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NO. 65167-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION I

ANGELA HARRIS

Appellant,

v.

PROVIDENCE EVERETT MEDICAL CENTER,

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Defendant Medical Center, as the moving party, was obligated to demonstrate that it was entitled to judgment as a matter of law. Because it relied on the statutory exemption for “religious organizations,” it was obligated to show that there is no genuine dispute that it meets the definition for that exemption. Because the Washington Law Against Discrimination (WLAD) expresses a public policy of utmost importance and is to be liberally construed in favor of employees, the Washington courts have carefully scrutinized the evidence to determine whether an employer is truly a religious organization in the sense that its fundamental purpose, mission, and character are religious. The Medical Center failed to show any of these things. It did not meet its burden, and summary judgment was inappropriate.

Moreover, the Medical Center should be estopped from asserting exemption from the WLAD because it promised employees like Plaintiff that it would comply with that law’s mandates, and she relied on that promise. Further, application of the exemption to protect the Medical Center from sex discrimination claims like

Plaintiff's is unconstitutionally broad because there is no rational secular purpose for such exemption and its primary effect is to give religious employers an unfair and unwarranted advantage over other employers at the expense of their employees.

Finally, the trial court should have permitted Plaintiff to pursue her claim as a wrongful discharge claim based on the public policy against sex discrimination, which is plainly available on the facts alleged in the Complaint. And the court should have allowed oral argument after converting the motion to one for summary judgment because oral argument is mandatory under the local rule.

II. ARGUMENT

A. The Medical Center Did Not Establish That it is Exempt from Discrimination Claims.

The Medical Center admits, as it must, that it has the burden of proving that it is exempt from the WLAD, and that all factual inferences should be drawn in favor of Plaintiff. *See* Response at 6. It has not met that burden.¹ The documents it relies upon show only

¹ Defendant urges the Court not to consider this fundamental question because Plaintiff did not expressly argue it below, focusing instead on estoppel and other legal issues since Defendant styled its motion as a Rule 12 motion on the pleadings. First, the rule regarding new arguments on appeal is wholly discretionary. *State v. Ford*, 137 Wn.2d 472, 477, 973

that it had religious origins, over 100 years ago. CP 22. It has not shown by competent evidence that its contemporary purpose, people, or operations are religious. To the contrary, the evidence shows that Providence Medical Center is a major, sprawling health care provider that serves the entire community, regardless of religion. CP 41-43. It cannot be that a massive community institution like the Medical Center can avoid the WLAD simply by mentioning God and “compassionate service” in some of its pamphlets. *E.g.*, CP 54.

Generally, courts should “scrutinize with care” the evidence upon which a moving party relies for summary judgment. *Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166, 173, 758 P.2d 524 (1988) (citing *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 879, 431 P.2d 216 (1967)). Equally, the case law on the religious

P.2d 452 (1999). Second, the Supreme Court “ha[s] consistently stated that a new issue can be raised on appeal ‘when the question raised affects the right to maintain the action.’” *Roberson v. Perez*, 156 Wn.2d 33, 40, 123 P.3d 844 (2005) (quoting *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990)); *see also* RAP 2.5(a) (party may raise on appeal a new claim of error involving failure to establish facts upon which relief can be granted). Defendant’s qualification as a religious organization affects Plaintiff’s right to maintain this action, and therefore should be considered on appeal. Finally, because it was Defendant’s burden to demonstrate it was entitled to judgment as a matter of law, and this Court’s review is *de novo*, it can and should consider the sufficiency of Defendant’s evidence. *Parkin v. Colocousis*, 53 Wn. App. 649, 652-53, 769 P.2d 326 (1989).

exemption shows that its application should be carefully scrutinized. In *Hazen v. Catholic Credit Union*, 37 Wn. App. 502, 681 P.2d 856 (1984), the court found that Catholic Credit Union was not a religious organization, even though it was formed by Catholics to aid members of the Catholic Church; its membership was open only to Catholic parishioners, employees of any Catholic institution, and their family members; most of its employees were Catholic; and its board meetings opened and closed with a prayer. *Id.* at 504-05.

The reason the *Hazen* court found the defendant did not fall within the exemption was that it had an essentially secular purpose—promoting thrift and providing a source of credit. *Id.* at 506 (these purposes are not “manifestations of devotion to a superior being in a religious sense.”). Providence’s alleged “mission of caring” through “compassionate service” to the poor are equally secular. Response at 3.

In the only case in which the religious exemption was held to apply, *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 807 P.2d 830 (1991), the Court found that CRISTA Ministries was a religious organization because its purpose was to promote evangelical

churches and missions; its by-laws and staff manual contained a statement of faith, which employees had to sign and adhere to; its mission statement for the nursing staff contained a pledge to God; and CRISTA began most days with devotions and prayers. *Id.* at 677-78.

Under this authority, the Medical Center has not established it is a religious organization exempt from the WLAD. There is no evidence that any of its employees or patients are Catholic or religious or participate in any religious activities at the Medical Center. There is no evidence the Medical Center is led by religious people, operationally driven by religious objectives, or actively engaged in spreading a religious message. This evidence, and all the inferences taken from it, must be construed against the Medical Center. *Passovoy*, 52 Wn. App. at 173. The Medical Center has failed to establish that it is exempt from the WLAD and was not entitled to summary judgment.

B. The Medical Center Should be Estopped from Asserting Exemption.

Furthermore, the Medical Center should be estopped from asserting it is exempt, just as it was held estopped in *French v.*

Providence Everett Medical Center, 2008 U.S. Dist. LEXIS 80125,

*24-25 (W.D. Wash. 2008).² The parties do not dispute the legal elements of estoppel:

(1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the party to contradict or repudiate such admission, statement, or act.

Farnam, 116 Wn.2d at 678-79. Defendant does not deny it had an anti-discrimination policy which expressly promised not to discriminate against employees. It argues only that Plaintiff cannot show she “relied upon” that policy. Response at 19. However, Plaintiff expressly testified that she relied upon it before and after taking pregnancy leave, and it was “one of the reasons [she] chose to continue to work” for the Medical Center. CP 90-91.

Defendant’s only real complaints are that Plaintiff’s declaration did not explicitly refer to the policy by name as “the EEO policy,” and that she did not attach a copy of it to her

² See also *Halle v. Providence Health & Servs.*, 2010 WL 3259699, *2 (W.D. Wash. Aug. 18, 2010) (Judge Lasnik’s decision in *French* “certainly stands as persuasive authority” regarding whether Providence should be estopped from arguing exemption).

declaration. Response at 20. These objections are legally and practically mistaken. First, on summary judgment, all evidence is taken in the light most favorable to the non-moving party, i.e. the Plaintiff here, and all inferences must be drawn in her favor. Under that standard, her declaration easily supports a claim of estoppel. Second, the only reason she did not originally submit a copy of the policy is because she did not possess one, and had had no discovery yet. Ultimately she obtained it from another case and put it into evidence. *See* CP 133 ¶ 7 & CP 164; *French*, 2008 U.S. Dist. LEXIS 80125, *24-25. Regardless, it is undisputed that the Medical Center had an EEO Policy, that it contained a promise not to discriminate, and that Plaintiff relied upon this promise.

The Medical Center also argues that Plaintiff failed to show she “detrimentally” relied on the policy. Response at 20-21. The doctrine of equitable estoppel requires that the plaintiff show she would be injured by allowing the defendant to repudiate its earlier promise. *Farnam*, 116 Wn.2d at 678-79. That is hardly debatable here, because Ms. Harris lost her job, and if the Medical Center is

allowed to contradict its non-discrimination promise, Plaintiff would be deprived of a statutory remedy for her discriminatory discharge.

The Medical Center claims this is not an injury because Ms. Harris could sue under the federal anti-discrimination statute, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. Response at 21. The Medical Center argues that the protections offered by Title VII are “identical,” but fails to mention that the procedures are quite different: unlike the WLAD, which has a three-year statute of limitations, Title VII requires the employee to file an administrative charge with the Equal Employment Opportunity Commission within 180 days of the discriminatory act. 42 U.S.C. § 2000e-5(e).³ Ms. Harris did not do that, so she does not have that alternative. Thus, she will suffer injury if the Medical Center is permitted to contradict its promise not to discriminate under state law “in any aspect of its employment or pre-employment practices.” CP 164. The Medical Center should be estopped from contradicting that promise now.

³ Likewise, the remedies available under the WLAD are broader than those available under alternative claims such as wrongful discharge in violation of public policy. *See Roberts v. Dudley*, 140 Wn.2d 58, 76, 993 P.2d 901 (2000).

C. The Exemption for Religious Organizations is Unconstitutionally Broad.

Plaintiff also claims that a broad application of the WLAD’s religious employer exemption to include exemption from any kind of discrimination, not just religious discrimination, is unconstitutional.⁴ The Medical Center admits that in order to sustain the exemption, it must be found to have a secular purpose. Response at 13. However, it offers no purpose whatsoever for broadly exempting religious employers from all forms of discrimination claims. Instead, it blithely observes that the purpose of the WLAD as a whole—to “avoid discrimination”—is secular. *Id.* at 14.⁵ This totally misses

⁴ Again the Medical Center urges the Court to ignore the question of constitutionality because it was not raised below. This issue also affects Plaintiff’s right to maintain this action, and therefore may be addressed in this court. *See infra* note 1. The Court also should consider the constitutionality of the exemption because it is an issue of “broad public interest” whether religious organizations in Washington can discriminate on any ground or only on the basis of religion. *Port of Edmonds v. Northwest Fur Breeders Coop.*, 63 Wn. App. 159, 164, 816 P.2d 1268 (1991).

⁵ Indeed, as Plaintiff argued, the vital public interest in deterring and eliminating discrimination has caused many courts to question whether a broad reading of the religious exemption is appropriate. *Hazen*, 37 Wn. App. at 507 (citing *King’s Garden, Inc. v. FCC*, 498 F.2d 51, 55 (D.C. Cir. 1974)); *see also Elvig v. Ackles*, 123 Wn. App. 491, 500, 98 P.3d 524 (2004) (“Our ruling is a narrow one As such, we are not deciding whether the religious exemption ... is constitutional”); *French*, 2008 U.S. Dist. LEXIS 80125, *24.

the mark: Obviously, when analyzing a statutory exemption under the Establishment Clause, a court must consider the purpose of the exemption, not of the larger statute.

There seems to be no record of the legislature's specific intent with respect to the religious exemption in the WLAD. Virtually all similar exemptions have been understood as efforts to "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) (upholding Title VII's exemption of religious employers from claims of religious discrimination), *cited in Farnam*, 116 Wn.2d at 681; *see also King's Garden, Inc. v. FCC*, 498 F.2d 51, 54 (D.C. Cir. 1974) (describing legislative purpose of Title VII's exemption for religious organizations).

That purpose supports an exemption of religious organizations from claims of religious discrimination, because such claims would likely "burden[] the exercise of religion" by forcing religious organizations to hire employees who do not share their

beliefs. *Amos*, 483 U.S. at 338. But this interest does not support an exemption from all kinds of discrimination, such as the sex discrimination alleged here. The Medical Center does not claim subjecting it to sex discrimination claims would burden its exercise of religion. There is no secular purpose to allow “religious” employers, but not other employers, to discriminate against women. Because there is no secular purpose to the exemption—as applied to claims of discrimination other than religious discrimination—the exemption fails the first prong of the *Lemon* test and violates the Establishment Clause.⁶

The exemption also fails the second prong of the *Lemon* test because its primary effect is to advance religion. Oddly, the Medical Center’s only response to this argument is to point to other statutes that do not exempt religious organizations from sex discrimination claims. It says that its employees may still sue it for discrimination under, for example, Title VII or other common law torts. Response at 15. This happenstance does not change the fact that the Medical

⁶ *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) (to survive Establishment Clause challenge, statute must have secular purpose and its primary effect must not advance or inhibit religion, nor foster “excessive government entanglement with religion.”).

Center, if exempt, would enjoy immunity from claims under the WLAD that other employers do not, simply because it claims to be a “religious” employer. As noted above, there are significant substantive and procedural advantages offered by the WLAD over alternative causes of action, and the Medical Center’s employees would be deprived of these advantages.⁷ This would have the primary effect of bestowing an advantage on the Medical Center because of religion.⁸

The Medical Center cites statutes in other states that allegedly exempt religious organizations from all forms of discrimination. Response at 16. Such exemptions, like Washington’s, are the exception, not the norm. Most state anti-discrimination statutes, like the federal statute, exempt religious employers from only religious

⁷ See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709, 105 S. Ct. 2914, 86 L. Ed. 2d 557 (1985) (statute that requires employers to allow religious employees to refuse to work on their “Sabbath” unfairly burdens employer and non-religious employees).

⁸ See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 11, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989) (where statute benefits only religious organizations it results in state sponsorship of religion).

discrimination claims, not all discrimination claims.⁹ And all of the courts in Washington that have considered the constitutionality of exempting religious employers from all claims of discrimination have expressed doubts that it would withstand challenge. *See supra* note 5.

Erdman v. Chapel Hill Presbyterian Church, 234 P.3d 299 (2010), a recent decision cited by the Medical Center, is no exception. As the Medical Center tacitly acknowledges, that case did not involve an Establishment Clause challenge, and contains no analysis of that issue. *See id.* at ¶ 53 (slip op. at 29). Even the court's brief discussion of the plaintiff's challenge under the Equal Protection Clause is not applicable to this case. The court relied solely on *dicta* in *Farnam, supra*, which merely acknowledged the state's interest in exempting religious employers from religious discrimination claims, because adjudication of such claims could interfere with the employer's freedom of religion. *Erdman*, 234 P.3d 299 at ¶ 55 (slip. op. at 30) (quoting *Farnam*, 116 Wn.2d at 681).

⁹ See Andrew C. Nichols, *Exemptions for "Religious Corporations" from Employment Discrimination Statutes: Should Non-Profit Status be Required?*, 3 GEO. J.L. & PUB. POL'Y 133, 135-136 (Winter 2005).

There is no similar justification for the state to exempt a religious employer like the Medical Center from claims of sex discrimination, which admittedly do not implicate any religious issues.

Exempting the Medical Center from all types of discrimination claims under the WLAD has no rational or secular purpose and has the primary effect of advantaging religious employers over non-religious employers, and is therefore unconstitutionally broad.

D. Plaintiff Should Have Been Permitted to Assert Additional Causes of Action.

The Medical Center does not deny that Plaintiff's allegations of pregnancy-based sex discrimination state a cause of action for wrongful discharge in violation of public policy. *See Roberts v. Dudley*, 140 Wn.2d 58, 60, 993 P.2d 901 (2000). Plaintiff articulated this claim in her opposition brief and in her motion for reconsideration, where she specifically requested leave to amend. CP 70, 190. Defendant's only response, that this does not qualify because CR 15 requires a formal motion accompanied by a proposed amended pleading, is extremely formalistic and out of step with Washington courts' view of amending pleadings. Furthermore, the

purpose of a motion on the pleadings is to ensure that the Plaintiff's factual allegations support some claim for relief. *See McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101, 233 P.3d 861 (2010) (Rule 12 is designed to “weed[] out complaints where, even if what the plaintiff alleges is true, the law does not provide a remedy.”).

Plaintiff has plainly stated a claim under *Roberts* and, at the very least, the trial court should have permitted Plaintiff to pursue that claim.

E. Oral Argument is Required by Local Civil Rule.

Finally, the trial court erred in granting summary judgment without affording Plaintiff a hearing in court. King County Local Civil Rule 56(c)(1) states that “[a]ll summary judgment motions shall be decided after oral argument, unless waived by the parties.” The Medical Center’s assertion that Plaintiff “waived” her right to oral argument by not requesting it is belied by the record. When the motion was originally filed it was not a summary judgment motion, and once the court converted it to such a motion, Plaintiff asked for oral argument. CP 190. The court was required to permit oral argument.

III. CONCLUSION

For each of the foregoing reasons, Plaintiff asks that the judgment in favor of Defendant be reversed and the case remanded for further proceedings.

RESPECTFULLY SUBMITTED this 23rd day of August, 2010.

A handwritten signature in black ink, appearing to read "Daniel F. Johnson", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Miriam C. Simmel, certify and declare:

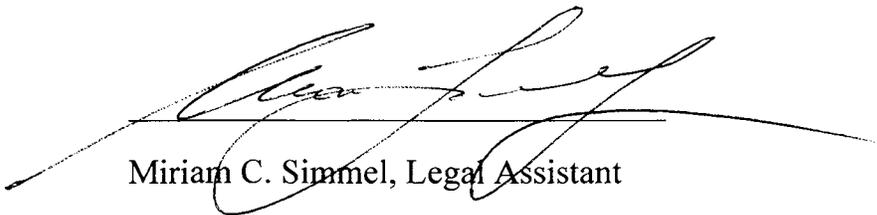
I am over the age of 18 years, make this Declaration based upon personal knowledge, and am competent to testify regarding the facts contained herein. On this 23rd day of August, 2010, I served true and correct copies of the document to which this Certificate is attached on the following in the matter listed below.

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COMMUNICATIONS SECTION
FBI-SD

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.


Miriam C. Simmel, Legal Assistant