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NO. 370186

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JOHANNA LARSON

Appellant,

v.

CENTRAL WASHINGTON UNIVERSITY

Respondent.

REPLY BRIEF OF APPELLANT

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I. REPLY TO DEFENDANTS' ARGUMENTS

Plaintiff, Johanna Larson (Larson), properly presented all relevant orders in her Notice of Appeal to this Court. Defendants' statement that she did not is unfounded. Larson provided all orders that the Court issued. Defendants' case facts presented to the Court and statements regarding Larson's evidence are inaccurate. They are spun. Defendants play the other side of the fence depending on the claim they attempt to defend. They are in violation of Washington's Law Against Discrimination (WLAD) and the Washington Family Leave Act/Family Medical Leave Act (WFLA/FMLA). The trial Court erred in granting Defendants' Motion for Summary Judgment on those issues and denying Larson's on the same. The errors are one in the same.

A. 1. Disparate Treatment

Larson presented direct evidence of discrimination. "To establish a prima facie case of discrimination by direct evidence, a plaintiff must provide direct evidence that the defendant acted with a discriminatory motive and that the discriminatory motivation was a "significant or substantial factor in an employment decision ...".” Kastanis v. Educ. Employees Credit Union, 122 Wn.2d 483, 490, 859 P.2d 26, 30–31, (1993), amended, 122 Wn.2d 483, 865

P.2d 507, (1994). After being injured on the job, Larson's supervisor, Dr. Laila Abdalla (Abdalla), told her that she did not want her working unless she could do 100 percent of her job. (CP 263, 292) Abdalla did not want a an employee with disability issues affecting their employment working for her. Abdalla then disallowed Larson to work for a period of time as a direct result of her disability. (CP 76, 143-44, 249, 293-94, 395) Defendants then disciplined and terminated Larson as a direct result of those absences. (CP 229-31, 233-34, 239-42, 262, 268-69, 297, 439) This is direct evidence. No inference is needed. If Larson's shoulder injury had not flared up, requiring medical leave until feeling better, Abdalla would not have set the motion for her termination by not allowing her to work at all, direct "but for" evidence.

"...The defendant must show, by a preponderance of the evidence, that the same decision would have been reached absent the discriminatory factor." Kastanis, 122 Wn.2d at 490. Defendants cannot show that they would have reached the same termination decision but for Larson's disability. They did not primarily terminate Larson due to her alleged performance issues in her actual termination, they were a side note. (CP 57, 76, 262-65, 267-71, 233-235, 239-42, 293-95, 297, 395, 439) She had remained employed despite them. Id. Only when she was forced to stop working due to her disability

was she terminated. *Id.*

Defendants incorrectly conclude that termination is required for a Disparate Treatment claim and that Dean Robertson and Provost Stephen Hulbert must have voiced discriminatory intent for there to be a violation. In the WLAD, the language in the definition of employer referring to “any person acting in the interest of an employer” includes supervisors working for an employer. *See: Brown v. Scott Paper Worldwide Co.* 143 Wn.2d 349, 358, 20 P.3d 921 (2001). Abdalla was Larson’s supervisor. Supervisors acting in the interest of an employer who employs eight or more people can be held individually liable for discriminatory acts against an employee, along with the employer, in light of the fact that the employment discrimination statute, by very terms, contemplates individual supervisor liability, the statute expressly includes within the definition of employer, a person acting in the interest of the employer, and enabling employees to sue individual supervisors who have discriminated against them is consistent with the broad public policy to eliminate all discrimination in employment. RCW 49.60.010 et seq. Brown, 143 Wn.2d at 358. Employer liability under the statute prohibiting employment discrimination is not based upon independent fault, but upon the theory of respondeat superior. RCW 49.60.010 et seq. Brown,

143 Wn.2d at 359-60.

The elements of a disparate treatment claim consist of proof that the employee's membership in the protected class was a substantial factor in the defendant's decision to discharge or discriminate in the terms or conditions of employment. *See*: Washington Pattern Jury Instructions - Civil 6th WPI 330.01.01. And in an employment discrimination case, under the "cat's paw" theory, the animus of a non-decision-maker who has a singular influence may be imputed to the decision-maker. Boyd v. State, Dep't of Soc. & Health Servs., 187 Wn. App. 1, 349 P.3d 864,(2015); *See, e.g.*, Staub v. Proctor Hosp., 562 U.S. 411, 131 S.Ct. 1186, 179 L.Ed.2d 144 (2011).

Where a plaintiff lacks direct evidence, Washington courts use the burden-shifting analysis articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 to determine the proper order and nature of proof for summary judgment. Scrivener v. Clark Coll., 181 Wn.2d 439, 445, 334 P.3d 541, (2014) (*citing* Hume v. Am. Disposal Co., 124 Wash.2d 656, 667, 880 P.2d 988 (1994)).

To present a prima facie case for a disparate treatment case of disability discrimination, a plaintiff must establish that she was 1) disabled; 2) subject to an adverse employment action; 3) doing satisfactory work; and

4) her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination or she was treated differently or less favorably than someone not in the protected class. Scrivener v. Clark Coll., 181 Wn.2d at 446; Anica v. Wal-Mart Stores, Inc., 120 Wn. App. 481, 488, 84 P.3d 1231, 1236 (2004), as amended on denial of reconsideration (Feb. 24, 2004); Kirby v. City of Tacoma, 124 Wn. App. 454, 468, 98 P.3d 827, 834, (2004); Chuang v. Univ. Cal. Davis, 225 540 U.S. 44, 50 n. 3, 124 S.Ct. 513, 1527 L.Ed.2d 357 (2003). Defendants dispute elements three and four.

As to element three, the determinative factor in Larson's termination was absences resulting from the treatment Defendants afforded her as a direct result of her disability, by their refusal to allow her to work with accommodations. (CP 76, 233-34, 239-42, 262-65, 267-71, 293-97, 439, 395) Defendants have not claimed that Larson could not perform the essential functions of her job. And until her injury, although they alleged performance issues, they did not claim that she was not fit for her job. (CP 225-226, 229-300) And regardless, Larson was a good employee. She helped train her co-workers and her performance reviews were satisfactory; Her co-workers were not aware of any issue she had. (CP 165-72, 296-97) Even if it were true that part of Larson's work were not satisfactory, Larson's

disability was a substantial factor in the treatment Defendants afforded her. There is no evidence she would have been terminated for performance but for the disability and relating alleged attendance issues set into motion by Defendants due to it, including the alleged notification issues. Defendants cannot dispute this. Telling someone to not work and then accusing them of not telling you they were not going to work is simply nonsensical.

As to the fourth element, Defendants argue that they determine what is reasonable under the applicable reasonable standard, but here, this is at the least a question of fact for the jury. Defendants also present circumstances where a reasonable inference of unlawful discrimination may be found, but those situations are by no means inclusive. Larson was treated differently than her co-workers that were not disabled. (CP 296) The fact, as presented by Defendants, that not all supervisors at Central Washington University discriminated against their employees is not determinative here in the discrimination Larson endured. Defendants are still liable for Abdalla's conduct and Larson's termination. The differential treatment evidences that Abdalla discriminated while her counterparts did not. Defendants' agenda in replacing Larson was to employ someone that would not need accommodation, as was Abdalla's agenda. (CP 57, 76, 266, 292-94, 395)

Larson's secondary need for accommodation came from Defendants' mandate that she needed it by way of her mandated absences from work as a direct result of her disability. Although it went beyond what Larson needed, it was still implemented by Defendants. And as to the performance allegations, Larson was subject to performance reviews before her injury, but she was not terminated for performance at that time. She was terminated after her injury for absences directly resulting from it as mandated by Defendants.

Once the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. Scrivener, 181 Wn.2d at 446 (citing Grimwood v. Univ. of Puget Sound, Inc., 110 Wash.2d 355, 363-64, 753 P.2d 517(1988)).

Defendants hang their hat on their allegation that Larson was not performing satisfactorily. But again, Larson's absences resulting from the treatment Defendants afforded her as a direct result of her disability were, as admitted by Defendants, the determining factor in her termination. Any conceivable notification issue while Larson was out stems from Defendants' conduct. In the context of an employee's claim against the employer for

disparate treatment, conduct resulting from the employee's disability is part of the disability and not a separate basis for termination. Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 151-152, 94 P.3d 930, 933, (2004). Albeit indirectly and derivatively, Larson's absences imposed by Defendants were a result of her disability.

Likewise, Defendants claim that Larson did not properly communicate with them while she waited to see her Department of Labor and Industries Doctor in order to obtain the additional and unnecessary release they required. But she informed them of that wait that she had not control over. (CP 268, 293-295) It was the Defendants that did not properly communicate with Larson regarding her protected leave. (CP 80-85, 268, 295, 422-424, 429, 439) And they knew why she was not working, or they clearly would have terminated her before her return to work for the extended absence. But they took not action to do so. This situation is clearly distinguishable from any other lack of communication situation that could be alleged to have existed. Defendants had no policy for requiring employees to notify them of not being able to work, after instructing them not to work, for medical reasons, until obtaining a medical release ,where a valid one is in place , and while that employee is on their imposed WFLA/FMLA

qualifying leave. The alleged notification issue was a direct result of Defendants' actions. Larson was treated less favorably due to her disability.

If the Defendant meets the burden of producing a legitimate reason for termination, the third prong of the McDonnell Douglas test requires the Plaintiff to produce sufficient evidence that Defendant's alleged nondiscriminatory reason for [the employment action] was a pretext. Scrivener, 181 Wn.2d at 446 (*citing Hume*, 124 Wash.2d at 667). Evidence is sufficient to overcome summary judgment if it creates a genuine issue of material fact that the employer's articulated reason was a pretext for a discriminatory purpose. Scrivener, 181 Wn.2d at 446 (*citing Id.* at 668, 880 P.2d 988; Grimwood, 110 Wash.2d at 364, 753 P.2d 517; Riehl, 152 Wash.2d at 150, 94 P.3d 930).

An employee may satisfy the pretext prong by offering sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is pretextual or (2) that although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer. Scrivener, 181 Wn.2d at 446-47 (*citing Fell v. Spokane Transit Auth.*, 128 Wash.2d 618, 643 n. 32, 911 P.2d 1319 (1996); *see Wilmot v. Kaiser Alum. & Chem. Corp.*, 118 Wash.2d 46, 73, 821 P.2d

18 (1991); Grimwood, 110 Wash.2d at 365, 753 P.2d 517).

An employee does not need to disprove each of the employer's articulated reasons to satisfy the pretext burden of production. Mikkelsen, 189 Wn.2d at 534. Case law clearly establishes that it is the plaintiff's burden at trial to prove that discrimination was a substantial factor in an adverse employment action, not the only motivating factor. Scrivener, 181 Wn.2d at 445 (*citing* Mackay v. Acorn Custom Cabinetry, 127 Wn.2d 302, at 309-311, 898 P.2d 284 (1995)) An employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable under the WLAD. Scrivener, 181 Wn.2d at 447 (*citing* Mackay, 127 Wn.2d 302 at 309-311. Where there are reasonable but competing inferences of both discrimination and nondiscrimination, it is the jury's task to choose between such inferences, not the court's. Mikkelsen., 189 Wn.2d at 536.

The McDonnell Douglas analysis "was never intended to be rigid, mechanized, or ritualistic; Rather, it is merely a sensible, orderly way to evaluate the evidence in light of the common experience as it bears on the critical question of discrimination." Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 181, 23 P.3d 440, 446, (2001); Grimwood, 110 Wn.2d at 363.

The ultimate question in every disparate treatment claim case is

whether discriminatory motive was a "substantial factor" in the challenged decision. Mackay, 127 Wn.2d at 310; WPI 330.01. This is a "pure question of fact." Johnson v. Chevron U.S.A., Inc., 159 Wn. App. 18, 244 P.3d 438, 444, (2010). "The Jury should decide this question after deliberation, rather than courts deciding based upon the same facts as a matter of law." Phillips v. Seattle, 111 Wn.2d 903, 909 766 P.2d.

Importantly, in their Response, Defendants concede that "The University's termination of Larson...occurred only after it determined there was not medical excuse for Larson's absence." But it was Defendants that determined Larson was medically unable to work. They forced a leave of absence on their own initiative, a reasonable accommodation for a disability, and then terminated her for it, knowing she would need further leaves of absence. (CP 296) There was no other reason for Defendants to tell Larson she could not work. Defendants wanted an employee whose work would not be affected by a disability.

2. Failure to Accommodate

Under the WLAD, a plaintiff must prove that (1) she had a sensory, mental, or physical impairment that is medically recognizable or diagnosable, exists as a record of history, or is perceived to exist; (2) the impairment had

a substantially limiting effect upon her ability to perform the job such that accommodation was reasonably necessary; (3) she was qualified to perform the essential functions of the position; (4) she either gave the employer notice or the employer knew of the impairment; and (5) upon notice, the employer failed to reasonably accommodate the impairment. Wash. Rev. Code § 49.60.040(7); *see Hale v. Wellpinit School Dist. No. 49*, 165 Wash.2d 494, 502–03, 198 P.3d 1021 (2009) (discussing the 2007 legislative amendments to the WLAD, which redefined "disability"); *Goodman v. Boeing Co.*, 127 Wash.2d 401, 408, 899 P.2d 1265 (1995) (discussing the notice requirement); *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 28-29, 244 P.3d 438, 444 (2010) (discussing the 2007 legislative amendments to the WLAD, which eliminated "medical necessity" as the sole basis for a right to accommodation); *see also Riehl*, 152 Wash.2d at 146 (laying out the elements of a WLAD claim applied by Washington courts, pre-2007 legislative amendments).

Initially, Defendants did accommodate Larson's disability. But once she was disallowed to work with her accommodations that all changed. A brief initial accommodation does not vitiate an employer's requirement to continue to accommodate. Again, Defendants medically determined Larson

should not work, completely disregarding her medical documentation releasing her to work with restrictions they were able to accommodate. (CP 76, 137-39, 266, 292-94, 395) The additional release Larson was forced to obtain showed that her initial release with restrictions was valid, and she could have worked pursuant to it had she not been denied accommodation and employment. (CP 268, 293-295) Larson had no choice in the matter. She knew she could have continued working. Larson's medically recommended accommodations were not provided once she was required to take time off because of her disability.

Defendants argue using "Medical necessity" standards. But "“Medical necessity” is no longer the sole basis for a right to accommodation. Under the new statute, either the impairment must be the source of a substantial limitation or there must be medical documentation indicating a reasonable likelihood that engaging in the job duties without accommodation “would aggravate the impairment to the extent that it would create a substantially limiting effect.”“ Johnson., 159 Wn. App. at 29–30. Larson provided medical evidence that she needed accommodations so that she could work, but rather than follow that evidence, Larson was disallowed to work.

It is true that Larson requested an altered work schedule and that

request was ignored. (CP 293) This request was made in response to Abdalla's hostility towards her regarding her working with her disability. (CP 266, 292-93) Defendants dismissed the idea of working on a change of schedule, disallowed Larson to work with her release and modifications, and then terminated her for not working as they improperly demanded.

Larson was sent home and not allowed to return until obtaining an additional and unnecessary work release as a direct result of her shoulder injury. (CP 76, 143-44, 267, 293-294, 395) It was the only medical condition that she was under work restrictions for and that was the only release that could have been restated or modified, as required. Larson had already returned to work from a separate illness when she was sent home because her shoulder injury flared up. (CP 75, 129, 267, 293) Larson's reasons for her absences have remained the same. Defendants did not allow Larson to return to work when her shoulder was feeling better. If the Appellate Court does not find that Defendants failed to accommodate Larson, whether Defendants actions in alleged accommodation were reasonable is a question fo fact for the jury.

B Larson's Motion to Amend her Complaint to add a Claim of Violation of the WFLA Should have been Granted

Larson was unable to provide an Order on her Motion to Amend and

Motion for Summary Judgment because the Court did not issue one. The errors are preserved in the fact that Larson made the Motions, but as shown in the complete absence of an order on the record, the Court would not rule on them, but rather dismissed all of Larson's claims. It is the error.

C. The WFLA/FMLA was violated as a Matter of Law

In addition to the violations already outlined by Larson, in Crawford v. JP Morgan Chase NA, 983 F. Supp. 2d 1264, 1270, 2013 WL 4670639 (W.D. Wash. 2013), the Court held that "The Ninth Circuit does not apply the burden shifting framework delineated in McDonnell Douglas Corp. v. Green to interference claims. To make an FMLA interference claim, an employee need only establish "(1) he was eligible for the FMLA's protections, (2) his employer was covered by the FMLA, (3) he was entitled to leave under the FMLA, (4) he provided sufficient notice of his intent to take leave, and (5) his employer denied him FMLA benefits to which he was entitled. The employer's intent is irrelevant in an interference claim." (internal citations omitted)

"Under § 2615(a)(2), it is 'unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.' An allegation under this section

is a retaliation or discrimination claim...District Courts in the Ninth Circuit have used the McDonnell Douglas framework in the analysis of § 2615(a)(2) claims. Under the McDonnell Douglas framework, a plaintiff must establish a prima facie case of retaliation. To establish a prima facie case of FMLA retaliation, a plaintiff must show (1) he availed himself to a protected right under the FMLA, (2) he was adversely affected by an employment decision, and (3) there is a causal connection between the two actions. If a prima facie case is established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse action. If the employer articulates a legitimate reason for its action, the burden shifts back to the plaintiff to show the reason given is pretext. Pretext can be proven indirectly, by showing the employer's explanation is not credible because it is internally inconsistent or otherwise not believable, or directly, by showing unlawful discrimination more likely motivated the employer." Crawford, 983 F. Supp. 2d at 1269-70 (internal citations omitted).

Defendants argue that Larson does not have a claim because she did not have a medical condition that qualified for WFLA/FMLA leave. As Larson has stated, she was improperly force on WFLA/FMLA qualifying leave by Defendants imposition that she was medically unable to work. She

was then terminated for that leave that Defendants deemed should have been protected because they improperly applied it. The absences were due to her shoulder injury, and Defendants in fact did qualify all of her leave related to her shoulder injury as WFLA/FMLA leave. (CP. 254, 256, 269, 295-96, 425-27) Employers cannot force WFLA/FMLA qualifying leave and then terminate an employee because they made them take it. If Larson's leave did not qualify for WFLA/FMLA protections, then why did Defendants determine it was necessary and force it? It was due to a serious health condition.

Contrary to Defendants' assertion, Defendants' violation of WFLA/FMLA notice requirements that harmed Larson were at issue in the Trial Court, and harm is determinative where a cause of action may lie. (CP 496-97) Crawford, 983 F. Supp. 2d at 1271. The law itself states a cause of action may lie. The notice requirements are not technical violations, they are rules that must be adhered to in order that situations such as the one currently being litigated do not occur. The violations support a cause of action as do any other violations of law causing harm.

Larson was medically entitled to the leave because Defendants designated it as WFLA/FMLA qualifying on their own initiative, by force.

Again, the evidence says Larson left work due to her shoulder injury flaring up, despite the fact that Defendants keep missing this fact. This is at the least a question of fact for the jury. But you can only modify an existing release and Larson only had a release for her shoulder injury. Because Defendants required Larson to take leave that they unilaterally determined as WFLA/FMLA qualifying, they must honor that leave as WFLA/FMLA qualifying. Defendants' argument that they did return Larson to work shortly before terminating her so they are not liable is nonsensical. That would allow Defendants to manipulate the system in any fashion of their choosing in order to skirt laws that are in place for a reason and must be followed. It is Defendants that attempt to spin the situation to avoid liability on technicalities. They should not be allowed to do so. Defendants must return employees to work permanently.

II. CONCLUSION

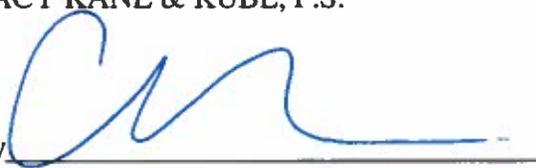
Defendants cannot mandate an employee to take unnecessary medical leave while ignoring a valid work release with restrictions, self-determining they are medically unable to work, and then terminate them for that leave. They also cannot force WFLA/FMLA qualifying leave on an employee, based upon their medical determination that it is necessary, while ignoring a valid

work release with restrictions, and then terminate that employee by going back on their determination that employee was unable to work the whole time with their restrictions, when the valid work release is verified. The only reason to force an employee to stop working due to a medical condition until they are released to work is a determination that employee is unable to work due to the medical condition. Anyway the Defendants spin it, they violated the laws. Any other ruling would be in contradiction to the purpose and spirit of both laws.

The trial court's decision on Summary Judgment should be reversed. This matter should be remanded to the trial court for a judgment finding liability against Defendants. The matter should then proceed to a trial on damages. If not remanded to the trial court for a judgment for liability, the matter should be remanded for trial.

Respectfully submitted this 21st day of February.

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