

KWJ 66407-7

66407-7

NO. 66407-7

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

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ANGELA HARRIS,

Appellant,

v.

PROVIDENCE EVERETT MEDICAL CENTER,

Respondent.

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PROVIDENCE EVERETT MEDICAL CENTER'S RESPONSE BRIEF

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	COUNTERSTATEMENT OF ISSUES .....	2
III.	STATEMENT OF FACTS .....	3
	A. The Parties. ....	3
	1. Appellant Angela Harris. ....	3
	2. Providence Everett Medical Center. ....	4
	B. Procedural Background: 2009 Complaint. ....	4
	1. Dismissal of 2009 Lawsuit. ....	4
	2. Pending Appeal of 2009 Lawsuit. ....	5
	C. Procedural Background: 2010 Complaint. ....	5
IV.	ARGUMENT.....	7
	A. Standards of Review. ....	7
	1. Motion to Dismiss. ....	7
	2. Award of Sanctions. ....	7
	B. Harris’s Claims are Barred by <i>Res Judicata</i> . ....	8
	1. <i>Res Judicata</i> Prevents Filing a Second Action While an Appeal is Pending. ....	8
	2. <i>Res Judicata</i> Bars Claims that Could Have or Should Have Been Raised in a Prior Action. ....	9
	3. Harris’s Claims Involve the Same Subject Matter. ....	10
	4. Harris’s Causes of Action are the Same. ....	12
	5. The Parties are Identical. ....	13

6. <i>Res Judicata</i> Clearly Applies. ....	13
C. Harris’s Claims for Violation of Public Policy and Breach of Policy Fail. ....	15
1. Harris’s Public Policy Claim Fails as a Matter of Law. ....	15
2. No Breach of Promise to Comply with Policies Claim. ....	18
D. Harris Failed to Identify the Sanctions Order on Her Notice of Appeal.....	19
E. The Trial Court Did Not Abuse Its Discretion in Ordering Sanctions.....	19
F. PEMC Requests Attorney Fees And Costs Under RAP 18.9 and CR 11. ....	21
V. CONCLUSION .....	23

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>FEDERAL CASES</b>	
<i>King v. Hoover Group, Inc.</i> , 958 F.2d 219 (8 <sup>th</sup> Cir. 1991) .....	14
<i>Mpoyo v. Litton Electro-Optical System</i> , 430 F.3d 985 (9 <sup>th</sup> Cir. 2005) .....	14
<i>Plemmons v. U.S. Bancorp</i> , 2006 WL 290557 (W.D. Wash. February 7, 2006) .....	17
<b>STATE CASES</b>	
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210, 829 P.2d 1099 (1992).....	20, 21
<i>City of Des Moines v. Personal Prop. Identified as \$81,231 in U.S. Currency</i> , 87 Wn.App. 689, 943 P.2d 669 (1997).....	9
<i>Crosby v. County of Spokane</i> , 137 Wn.2d 296, 971 P.2d 32 (1999).....	9
<i>Cutler v. Phillips Petroleum Co.</i> , 124 Wn.2d 749, 881 P.2d 216 (1994).....	7
<i>Domingo v. Boeing Employees Credit Union</i> , 124 Wn.App. 71, 98 P.3d 1222, 1229 (2004).....	15
<i>Drobny v. Boeing</i> , 80 Wn.App. 97, 907 P.2d 299 (1995).....	18
<i>Ellis v. City of Seattle</i> , 142 Wn.2d 450, 13 P.3d 1065, 1071 (2000).....	15
<i>Fosmo v. State Dept. of Personnel</i> , 114 Wn.App. 537, 59 P.3d 105, 107 (2002).....	16

<i>Gardner v. Loomis Armored, Inc.</i> , 128 Wn.2d 931, 913 P.2d 377, 383-384 (1996) .....	15, 16
<i>Hill v. J.C. Penny</i> , 70 Wn.App.225, 852 P.2d 1111 (1993).....	18
<i>Holiday v. City of Moses Lake</i> , 157 Wn.App. 347, 236 P.3d 981 (2010).....	22
<i>Hubbard v. Spokane County</i> , 146 Wn.2d 699, 50 P.3d 602, 609 (2002).....	16
<i>In re the Marriage of Dicus</i> , 110 Wn.App. 347, 40 P.3d 1185 (2002).....	10
<i>Korslund v. Dyncorp Tri-Cities Services, Inc.</i> , 156 Wn.2d 168, 125 P.3d 119, 125 (2005).....	16, 17, 18
<i>Lutz Tile, Inc. v. Krech</i> , 136 Wn.App. 899, 151 P.3d 219 (2007).....	21
<i>Marino Property Co. v. Port Comm'rs</i> , 97 Wn.2d 307, 644 P.2d 1181 (1982).....	13
<i>Millers Cas. Ins. Co. of Texas v. Briggs</i> , 100 Wn.2d 9, 665 P.2d 887 (1983).....	22
<i>Norris v. Norris</i> , 95 Wn.2d 124, 622 P.2d 816 (1980).....	8
<i>Rains v. State of Washington</i> , 100 Wn.2d 660, 674 P.2d 165 (1983).....	10, 12
<i>Reid v. Pierce County</i> , 136 Wn.2d 195, 961 P.2d 333 (1998).....	7
<i>Reninger v. State Dept. of Corrections</i> , 134 Wn.2d 437, 951 P.2d 782, 787 (1998).....	16
<i>Rhinehart v. Seattle Times</i> , 51 Wn.App. 561, 754 P.2d 1243 (1988).....	22

<i>Rhinehart v. Seattle Times</i> , 59 Wn.App. 332, 798 P.2d 1155 (1990).....	20, 22
<i>Riblet v. Ideal Cement Co.</i> , 57 Wn.2d 619, 358 P.2d 975 (1961).....	9
<i>Sanwick v. Puget Sound Title Ins. Co.</i> , 70 Wn.2d 438, 423 P.2d 624 (1967).....	13
<i>Shoemaker v. City of Bremerton</i> , 109 Wn.2d 504, 745 P.2d 858 (1987).....	8
<i>Spokane County v. Miotke</i> , 158 Wn.App. 62, 240 P.3d 811 (2010).....	9
<i>Wash. State Physicians Ins. Exch. &amp; Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	7
<i>Wilson v. Henkle</i> , 45 Wn.App. 162, 724 P.2d 1069 (1986).....	22

**RULES**

Civil Rule 11.....	passim
Civil Rule 11(a) .....	7
Civil Rule 12(c) .....	7
Civil Rule 56.....	7
Rules of Appellate Procedure 5.3 (a)(3).....	19
Rules of Appellate Procedure 18.7 .....	22
Rules of Appellate Procedure 18.9 .....	3, 21, 22
Rules of Appellate Procedure 18.9(a).....	21

**OTHER AUTHORITIES**

14A Wash. Prac., Civil Procedure § 35:24.....	10
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## I. INTRODUCTION

Respondent Providence Everett Medical Center (“PEMC”) respectfully moves the Court for an order affirming the trial court’s dismissal of Appellant Angela Harris’s (“Harris”) duplicative second lawsuit and the trial court’s imposition of sanctions for filing a baseless second action.

In 2009, Harris filed her first lawsuit against her former employer, PEMC, alleging one claim of sex discrimination in violation of the Washington Law Against Discrimination (“WLAD”). The 2009 lawsuit was based on Harris’s employment at PEMC and her eventual termination. That action was dismissed with prejudice by the trial court on December 3, 2009 and is currently pending on appeal before the Washington Court of Appeals.<sup>1</sup> In the appeal of her 2009 lawsuit, Harris specifically requested that this Court allow her leave to amend her complaint to add additional claims.<sup>2</sup>

Apparently unwilling to wait for the Court of Appeals to render its decision, Harris filed a second lawsuit against PEMC on August 20, 2010.

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<sup>1</sup> See *Angela Harris v. Providence Everett Medical Center*, Case No. 65167-6-1, filed April 5, 2010. Oral arguments on the case were heard on March 3, 2011, and the appeal is still pending.

<sup>2</sup> The trial court in the 2009 lawsuit did not allow Harris to amend her Complaint because of procedural deficiencies and failure to comply with local rules governing amendment. PEMC believes that amendment was properly disallowed by the trial court. The trial court’s decision to disallow amendment is an issue still in dispute in the pending appeal of the 2009 lawsuit.

She alleges two claims that are already pending appeal in her 2009 lawsuit. The 2010 lawsuit asserts two causes of action against PEMC: (1) wrongful termination in violation of the public policy; and (2) breach of promise to comply with employee policies. Both these claims were expressly raised in the prior action and are already at issue in the first appeal pending before this Court. Both of the 2010 claims are based on the exact same facts regarding Harris's employment and eventual termination. Harris's new claims are squarely barred by *res judicata* and were properly dismissed.

Furthermore, the additional 2010 claims are also without factual or legal merit. Harris cannot maintain a public policy claim because the public policy at issue was adequately protected by other means, including federal law. The contract claim fails because Harris has not identified any specific policy that she alleges PEMC should be bound by.

The trial court properly dismissed Harris's second lawsuit and properly awarded PEMC sanctions based on filing a duplicative series of lawsuits that raised the same issues.

## **II. COUNTERSTATEMENT OF ISSUES**

1. Did the trial court properly dismiss the case where Harris's lawsuit is based on identical facts of a prior lawsuit and reasserts claims that are currently pending on appeal?

2. Is Harris's public policy claim properly dismissed where she admits that the public policy she identifies was protected under federal law?

3. Is Harris's breach of promise to comply with policy claim properly dismissed where she fails to identify any specific policy or any specific violation of a policy?

4. Did Harris fail to preserve the issue of the trial court's sanction award by failing to expressly appeal the trial court's award of sanctions?

5. Did the trial court correctly impose sanctions on Harris where she filed a second, duplicative lawsuit that is clearly barred by *res judicata*?

6. Should the Court of Appeals award sanctions against Harris pursuant to RAP 18.9 and CR 11 for filing a frivolous appeal?

### **III. STATEMENT OF FACTS**

#### **A. The Parties.**

##### **1. Appellant Angela Harris.**

Harris is a former employee of PEMC. CP 2. Harris worked as a nurse until she was terminated in August 2007 for disciplinary action.

CP 2-3.

**2. Providence Everett Medical Center.**

Providence Everett Medical Center is part of Providence Health and Services (“PHS”), a health care ministry of the Catholic Church. CP 106. Providence Health and Services is a not-for-profit health care organization. *Id.*

**B. Procedural Background: 2009 Complaint.**

On July 17, 2009, Harris filed a complaint in King County Superior Court, Case Number 09-2-26959-9 SEA (“2009 Complaint”), asserting one cause of action claiming gender discrimination under the WLAD. CP 23-27. PEMC filed a Motion to Dismiss on September 30, 2009, and Harris responded on October 26, 2009. CP 7-17 (Motion to Dismiss); 29-35 (Response). In her Response, Harris asked the trial court to allow her to add causes of action for wrongful discharge in violation of public policy, outrage, and intentional infliction of emotional distress. CP 32.

**1. Dismissal of 2009 Lawsuit.**

The trial court dismissed the 2009 Complaint on December 3, 2009 and did not allow any amendments. CP 94-95. Harris subsequently filed a Motion for Reconsideration on December 14, 2009. CP 38-46. In the Motion for Reconsideration, Harris again requested leave to amend her pleadings to add causes of action, including violation of public policy,

equitable estoppel, negligent infliction of emotional distress and outrage.

CP 38. The trial court denied Harris's Motion for Reconsideration.

CP 57.

## **2. Pending Appeal of 2009 Lawsuit.**

Harris appealed the dismissal of the 2009 Complaint to the Washington Court of Appeals. Harris filed her Opening Brief on June 21, 2010. CP 48-76. In her Opening Brief, Harris specifically asks the Court of Appeals to reverse the trial court's decision to disallow amendments to the 2009 lawsuit. Harris states that "[t]he trial court also erred in refusing to permit Harris to pursue alternative causes of action, such as wrongful termination in violation of public policy and intentional or negligent infliction of emotional distress." CP 72. PEMC filed its Response Brief on July 22, 2010. CP 97-130. The appeal of the dismissal of the 2009 Complaint is still pending before this Court. Oral arguments were recently heard by the Court on March 3, 2011.

### **C. Procedural Background: 2010 Complaint.**

On August 20, 2010, Harris filed the complaint that is the subject of the instant appeal ("2010 Complaint"). The 2010 Complaint is largely based on the same set of facts as her 2009 Complaint, dressed up as different causes of action. CP 1-6. As noted, the alleged facts are almost identical to the facts alleged in her 2009 Complaint, and all her claims still

arise from her termination following a parental leave. CP 2-3. Harris did not include a WLAD claim in her 2010 Complaint, but instead alleges two causes of action for (1) violation of public policy based on sexual discrimination and (2) breach of promise to comply with employee policies on sexual discrimination. CP 4.

On September 20, 2010, counsel for PEMC sent a letter to counsel for Harris requesting that Harris withdraw her second, duplicative lawsuit. CP 81. Harris did not dismiss the lawsuit and on October 12, 2010, PEMC filed a Motion to Dismiss for Failure to State a Claim Under Rule 12(b)(6) and 12(c) and Request for Sanctions. CP 7-17.

The trial court granted PEMC's Motion to Dismiss on November 12, 2010. CP 139-140. Harris filed a Notice of Appeal on December 10, 2010 and identified only the November 12, 2010 Order as the subject of the appeal. CP 156-157. After the Notice of Appeal was filed, the trial court awarded PEMC \$5,604.82 in sanctions on December 14, 2010. CP 161-162. Harris has never appealed the December 14, 2010 Order.

## IV. ARGUMENT

### A. Standards of Review.

#### 1. Motion to Dismiss.

This Court reviews a motion to dismiss *de novo*. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). A motion to dismiss under 12(b)(6) is properly granted where “it appears beyond a reasonable doubt that no facts exist that would justify recovery.” *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). Civil Rule 12(c) allows a party to bring a motion to dismiss that includes matters outside of the pleadings and provides that the procedural rules for page lengths and notice will be governed by Civil Rule 56. CR 12(c).

#### 2. Award of Sanctions.

This Court reviews an award of sanctions under CR 11 for abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). A trial court abuses its discretion if its order is manifestly unreasonable or is based on untenable grounds. *Id.* at 339. Civil Rule 11(a) allows a court to impose an “appropriate sanction” upon the person who signs a motion or pleading that is not well grounded in fact or makes unwarranted denials of factual contentions. The court can also impose the sanctions on “a represented party.” CR 11(a).

**B. Harris's Claims are Barred by *Res Judicata*.**

Dismissal of Harris's claims was proper because they are barred by *res judicata*. According to the Washington Supreme Court, *res judicata* "acts to prevent relitigation of claims that were or **should have been decided** among the parties in an earlier proceeding." *Norris v. Norris*, 95 Wn.2d 124, 130, 622 P.2d 816 (1980) (emphasis added). *Res judicata* prevents a plaintiff from *recasting her claim under a different theory* and litigating again. *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987) ("a plaintiff is not allowed to recast his claim under a different theory and sue again"). *Res judicata* specifically applies when a party already has an issue on appeal in a prior case.

**1. *Res Judicata* Prevents Filing a Second Action While an Appeal is Pending.**

Washington courts specifically apply *res judicata* when an appeal is currently pending to avoid inconsistent results and for judicial efficiency.

The policy underlying this rule is that a party is entitled to one but not more than one fair hearing. A party who loses at trial may appeal, and if she prevails on appeal the resultant rehearing will have been the first fair hearing. **While the appeal is pending, however, she is precluded by *res judicata* from starting a new action at the trial court level in hopes of obtaining a**

**contrary result while the appeal is pending.**

*City of Des Moines v. Personal Prop. Identified as \$81,231 in U.S. Currency*, 87 Wn.App. 689, 702-703, 943 P.2d 669 (1997) (internal citations omitted) (emphasis added); *See also Crosby v. County of Spokane*, 137 Wn.2d 296, 312, 971 P.2d 32 (1999) (“an appeal does not suspend or negate *res judicata* effects of a decision . . . otherwise a party who lost could start a new action while the appeal was pending”); *Riblet v. Ideal Cement Co.*, 57 Wn.2d 619, 621, 358 P.2d 975 (1961) (an appeal does not suspend or negate the *res judicata* aspects of a judgment); *Spokane County v. Miotke*, 158 Wn.App. 62, 67, 240 P.3d 811 (2010) (“when an appeal is pending, a party is precluded by *res judicata* from starting a new action ... in hopes of obtaining a contrary result”).

**2. Res Judicata Bars Claims that Could Have or Should Have Been Raised in a Prior Action.**

Washington cases are clear that *res judicata* applies to bar claims that **could have** been raised in a prior lawsuit:

[R]es judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, *exercising reasonable diligence*, might have brought forward at that time.

*In re the Marriage of Dicus*, 110 Wn.App. 347, 356, 40 P.3d 1185 (2002), citing *Kelly-Hansen v. Kelly-Hansen*, 87 Wn.App. 320, 941 P.2d 1108 (1997) (emphasis in original); see also 14A Wash. Prac., Civil Procedure § 35:24 (“a plaintiff cannot avoid the *res judicata* effect of an unfavorable judgment by refiling the same claim based upon a different theory of recovery”).

*Res judicata* applies to subsequent claims when “a prior judgment has a concurrence of identity” with subsequent claims in four respects: (1) identity of subject matter; (2) identical causes of action; (3) identical persons or parties; and (4) identical “quality of persons for or against whom the claim is made.” *Rains v. State of Washington*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983). Harris’s claims in the 2010 Complaint share a “concurrence of identity” with the 2009 lawsuit that is currently on appeal.

### **3. Harris’s Claims Involve the Same Subject Matter.**

Harris’s 2010 claims involve the very same subject matter at issue in the 2009 Complaint. Her claims in both lawsuits arise from the end of her employment at PEMC in 2007 following a parental leave. In fact, Harris cut and pasted the “Background Facts” section from her First Complaint into her Second Complaint and then added a few minor details. A redline comparison of the Fact sections of the 2009 Complaint and the

2010 Complaint is included in the Clerk's Papers. CP 78-79. The factual basis for both lawsuits is the same.

Harris repeatedly requested leave to amend her 2009 Complaint to add a claim for wrongful termination in violation of public policy. Her briefs appealing dismissal of the 2009 Complaint expressly request leave to add that cause of action, and she is specifically appealing the trial court's decision to deny her leave to amend. CP 72. In her Opening Brief to the Court of Appeals with respect to her 2009 Complaint, Harris admits that "the additional causes of action she proposed **are only legal variations on the same facts.**" CP 73. Harris further argues in her 2009 appeal:

[i]t is clear that Plaintiff has, at the very least, stated a claim for wrongful discharge in violation of public policy, and should have been allowed to pursue that claim, as well as other common law causes of action.

CP 74. The subject matter of the two cases is identical.<sup>3</sup>

Finally, the claims in both lawsuits are also the same. In the 2009 lawsuit, Harris specifically argued that she relied on PEMC's policies to support her WLAD claim: "As shown by Harris' Declaration she relied on PEMC's policy in taking medical leave due to her pregnancy and in returning to Providence after her leave." CP 33. She asserts the identical

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<sup>3</sup> If this Court agrees with Harris with respect to her first lawsuit and allows her to amend her 2009 Complaint, she will have two identical lawsuits pending with identical claims.

argument in the Opening Brief of her appeal of the 2009 lawsuit. CP 57. The first argument in Harris's appellate brief is captioned: "The Medical Center Promised Not to Discriminate Against Plaintiff and is Therefore Estopped from Asserting Immunity From the Law Against Discrimination." CP 57.

In her 2010 Complaint, Harris makes the same claim based on the same legal theory that is pending appeal. In the 2010 Complaint, she alleges that PEMC failed to follow its own policy that promised her it would not discriminate against her and that she had relied on the policy. CP 5.

#### **4. Harris's Causes of Action are the Same.**

In determining the similarity between the causes of action, courts examine whether: (1) rights or interests in the prior judgment would be impaired or impeded; (2) the evidence in each case is substantially the same; (3) the two suits involve infringement of the same right; and (4) the two suits arise out of the "same transactional nucleus of facts." *Rains*, 100 Wn.2d at 663-64 (internal citations omitted). Here, Harris cannot reasonably contend that her new claims involve different evidence or arise out of a different "nucleus of facts." Harris cannot now repackage those claims with different labels in order to prevent this Court from applying *res judicata* in this case.

As discussed above, it is undisputed that Harris already raised the specific issues of gender discrimination and reliance on Providence's policies in her 2009 Complaint. CP 33. In addition, she requested leave to add her "new" causes of action in the 2009 Complaint, and she has asked the Court of Appeals to reverse the trial court decision on that issue. CP 72-74. Harris already represented to the Court that her new claims are "legal variations on the same facts." CP 73.

**5. The Parties are Identical.**

The parties in the 2010 lawsuit are precisely the same parties as in the 2009 lawsuit.

**6. *Res Judicata* Clearly Applies.**

*Res judicata* clearly applies to Harris's claims. Washington courts reject efforts by litigants to simply repackage their old claims or argue interrelated claims in a second lawsuit. *Marino Property Co. v. Port Comm'rs*, 97 Wn.2d 307, 311, 644 P.2d 1181 (1982) (issues that were "implicitly addressed" in prior decision barred second action on interrelated issue). *Sanwick v. Puget Sound Title Ins. Co.*, 70 Wn.2d 438, 441, 423 P.2d 624 (1967) ("This court from early years has dismissed a subsequent action on the basis that the relief sought could have and should have been determined in a prior action").

It is further undisputed that the trial court did not grant Harris's request to file a motion to amend her 2009 Complaint to add a claim of violation of public policy. CP 83:16-17. Courts routinely apply *res judicata* principles to prevent a litigant from bringing a second lawsuit after a court has refused to allow a plaintiff to amend his or her claims in the first action:

There was no bar to Mpoyo [plaintiff] presenting these claims in the original suit . . . and the district court in *Mpoyo I* denied leave to amend because such action was untimely two years after the initial complaint was filed. . . . **Denial of leave to amend in a prior action based on dilatoriness does not prevent application of *res judicata* in a subsequent action.**

*Mpoyo v. Litton Electro-Optical System*, 430 F.3d 985, 989 (9<sup>th</sup> Cir. 2005) (emphasis added); *see also King v. Hoover Group, Inc.*, 958 F.2d 219, 222-223 (8<sup>th</sup> Cir. 1991) (“It is well settled that denial of leave to amend constitutes *res judicata* on the merits of the claims which were the subject of the proposed amended pleading”). Harris admits that she requested to amend her 2009 Complaint and the request to amend is specifically under appeal in her 2009 lawsuit. CP 83. Harris's claims are clearly barred by *res judicata* and the trial court's ruling should be affirmed.

**C. Harris's Claims for Violation of Public Policy and Breach of Policy Fail.**

An independent ground for dismissing Harris's claims in her 2010 Complaint is that her "new claims" fail as a matter of law.

**1. Harris's Public Policy Claim Fails as a Matter of Law.**

It is well established that an employee at will can be terminated for any reason "absent a contract or narrow exception where the discharge violates a clear mandate of public policy." *Domingo v. Boeing Employees Credit Union*, 124 Wn.App. 71, 85, 98 P.3d 1222, 1229 (2004). The cases addressing the claim of wrongful discharge in violation of public policy generally involve situations where employees are fired for refusing to commit an illegal act, for performing a public duty, for exercising a legal right or privilege, or for engaging in whistleblowing activity. *See, e.g., Ellis v. City of Seattle*, 142 Wn.2d 450, 461, 13 P.3d 1065, 1071 (2000) (public policy implicated where employee was fired for refusing to bypass a fire alarm); *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 944-945, 913 P.2d 377, 383-384 (1996) (public policy violated when an employee who broke company rule to save a woman's life was discharged). It is clear from the 2010 Complaint that Harris's claim does not arise from any of these types of situations. CP 1-6.

The intentional tort of wrongful discharge in violation of public policy must be supported by allegations of: (1) a clear public policy; (2) that discouraging plaintiff's conduct would jeopardize the public policy; (3) public-policy linked conduct caused the dismissal; and (4) an absence of justification from the employer. *Korslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 178, 125 P.3d 119, 125 (2005); *Fosmo v. State Dept. of Personnel*, 114 Wn.App. 537, 540-541, 59 P.3d 105, 107 (2002). Washington courts have "interpreted the cause of action narrowly." *Reninger v. State Dept. of Corrections*, 134 Wn.2d 437, 446, 951 P.2d 782, 787 (1998). Harris's claim fails as a matter of law because she cannot establish the jeopardy element of a *prima facie* case.

Washington courts consistently hold that where, as here, other remedies are available to address the alleged public policy violation, the plaintiff cannot demonstrate the jeopardy element of the *prima facie* case. In those instances, the public policy claim is dismissed. *Korslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 182-183, 125 P.3d 119, 126-127 (2005); *Hubbard v. Spokane County*, 146 Wn.2d 699, 713, 50 P.3d 602, 609 (2002) (same); *Gardner*, 128 Wn.2d at 945, 913 P.2d at 384 (same). If federal remedies exist, courts will not extend the tort of wrongful discharge in violation of public policy. *See e.g. Korslund*, 156 Wn.2d at (remedies under federal Energy Reorganization Act sufficient to

protect public interest; plaintiff's claims of wrongful discharge in violation of public policy rejected); *Plemmons v. U.S. Bancorp*, 2006 WL 290557 at \*5-6 (W.D. Wash. February 7, 2006) (remedies under Federal Truth in Lending Act sufficient to protect public interest; plaintiff's claims of wrongful discharge in violation of public policy rejected).

The only public policy identified by Harris is wrongful gender discrimination. CP 4. Any public policy would be adequately protected by Title VII, which provides remedies for gender discrimination. Harris admits that she could have sought remedies for discrimination with the EEOC under federal law. CP 87:18-20. She further admits that she elected not to pursue remedies under Title VII for procedural reasons only. CP 87. Harris offers no argument or evidence that remedies under Title VII would be inadequate. *Id.* Harris has the burden to affirmatively establish that alternative remedies are inadequate. *Korlund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 182 -183, 125 P.3d 119, 126-127 (2005) ("plaintiff also must show that other means of promoting the public policy are inadequate"). The determination of whether remedies are available to protect the public interest has been considered a question of law by the Washington Supreme Court:

The question whether adequate alternative means for promoting the public policy exist may present a question of law, i.e., where

the inquiry is limited to examining existing laws to determine whether they provide adequate alternative means of promoting the public policy.

*Id.* at 182-183. The public policy claim was properly dismissed because federal remedies are already available to protect the public from discrimination based on gender and there is no evidence or argument to the contrary.

**2. No Breach of Promise to Comply with Policies Claim.**

Dismissal of Harris's breach of promise to comply with policies claim was properly dismissed because she fails to state a viable claim for breach of contract. Harris does not identify any specific policy that was allegedly violated. CP 4-5. Moreover, Harris does not identify who violated such a policy or how a violation occurred. CP 5. Harris merely makes conclusory allegations. Vague and conclusory allegations cannot sustain a claim for breach of promise of specific treatment. *See e.g., Hill v. J.C. Penny*, 70 Wn.App.225, 236, 852 P.2d 1111 (1993) (employee handbook that contained general rules, regulations and retail philosophy could not form the basis of an enforceable promise of specific treatment); *Drobny v. Boeing*, 80 Wn.App. 97, 101, 907 P.2d 299 (1995) ("If however, the [employment] manual terms as written amount only to

general policy statements, then the manual will not create an implied contract”).

**D. Harris Failed to Identify the Sanctions Order on Her Notice of Appeal.**

Harris failed to properly preserve the award of sanctions issue on appeal. Harris filed her Notice of Appeal on December 10, 2010 and only identified the trial court’s order of dismissal. CP 156. The trial court entered its sanctions award on December 14, 2010. CP 161-162. The appeal came before the sanctions order. Harris never appealed the December 14, 2010 order. CP 156. Harris has failed to identify the award of sanctions as the subject of her appeal. RAP 5.3 (a)(3) (“A notice of appeal must . . . designate the decision or part of the decision which the party wants reviewed”). The Court should not consider the trial court’s award of sanctions because it was not identified in Harris’s appeal.

**E. The Trial Court Did Not Abuse Its Discretion in Ordering Sanctions.**

The trial court did not abuse its discretion in ordering sanctions against Harris under Civil Rule 11 for filing a baseless lawsuit. The reasons for the trial court’s decision are properly set forth in the record in PEMC’s Motion to Dismiss for Failure to State a Claim Under Rule 12(b)(6) and 12(c) and Request for Sanctions, Reply in Support of Defendant’s Motion to Dismiss for Failure to State a Claim Under Rule

12(b)(6) and 12(c) and Request for Sanctions, and the trial court's order granting PEMC's motion. CP 16, 136 and 139.

Harris's 2010 Complaint is clearly duplicative of her first lawsuit, and the claims and issues in her 2010 Complaint are already under appeal in her first case before the Washington Court of Appeals. PEMC requested that Harris withdraw her second, duplicative lawsuit and notified her counsel that it would seek sanctions. CP 81. Further, Harris's 2010 Complaint also lacks any legal basis even in the absence of *res judicata* principles and PEMC also noted that issue in its letter to Harris's counsel. *Id.*

Trial courts have wide discretion to issue sanctions based on the failure to file a well-grounded complaint. *Rhinehart v. Seattle Times*, 59 Wn.App. 332, 341, 798 P.2d 1155 (1990) (trial court's discretion to issue sanctions under CR 11 upheld). Sanctions are appropriate if "(1) the action is not well grounded in fact; (2) it is not warranted by existing law; and (3) the attorney signing the pleading has failed to conduct reasonable inquiry into the factual or legal basis of the action." *Id.* The court must apply an objective standard to determine "whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified." *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). In *Rhinehart*, the trial court properly sanctioned the

plaintiff because “most of the issues in this case have been raised and rejected in at least two prior cases.” *Id.*

In her Opening Brief, Harris argues that she filed the 2010 Complaint because the statute of limitations was set to expire on August 21, 2010. Opening Brief at 3. This argument fails because Harris has already requested that she be allowed to amend her 2009 lawsuit in her pending appeal. CP 74. There is no justification for filing a duplicate lawsuit on the same facts and same issues as Harris’s 2009 lawsuit. Here, the trial court properly granted sanctions because the 2010 Complaint is clearly barred by *res judicata*.

**F. PEMC Requests Attorney Fees And Costs Under RAP 18.9 and CR 11.**

PEMC requests attorney fees and costs under RAP 18.9 and CR 11 because Harris filed a frivolous appeal. Under RAP 18.9(a), the Court of Appeals may order a party who files a frivolous appeal “to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.” “An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal.” *Lutz Tile, Inc. v. Krech*, 136 Wn.App. 899, 906, 151 P.3d 219

(2007); see also *Millers Cas. Ins. Co. of Texas v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983); *Holiday v. City of Moses Lake*, 157 Wn.App. 347, 356-357, 236 P.3d 981 (2010); *Rhinehart v. Seattle Times*, 51 Wn.App. 561, 581, 754 P.2d 1243 (1988).

The Court of Appeals may also award sanctions under CR 11, which is made applicable by RAP 18.7. *Id.* at 580-581, citing *Miller v. Badgley*, 51 Wn.App. 285, 753 P.2d 530 (1988). A party or an attorney or both may be assessed litigation expenses, including reasonable attorney fees, for a CR 11 violation on appeal. *Wilson v. Henkle*, 45 Wn.App. 162, 174, 724 P.2d 1069 (1986).

In *Rhinehart*, the Court of Appeals awarded sanctions against the appellant for bringing an appeal of the trial court's order dismissing the action as sanctions for failure to comply with a discovery order. The trial court based its decision to dismiss on the fact that the appellant's objections to complying with the discovery order were "frivolous and in bad faith because the issue has already been decided against them in this lawsuit and in another lawsuit." *Rhinehart*, 51 Wn.App. at 581.

Likewise, Harris' appeal is frivolous and sanctions under RAP 18.9 and CR 11 are appropriate.

**V. CONCLUSION**

For the reasons stated above, PEMC respectfully requests that the Court deny Harris's second appeal and uphold the trial court's dismissal of the case and award of sanctions.

RESPECTFULLY SUBMITTED this 25 day of April, 2011.

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Everett Medical Center

By



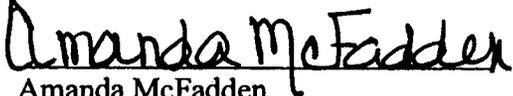
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**CERTIFICATE OF SERVICE**

I hereby certify that on this day I filed the foregoing document with the Clerk of the Court of Appeals and served a copy via electronic mail and hand delivery upon the following:

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DATED this 25<sup>th</sup> day of April, 2011.

  
Amanda McFadden

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