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NO. 370186

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JOHANNA LARSON

Appellant,

v.

CENTRAL WASHINGTON UNIVERSITY

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant/Plaintiff Johanna Larson (Larson) brought employment law claims for violation of The Washington Family Leave Act (WFLA) (R.C.W. 49.78)/The Family Medical Leave Act (FMLA) (29 U.S.C. § 2601 et seq.) and Washington's Law Against Discrimination (WLAD) (R.C.W. 49.60) against Respondent/Defendant Central Washington University (Central). Central brought a Motion for Summary Judgment that the Trial Court improperly granted. The Trial Court also improperly denied Larson's Motion for Summary Judgment on those claims

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Assignment of Error No. 1

1. **Assignment of Error:** Summary judgment is proper if there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds could reach only one conclusion from the evidence presented. Quinault Indian Nation v. Imperium Terminal Servs., LLC, 187 Wn.2d 460, 468, 387 P.3d 670, 675, (2017). The Trial Court erred by holding that there is no genuine issue as to any material fact regarding any of Larson's claims, Central is entitled to judgement as a matter of law, and reasonable minds could reach only once conclusion from

the evidence presented, thereby denying Larson's Motion for Summary Judgment and granting Defendant's.

2. First Issue Pertaining to Assignment of Error: In discrimination cases, summary judgment for an employer is seldom appropriate because of the difficulty of proving discriminatory motivation; when the record contains reasonable but competing inferences of both discrimination and nondiscrimination, the trier of fact must determine the true motivation. Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty., 189 Wn.2d 516, 528-29, 404 P.3d 464 (2017). To overcome summary judgment, the plaintiff needs to show only that a reasonable jury could find that discrimination was a substantial factor in the employer's adverse employment action. Mikkelsen, 189 Wn.2d at 528. Whether Larson's disability was a substantial factor in adverse employment actions against her is a question of fact for the jury. Did the Trial Court err by ruling on this question of fact? Did the Trial Court err in denying Larson's Motion for Summary Judgment but granting Central's on this issue?

3. Second Issue Pertaining to Assignment of Error: Whether Central reasonably accommodated Larson's disability is a question of fact for the jury. What constitutes a reasonable accommodation depends on the facts and circumstances of each case and generally is a question of fact for the jury.

Johnson v. Chevron U.S.A., Inc., 159 Wash.App. 18, 31, 244 P.3d 438 (2010). Did the Trial Court err by ruling on this question of fact? Did the Trial Court err in denying Larson's Motion for Summary Judgment but granting Central's on this issue?

4. Third Issue Pertaining to Assignment of Error: Whether Larson was able to work during a time period where she had in place a valid medical work release with restrictions that she provided Central, but was not allowed to work under, as it was determined by Central that she was medically unable to, is a question of fact for the jury, as relating to her claims. Did the Trial Court err by ruling on this question of fact that could be determinative for summary judgment in Larson's claims?

5. Fourth Issue Pertaining to Assignment of Error: Whether Larson was performing her job satisfactorily, where competing inferences exist, is a question of fact for the jury, as relating to her claims. Central alleges Larson was terminated for poor work performance, although work performance did not precipitate her termination. Did the Trial Court err by ruling on this question of fact that could be determinative for summary judgment in Larson's claims?

6. Fifth Issue Pertaining to Assignment of Error: Central required Larson to not work until she obtained a medical work release with

modifications to her then existing valid work release with restrictions for her shoulder injury. Because the shoulder injury was a workplace injury, Larson was required to obtain the additional release from her Washington State Department of Labor and Industries (L & I) Doctor. She had to wait for a time that the L & I Doctor was able to see her. Larson notified Central of this situation while she was not allowed to work and in wait. Central eluded that they dispute her notification. Whether Central was notified of this by Larson is a question of fact for the jury. Did the Trial Court err by ruling on this question of fact that could be outcome determinative in Larson's claims because Central has claimed they terminated her for failure to notify of absences, unauthorized absences, and job abandonment, despite requiring Larson not to work during the time those issues are alleged?

B. Assignment of Error No. 2

1. Assignment of Error: The Trial Court erred by not allowing amendment of Larson's Complaint of to add a Claim for violation of the WFLA, where Larson had plead violation of the FMLA, and Central filed a Motion for Summary Judgment on the FMLA claim based upon Sovereign Immunity.

2. First Issue Pertaining to Assignment of Error: The principal factor in determining whether amendment will be granted is the

presence of absence of prejudice to the nonmoving party. Del Guzzi Constr. Co. v. Global Nw., Ltd., 105 Wn.2d 878, 888, 719 P.2d 120 (1986). Central did not claim prejudice by Larson's request for Amendment. Did the Trial Court abuse its discretion by not allowing amendment of the Complaint? There is no record of a decision on this issue.

C. Assignment of Error No. 3

1. Assignment of Error: The Trial Court erred by denying Plaintiff's Motion for Summary Judgment on Larson's WFLA/FMLA claim and ordering its dismissal.

2. First Issue Pertaining to Assignment of Error:

Central did not designate time that they determined Larson was unable to work due to her shoulder injury as WFLA/FMLA leave despite that leave being available to her. Did the trial Court err by denying Larson's Motion for Summary Judgment and dismissing her claim?

3. Second Issue Pertaining to Assignment of Error: 29 C.F.R. § 825.301 provides that an employer's designation of leave as leave under the WFLA/FMLA must be based only on information received from the employee. As a matter of law, did Central interfere with Larson's rights under the WFLA/FMLA by placing her on WFLA/FMLA qualifying leave based on medical opinion and directive of her Department Head, which

resulted in her termination due to Central's later determination that the leave did not qualify as WFLA/FMLA leave, based upon information received from her L & I Doctor? Did the Trial Court err in denying Larson's Motion for Summary Judgment but granting Defendant's?

4. Third Issue Pertaining to Assignment of Error: The WFLA/FMLA requires that an employee be restored to her position of employment when she returns from leave.

Did Central interfere with Larson's rights under the WFLA/FMLA to be returned to her position of employment, as a matter of law, after placing her on WFLA/FMLA qualified medical leave after self determining that she was medically unable to work due to a qualified serious health condition and then terminating her when her medical provider determined she was still fit for duty? If the medical condition did not qualify for WFLA/FMLA leave, then why was Larson placed on leave? Did the Trial Court err by denying Larson's Motion for Summary Judgment but granting Defendant's?

5. Fourth Issue Pertaining to Assignment of Error: 29 CFR § 825.300 outlines the WFLA/FMLA employer notice requirements for eligibility, rights and responsibilities, and designation of leave the Code requires, and outlines employer consequences for failure to comply with those requirements, which constitutes interference, restraint and denial. As a matter

of law, did Central interfere with Larson's rights under the WFLA/FMLA by not providing her required notification of her eligibility, rights and responsibilities, designation of leave, and potential consequences for her failure to comply with requested obligations pursuant to the WFLA/FMLA? Did the Trial Court err by denying Larson's Motion for Summary Judgment and granting Defendants'?

III. STATEMENT OF THE CASE

A. Statement of Facts

Larson graduated from Purdue University in West Lafayette Indiana. (CP 291) Larson was thereafter employed by Central as a Senior Secretary. (CP 263, 291) She was supervised by her department chair, Dr. Laila Abdalla (Abdalla). (CP 263)

On September 24, 2015, while working at Central, Larson fell and tore a ligament in her shoulder. (CP 265-66, 291-292). When she returned to work the next day, September 25, 2015, in extreme pain, Abdalla told her that she did not want her working unless she could do 100 percent of her job. (CP 292) Larson therefore left work early that day. (CP 266)

Larson was unable to work from September 25, 2015 until October 12, 2015, due to her shoulder injury. (CP 266) Larson was then released to work with restrictions from her L & I Doctor, Dr. Nathan Lilya. (CP 266,

292) The release and restrictions were based upon Central's job description for Larson. (CP 137-39) Larson's ability to work at the speed that she could before her shoulder injury was affected. (CP 292). Central was able to allow Larson to work under the restrictions, and did initially, but Abdalla disapproved of Larson working at a slower pace than before her injury. (CP 266, 292-93) Larson therefore requested a flexible or reduced schedule in accommodation, but a schedule change was not allowed. (CP 293). Abdalla then started to take away Larson's job duties which she was capable of performing with her restrictions. (CP 293)

Larson also suffers from Rheumatoid Arthritis, an autoimmune disease affecting connective tissue such as ligaments, and she had to take immunosuppressant medication for it, as Central was aware. (CP 293). Larson missed work due to her Rheumatoid Arthritis and relating complications from her shoulder, immune system, and having a cold, from November 2, 2015 until November 6, 2015. (CP 75, 129, 267, 293) She attempted to return to work on November 9, 2019, but was forced to leave early due to compounded extreme pain in her torn shoulder ligament. (CP 76, 267, 293-94) Larson's shoulder injury was subject to episodic flare ups preventing her from performing her job functions with, chronicity depending on treatment, as certified by her L & I Doctor. (CP 143-44) Abdalla

immediately told Larson that she could not return to work unless she obtained an additional work release noting any modifications needed to the valid restrictions in place for her shoulder injury. (CP 76, 294, 395).

By that time, Abdalla had already begun to take steps to replace Larson. (CP 57) A replacement for Larson was then immediately hired. (CP 294)

Larson did not work until she obtained another note from her L & I Doctor, as she was instructed. (CP 269) If she had worked, Central could have terminated her for insubordination, as she was informed and aware. (CP 269) While waiting to get the doctor note, Larson had informed Central that she was unable to see her L & I Doctor until December 10, 2015, where he determined that she was still able to work with the same restrictions he had her working under before Abdalla told her she could not. (CP 268, 293-95) Central now claims they were unaware of Larson having to wait for her L & I Doctor to be able to see her. Central claims that Larson failed to show for work for that “extended” time period without explanation, abandoning her position. (CP 267-71). Given Abdalla’s clear instruction to Larson in her Email, there is no evidence for this assertion, but ample evidence otherwise, as was presented to the Trial Court. Factually, a release with restrictions can only be modified if it exists, and only a release with restrictions for Larson’s

shoulder existed. Larson left work due to shoulder pain.

Central then sent Larson an official written reprimand on November 19, 2015, 10 days after Larson had last worked, due to Adballa's refusal to let her. (CP 229) The reprimand outlined general performance expectations that Central claims Larson needed to improve in, one of which was time and attendance management. (CP 230). It made no reference though to Adballa's directive to not work until obtaining the additional work release with modified restrictions. Id.

Larson sought WFLA/FMLA protection for her shoulder injury. (CP 295) While Larson was disallowed to work from November 10, 2015 until December 11, 2015, Central emailed her WFLA/FMLA certification paperwork. (CP 268, 295, 439) Central knew though that because Larson was not working, she would not receive the Emails. (CP 295, 429) Central acknowledges they could have attempted to obtain the WFLA/FMLA certification paperwork from Larson by contacting her by other means. (CP 295)

In their emails, Central did not indicate any action that would be taken by them against Larson's in relation to any failure of her requested responsibilities regarding WFLA/FMLA leave, such as certification or fitness for duty testing. (CP 80-85, 422-24) Central initially did not designate any

time relating to Larson's shoulder injury as WFLA/FMLA leave, but then on December 10, 2015, designated all absences for her shoulder injury as WFLA/FMLA qualifying and protected from September 24, 2015 until December 16, 2015, including the time she missed from September 24, 2015 to October 12, 2015. (CP 254, 256, 269, 295-96, 425-27)

It was also determined that Larson would need shoulder surgery, and she made Central and Abdalla aware that it would take place in January of 2016, where she would require further accommodation. (CP 296)

Larson returned to work on December 11, 2015, after being able to be recreated by her L & I Doctor to work with the same restrictions she previously worked under. (CP 240) It was not until another 10 days later, December 21, 2015, in a meeting, that Central claimed Larson was not authorized to miss work from November 10, 2015 until December 10, 2015, despite being instructed so. (CP 240)

Central then sent Larson a disciplinary notification letter on January 4, 2015, outlining the alleged unauthorized leave from November 10, 2015 until December 10, 2015, indicating that she could be terminated and referencing only the alleged unauthorized leave. (CP 233-34)

Larson had shoulder surgery schedule for January 19, 2016. (CP 204-8)

Central then terminated Larson on January 14, 2016 for the alleged unauthorized absences. (CP 239-242) Central noted Larson not turning in WFLA/FMLA paperwork in a timely matter in her discipline and discharge letters. (CP 229-231, 239-42)

Central claimed the reason for her termination was that from November 10, 2015 to December 10, 2015 her restrictions had not changed, she was therefore on unauthorized leave, had abandoned her job, and those absences were not protected. (CP 262, 268-69, 297, 439) It was central though that determined Larson was medically unable to work due to her shoulder injury; Central then designated all of the time that she missed work due to her shoulder injury as WFLA/FMLA protected. (CP 76, 269, 293-94) Larson does not dispute that she was released to work with restrictions and able to do so during that time. No modifications were necessary. (CP 268-69) There was no medical basis for Central disallowing her to work.

At the end of the four (4) page termination letter outlining the alleged unauthorized absences issue, Central included a brief sentence long statement alleging Larson had a history of poor work performance. (CP 241)

Central has claimed that poor work performance was also a factor in Larson's termination, but alleged unauthorized absences and job abandonment precipitated her termination. (CP 233-35, 239-42, 262-65).

And Central did not discipline Larson for performance issues until after her injury, via a pre-disciplinary notification letter sent October 19, 2015. (CP 225-26) And Larson was never notified of any performance issues, her performance reviews were satisfactory, and she helped train at least one co-worker that was slow to catch on and made a lot of mistakes, Angela Hill (Hill), as testified to by Hill. (CP 296-97) Despite catching on slowly and making a lot of mistakes, Hill kept her job. (CP 296) Central claims that Larson was trained by Vickie Winegar (Winegar). (CP 263) At her deposition, Winegar testified that she had no knowledge of Larson having any performance issues and never witnessed Larson make a mistake, although she herself made mistakes. (CP 297) In Larson's recent performance evaluations, Larson was evaluated as meeting expectations in six out of seven categories, with the only exception being one "needs improvement" mark, with a supplemental "But I know she is working hard at it" notation. (CP 165-172) There were no unsatisfactory ratings. Id.

B. Procedural History

Larson filed a Complaint for violation of the WLAD and violation of the WFLA/FMLA, amongst other claims not addressed in this appeal. (CP 1-6) Central moved for Summary Judgment on all claims, relying almost entirely on self-serving declarations attacking Larson's character and

performance. (CP 271) Central argued Larson's FMLA claim was barred by Sovereign Immunity. (CP 273-74) Larson noted a Motion to Amend the Complaint for the same hearing time as the Motion for Summary Judgment, to add a claim for violation of the WFLA, and requested summary Judgment on her claims of and Disability Discrimination and violation of the WFLA/FMLA. (CP 291, 465-474) The Court granted Central's Motion on all claims, without providing legal reasoning, and did not address Larson's Motion to Amend. (CP 478) Larson then filed a Motion to Reconsider that was denied. (CP 534)

IV. ARGUMENT

A. Genuine Issues of Material Fact Exist as to Larson's WLAD Claim, Precluding Summary Judgement as Granted by the Trial Court, and Larson is Entitled to a Determination that Central Violated the Act Where no such Issues Exist

1. The WLAD

The WLAD prohibits an employer from discharging or otherwise discriminating against "any person because of ... the presence of any sensory, mental, or physical disability." Wash. Rev.Code § 49.60.180. Washington Courts look to federal discrimination laws for guidance in interpreting their own discrimination laws. *See e.g., Clarke v. Shoreline School Dist.*, 106 Wash.2d 102, 118, 720 P.2d 193 (1986).

Central argued that there is no evidence that Larson was disabled. It is elementary that she was. Under the WLAD "disability" means the presence of a sensory, mental, or physical impairment that is medically cognizable or diagnosable or exists as a record or history or is perceived to exist whether or not it exists in fact. R.C.W. 49.60.040(7)(a). "Impairment" is broadly defined as, including but not limited to, "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine," or "[a]ny mental, developmental, traumatic, or psychological disorder, including but not limited to, cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." R.C.W. 49.60.040(7)(c); Washington Pattern Jury Instructions - Civil 6th WPI 330.31.01. Therefore, "under the plain language of the statute, any mental or physical condition may be a disability." Clipse v. Commercial Driver Servs., Inc., 189 Wn. App. 776, 793, 358 P.3d 464 (2015). Larson's shoulder injury requiring work accommodation and surgery qualified as a disability. This is straightforward.

2. Disparate Treatment

At trial, to prove a claim for disparate treatment under the WLAD, a plaintiff must prove that her protected characteristic was a "substantial factor," meaning a "significant motivating factor," in an employer's adverse employment decision, not the "sole factor." R.C.W. 49.60.180(2); Scrivener v. Clark Coll., 181 Wn.2d 439, 444, 334 P.3d 541, 545, (2014) (citing Mackay v. Acorn Custom Cabinetry, Inc., 127 Wash.2d 302, 310, 898 P.2d 284 (1995)). Under the direct evidence test, the court determines whether the WLAD plaintiff has provided direct evidence that (1) the defendant employer acted with a discriminatory motive and (2) the discriminatory motivation was a significant or substantial factor in an employment decision. Alonso v. Qwest Commc'ns Co., LLC, 178 Wn. App. 734, 744, 315 P.3d 610, 616,(2013) (citing Kastanis v. Educ. Emps.' Credit Union, 122 Wash.2d 483, 491, 859 P.2d 26, 865 P.2d 507 (1993). Direct evidence "includes discriminatory statements by a decision maker and other smoking gun evidence of discriminatory motive." Fulton v. State, 169 Wash.App. 137, 148 n. 17, 279 P.3d 500 (2012).

Relatedly, summary judgment to an employer is seldom appropriate in the WLAD cases because of the difficulty of proving a discriminatory motivation. Scrivener, 181 Wn.2d at 445 (citing Riehl v. Foodmaker, Inc., 152 Wash.2d 138, 144, 94 P.3d 930 (2004); Sangster v. Albertson's, Inc., 99

Wash.App. 156, 160, 991 P.2d 674 (2000) (“Summary judgment should rarely be granted in employment discrimination cases.”); *and also* Rice v. Offshore Sys., Inc., 167 Wash.App. 77, 90, 272 P.3d 865 (2012) (When the record contains reasonable but competing inferences of both discrimination and nondiscrimination, the trier of fact must determine the true motivation.)). To overcome summary judgment, a plaintiff needs to show only that a reasonable jury could find that the plaintiff's protected trait was a substantial factor motivating the employer's adverse actions. Scrivener, 181 Wn.2d at 445 (citing Riehl, 152 Wash.2d at 149.) “This is a burden of production, not persuasion, and may be proved through direct or circumstantial evidence.” *Id.*

A reasonable juror could conclude that Larson was terminated because Abdalla did not want to deal with her disability. She wanted an employee that would not be absent and could do 100 percent of the job. She therefore disciplined Larson for performance issues and disallowed her to work with her work release and restrictions, leading to her termination.

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, 181 Wn.2d at 445 (citing Hume v. Am. Disposal Co., 124 Wash.2d 656, 667, 880 P.2d 988 (1994)).

Under the first prong of the McDonnell Douglas framework, a plaintiff bears the initial burden of establishing a prima facie case of discrimination, which creates a presumption of discrimination. Scrivener, 181 Wn.2d at 446 (citing Riehl, 152 Wash.2d at 149–50; Kastanis, 122 Wash.2d at 490). 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, 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).

However, proof of these precise factors is not required. McDonnell Douglas, 411 U.S. at 802 n. 13 (“[T]he prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.”) Rather, to establish a prima facie case, a plaintiff merely “must offer evidence that gives rise to an inference of unlawful discrimination.” Hawn v. Exec. Jet Mgmt., Inc., 615 F.3d 1151, 1156 (9th Cir.2010) (citations

omitted). This prima facie case “entitles [a plaintiff] to a commensurately small benefit, a transitory presumption of discrimination.” Costa v. Desert Palace, 299 F.3d 838, 85254 (9th Cir.2002).

(1) As shown, Larson was disabled. (2) It is undisputed that Larson was disciplined and terminated. (3) There is conflicting evidence of Larson’s performance, a question of fact for the jury. But for purposes of Summary Judgment it must be construed that Larson was performing satisfactorily. (4) Larson was replaced by an individual that did not need accommodation for disability in the form of leave of absence, and Abdalla had already begun to take the steps to replace her before disallowing her to work due to her disability. Larson’s need for accommodation was met with hostility. Central began implementing poor performance reviews and discipline and then disallowed her to work. Larson was then terminated. This raises a reasonable inference of unlawful discrimination.

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)). Abdalla disapproved of Larson working at a slower pace and did not want her working unless she could work at 100 percent. Central does not

have a legitimate reason for disciplining and terminating Larson for her absences resulting from her disability. They mandated them due to her disability despite her being released to work with restrictions. Larson's conduct, the grounds for her termination, was a result of Central's mandate resulting from her disability.

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, 152 Wn.2d at 151-52. An employer may not terminate a disabled employee for "conduct resulting from" the employee's disability because such conduct is part and parcel of the disability itself. Gambini v. Total Renal Care, Inc., 486 F.3d 1087, 1093, 1094 (9th Cir. 2007). In the Ninth Circuit case Humphrey v. Mem'l Hosps Ass'n, 239 F.3d 1128, 1139-40 (9th Cir. 2001), as cited by the Washington Supreme Court in Riehl, the Court stated:

Unlike a simple failure to accommodate claim, an unlawful discharge claim requires a showing that the employer terminated the employee because of his disability. *See Cooper v. Neiman Marcus Group*, 125 F.3d 786, 790 (1997). Often the two claims, are, from a practical standpoint, the same. For the consequence of the failure to accommodate is, as here, frequently an unlawful termination. In this case, MHA's stated reason for Humphrey's termination was absenteeism and tardiness.

For purposes of the ADA, with a few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination. *See Hartog v. Wasatch Academy*, 129 F.3d 1076, 1086 (10th Cir. 1997). The link between the disability and the termination is particularly strong where it is the employer's failure to reasonably accommodate a known disability that leads to discharge for performance inadequacies resulting from that disability. *See Borkowski v. Valley Central Sch. Dist.*, 63 F.3d 131, 143, (2d Cir. 1995). In *Kimbro*, for example, we found that there was a sufficient causal connection between the employee's disability and termination where the employee was discharged for excessive absenteeism caused by migraine-related absences. *See Kimbro*, 889 F.2d at 875. Similarly, *Humphrey* has presented sufficient evidence to create a triable issue of fact as to whether her attendance problems were caused by OCD. In sum, a jury could reasonably find the requisite causal link between a disability of OCD and *Humphrey's* absenteeism and conclude that HMA fired *Humphrey* because of her disability.

Larson was refused work because of her disability and then terminated for absences resulting from the refusal. This is not a legitimate reason for termination, as a reasonable juror could conclude. It is direct evidence of discrimination. Larson needed disability accommodation by an afternoon off of work because her shoulder injury was bothering her as it was prone to "flare up." Her absences were a direct result of her disability. Central then

terminated her for those absences, in violation of the WLAD.

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 447(citing Mackay, 127 Wash.2d at 309–11, 898 P.2d 284.) 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 Wash.2d at 309–11, 898 P.2d 284.) This is in direct contradiction to the assertion that Central presented the trial court that “anyone claiming employment discrimination must demonstrate their work was satisfactory.” (CP 263) Such a required showing could swallow up every cause of action under the WLAD. To negate liability, an employer would be able to claim the employee’s work was not satisfactory in their opinion, which can always be construed subjectively. This issue was addressed in Griffith v. Schnitzer Steel Indus., Inc., 128 Wn. App. 438, 449, 115 P.3d 1065, 1071, (2005), where the Court held:

“whether an employee was performing adequately when the termination decision was made is a fact always disputed in a discrimination case; the employer's burden to present nondiscriminatory justifications for the firing necessarily requires it to dispute the “satisfactory performance” element of a prima facie case. The ultimate question for the fact-finder, assuming the employee has met the other elements

of a prima facie case, is whether the employee was performing adequately when he was terminated: If the fact-finder rejects the employer's proffered justifications for the firing, it has generally concluded that the employee's performance was satisfactory; if it has accepted the justifications, it has necessarily concluded that performance was unsatisfactory. Because satisfactory performance is viewed in light of all the evidence presented, summary judgment for the employer on this basis will rarely, if ever, be appropriate.”

A plaintiff may show, for example, that the reason has no basis in fact, it was not really a motivating factor for the decision, it lacks a temporal connection to the decision, or was not a motivating factor in employment decisions for other employees in the same circumstances.” Scrivener, 181 Wn.2d at 444-48 (citing Kuyper v. Dep't of Wildlife, 79 Wash.App. 732, 738–39, 904 P.2d 793 (1995) (emphasis added). A plaintiff may satisfy the pretext prong using those examples, but the plaintiff may also satisfy the pretext prong by presenting sufficient evidence that discrimination nevertheless was a substantial factor motivating the employee. Scrivener, 181 Wn.2d at 448. Adverse employment actions have been determined to be: (1) giving plaintiff lesser performance ratings; (2) papering his personnel file with negative reports including written reprimands; (3) verbal warnings to plaintiff about his poor attitude toward management; (4) characterizing the plaintiff as unwilling to assume more job responsibility; (5) placing plaintiff under constant surveillance at work; (6) an unwarranted assignment of blame; and

(7) a threat of disciplinary action. Kim V. Nash Finch, Co, 123 F.3d 1046 (8th Cir. 1997); Coszalter v. City of Salem, 2003 C09 (USCA9, 2003). Larson has shown all of the above. 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. There is ample evidence showing Larson was performing satisfactorily. After her injury, things changed drastically.

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. "Above all, it should never be viewed as providing a format into which all cases of discrimination must somehow fit." *Id.* And "The elements of a prima facie case are not rigid." Cuff v. CMX Corp., 84 Wn.App 634, 637-8, 929 P.2d 1136 (1997); Johnson v. Dep't of Soc. & Health Servs., 80 Wn. App. 212, 227, 907 P.2d 1223, 1231(1996)(elements of a prima facie case "should be used flexibly to address the facts in different cases"); Parsons v. St. Joseph's Hosp. & Health Ctr., 70 Wn.App. 804, 809, 856 P.2d 702 (1993) ("A plaintiff...can...meet his or her burden of production in any way which yields

evidence from which a rational trier of fact could find unlawful discrimination..."

Accordingly, the ultimate question in every disparate treatment claim case is whether discriminatory motive was a "substantial factor" in the challenged decision. Mackay v. Acorn Custom Cabinetry, 127 Wn.2d 302, 310, 898 P.2d 284 (1995) WPI 330.01. This is a "pure question of fact." Johnson, 80 Wn.App. at 229. "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.

If the Appellate Court does not conclude Central violated the WLAD by termination for the mandated absences due to Larson's disability, which was the disability itself, then the issue of whether was Larson's Disability was a substantial factor in her termination should be decided by a jury.

3. Failure to Accommodate

The WLAD requires an employer to make reasonable accommodations for an employee with a disability. Doe v. Boeing Co., 121 Wash.2d 8, 17-18, 846 P.2d 531 (1993). 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*, 159 Wash.App. at 28–29 (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).

(1) As shown, Larson suffered from a disability. (2) Larson required and received accommodation from Central that was reasonable, as Central initially provided it, and necessary, as it was provided pursuant to Larson’s medical release with restrictions from her L & I Doctor. (3) Larson was qualified to perform the essential functions of her job with reasonable accommodation. She performed them before her injury and initially with her accommodations. (4) Central had notice of the impairment which is

undisputed. (5) Central failed to reasonably accommodate the impairment. Central refused to allow Larson to work under a valid work release with restrictions that they were able to continue to accommodate. They instead demanded that she not work until obtaining another release and then terminated her for the time she could not work while she obtained that release. The additional release 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.

Further, once an employee provides notice of her need for accommodation, the employer has a duty to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. *See Goodman*, 127 Wash.2d at 408, 899 P.2d 1265 (noting that once an employee gives the employer notice of her disability, "[t]his notice then triggers the employer's burden to take 'positive steps' to accommodate the employee's limitations") (citation omitted). "A reasonable accommodation envisions an exchange between employer and employee, where each party seeks and shares information to achieve the best match between the employee's capabilities and available positions." *Frisino v. Seattle School Dist. No. 1*, 160 Wash.App. 765, 779, 249 P.3d 1044 (2011) (citing *Goodman*, 127 Wash.2d at 409, 899 P.2d 1265). After being apprised of

Abdalla's displeasure with her slowed pace of work and need for accommodation, Larson requested to alter her schedule to ensure her success. Central and Larson could have worked together, but his request was denied.

What constitutes a reasonable accommodation depends on the facts and circumstances of each case and generally is a question of fact for the jury. Johnson, 159 Wash.App. at 31, 244 P.3d 438. And it is true that "an employer is not obligated to provide an employee the accommodation he requests or prefers, the employer need only provide some reasonable accommodation." Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1089 (9th Cir.2002) (citation omitted); Doe, 121 Wash.2d at 20 (noting an employer is not obligated "to offer the precise accommodation which [the employee] requests"). But a change in work schedule, or leave of absence, is a recognized form of accommodation. Doe, 121 Wn.2d at n. 4 and 21 n.5.work; MacSuga v. Cty. of Spokane, 97 Wn. App. 435, 440, 983 P.2d 1167, 1170, (1999). Central 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. If the Appellate Court does not find that Central failed to accommodate Larson, whether Centrals 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

1. Complaint Amendment Standards

The Court erred in not addressing Larson's Motion to Amend the Complaint to add a claim of Violation of the WFLA and amending the Complaint to add it as a claim as a matter of law.

A complaint is a notice pleading. The purpose of a notice pleading is to facilitate a proper decision on the merits; in pursuit of this, the trial court should freely grant leave to amend when justice so requires. Watson v. Emard 165 Wash.App. 691, 267 P.3d (2011). Great latitude in permitting amendment of pleadings is vested in the trial court by rule, and powers so vested have been liberally construed. Walker v. Sieg, 23 Wash.2d 552, 161 P.2d 542 (1945). Amendments to a Complaint can be made at any time, under CR 15. Federal Rubber Co. v. Stewart Co., 180 Wash. 625, 41 P.2d 158 (1935). Justice required allowing amendment of Larson's Complaint, as was proper.

Leave to amend a Complaint should be given unless it appears to certainty that plaintiff would not be entitled to any relief under any stated facts which could be proven in support of his claim. Adams v. Allstate Ins. Co. (1961) 58 Wash.2d 659, 364 P.2d 804. A trial court abuses its discretion in not permitting a party to amend its complaint to allege a claim under CR 15(a) if the party's claim has merit. Denny's Restaurants, Inc. v. Security Union Title

Ins. Co., 71 Wash.App. 194, 859 P.2d 619 (1993). The trial Court was obligated to allow Larson to amend her Complaint.

The true test for permitting amendment to pleading is whether opposing party is prepared to meet new issue. Bacon v. Gardner, 38 Wash.2d 299, 229 P.2d 523 (1951). The principal factor in determining whether amendment will be granted is the presence of absence of prejudice to the nonmoving party. Del Guzzi Constr. Co. v. Global Nw., Ltd., 105 Wn.2d 878, 888, 719 P.2d 120 (1986). As a result, the fact that the added material or claims could have been included in the original pleading will not preclude amendment, in the absence of prejudice to the nonmoving party. Caruso v. Local Union, 690 of Int'l Bhd. of Teamsters, 100 Wn.2d 343, 350-351, 670 P.2d 240 (1983). Even "(w)here a new claim can be litigated with the same evidence that is already in the case, it may be proper for a court to allow an amendment even when the motion to amend is made shortly before trial." Karlberg ve. Otten, 167 Wn. App. 522, 529, 280 P.3d 1223 (2012).

2. No Prejudice to Defendant Existed

The WFLA mirrors its federal counterpart and provides that courts are to construe its provisions in a manner consistent with similar provisions of the FMLA. Crawford v. JP Morgan Chase NA, W.D.Wash.2013, 983 F.Supp.2d 1264. "This chapter must be construed to the extent possible in a manner that

is consistent with similar provisions, if any, of the federal family and medical leave act of 1993 (Act Feb. 5, 1993, P.L. 103-3, 107 Stat. 6), and that gives consideration to the rules, precedents, and practices of the federal department of labor relevant to the federal act." R.C.W. 49.78.410. Courts must analyze WFLA claims following FMLA case law, *see e.g.*: Shelton v. Boeing Co., 2014 U.S. Dist. LEXIS 175047, 2014 WL 7272430 (W.D. Wash. 2014). For all purposes in a notice pleading state, Larson plead violation of WFLA. The claims are identical, and Central received notice upon service. Central did not claim prejudice. It did not exist and the Trial Court should have allowed Larson to amend her complaint to specifically state a claim for violation fo the WFLA. The Trial Court erred in not addressing this issue.

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

1. The WFLA/FMLA

An eligible employee may take WFLA/FMLA leave because of the employees own "serious health condition" that makes the employee unable to perform the functions of her or his job. 29 U.S.C. § 2612(a)(1)(D); 29 C.F.R § 825.112(a)(4). A "serious health condition" is a physical injury or impairment that involves continuing treatment by a health care provider. 29 U.S.C. § 2611(11); 29 C.F.R § 825.113(a). In turn, "continuing treatment" is defined as:

- A period of incapacity of more than three consecutive calendar days that involves ongoing treatment of a health care provider, as specified in 29 C.F.R § 825.118;
- A period of incapacity due to a chronic serious health condition;
- A permanent or long-term period of incapacity due to a condition for which treatment might not be effective; or
- A period of absence to receive multiple treatments for certain conditions.

29 C.F.R § 825.115. “[T]he employee need not expressly assert rights under FMLA or even mention FMLA, but may only state that leave is needed” for a medical reason, for example. Sims v. Alameda-Contra Costa Transit Dist., 2 F. Supp. 2d 1253, 1259 (N.D. Cal. 1998).

The WFLA/FMLA confers two substantive rights upon eligible employees. 29 U.S.C. § 2601, et seq., The first is the right to take paid leave for protected reasons such as caring for a newborn child, caring for a child or parent with a serious health condition, or on account of the employee's own serious health condition. Id. § 2612(a). The second is the right to be restored to the same position, or a position with equivalent pay, benefits and terms of employment, upon returning from such leave. Id. § 2614(a). Even if that employee has been replaced or their position restructured. 29 C.F.R § 825.214. These rights are enforceable through two separate causes of action set forth in 29 U.S.C. § 2615(a).

The first substantive right under the WFLA/FMLA prevents an employer from interfering with the exercise of the employee's right to take leave. Id. § 2615(a); 29 C.F.R. § 825.220(a). Such a claim is known as an “interference” or “entitlement” claim. Sanders v. City of Newport, 657 F.3d 772, 777–78 (9th Cir.2011). Pursuant to the WFLA/FMLA, “[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided.” 29 U.S.C. § 2615(a). “[E]mployer actions that deter employees' participation in protected activities constitute ‘interference’ or ‘restraint’ with the employees' exercise of their rights.” Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1124 (9th Cir.2001); see 29 C.F.R. § 825.220(b) (stating that “interference” includes “not only refusing to authorize FMLA leave, but discouraging an employee from using such leave”).

The Ninth Circuit does not apply the McDonnell Douglas burden shifting framework to interference claims; the plaintiff must simply prove his case with either direct or circumstantial evidence. Bachelder, 259 F.3d at 1125. When termination decision challenged under WFLA/FMLA rely on subjective evaluations, careful analysis of possible impermissible motivation is warranted, inasmuch as such evaluations are particularly susceptible of abuse and more likely to mask pretext. Xin Liu, 347 F.3d at 1136.

2. In Violation of the WFLA/FMLA, Central Failed to Comply with Procedural and Notice Requirements, and Acted Outside their Protective Bounds

If the employer has requisite knowledge that the employee begun leave for an WFLA/FMLA reason, the employer must notify the employee of the employee's eligibility to take WFLA/FMLA leave within five business days. 29 C.F.R § 825.300(b). If the employee is eligible, the employer must provide written notice of the rights and responsibilities of the employee, as specified in 29 C.F.R § 825.300(c). The employer is responsible for designating WFLA/FMLA leave and notifying the employee accordingly and in writing within five business days of determining whether the leave is WFLA/FMLA protected. 29 C.F.R § 825.300(d); Ragsdale v. Wolverine World Wide, INC., 535 U.S. 81, 122 S.Ct. 1155 (2002). Central failed this duties. They did not provide any notice and did not designate Larson's WFLA/FMLA leave for her shoulder as protected until December 10, 2015, almost three months after they were able to do so. By then, they forced on her termination path they created.

Relatedly, an employer may require that an employee's leave due to their serious health condition that makes them unable to perform one or more of the essential functions of their position be supported by certification issued by a health care provider of the employee. 29 CFR. § 825.305(a). An employer must give notice of a requirement for certification each time a

certifications is required, and that notice must be written whenever required by 29 CFR. § 825.300(c). Id.

The employer should request that the employee furnish certification at any time the employee gives notice for leave or within 5 business days thereafter. 29 CFR. § 825.305(b) The employer shall advise an employee whenever the employer finds a certification incomplete or insufficient and state in writing what additional information is necessary to make the certification complete and sufficient. 29 CFR. § 825.305(c) The employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. Id. At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. 29 CFR. § 825.305(d).

The WFLA/FMLA does not prevent the employer from following the worker's compensation provisions, and information received under those provisions may be considered in determining the employee's entitlement to WFLA/FMLA-protected leave; Any information received pursuant to such policy may be considered in determining the employee's entitlement to the WFLA/FMLA protected leave. 29 CFR. § 825.306(c)

Larson's L & I documentation were compliant with 29 CFR. § 825.306, which outlines the content of medical certification for WFLA/FMLA leave. It is not mandatory that WFLA/FMLA certification paperwork be completed by an employee. An employer may request it. See 29 U.S.C. § 2613 (a) (employer may require certification issued by the health care provider for the employee). Central did not request official WFLA/FMLA paperwork until mid November, 2015, after not allowing Larson to work with her valid release with restriction, failing to timely request it at every step and waiving their right to it. This set Larson up for discipline and termination.

Central also noted that Larson did not comply with their deadline for receiving her WFLA/FMLA certification paperwork in their discipline and termination letters, after they violated the requirements getting the documents to her. But "The employee must provide the requested certification to the employer within 15 calendar days after the employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employer provides more than 15 calendar days to return the requested certification" Aboulhosn v. Merrill Lynch, Pierce, Fenner & Smith Inc., 940 F. Supp. 2d 1203, 1216, (C.D. Cal. 2013), rev'd and remanded sub nom. Aboulhosn v. Lynch, 606 Fed. Appx. 377 (9th Cir. 2015). ("This deadline can be tolled, however, if warranted by the

employer's conduct or if the employee cannot reasonably have been expected to act within fifteen days;" "The FMLA contains a built-in equitable provision in its regulations, specifying that an employee must submit requested medical certification "within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts;" "In general, what is practicable in terms of timing is based on the facts and circumstances of each case and is a question for the jury."") (internal citations omitted); *see also* Shaaban v. Covenant Aviation Sec., No. CV 08-03339 CR, 2009 WL 3817473, *5-6 (N.D.Cal. Nov. 10, 2009) (noting that in the context of the FMLA's 15 day deadline for employees to obtain medical documentation, "the regulations specifically provide [] for tolling,") citing § 825.305(b)). It was not practicable under the circumstances for Larson to obtain the official WFLA/FMLA certification paper work by Central's mandated deadline. The time limit should have been tolled, at the least, a question of fact for the jury.

Larson was also terminated for failure to notify Central of their mandated absences. An employer may also require an employee on WFLA/FMLA leave to report periodically on the employee's status and intent to return to work. The employer's policy regarding such reports may not be

discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation. 29 CFR § 825.311(a). Central had no such policy for Larson to follow. Larson followed their direction to not work after be forced on what they determined to be WFLA/FMLA qualifying leave.

As touched upon regarding certification, 29 CFR § 825.300(c) requires employers to provide employees notice of specific obligations and expectations regarding their WFLA/FMLA leave, including any consequences of their failure to meet those obligations and expectations, by notice mailed to the employee's address of record:

“(c) Rights and responsibilities notice.

(1) Employers shall provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The employer is obligated to translate this notice in any situation in which it is obligated to do so in § 825.300(a)(4). This notice shall be provided to the employee each time the eligibility notice is provided pursuant to paragraph (b) of this section. If leave has already begun, the notice should be mailed to the employee's address of record. Such specific notice must include, as appropriate:

(i) That the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying (see §§ 825.300(c) and 825.301) and the applicable 12-month period for FMLA entitlement (see §§ 825.127(c), 825.200(b), (f), and (g));

(ii) Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of covered active

duty or call to covered active duty status, and the consequences of failing to do so (see §§ 825.305, 825.309, 825.310, 825.313);

(iii) The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave (see § 825.207);...

(vi) The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave (see §§ 825.214 and 825.604)..."

29 CFR § 825.300(c). Central also failed to mail Larson any of her WFLA/FMLA paperwork, causing her to not receive it as she was already on mandated leave. They also failed to apprise her of any of her rights and responsibilities as required, but disciplined and terminated her for her attendance conduct resulting from their failure regardless.

Likewise, as part of the required designation of WFLA/FMLA leave notice, 29 CFR § 825.300 (d) (3) requires an employer, if they will require the employee to provide fitness-for-duty certification to return to employment, to comply with notice requirements as follows:

...(d)(3) If the employer will require the employee to present a fitness-for-duty certification to be restored to employment, the employer must provide notice of such requirement with the designation notice. If the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employer must so indicate in the designation notice, and must

include a list of the essential functions of the employee's position. See § 825.312.

29 CFR § 825.300(d). Centrals request for a second release served as fitness-for-duty certification request despite Central already receiving such certification via the original release with restrictions. They failed the notice requirement and then disallowed Larson to work pending its receipt, despite waiving their right to request one.

These procedures are in place to protect employees pursuing WFLA/FMLA leave from being disciplined or terminated. Central failed these duties, giving rise to their basis for Larson's termination, in violation of the WFLA/FMLA.

3. Larson Should not have been Forced on WFLA/FMLA Qualifying Leave by Central's Medical Determination

29 CFR. § 825.301 provides that an employer's designation of leave as WFLA/FMLA leave must be based only on information received from the employee, or the employee's spokesperson, such as her L & I Doctor. When confronted with a lack of sufficient information about the reason for an employee's use of leave, the employer should inquire further of the employee or her spokesperson to ascertain if an employee's use of leave is potentially WFLA/FMLA-qualifying. 29 C.F.R. § 825.301. The WFLA/FMLA generally requires the employer to return the employee to her position at the end of the

authorized leave period. 29 C.F.R. § 825.214.

Central placed Larson on WFLA/FMLA qualified leave by claiming she was unable to perform the essential functions of her job, by forcing her to not work due to her disability. By placing Larson on WFLA/FMLA leave with its own developed information, Central violated the Act. The violation of the Act set the stage for the termination of Larson. The imposition of leave by Central gave them the opportunity to terminate her for it as unprotected.

The Sixth Circuit remarked on the nature of a "forced leave claim" in Sista v. CDC Ixis N. Am. Inc., 445 F.3d 161 (2nd Cir. 2006). In Sista, the plaintiff claimed that he was "involuntarily" placed on WFLA/FMLA leave in violation of the Act. 445 F.3d at 174. The Court observed that the WFLA/FMLA did not address the situation when an employer "forces" an employee to take WFLA/FMLA leave. However, the Court did contemplate that there could be instances where a forced leave did violate the FMLA:

If Sista were able to demonstrate that such a forced leave interfered with, restrained, or denied the exercise or attempted exercise of a right provided under the FMLA, a cause of action might lie.

445 F.3d at 175. In fact, the Sixth Circuit has observed that a plaintiff/employee may make a claim under 29 U.S.C. § 2615 (a) for

interference with an employee's rights under the WFLA/FMLA when an employer forces an employee to take WFLA/FMLA leave when the employee does not have a "serious health condition" that prevents the employee from working. Wysong v. Dow Chemical Co., 503 F.3d 441, 449 (6th Cir. 2007)(employer prevented pregnant employee from returning to work thus reducing time available after birth). However, the cause of action ripens when the employee later seeks WFLA/FMLA leave but is denied due to the exhaustion of the leave entitlement by the improperly imposed leave. 503 F.3d at 449. The result in the situation here is the same. Larson was denied protected leave due to not being entitled to it because Central improperly imposed it upon her.

In the case at bar, Larson was forced to take what Central self determined was WFLA/FMLA leave by their decision that she was unable to work via rejection of her work release with restriction. Central must then abide by their designation and apply the leave as WFLA/FMLA protected. Central alleged Larson was unable to work with her accommodations and would need re-evaluated before returning to work. Central violated the WFLA/FMLA by placing Larson on WFLA/FMLA on the basis of their medical directive and then terminating her when her L & I doctor determined

she could have worked. Unlawful interference stems from the improper application of Larson's rights under the Act which exposed her to termination. As a matter of law, Central is liable for such interference.

4. In Violation of the WFLA/FMLA, Larson was not Returned to Work

To establish prima facie interference claim under WFLA/FMLA where employer fails to reinstate the employee, the employee must show that: (1) she was eligible for WFLA/FMLA's protections, (2) her employer was covered by WFLA/FMLA, (3) she was entitled to leave under WFLA/FMLA, (4) she provided sufficient notice of his intent to take leave, and (5) her employer denied him WFLA/FMLA benefits to which she was entitled. 29 U.S.C. § 2614(a)(1); 29 C.F.R. § 825.220(b). Sanders v. City of Newport, 657 F.3d 772, 94 Empl. Prac. Dec. P 44123 (9th Cir. 2011).

As a condition of restoring an employee whose WFLA/FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work, as

also touched upon. C.F.R§ 825.312. The WFLA/FMLA fitness-for-duty

certification requirements are further outlined as follows:

(b) An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. Additionally, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require such a certification, an employer must provide an employee with a list of the essential functions of the employee's job no later than with the designation notice required by § 825.300(d), and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. If the employer satisfies these requirements, the employee's health care provider must certify that the employee can perform the identified essential functions of his or her job. Following the procedures set forth in § 825.307(a), the employer may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made. No second or third opinions on a fitness-for-duty certification may be required...

(d) The designation notice required in § 825.300(d) shall advise the employee if the employer will require a fitness-for-duty certification to return to work and whether that fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job.

(e) An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notice required in paragraph (d) of this section. If an employer provides the notice required, an employee who does not provide a

fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA. See § 825.313(d).

(f) An employer is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule. However, an employer is entitled to a certification of fitness to return to duty for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave. If an employer chooses to require a fitness-for-duty certification under such circumstances, the employer shall inform the employee at the same time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Alternatively, an employer can set a different interval for requiring a fitness-for-duty certification as long as it does not exceed once every 30 days and as long as the employer advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule leave. The employer may not terminate the employment of the employee while awaiting such a certification of fitness to return to duty for an intermittent or reduced schedule leave absence. Reasonable safety concerns means a reasonable belief of significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur.

Larson's original work release served as a fitness-for-duty certification.

But Central required Larson to obtain another release with restrictions before returning her to work, in violation of the Act.

Under the WFLA/FMLA, once an employee's health care provider provides a statement indicating that the employee is able to return to work, the employee must be restored to her position pursuant to 29 U.S.C. § 2614 (a)(1). The employer with questions regarding the employee's ability to return to work may take advantage of the option to contact the employee's health care provider to seek clarification. Albert v. Runyon, 6 F. Supp.2d 57, 62-63 (D. Mass. 1998). The employer cannot force an employee to submit to a further examination before allowing the employee to return to work. 6 F. Supp.2d at 63. Central therefore violated the act.

Upon receiving Larson's original L & I Doctor's statement, Central had one option at its disposal. With the permission of Larson, Central could have contacted her L & I Doctor and sought clarification of Larson's fitness to return to work. Central could not delay Larson's return to work while it sought clarification of her original release. *See* 29 C.F.R 825.313 (b). Under the WFLA/FMLA, it was Larson's L & I Doctor's call whether she was able to return to work and resume her duties. *See* Routes v. Henderson, 58 F. Supp.2d at 998 (FMLA leaves it to the employee's health care provider, not the employer, to determine whether employee is sufficiently recovered to return to work). Central never sought to contact Larson's L & I Doctor.

As a matter of law, Central violated the WFLA/FMLA by refusing to restore Larson to her position after it was stated she could return. “When an employee takes FMLA leave, the FMLA generally requires the employer to return the employee to her position at the end of the authorized leave period. However, the FMLA permits an employer to require the employee to “obtain and present certification from the employee's health care provider that the employee is able to resume work.” Two requirements must be met under the FMLA for the certification to be valid. First, “[t]he certification itself need only be a simple statement of an employee's ability to return to work.” Second, federal case law holds that “it is axiomatic that the ‘simple statement’ be made contemporaneously with the employee's ability to return to work.” If these two requirements are met, failure to return the employee to work violates the FMLA. In the event an employer is uncertain or has questions about the certification for the employee's fitness to return to work, the employer may ask the treating physician for clarification but may not delay the employees return to work while the request for clarification is being made” Chaney v. Providence Health Care, 176 Wn.2d 727, 732–33, 295 P.3d 728, 731–32, (2013) (citations omitted). In violation, Larson was required to obtain a second release with restriction deeming her fit to work after returning from

WFLA/FMLA leave.

5. Central Failed to Designate Larson's Absences as WFLA/FMLA Qualifying Leave

In interference claims, the employer's intent is irrelevant to a determination of liability. Sanders, 657 F.3d at 778 (citations omitted). Interference includes mislabeling an employee's WFLA/FMLA-protected leave as "personal leave" or something else. Jadwin v. Cty. of Kern, 610 F. Supp. 2d 1129, 1171, 2009 WL 973226 (E.D. Cal. 2009). In that situation, the employee may remain subject to the control and discretion of the employer in a manner which the employee would not have been had the leave been appropriately deemed as WFLA/FMLA leave. *Id.* (quoting Liu v. Amway, 347 F.3d 1125, 1134-35 (9th Cir. 2003) (internal quotations omitted). An employer also unlawfully "interferes" when it counts WFLA/FMLA leave under "no fault" attendance policies. 29 C.F.R § 825.220(c); Batchelder, 259 F.3d at 1121-25 (looking to judicial interpretation of Section 8(a)(1) of the National Labor Relations Act to clarify the meaning of "interference" and "restraint" in the WFLA/FMLA, because of the similarity of language in the two statutes). Central violated the Act by failing to qualify the absences they put into practice as qualifying for WFLA/FMLA leave and then and terminating Larson for them.

An employee may also have an "interference" claim if her employer forced her to take full-time WFLA/FMLA leave, instead of intermittent leave. Jadwin, 610 F. Supp. 2d at 1169-70. Larson was forced to stop working completely when she only requested an afternoon off for her shoulder injury that flared up. The WFLA/FMLA provides for intermittent leave when medically necessary, provided in separate blocks of time. 29 U.S.C § 2612(b)(1); 29 C.F.R § 825.202. WFLA/FMLA coverage for intermittent leave is factually-dependant on the condition, treatment, and terms of incapacity. *See Sabbrese v. Lowes Home ctrs, Inc.*, 320 F. Supp. 2d 311, 322 (W.D. Pa. 2004).

An employee giving notice of the need for WFLA/FMLA leave only must explain the reasons for the needed so as to allow the employer to determine whether the leave qualifies under the act. 29 C.F.R § 825.301(b). If an employer does fails to designate leave as required 29 C.F.R § 825.300 (the employer is responsible in all circumstances for designating leave as WFLA/FMLA qualifying (d)), the employer may retroactively designate the leave with appropriate notice as required by C.F.R § 825.300 provided that the employer's failure to timely designate leave does not cause harm or injury to the employee, which may constitute interference and liability for harm.

C.F.R. §§ 825.301(d)(e). Central failed to retroactively designate Larson's leave after their failure to do so.

6. Central used Larson's WFLA/FMLA Protected Leave as the Basis for Her Termination

The WFLA/FLMA prohibits an employer from the use of WFLA/FMLA-protected leave as a "negative factor" in an employment decision. 29 C.F.R. § 825.220(c); Xin Liu v. Amway Corp., 347 F.3d 1125, 1136 (9th Cir.2003); Bachelor, 259 F.3d at 1124. Central determined that Larson was medically unable to perform her job functions after she had been released to work by her L & I Doctor, removed her from them, and demanded she obtain a new medical release for her shoulder stating that she was fit to continue working in her position. It was then Central's duty to designate that leave as WFLA/FMLA leave as it related to her shoulder. The negative factor in Larson's termination was that leave.

The regulations enumerate additional interference violations of the WFLA/FMLA, which include discouraging an employee from using such leave, Liu, 347 F.3d at 1134, 29 C.F.R. § 825.220(b), manipulation to avoid responsibilities under WFLA/FMLA (e.g. transferring employees between work sites to keep work sites below the fifty employee threshold; changing essential functions of the job in order to preclude the taking of the leave; or

reducing hours available to work to avoid employee eligibility), 29 C.F.R § 825.220(b), or failing to follow the notice and designation requirements specified in 29 C.F.R §§ 825.300, .301, amongst others. Central manipulated the system in order to terminate Larson and is in direct violation of the WFLA/FMLA requirements on multiple points.

IV. CONCLUSION

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 Central. 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 23rd day of December, 2019.

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By


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