be superfluous and need not be considered at all on appeal. *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978); *Hubbard v. Spokane County*, 146 Wn.2d at 706, n. 14.

Kries' objection to the Court's Undisputed Fact #3 misreads the Court's statement. The fact stated is that Kries' wound was open through July, 2010. (CP 483) Thus, Kries' citations to testimony of Dr. Olson that he closed the wound in July, 2010 (CP 351, p. 71, ll.17-22) does not contradict the Court's statement of undisputed fact.

Kries' attempt to dispute the Court's Undisputed Fact #4 (CP 483) also fails. Kries nitpicks the Court's language, but it is clear from the evidence cited by Kries that the drains were placed to drain the wound. (CP 340, p. 25, ll.18-24)

Kries responds to the Court's Undisputed Fact #6 (CP 484) with conclusory argument that the Clinic's refusal to return Kries to work was discriminatory because the Clinic perceived Kries to be disabled. Kries' argument is not an admissible fact. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn. 2d 355, 359, 753 P.2d 517 (1988). Kries' citation to the Clinic's Return to Work Policy (CP 445), which she argues the Clinic should have considered, does not dispute the fact that Kries was not permitted to return to work based on the ICP.

In response to the Court's Undisputed Fact #10 (CP 484), Kries appears to dispute whether she was "accepted" back to work. However, Kries does not dispute that she was approved to return to work on Friday, September 10, 2010, but never returned to work again after Monday, September 13 once her wound became infected over the weekend. (CP 258; CP 188, l.4 – CP 189, l.1; CP 57, l.7-CP 58, l.5; CP 103-104)

In response to the Court's Undisputed Fact #11 (CP 484), Kries attempts to dispute the Court's statement that the September 15, 2010 (CP 106) note was not a clearance to return to work. Kries cites no evidence to

support any contrary fact. Kries “just assumed” the note released her to return to work, (CP 401, p. 203, ll.14-19) but she does not (and cannot) contradict Dr. Olson’s own testimony that *the note was not a release to return to work*. (CP 78, ll.14-21; CP 190, l.16–CP 192, l.4; CP 346, p. 49, l.3–p. 50, l.1) Kries’ assumption is not evidence. *Grimwood*, 110 Wn.2d at 359.

In response to the Court’s Undisputed Fact #12 (CP 484), Kries claims it was futile for her to bring an authorization to return to work after September 15, 2010 because she was told she could not return to work with an open or draining wound. (CP 398, p.189, ll.16-22; CP 399, p.194, l.22-p.195, l.25; CP 400, p.196, ll.4-18) None of the testimony cited by Kries, however, controverts the Court’s statement of fact that Kries “failed to provide any subsequent documentation from her treating physician authorizing her to return to work.” (CP 484) Kries offered no evidence that she made any effort to keep the Clinic informed of the status of her wound after September 15, 2010. The facts before the court are undisputed that Kries did not provide a return to work authorization after September 15, 2010. (CP 191, l.11-CP 192, l.4)

In response to the Court’s Undisputed Fact #16 (CP 485), Kries asserts there were times when she had no open or draining wound and could have worked with a covered wound. The testimony Kries cites

establishes that she may have had a closed wound, but there is no question that the wound was draining, bacteria was present, and she was a risk for developing an infection. (CP 346, p.50, ll.13-25, p.51, ll.1-24) Kries does not cite any testimony to controvert the fact stated by the Court that, “[w]ith 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 [a] draining wound.”

Kries’ response to the Court’s Undisputed Fact #17 (CP 485) is completely without evidence. Kries claims the Return to Work Policy allows someone to return to work from surgery with a covered wound, even with a drain in place, citing only to the policy. (CP 445) A review of the Return to Work Policy clearly establishes that ***it does not address wounds that are draining.*** (*Id.*) In contrast, the ICP specifically addresses draining wounds. (CP 436, ¶I.A) Kries has not established a conflict between the cited policies, and does not contradict the Court’s statement that the ICP is a narrower policy based on safety concerns for patients and employees.

Kries’ response to the Court’s Undisputed Fact #20 (CP 485) misses the point of the Court’s statement. The Court states that covering an open wound is not a guarantee against infection, and that working with an open or draining wound is restricted by the ICP. The Court’s statement

is supported by undisputed evidence. (CP 140, ll.3-18) Kries does not dispute the Court's statement, but instead argues that the Clinic did not participate in the interactive process to find an alternative position for Kries. This argument is addressed more fully, *infra*, but the argument fails because the ICP prohibits working with an open or draining wound in any position in the hospital due to the risk of infection. (CP 436, ¶I.A; CP 131, l.18-CP 132, l.2; CP 133, ll.10-11) In addition, Kries never applied for another position with the Clinic (CP 69, ll.2-14), and never provided a return to work release. (CP 191, l.11-CP 192, l.4)

Kries has not offered evidence to controvert any of the undisputed facts identified by the Superior Court. (CP 483-485) In her appeal brief, as in the trial court, Kries failed to dispute the following key facts that require affirmance of the Superior Court's grant of summary judgment dismissing her claims for disability discrimination:

(1) Kries had either a draining or open wound (or both) from July 14, 2010 through the date her employment was terminated on November 16, 2010. (CP 42, ll.2-9; CP 44, ll.17-18; CP 57, l.7-CP 58, l.5; CP 91-92; CP 103-104; CP 176, l.3-CP 177, l.4; CP 178, ll.3-14; CP 179, ll.15-25; CP 183, ll.17-25; CP 188, l.4-CP 189, l.1)

(2) Open or draining wounds cannot be effectively monitored for infection because of the delay between taking a wound culture and

receiving test results. (CP 158, l.3-CP 159, l.3; CP 166, ll.11-13)

(3) Twice after her own doctor had released Kries to return to work, she developed an infection in her wound, in August, 2010 (CP 184, ll.3-19) and September, 2010. (CP 57, l.7-CP 58, l.5; CP 103-104; CP 188, l.4-CP 189, l.1)

(4) Medical evidence shows that an employee with an open or draining wound can transmit infection to patients, employees, and others, and the employee has an increased risk of acquiring an infection. (CP 133, ll.10-17; CP 218, l.20 – 219, l.23; CP 220, ll.8-19)

(5) Hospital patients, especially the Clinic's patients, are highly susceptible to infection. (CP 26, ll.3-18; CP 160, ll.8-12; CP 215, ll.2-22)

(6) As a healthcare facility, the Clinic is responsible for preventing the spread of infection within its facilities to both patients and employees. (CP 148, l.13-CP 150, l.22; CP 214, ll.3-19)

(7) The ICP explicitly prohibits employees from working with either an open or draining wound. (CP 248)

(8) The Clinic allowed Kries over four months of leave from work for her wound to heal, despite Kries' ineligibility for statutory or other leave. (CP 237, l.16-CP 238, l.4)

(9) Kries never contacted the Clinic once her wound was no longer open and/or draining in February 2011 or thereafter (CP 68, l.17-

CP 69, 1.14); she never applied for another position despite specific encouragement from the Clinic (CP 125); and she never provided a return to work release after September 10, 2010. (CP 78, 11.14-21; CP 191, 1.11-CP 192, 1.4)

On the basis of these undisputed facts, *inter alia*, the dismissal of Kries' disability discrimination should be affirmed.

B. Compliance with the ICP Is an Essential Function of any Job with the Clinic or at Deaconess

Summary judgment was proper because Kries has not created a question of fact whether she was qualified to perform the essential functions of her job due to her open or draining wound. *Fey v. State*, 174 Wn. App. 435, 452, 300 P.3d 435, 444 (2013). The ICP prohibited employees with open and/or draining wounds from working at the Clinic because such employees posed an unacceptable risk of transmitting or acquiring infection through the performance of their job duties. (CP 34, 1.25-CP 36, 1.13; CP 131, 1.24-CP 132, 1.6; CP 133, 11.12-17; CP 211, 11.3-11; CP 218, 1.23-CP 219, 1.5; CP 248) The Clinic was required to keep its patients, employees and others safe from the transmission of infection, and it enforced the ICP for that purpose. (CP 148, 1.13-CP 150, 1.22; CP 214, 11.20-23; CP 374, p. 42, 11.20-25).

A safety-based qualification standard, like the ICP's open or

draining wound work restriction, may preclude persons from employment even though they have a disability so long as (1) it is job-related, (2) consistent with business necessity, and (3) no reasonable accommodation exists. *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 996 (9th Cir. 2007).³

1. Prohibiting Employees with Open or Draining Wounds from Working at a Healthcare Facility is Undeniably Job-Related

An employee cannot safely provide patient care to women and newborn babies if she has an open or draining wound because of the risk of transmitting infection to the patient. (CP 133, ll.10-17; CP 218, l.20-CP 219, l.23; CP 220, ll.6-19) Non-direct patient care employees also pose an unacceptable risk of transmitting infection because they work in a healthcare facility where infection can easily spread. (*Id.*) Deaconess has determined that the only safe way to reduce the risk of infection is to not allow employees with open or draining wounds to work in its facilities. (CP 141, ll.19-24; CP 374, p. 42, ll.20-25)

It is undisputed that wound drainage contains bacteria and can

³ Because the Washington statutes and regulations at issue have the same purpose as their federal counterparts, federal cases provide interpretive guidance. *Stieler v. Spokane Sch. Dist.* 81, 88 Wn. 2d 68, 73, 558 P.2d 198 (1977). There appears to be no applicable Washington law on safety-based qualification standards or direct threat, and as such, authorities interpreting the ADA provide guidance to this court.

transmit infection. (CP 133, 1.10-CP 134, 1.19; CP 141, 11.1-11; CP 192, 1.13-CP 193, 1.1) Wound coverings can leak through and expose the draining liquid. (CP 138, 1.22-CP 139, 1.12; CP 140, 11.14-18) As the facts of this case show, a wound with drains can still leak; Kries experienced leakage around her wound drain site (CP 110; CP 194, 14-24) and also had a drain that was pulled out on at least one occasion. (CP 49, 1.17-CP 50, 1.8; CP 184, 1.14-25)

An essential function of Kries' Lead Medical Assistant position was to provide direct patient care. (CP 34, 1.25-CP 36, 1.13; CP 30, 1.8-CP 32, 1.10) Kries worked hands on with expectant and post birth mothers, as well as their newborn babies. (*Id.*) Kries' Lead Medical Assistant position was identified as a position with an increased risk of transmitting blood-borne pathogens. (CP 34, 1.25-CP 36, 1.13) Kries' open or draining wound posed an unacceptable risk of transmitting infection to those patients through the fluids that were frequently draining from her wound. (CP 133, 1.10-CP 134, 1.19; CP 141, 11.1-11; CP 192, 1.13-CP 193, 1.1)

Kries alleges she could have worked in an alternative non-patient care position, but her open and draining wound posed an unacceptable risk of infection in every position within the facility. (CP 211, 11.3-11; CP 248; CP 131, 1.24-CP 132, 1.6) Deaconess concluded in its administration of the ICP that an employee cannot perform a job at a healthcare facility

when the employee had an open and/or draining wound that could cause an infection. (CP 133, ll.10-17; CP 141, ll.1-24; CP 218, l.20-CP 219, l.23; CP 220, ll.8-19; CP 236, ll.10-24; CP 374, p. 42, ll.21-25)

2. The ICP is Consistent with Business Necessity as the Purpose of a Healthcare Facility is to Make Patients Well and Not Infect Them

To establish the business necessity defense, an employer must prove that the challenged employment practice significantly correlates with the fundamental requirements of job performance. *Hegwine v. Longview Fibre Co.*, 162 Wn. 2d 340, 355-56, 172 P.3d 688 (2007). *Shannon v. Pay 'N Save Corp.*, 104 Wn. 2d 722, 731, 709 P.2d 799 (1985). Business necessity is a defense to disparate treatment claims. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 52-53, 124 S. Ct. 513 (2003) (the business necessity defense to both disparate treatment and disparate impact claims under the ADA); *Bates v. U.P.S.*, 511 F.3d 974, 995 n. 10 (2007)(the ADA's business necessity defense may be asserted to defend against disparate treatment and disparate impact claims); *Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 486, 859 P.2d 26 (1993) (business necessity defense applies to a disparate treatment discrimination claim based on marital status under RCW 49.60.180).

The Clinic was a healthcare provider in the business of improving the health of its patients, which required protecting its patients from

infections. (CP 26, l.3-18; CP 216, ll.3-CP 217, l.25; CP 218, l.20-CP 219, l.5; CP 374, p. 42, ll.20-24) Hospital acquired infections pose significant threats to patients treated in healthcare institutions and add billions of dollars to healthcare costs. (CP 148, l.13 – p.149, l.4; CP 160, ll.8-12) *See*, <http://www.cdc.gov/HAI/research/research.html>. It was the responsibility of the Clinic to take appropriate steps to prevent transmitting an infection to or from patients. *See Douglas v. Freeman*, 117 Wn.2d 242, 252, 814 P.2d 1160 (1991) (the corporate negligence theory is based on the proposition that a hospital owes an independent duty of care to its patients). Thus, the Clinic’s business and medical judgment regarding the necessary safety precautions should not be second-guessed by outside physicians like Dr. Riedo or Dr. Olson who have no responsibility for infection control at Deaconess or in the Clinic. *See Davis v. Microsoft Corp.*, 149 Wn.2d 521, 536, 70 P.3d 126 (2003)(The WLAD does not permit the court to second-guess an employer’s business objectives or how it organizes its work force and structures jobs).

“[I]n evaluating whether the risks addressed by...[a] qualification standard constitute a business necessity, the court should take into account the magnitude of possible harm as well as the probability of occurrence.” *Bates*, 511 F.3d at 996, *quoting EEOC v. Exxon Corp*, 203 F.3d 871, 875 (5th Cir. 2000). The acceptable probability of an incident varies with the

potential hazard posed by the particular provision: a probability that might be tolerable in an ordinary job might be intolerable in others. *Id.*

The prohibition against working with an open or draining wound, as set forth in the ICP, was necessary because it is not possible or practicable to continuously and individually monitor employees for infection. It takes 48 to 72 hours to confirm an infection. (CP 158, ll.16-20) Kries' history of serious and recurring infections clearly demonstrated the necessity for the ICP. Dr. Olson released Kries to return to work on July 27. (CP 94) Three weeks later she had an infection. (CP 96; CP 184, 1.5-CP 186, 1.24) He released her again to return to work on September 10 (CP 101), but 3 days later Kries had another serious infection. (CP 57, 1.7-CP 58, 1.5; CP 103) In October and November, Kries was infected again on multiple occasions. (CP 194, ll.5-24; CP 195, ll.16-22; CP 198, 1.20-CP 199, 1.25)

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He released her again to return to work on September 10 (CP 101), but 3 days later Kries had another serious infection. (CP 57, 1.7-CP 58, 1.5; CP 103) In October and November, Kries was infected again on multiple occasions. (CP 194, 11.5-24; CP 195, 11.16-22; CP 198, 1.20-CP 199, 1.25)

The Clinic established the ICP as a nondiscriminatory safety-based qualification standard. Deaconess' ICP is supported by strong medical evidence. (CP 133, 1.6-CP 134, 1.19; CP 150, 11.9-13; CP 161, 11.6-12; CP 165, 11.6-16; CP 182, 11.5-15; CP 342, p. 36, 11.12-15; CP 367, p. 16, 11.12-18) The Clinic owes a duty of care to its patients and employees. *See Douglas v. Freeman*, 117 Wn.2d at 252; WAC 296-126-094. In the face of two reasonable alternatives, the Clinic's choice about the terms of its ICP should not be second-guessed. *White v. State*, 131 Wn.2d 1, 19-20, 929 P.2d 396 (1997); *Mickelsen v. Albertson's, Inc.*, 226 F. Supp. 2d 1238, 1248 (D. Idaho 2002).

Although Kries alleges the ICP was improper, she does not create an issue of material fact by relying on Dr. Riedo's opinion. Dr. Riedo testified about his opinion. (CP 152, 1.19-CP 153, 1.8; CP 157, 11.8-20) But he agrees there is no standard of care regarding the best or only way to prevent transmission of hospital acquired infections. (CP 149, 1.5-CP151, 1.22) Dr. Riedo clearly recognized there were varying opinions. (CP 151, 11.20-22) Dr. Riedo's testimony does not contradict the medical evidence;

it only establishes a differing opinion. Without specific facts to genuinely dispute the ICP's validity, the evidence merely presents competing medical opinions as to which valid policy the Clinic may adopt and follow --- a choice that undoubtedly belongs solely to the Clinic.

If Kries spread infection to a post-birth mother or a newborn child, or experienced an infection herself, the results could have been very serious. (CP 215, ll.2-9) The Clinic has established that the ICP was job-related and consistent with business necessity. Kries did not offer factual evidence to create a genuine dispute of material fact on this issue.

3. There Is No "Other" Policy That Allowed Kries to Work with an Open or Draining Wound

Kries repeatedly alleges in her appeal brief that the Clinic's Return to Work Policy (CP 445) explicitly permits her to work with an open and/or draining wound, despite the provisions of the ICP. (Brief of Appellants, pp. 24-26) Kries' allegation is without merit. The Return to Work Policy does not authorize or even suggest an employee may work with an open and/or draining wound.

The ICP specifically addresses open or draining wounds. (CP 248) The Return to Work Policy does not address draining wounds. (CP 445) At all times from July 14, 2010 through the date her employment was terminated on November 16, 2010 (except for September 10 to September

13, 2010), Kries had a draining wound. (CP 53, ll.2-9; CP 57, l.13-CP 58, l.5; CP 59, ll.10-21; CP 61, ll.10-24; CP 62, ll.16-19; CP 65, ll.1-17; CP 178, ll.3-11; CP 183, ll.6-25; CP 185, ll.7-20; CP 187, ll.3-22; CP 192, l.9-CP 193, l.9; CP 194, ll.16-24; CP 195, ll.9-13; CP 196, ll.7-25; CP 197, ll.1-9; CP 198, ll.9-15; CP 199, ll.11-25; CP 201, ll.10-16; CP 96, 98, 103, 108, 110, 116, 119, 121-123) The ICP specifically provides that Kries was not permitted to work while her wound was draining. (CP 248) Kries' interpretation of the Return to Work Policy ignores the first sentence of the ICP which unambiguously states, "No one is allowed to work with an open or draining wound." (*Id.*) There is nothing in the Return to Work Policy to suggest it was meant to override the ICP.

Kries' citation to *Lamar Outdoor Advertising v. Harwood*, 162 Wn. App. 385, 254 P. 3d 208 (2011) does not support her argument that the ICP should be construed against the Clinic or the Hospital. That case is not helpful because it is a contract case. Kries has not asserted a breach of contract claim against the Clinic or the Hospital. She has made no claim of reliance on the Return to Work policy. Kries never established that she was even aware of the Return to Work Policy prior to litigation. There can be no genuine question of fact as to the interpretation of a policy of which Kries was unaware. *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 340-41, 27 P.3d 1172 (2001)(Plaintiff could not have justifiably relied on

employment policies of which he was unaware before he was terminated). The Clinic is entitled to interpret and apply the operational policies it drafted which do not provide any promises or guarantees to employees --- it is not a decision for the fact finder.

4. The ICP was Reasonable Because Kries Posed a Direct Threat to Clinic Patients, Fellow Employees, and to Herself

The Clinic was entitled to exclude Kries from working in the healthcare facility because her open and/or draining wound posed a direct threat to patients, fellow employees, and to herself. 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.15(b)(2); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 84-86, 122 S. Ct. 2045, 153 L. Ed. 2d 82 (2002); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247-49 (9th Cir. 1999). A “direct threat” is defined as a “significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” 42 U.S.C. § 12111(3).

A direct threat determination must be based on current medical or other objective evidence. *Nunes*, 164 F.3d at 1248. Specific factors to be considered include (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm. *Id.*

a) It is undisputed that Kries posed a risk of infection with her open or draining wound.

Without any legal citation, Kries argues that her open or draining

wound was not a significant risk, citing Dr. Gillum's testimony that the risk of infection was possible but not probable. (CP 370, p.26, l.1-p.27, l.2) In fact, Dr. Gillum's testimony was that the risk of infection was less than fifty percent (50%). (*Id.*) That risk is still very real. (CP 131, ll.4-7; CP 133, ll.1-17; CP 134, ll.8-19; CP 136, ll.16-25) A low probability of transmitting infection does not negate the actual existence of a risk of infection. (CP 370, p.26, ll.8-13) *See Doe v. Univ. of Maryland*, 50 F.3d 1261, 1263 (4th Cir. 1995) (significant risk existed despite general agreement among health officials that the risk of transmission was small).

Whether there is a significant risk is determined by a four-prong test, not simply whether the risk was possible or probable. *School Board of Nassau County v. Arline*, 480 U.S. 273, 288 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987). The test considers (1) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (3) the severity of the risk (what is the potential harm to third parties) and (4) the probabilities the disease will be transmitted and will cause varying degrees of harm. *Id.*

The Clinic has established that Kries' wound was a significant risk: (1) Infection can be transmitted through an open or draining wound to patients, coworkers, or the employee herself when working in a healthcare facility (CP 133, ll.10-17; CP 218, l.20-CP 219, l.23; CP 220, ll.8-19); (2)

An open or draining wound is always at risk of transmitting infection until the wound is no longer open or draining (CP 133, 1.10-CP 134, 1.19; CP 141, 11.1-11; CP 192, 1.13-CP 193, 1.1); (3) Hospital patients (and specifically the Clinic's patients) are highly susceptible to infection (CP 215, 11.2-9); and, (4) The potential harm could be catastrophic (e.g. infection transmitted to a newborn baby) making even a low probability of transmission unacceptable in a healthcare setting. (CP 215, 11.7-9; CP 138, 1.22-CP 139, 1.4) Despite a wound being covered and under clothing, there is still no guarantee that an open wound or its wound drainage will remain isolated. (CP 138, 1.22-CP 139, 1.12; CP 141, 11.1-24; CP 220, 11.8-21)

Kries' evidence that her wound was covered does not create a material question of fact in this case. Covering a wound can reduce the risk of transmitting infection, but the risk is still unacceptable. (CP 138, 1.22-CP 139, 1.12) Wound dressings can come loose even if performed by the most competent healthcare professional. (*Id.*) Draining a wound into a pouch does not assure that the draining fluid is confined to that pouch. (*Id.*) Drainage from Kries' wound leaked from the drain site despite her drainage pouch. (CP 110; CP 194, 11.14-24) Regardless of preventative measures, when infection is passed to another person, it is a one hundred percent chance that the infection did occur. (CP 479, 11.10-23)

b) The Clinic's individualized assessment, based on objective medical evidence, showed that Kries posed a direct threat to both herself and to patients.

The Clinic engaged in an individualized assessment of Kries' ability to return to work in accordance with its policy. The Employee Health Coordinator interacted directly with Kries to determine that she had a draining wound when Kries attempted to return to work on July 27, 2010. (CP 46, 1.10-CP 48, 1.25) The Employee Health Coordinator then consulted with Deaconess' Director of the Infection Control Department, Sharyl Bergerud, to discuss whether Kries could return to work under the ICP. (CP 209, 1.2-CP 210, 1.17) Ms. Bergerud considered Dr. Olson's note stating Kries could work with her drains in, but concluded that the ICP clearly prevented Kries from returning to work because of her draining wound. (CP 208, 11.4-23; CP 210, 11.8-17)

The ICP is grounded in objective medical evidence showing that draining wounds pose an unacceptable risk of transmitting infection in a healthcare facility. (CP 133, 1.6-CP 134, 1.19; CP 215, 1.20-CP 217, 1.12) Portions of the ICP are mandated by Washington regulations. (CP 217, 11.2-6) The ICP is drafted by medical professionals with backgrounds in infectious disease to protect from the risk of the spread of infection. CP 207, 11. 11-CP 208, I. 2; CP 221. 1.17-CP 222, 1.12) Dr. Gillum, the chair of the Infection Control Committee, has been an infectious disease

specialist for over twenty-four years. (CP 130, ll.11-24) Dr. Gillum and the Infection Control Committee review the ICP every two years. (CP 271, p.30, ll.18-23)

The three physicians in this case all agree that open wounds and draining wounds can pose an unacceptable risk of infection. (CP 131, ll.4-7; CP 150, ll.9-22; CP 157, ll.3-7; CP 165, ll.6-21; CP 182, ll.5-21) They disagree whether open and/or draining wounds pose an unacceptable risk of infection once covered with wound dressings and the drainage is contained. (CP 152, l.19-CP 153, l.8; CP 180, ll.19-25; CP 131, ll.4-7) Regardless of whether a wound can be covered by a dressing, the undisputed facts show wound dressings can and do fail. (CP 138, l.22-CP 139, l.12) If a wound dressing fails, it is an open and draining wound that poses an unacceptable risk of infection. (*Id.*) The evidence is undisputed that Kries' wound was routinely draining 30 or more cc's daily --- a level that Dr. Olson believed was too much. (CP 61, ll.10-24; CP 192, ll.16-17; CP 194, ll.11-24; CP 98, 103, 108, 110, 119, 123) Kries wound leaked around the wound site. (CP 194, ll.14-24)

The Clinic's decision to not allow Kries to bring 30 cc's or more of potentially infected wound drainage to work every day with only the hope that the drainage stay contained was a reasonable business and medical judgment. Deaconess is responsible for infection control at its facilities,

and has implemented the ICP to eliminate this kind of risk. The Clinic cannot and should not be subject to second-guessing by outside physicians or juries who do not have that responsibility. *Fey v. State*, 174 Wn. App. at 459 (The jury's function does not extend to second-guessing the employer's management judgment).

c) A blanket prohibition on employees with open and/or draining wounds is proper.

An employer is typically required to make an individualized inquiry for each employee before it may exclude the employee as a direct threat. *Nunes*, 164 F.3d 1243 at 1248. However, in *EEOC v. Exxon Corp.*, 967 F.Supp. 208 (N.D. Tex. 1997) (vacated on other grounds), the court recognized that an individualized assessment may not always be required. Specifically, a blanket prohibition is proper where it is impossible or impractical to individually assess each employee affected by the policy. *Id.* at 214.

Following the Exxon Valdez environmental disaster (caused by an allegedly intoxicated captain), Exxon excluded employees with substance abuse problems from working in positions that posed a high risk of catastrophic incidents. *Id.* at 210. Exxon argued it was impossible to assess whether a rehabilitated substance abusing employee was at risk of relapse. *Id.* The court agreed such a blanket prohibition may be proper in

that scenario. *Id.*

Open wounds and draining wounds can become infected at any time. (CP 158, 1.16–CP 159, 1.3; CP 166, 11.11-13; CP 192, 1.13–CP 193, 1.1) Infection can occur because of unpredictable events that cause infection --- e.g. a drain falls out or becomes inoperable, bacteria colonize within the wound, etc. (CP 133, 1.10-CP 134, 1.19; CP 141, 11.1-11; CP 192, 1.13-CP 193, 1.1) Kries is a trained healthcare professional, educated in infection control measures, yet her wound became infected on five different occasions (that are known) between July 14, 2010 and November 12, 2010. (CP 53, 11.2-10; CP 57, 1.7-CP 59, 1.2; CP 179, 11.15-25; CP 184, 1.5-CP 186, 1.24; CP 188, 11.5-18; CP 192, 1.9-CP 193, 1.1; CP 195, 11.9-22; CP 198, 1.20-CP 199, 1.14; CP 91, 96, 103, 110-112, 116, 122-123) A blanket prohibition of employees working with draining wounds is proper in this case because of the healthcare setting and risk of infections in such facilities. (CP 141, 11.19-24)

Dr. Riedo opined that the Clinic should have allowed Kries back to work and simply taken cultures of Kries' wound to determine if it was infected. (CP 158, 11.3-15) The numerous and uncontrollable variables of an open or draining wound, in addition to the environment of a healthcare facility, make it impractical to conduct such individualized assessments. (CP 133, 11.10-17; CP 136, 11.10-25; CP 158, 11.7-20) Dr. Riedo

acknowledged that it takes between 48 to 72 hours to receive the results of a wound culture. (*Id.*) The delay between testing and receiving results makes the culture results unreliable and unhelpful.

Infection can develop in between the time the culture was taken and when the results are reviewed. (CP 158, l.24-CP 159, l.3) Although there may be no infection today, there could be an infection tomorrow. (CP 166, ll.11-13; CP 192, l.19-CP 193, l.1) Kries' own history demonstrates this fact --- on Friday, September 10, 2010, Kries was cleared to return to work. (CP 258) In less than three days, Kries' wound was severely infected and Dr. Olson removed 200 cc's of purulent (i.e. infected) drainage from her wound. (CP 58, l.13-CP 59, l.5; CP 188, l.1-21-CP 190, l.12)

All the physicians who testified agreed that blanket prohibitions are sometimes required --- employees cannot work with an active infection because there is an unacceptable risk of infection caused by the increased bacteria present during an active infection. (CP 131, ll.4-7; CP 133, l.10-11; CP 150, ll.9-22; CP 182, ll.5-15; CP 161, ll.6-12)

Kries' argument that Dr. Gillum should have been consulted regarding Kries' wound does not create an issue of material fact. Dr. Gillum testified that the ICP was a reasonable and necessary policy. (CP 134, ll.8-11; CP 367, p.16, ll.5-15; CP 374, p.42, ll.21-25) Infection

Control Director Bergerud testified that the ICP provided adequate guidance to make the proper determination whether Kries could return to work. (CP 208, ll.4-23) Because Kries had an open and draining wound, she could not return to work. (*Id.*)

The evidence establishes that individual assessment is not practicable and the ICP was a reasonable policy. Kries has not offered evidence to dispute that compliance with the Clinic's ICP was an essential function of her job.

C. **The Clinic Reasonably Accommodated Kries' Draining Wound**

Kries argues that her action against the Clinic is a result of the Clinic's "failure to conduct the interactive process with her, perform any kind of risk assessment, and attempt to accommodate her." (Brief of Appellants, p. 21) The undisputed evidence establishes, however, that the Clinic did accommodate Kries by providing four months of medical leave to allow Kries' wound to heal so she could return to work. (CP 237, l.25-CP 238, l.4) However, it was Kries who cut off communication with the Clinic and did not provide a release to return to work, and her employment was properly terminated.

1. **The Interactive Process Is Not an End in and of Itself**

The purpose of the interactive process is to determine an

appropriate reasonable accommodation. The process is the means to an end—the provision of a reasonable accommodation. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002). It is not an end in and of itself. *Id.*; *See Fey v. State*, 174 Wn. App. at 453 (failure to engage in an interactive process does not support a disability discrimination claim in the absence of evidence that accommodation was possible). Discussions between an employer and an employee are highly recommended, but they are not an absolute requirement. *MacSuga v. Spokane County*, 97 Wn. App. 435, 443, 983 P.2d 1167, 1171 (1999).

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 Wn.App. 894, 17 P.3d 707 (2001). Here, Employee Health Coordinator Ms. Wise reviewed information provided by Kries and her doctor. (CP 46, 1.10-CP 48, 1.25) Ms. Wise then consulted with Deaconess' Director of the Infection Control Department, Sharyl Bergerud. (CP 209, 1.2-CP 210, 1.17) Based upon the information provided by Kries, Ms. Bergerud concluded that Kries could not return to work since she had an open or draining wound and presented a risk of infection to Clinic or hospital patients, pursuant to the ICP. (CP 248; CP 208, 11.16-23) Kries was, instead, granted leave without pay to allow her additional

time for her wound to close and stop draining. (CP 238, 11.1-4)

2. A Leave of Absence is a Reasonable Accommodation

Kries was granted a leave a absence for a period of time to allow her wound to stop draining, with the expectation she could then return to her Lead Medical Assistant position with the Clinic. (CP 237, 1.25-CP 238, 1.4) The Clinic allowed Kries over four months of leave from work despite her ineligibility for statutory or other leave. (*Id.*) A leave of absence can be a reasonable accommodation for a disabled employee. *Kimbrow v. Atlantic Richfield Co.*, 889 F.2d 869, 879 (9th Cir. 1989)(employer could have accommodated employee suffering from cluster migraines by offering him a leave of absence). *See also* 29 C.F.R. 1630 app. § 1630.2(o)(a leave of absence for medical treatment may be a reasonable accommodation under the ADA). *See Hopkins v. City of Bothell*, 2003 Wash. App. LEXIS 1151, 1 (Wash. Ct. App. June 9, 2003)(3 months of medical leave was reasonable).

The Clinic could not return Kries to her medical assistant position or any other position because of the risk of infection presented by her open or draining wound to the Clinic's and Deaconess' patients and to Kries. (CP 133, 1.10-CP 134, 1.11; CP 136, 11.10-25; CP 161, 11.6-12; CP 182, 11.5-15; CP 367, p.16, 11.5-15; CP 374, p.42, 11.20-24) Kries wound did, in fact, become infected in July, August, September and October. (CP 53,

11.2-10; CP 57, 1.7-CP 59, 1.2; CP 179, 11.15-25; CP 184, 1.5-CP 186, 1.24; CP 188, 11.5-18; CP 192, 1.9-CP 193, 1.1; CP 195, 11.9-22; CP 198, 1.20-CP 199, 1.14; CP 91, 96, 103, 110-112, 116, 122-123) After Kries' infection in August, 2011, she was not released to return to work until September 10, 2010. (CP 101) She was approved to return to work, but she immediately developed another infection before she could return to work on September 13, 2010. (CP 258; CP 188, 11.4-CP 189, 1.1; CP 57, 1.7-CP 58, 1.5; CP 103-104) Thereafter, Kries never brought in a release to return to work. (CP 346, p.49, 11.1-5; CP 78, 11.14-21; CP 190, 1.16-CP 192, 1.4)

The Clinic provided Kries with extended medical leave despite the fact she was not entitled to such leave based on her short tenure of service with the Clinic. (CP 237, 1.16-CP 238, 1.17) The Clinic did not terminate Kries' employment until four months after Kries last worked at the Clinic, and she had not provided any prognosis as to when (or if) she could return to work. (CP 125; CP 238, 11.7-17) At that time, Kries still had not been released to return to work. (CP 190, 1.16-CP 192, 1.4)

3. Kries could not Be Accommodated unless she was Released to Return to Work

When an employee seeks to return to work following a medical leave of absence necessitated by the onset of a disability which prevents her from carrying out the essential functions of her job, her employer's

duty to reasonably accommodate her, including its duty to engage in a dialogue regarding reasonable accommodation, is triggered ***at the time the employee provides her employer with a release*** from her medical health care professional. *Ferguson v. Wal-Mart Stores, Inc.*, 114 F. Supp. 2d 1057, 1069 (E.D. Wash. 2000).

On September 10, 2010, Kries provided a written return to work release from Dr. Olson. (CP 54, 1.18-CP 55, 1.3; CP 101) Kries was cleared to return to work by Employee Health. (CP 258) But Kries did not return to work on September 13 as planned, due to another infection that occurred almost immediately. (CP 188, 1.4-CP 189, 1.1; CP 57, 1.7-CP 58, 1.5; CP 103) When Kries next tried to return to work on September 15, 2010, she did not provide a written return to work release. (CP 59, 11.10-21; CP 106) The September 15 note did not state anywhere that Kries was released to return to work. (*Id.*; CP 59, 1.22-CP 60, 1.13; CP 190, 1.16-CP 192, 1.6; CP 106) Dr. Olson testified that the September 15 note was not a return to work authorization. (CP 190, 1.16-CP 192, 1.1; CP 106)

After September 15, 2010, it is undisputed that Kries never provided a release by her physician to return to work. (CP 346, p.49, 11.1-5; CP 78, 11.14-21; CP 190, 1.16-CP 192, 1.4) An individual who has not been released to work by his or her doctor is not a "qualified individual with a disability." *See, e.g., Gantt v. Wilson Sporting Goods Co.*, 143 F.3d

1042, 1047 (6th Cir. 1998); *Kitchen v. Summers Continuous Care Ctr., LLC*, 552 F. Supp. 2d 589, 594 (S.D. W. Va. 2008)(a plaintiff who was not released by her doctor to return to work cannot meet the requirement to show that she was qualified to perform the essential functions of the job); *Jackson v. Simon Prop. Group, Inc.*, 795 F. Supp. 2d 949, 962 (N.D. Cal. 2011)(The interactive process claim fails because there was nothing for Defendant to do until it received notice that Plaintiff would be released to work). In *Crow v. McElroy Coal Co.*, 290 F. Supp. 2d 693, 696 (N.D. W. Va. 2003), the court stated: "Because [the plaintiff] failed to obtain a release to work from his doctor, [the plaintiff] has not shown that he can perform the essential functions of the job with or without reasonable accommodation." *Accord, Gower v. Wrenn Handling*, 892 F. Supp. 724, 727 (M.D.N.C. 1995) (plaintiff was not a qualified individual with a disability when his doctor failed to issue a release so the plaintiff could return to work); *Anderson v. Inland Paperboard & Packaging*, 11 F. App'x 432, 438 (6th Cir. 2001) (Plaintiff's doctor had not given her permission to return to work when her employment was terminated. Accordingly, she was unable to perform her duties as a storeroom clerk.).

4. Kries Never Provided a Return to Work Release after September 10, 2010

Kries knew that she was required to provide a return to work

release before she could be returned to work. (CP 81, ll.18-25) Yet, Kries never did so after September 10, 2010. (CP 78, ll.14-21; CP 82, ll.14-19; CP 190, l.16-CP 192, l.4)

Kries erroneously asserts that Dr. Olson released her to return to work on September 15, 2010. (Brief of Appellants, p. 16) Dr. Olson's testimony could not be clearer, that the September 15, 2010 note was *not a return to work release*. (CP 106; CP 190, l.16-CP 192, l.4) Dr. Olson testified there would have been a record of any return to work release for Kries in his records if such a release actually existed. (CP 190, l.16-CP 192, l.4) Dr. Olson's records confirm that no such release exists. (*Id.*; CP 78, ll.14-21)

Kries' only evidence that the September 15, 2010 note was a return to work release is her own testimony that she assumed it was a release. (CP 59, l.10-CP 60, l.3; CP 82, ll.5-19) But Kries' subjective belief, in light of Dr. Olson's testimony as the person who would issue a return to work release, does not transform the note into a return to work release, and does not create a genuine issue of material fact. CR 56(e) requires facts, not conclusions or assumptions. *Grimwood*, 110 Wn. 2d at 359-60.

a) Kries' could not be reassigned without a release to return to work.

Kries argues that she told the Clinic she was willing to work

anywhere. She asserts there were medical records positions available in December, 2010 and January, 2011. (Brief of Appellants, p. 19) But, as discussed above, it is undisputed that Kries always had a draining wound, and she never brought in a release to return to work after September 10, 2010, so the Clinic could not have assigned her to any other position.

b) The Clinic's continuing duty to accommodate Kries was not triggered because Kries never provided a release to return to work.

Kries' argument that the Clinic somehow failed its continuing accommodation duty is erroneous under Washington law. The interactive process is not a one-sided obligation --- both employee and employer must participate in an ongoing dialogue. *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 777-78, 249 P. 3d 1044 (2011). An employee has a duty to keep the employer apprised of any changes in disability status. *Wurzbach v. City of Tacoma*, 104 Wn.App. 894. It is undisputed that Kries failed to inform the Clinic that her wound was healed and no longer draining. (CP 68, l.21 – CP 69, l.14)

When Kries was terminated, the Clinic provided her with a link to the website that listed available positions and advised her to review and apply for positions when she was able. (CP 125; CP 68, ll.3-CP 69, l.14; CP 72, ll.10-18) Kries then failed in her duty to participate in the interactive process when she never applied for a job, and did not contact

anyone at the Clinic to alert them that her wound was no longer open and/or draining. Kries unilaterally and without justification shut down all lines of communication and accommodation discussions. Thus, it was Kries --- not the Clinic --- who failed in the duty under the interactive process dialogue (*Id*).

5. Kries Has Not Created a Question of Material Fact Regarding the Futility of Providing a Release to Return to Work.

Kries has not established a question of fact whether further communication with the Clinic or providing a release to return to work would have been futile, as she claims. (Brief of Appellants, p. 6, 17) It is undisputed that Kries understood the only reason she was not permitted to work was because she had an open and/or draining wound. (CP 347, p.53, ll.2-4) Yet once her wound had healed, Kries never notified the Clinic that she was able to return to work. (CP 68, ll.17-20)

Kries asserts that she was told not to bother bringing a release to return to work until her wound was closed. (CP 398, p.189, ll.16-22) Even if Kries was excused from providing a release before her wound stopped draining, there is no evidence to support any excuse for her failure to provide a release after the wound had stopped draining. The evidence establishes that Kries' wound may have been healed by the end November, 2010, (CP 376, p.52, ll.8-11; CP 70, ll.13-18) but certainly by

February, 2011. (CP 70, l.23-CP 71, l.16; CP 200, l.15-CP 201, l.16) Yet, Kries never notified the Clinic that her wound was no longer draining. (CP 68, ll.17-20; CP 81, ll.18-25) Kries never provided a release to return to work, even after her wound was healed. (CP 190, l.16-CP 192, l.4)

No evidence supports Kries' claim that providing a release after her wound had stopped draining would have been futile. Thus, Kries' failure to inform the Clinic that her wound had stopped draining precluded any further accommodation by the Clinic after her termination.

D. Kries Is Not Entitled To an Award of Attorney Fees

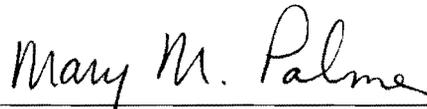
Kries' request for attorney fees on appeal should be denied. An employee who brings a claim under the WLAD is entitled to attorney fees only if her claims are meritorious: "Entitlement to attorney fees cannot be determined until after trial on the merits." *Hinman v. Yakima Sch. Dist. No. 7*, 69 Wn. App. 445, 453, 850 P.2d 536 (1993). *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. at 770 (An employment discrimination plaintiff who prevails on appeal in having a summary judgment of dismissal reversed has not yet had the merits of the claim decided in her favor for purposes of an award of appellate attorney fees under RCW 49.60.030(2); *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 153, 94 P.3d 930 (2004)(Where a party has succeeded on appeal but has not yet prevailed on the merits, the court should defer an award of attorney fees); *McClarty v. Totem*

Elec., 157 Wn.2d 214, 230-231, 137 P.3d 844, 852-853 (2006)(same).

V. CONCLUSION

Where reasonable minds could reach only one conclusion from the admissible facts in evidence, summary judgment should be granted. Here, it is undisputed that the ICP was a necessary and reasonable policy based on the Clinic's business judgment to protect its patients, employees and others from infection. Kries' open and/or draining wound presented a risk of infection that could not be accommodated except by a leave of absence, which the Clinic provided. Kries failed in her obligation to participate in the interactive process when she stopped communicating with the Clinic regarding the status of her wound and did not notify the Clinic that her wound had stopped draining or that she had been released to return to work. The Superior Court's grant of summary judgment dismissing Kries' disability discrimination claims should be affirmed.

Respectfully submitted this 3rd day of March, 2015.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of March, 2015, I caused to be served a true and correct copy of the foregoing on the following in the manner indicated:

| | | |
|--------------------------------|--------------|----------------|
| Larry J. Kuznetz | <u> X </u> | U.S. Mail |
| POWELL, KUZNETZ & PARKER, P.S. | <u> X </u> | Email |
| Rock Pointe Tower, Suite 380 | _____ | Hand Delivery |
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