

71306-0

71306-0

NO. 71306-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MERGITU ARGO,

Appellant,

v.

PORT JOBS,

Respondent.

RESPONDENT PORT JOBS' BRIEF

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I. INTRODUCTION

Appellant Mergitu Argo's ("Argo") First Amended Complaint alleges that she is a single Ethiopian-American woman who was an "employee" of, and wrongfully terminated by, Respondent Port Jobs. The sole cause of action in Argo's complaint against Port Jobs is "Racial Discrimination and Wrongful Termination of Employment Pursuant to RCW 46.60 *et seq.*", i.e., Washington's Law Against Discrimination ("WLAD"). Washington law is clear that only an "employee" or "independent contractor" may bring alleged employment discrimination claims under WLAD. Argo was neither.

Argo presented three separate and contradicting theories to the trial court in an attempt to maintain her frivolous claims against Port Jobs. In response to Port Jobs' first motion for summary judgment, Argo claimed that she was an "employee" of Port Jobs and expressly denied "independent contractor" status. The trial court ruled that Argo was not an "employee" of Port Jobs as a matter of law. Argo has since conceded that she was an employee of a separate non-profit entity, Neighborhood House ("NH"), and not Port Jobs. Argo is not appealing the trial court's order that she was not an "employee" of Port Jobs and has no viable claims against Port Jobs under the WLAD as an alleged "employee."

Port Jobs next moved for total dismissal of Argo's WLAD claims on the grounds that Argo was not an "independent contractor." Argo admitted the same in her opposition to Port Jobs' first motion for summary judgment. However, in response to Port Jobs' second motion for summary judgment, Argo flip-flopped and argued that she was indeed an independent contractor of Port Jobs. Based upon the overwhelming and undisputed evidence, the trial court found that Argo was not an independent contractor, and dismissed Argo's WLAD claims against Port Jobs.

Argo's arguments in the trial court and in her appellate brief that she was under the control of others as to the manner and method of performing her job functions further undermines and defeats her claim that she was an independent contractor. Argo was not an "employee" of Port Jobs nor an independent contractor with standing to assert claims against Port Jobs under the WLAD. The trial court properly dismissed Argo's claims against Port Jobs.

Undeterred, Argo filed a motion for reconsideration, impermissibly asserting for the first time that she was a "third-party beneficiary" to the contract entered into by and between Port Jobs and Neighborhood House and, as such, had standing to pursue third-party beneficiary claims under the WLAD. Argo never pled or claimed third-party beneficiary status

prior the court's dismissal of Argo's claims and asserted her third-party beneficiary argument for the first time in her motion for reconsideration. The trial court, pursuant to CR 59 and established case law, properly exercised its discretion and denied Argo's motion for reconsideration.

There was no employment relationship between Argo and Port Jobs. It is undisputed that Neighborhood House, not Port Jobs, was Argo's employer. By her own admissions, Argo was not an independent contractor. Argo does not have standing to pursue her alleged racial discrimination claims against Port Jobs under the WLAD. The trial court's dismissal of Argo's claims against Port Jobs should be affirmed.

II. STATEMENT OF CASE

A. UNDERLYING FACTS

Port Jobs is a non-profit organization whose goal is to ready typically underrepresented workers for jobs in the Port of Seattle economy, including SeaTac Airport. (CP 310-321.) Port Jobs partnered and contracted with other entities, including another, larger nonprofit, Neighborhood House ("NH"), to further its goal of readying typically underrepresented workers for jobs in the Port of Seattle economy. (CP 310-321.) Contrary to her complaint and initial arguments, Appellant Argo now correctly admits that Neighborhood House, not Port Jobs, was her employer. (CP 244.) It is undisputed that Neighborhood House was,

and is, Argo's employer. NH was responsible for Argo's employment, including the hiring, evaluation, compensation, and ultimate termination of Argo's employment [*i.e.*, layoff] with NH. (CP 310-313.)

1. Contract between Port Jobs and Neighborhood House

Port Jobs originally entered into a one-year Professional Service Agreement with Neighborhood House in 2006. (CP 310-313.) Subsequently, Port Jobs and NH entered into another one-year Professional Services Agreement, effective January 1, 2011 through December 31, 2011 ("Agreement"). (CP 306-321.) Per the terms of the Agreement, Port Jobs agreed to pay NH for the "scope of work" provided by NH to Port Jobs, which included "Employment Case Management for Jobseekers" for the 1/1/2011 to 12/31/2011 contract term. (CP 311, 320.) Attachment "A" to the Agreement described NH's scope of work/services as follows:

Employment Case Management for Jobseekers

Employ, train and support 1 FTE employment case manager through contract and leveraged resources. This case manager will be housed at Airport Jobs.

* * * * *

(CP 320.)

Section X of Agreement provides:

The relationship of Contractor [NH] to Port Jobs shall be that of an independent contractor; and the Contractor and

its officers, employees, subcontractors and agents shall not be considered employees, agents, or legal representative of Port Jobs for any purpose whatsoever. Port Jobs is not granted any express or implied right or authority to create or assume any obligation or responsibility on behalf of, or in the name of Contractor, or to bind Contractor in any manner or thing whatsoever.

(CP 319.)

The Agreement is between Port Jobs and Neighborhood House, not Port Jobs and Argo. (CP 315-321.) According to the express terms of the Agreement, NH was an independent contractor, not Argo. (*Id.*) Argo was NH's employee. Per the Agreement, NH out-stationed its employee, Argo, at the Airport Jobs' office for a portion of the time during her employment with NH. (CP 310-313.) This is consistent with the position NH posted in 2006 and for which Argo was hired by NH in 2006. Argo was also stationed during the same time at NH's Birch Creek Office and Greenbridge-Wiley Center. (*Id.*) Port Jobs had no involvement/relationship with NH's Birch Creek Office and Greenbridge-Wiley Center.

(CP 311-312.)

The Agreement expressly provides that NH was responsible for employing, training, and supporting Argo, and that Port Jobs did not have any authority over NH's employees, and that NH's employees [*i.e.*, Argo] shall not be considered employees, agents, or legal representatives of Port Jobs for any purpose whatsoever.

2. **NH Hired Argo as an Employee of Neighborhood House**

In early 2006, NH sought applications for the position of “Neighborhood House Employment Specialist.” (CP 328-330.) The position was in NH’s “Employment and Adult Education Department” and the successful applicant would report to NH’s Employment and Adult Education Manager. (*Id.*) NH described the scope of employment as follows:

Scope

NH is expanding its capacity across its employment-based initiative located at Airport Jobs (AJ). This Employment Specialist position will be responsible for providing community outreach, assessing client eligibility and offering employment and retention services across this program. The AJ program entails working with individuals seeking employment, training and wage progression opportunity at Airport Jobs. The Employment Specialist will be responsible for connecting with recruiting participants, providing comprehensive employment-focused case management, helping job seekers develop job readiness skills and providing placement and retention assistance to customers. (Emphasis added).

Neighborhood House is looking for one highly skilled, highly motivated case manager to join this dynamic initiative. Because of the needs of the underserved customers, **Neighborhood House would like to hire an individual who is bilingual**, preferably English/Spanish or English/South East Asian languages, including Vietnamese, or English/East African languages, including Somali. This position will be located at the Airport Jobs office in Sea Tac Airport. (Emphasis added).

(CP 328.)

NH specifically sought an employee to work for NH at Airport Jobs located at the Sea-Tac Airport. The NH job posting listed the hours of work, compensation, and benefits that NH would provide to the successful candidate. (CP 330.) This was a NH job posting for a NH employment position. (CP 328-330.) The job description in NH's job posting is consistent with the "scope of work" NH provided to Port Jobs pursuant to the Agreement between NH and Port Jobs. (CP 311, 328-330.) This was not a job posting by Port Jobs or any solicitation for a new employee or independent contractor. (CP 328-330.)

On or about March 17, 2006, Argo submitted an Application for Employment to NH for the position of Employment Specialist. (CP 332-335.) The application was for employment with NH, not Port Jobs. (*Id.*) NH checked Argo's references. (CP 337-338.) NH hired Argo and filled out a "Neighborhood House – New Hire (Employee)" form documenting the hiring of Argo in the position of Employment Case Manager II in response to the advertised position of "Employment Specialist." (CP 340.) The form was completed by Argo's ultimate supervisor, Amy Kickliter. (*Id.*) Ms. Kickliter's title with NH was Senior Manager, Employment & Adult Education.

On or about March 29, 2006, NH sent Argo a letter extending an offer of employment "as a regular employee of Neighborhood House" and

confirming the terms of Argo's employment with NH, including Argo's position, hours, salary, major benefits (medical, dental, and life insurance), 403(b) retirement account, vacation, sick leave, and termination. (CP 431-432.) NH's letter states that Amy Kickliter [NH] would determine Argo's specific hours of employment. (*Id.*)

Argo filled out a NH "New Employee Information Data Sheet" and NH completed a NH "Employee Orientation Checklist." (CP 342-343, 343-346.) Argo was provided a copy of NH's Employment Manual addressing employment-related issues and stating in part:

Your employment at Neighborhood House is "at-will" which means either you or Neighborhood House may terminate the employment relationship at any time, without notice and for any reason. No agency representative, other than the Executive Director [of NH] has the authority to make an agreement contrary to the preceding at will statement and such agreement must be in writing. (Emphasis added).

(CP 348-350.)

NH compensated Argo for her employment, including salary and benefits, and made decisions in response to Argo's requests for salary increases. (CP 352.) Argo was enrolled in NH's Long-Term Disability Insurance coverage [Prudential Financial], dental plan [Delta Dental], health insurance [Group Health], and NH's life and disability insurance program [Provident Life and Accident Insurance Company]. (CP 354-

360.) Argo admits that she did not receive any wage, health, pension, or other employment benefits from Port Jobs, and that she received wages, salary, and other compensatory payments and benefits solely from NH for the 2006-2012 time period. (CP 362-371) Argo further admits that at no time did Port Jobs provide her with an IRS Form W-4 or make arrangements for Port Jobs to withhold any amount of income or employment taxes. (*Id.*) Argo never received an IRS Form W-2 from Port Jobs. (*Id.*)

NH paid Argo and monitored Argo's accrued vacation time. The unrefuted documentary evidence presented to the trial court and included as a part of the appellate record firmly establishes that Argo requested vacation time and leave from her supervisor Amy Kickliter [NH] (CP 476-505); that NH monitored Argo's time-keeping; that Argo submitted her timesheets to NH; that Ms. Kickliter [NH] monitored Argo's attendance (CP 507-513); and that NH provided the tools and equipment necessary for Argo to perform her work, *i.e.*, laptop computer and cell phone. (CP 519-525.) Argo did not purchase her own tools and equipment. (*Id.*)

Argo received her "Performance Appraisals" from NH. (CP 379-390, 515-517.) Argo's Performance Appraisals are on an NH form and were signed by Argo as an "employee" of NH, as well as Argo's supervisor at NH [Amy Kickliter] and the Director of NH. (*Id.*) The

Performance Appraisals are part of NH's personnel file for Argo. (*Id.*)
Port Jobs does not have a personnel or employment file for Argo.
(CP 311.)

3. Neighborhood House Terminated Argo's Employment

As a nonprofit, Port Jobs funded its annual Agreements with NH through grant money. (CP 311-313.) Section IV.E. of the Agreement between NH and Port Jobs provides:

- E. Port Jobs may terminate this agreement [with NH] without recourse by the Contractor [NH], in the event that Port Jobs or outside funding agencies discontinue funding. In the event of such termination, Contractor shall receive payment for those services provided up to the date of the notice of termination, if hand delivered, or three days after, if notice is mailed.

(CP 316.)

The grant money supporting the Agreement between NH and Port Jobs was discontinued. (CP 312.) As such, Port Jobs was forced to end its long-standing contractual relationship with NH. (*Id.*) Based upon the termination of the Agreement between NH and Port Jobs, Argo stopped providing services on behalf of NH at the Sea-Tac airport at the end of February, 2012. (*Id.*) Argo continued her employment with NH for another month until the end of March, 2013. (CP 410-413.) There was no change/reduction in Argo's salary paid by NH or benefits. (*Id.*)

On or about March 27, 2012, NH's Internal HR Consultant, Claudia Malone, sent Argo a letter informing Argo of the "exit process" as a result of Argo's separation [*i.e.*, termination/layoff] from NH effective March 30, 2012. (CP 415-419.) The letter enclosed a "Reference Release Form," "Group Life Conversion Form," "Total Distribution Form," and an explanation of COBRA benefits. (*Id.*) The letter advised Argo that her final compensation and accrued vacation [if any] would be paid out by NH on the April 10, 2012 NH payroll, assuming that Argo submitted her final timesheet to her supervisor Amy Kickliter prior to her last day with NH. (*Id.*)

NH filled out a form titled "Neighborhood House – Separation (Employee and Others)" identifying Argo as an "employee" and indicating the "Separation Reason" as "Lay Off." (CP 421.) The form was completed by Amy Kickliter [Argo's supervisor]. (*Id.*) NH's "Personnel Action Log" further indicates that Argo was laid-off [from NH] effective March 30, 2012. (CP 423.) NH terminated Argo's employment.

4. Argo Held Herself Out to the Public as an NH Employee

Argo held herself out to the public as a NH employee and not as an employee of Port Jobs or an independent contractor. (CP 392-406, 408, 434-437.). The following websites include Argo's bio identifying Argo an NH employee:

▪ Seattle Women's Commission:

For the past five years Mergitu has worked for Neighborhood House as an employment specialist....
(CP 397.)

▪ Open Doors for Multicultural Families:

Mergitu Argo is from Ethiopia and is an Oromo. She has been living in the Northwest for 17 years. She currently works for Neighborhood House as an Employment Specialist. (CP 404.)

On or about January 24, 2012, prior to NH terminating Argo's employment, Argo submitted a NH "Internal Job Application" for the position of "Housing and Employment Coordinator." (CP 408.) Argo identified herself as an employee of NH as an "Employment Specialist" in NH's "Employment" Department. (*Id.*) Argo stated that she was hired by NH on April 10, 2006 and identified Amy Kickliter as her supervisor. (*Id.*)

5. Neighborhood House Rehired Argo as an Employee

Subsequent to terminating Argo's employment [effective March 30, 2012], NH sought applicants for the position of Employment Case Manager II. (CP 425-427.) Argo applied for the position and sent a cover letter and her resume to NH. (CP 434-437.) Argo's resume expressly states that she was employed by NH from 04/2006 to 03/2012. (CP 436-437.) There is no reference to alleged employment or independent contractor status with Port Jobs. (*Id.*) Argo was rehired by

NH with a start date of February 22, 2013. (CP 429.) According to the job posting, Argo will be stationed at NH throughout Seattle and King County. (*Id.*) Argo's current NH employee ID number [1438] is the same now as it was prior to NH terminating her original employment with NH effective March 30, 2012. (CP 425.)

B. PROCEEDINGS BELOW

On December 31, 2012, Argo filed her First Amended Complaint naming Port Jobs as Defendant and asserting a single cause of action for alleged Racial Discrimination and Wrongful Termination under Washington's Law Against Discrimination ("WLAD"), RCW 49.60 *et seq.* (CP 1-5.) Argo does not allege third-party beneficiary status. (*Id.*)

On April 22, 2013, Port Jobs filed its motion for summary judgment dismissal of Argo's WLAD claims, asserting that Port Jobs was not Argo's employer, and thus there was no employment relationship supporting Argo's WLAD claims against Port Jobs. (CP 290-305.) On May 10, 2013, Argo filed her opposition brief, arguing she was an "employee" of Port Jobs and specifically denying independent contractor status. (CP 438-450.) On July 12, 2013, the trial court granted Port Jobs' motion for summary judgment in part ruling that Argo was not an "employee" of Port Jobs as a matter of law. (CP 6-7.) Argo is not appealing the trial court's July 12, 2013 order.

On September 20, 2013, Port Jobs filed its second motion for summary judgment dismissal of Argo's claims on the grounds that Argo was not an independent contractor of Port Jobs with standing to pursue claims against Port Jobs under the WLAD. (CP 8-32.) Argo filed her opposition on October 14, 2013 arguing, in contradiction to her prior position, that she was an independent contractor. (CP 185-203). On October 29, 2013, the trial court granted Port Jobs' dismissal motion, finding Argo was not an independent contractor. (CP 240-242).

On November 8, 2013, Argo filed her motion for reconsideration of the trial court's October 29, 2013 order dismissing her WLAD claims against Port Jobs. (CP 243-252). Argo admitted that she was an "employee" of NH and not Port Jobs. (*Id.*) Argo argued for the first time in her reconsideration motion that she was a third-party beneficiary to the Agreement entered into between NH and Port Jobs. (*Id.*) This was Argo's third separate theory of liability presented to the trial court. At no time prior to her motion for reconsideration did Argo plead or otherwise allege third-party beneficiary status. (CP 285-289, CP 1-5, CP 438-450, CP 185-203.) On December 3, 2013, the trial court denied Argo's motion for reconsideration on the grounds [amongst others] that Argo's third-party beneficiary theory was not previously pled or presented to the court and

that Argo failed to offer any explanation for her failure to do so. (CP 273-275).

Below is the chronology of Argo’s different and contradicting legal theories presented to the trial court:

<i>Date</i>	<i>Pleading</i>	<i>Argo’s Argument</i>
5/10/13	Argo’s opposition re: Port Jobs’ first motion for summary judgment.	Ms. Argo argued that she was an “employee” of Port Jobs. <u>Ms. Argo specifically denied that she was an independent contractor of Port Jobs.</u> Ms. Argo did <u>not</u> argue or assert third-party beneficiary status. (CP 438-450).
10/14/13	Argo’s opposition re: Port Jobs’ second motion for summary judgment.	Ms. Argo reversed her position and argued that she <u>was</u> an “ <u>independent contractor</u> ” of Port Jobs. Ms. Argo did <u>not</u> argue or assert third-party beneficiary status. (CP 185-203).
11/18/13	Argo’s motion for reconsideration re: court order dismissing Argo’s claims.	Ms. Argo argued for the first time that she was a <u>third-party beneficiary</u> of the contract between NH and Port Jobs. (CP 243-252).

III. ARGUMENT

A. STANDARD OF REVIEW

1. Summary Judgment Orders

Review of summary judgment orders is *de novo*. *Hogan v. Sacred Heart Medical Center*, 101 Wn. App. 43, 2 P.3d 968 (2000). On review, the appellate court engages in the same inquiry as the trial court. *Clay v. Portik*, 84 Wn. App. 553, 557, 929 P.2d 1132 (1997).

2. Motion for Reconsideration

Motions for reconsideration are addressed to the sound discretion of the trial court and will not be reversed absent a clear or manifest abuse of discretion. *State v. Scott*, 92 Wn.2d 209, 212, 595 P.2d 549 (1979). A trial court abuses discretion when its decision is based on untenable grounds or reasons. *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). An abuse of discretion exists only if no reasonable prudent person would have taken the view adopted by the trial court. *State v. Henderson*, 26 Wn. App. 187, 190, 611 P.2d 136, *review denied*, 94 Wn.2d 1008 (1980).

B. THE TRIAL COURT PROPERLY DISMISSED ARGO'S CLAIMS ON SUMMARY JUDGMENT

This matter arises out of the summary judgment dismissal of Argo's single cause of action against Port Jobs for alleged "Racial Discrimination and Wrongful Termination of Employment Pursuant to RCW 49.60 *et seq.* [WLAD]." Washington law only grants "employees" and "independent contractors" standing to pursue employment discrimination claims under WLAD. The trial court ruled as a matter of law that Argo was not an "employee" of Port Jobs with standing to pursue WLAD claims against Port Jobs. Despite initial opposition, Argo now concedes that she was an employee of NH [not Port Jobs] and is not

appealing the trial court's ruling that Argo was not an employee of Port Jobs.

Despite acknowledging that she was an "employee" of Neighborhood House [*i.e.*, under control of her employer, Neighborhood House, as to the manner and methods of her employment], Argo is appealing the trial court's summary judgment dismissal order based upon the finding the Argo was not an independent contractor. Summary judgment is properly granted where the pleadings, discovery, and admission demonstrate that there is no genuine issue of material fact, all reasonable persons could reach only one conclusion, and that the moving party is entitled to a judgment as a matter of law. CR 56(c); *Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 136, 566 P.2d 972 (1977). A material fact is one upon which the outcome of the litigation depends. *Id.* at 136.

The non-moving party may not oppose summary judgment by relying on speculation or argumentative assertions that unresolved factual issues remain or have their affidavits simply considered at face value. *Island Air, Inc. v. LaBar* at 136. The non-moving party must set forth *specific facts* rebutting moving party's contentions. *Haubry v. Snow*, 106 Wn. App. 666, 670, 31 P.3d 1186 (2001). Bare assertions that a material issue exists, when unsupported by evidence in the record supporting the claim, are insufficient to defeat a summary judgment motion. *Ellis v. City*

of Seattle, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). Moreover, where a single conclusion is drawn from the facts, it becomes a question of law as to whether one is an independent contractor. *Hollingberry v. Dunn*, 68 Wn.2d 75, 80, 411 P.2d 431 (1966).

Here, the determinative issue is whether Argo was an independent contractor. As discussed below, the voluminous undisputed and unrefuted documentary evidence, coupled with Argo's own pleadings, statements and admissions, unquestionably supports the trial court's finding that Argo was not an independent contractor. The trial court correctly dismissed Argo's WLAD claims against Port Jobs after finding that Argo was not an "employee" of Port Jobs or an "independent contractor".

C. THE TRIAL COURT PROPERLY DETERMINED THAT ARGO WAS NOT AN INDEPENDENT CONTRACTOR

1. Argo Was Not an "Independent Contractor"

a. Argo Did Not Control the "Manner, Method and/or Means" of her Employment

An independent contractor is one who contracts with another to render services in the course of an independent occupation; such person represents the will of her employer only as to the result of the work, and not the manner and means by which it is accomplished. *Cassidy v. Peters*, 50 Wn.2d 115, 119, 309 P.2d 767 (1957); *AFOA v. Port of Seattle*, 176 Wn.2d 406, 296 P.3d 800 (2013). An independent contractor is one who

contracts to perform a certain service for another, according to her own manner or method, free from control and direction of her employer in all matters connected with the performance of the service, except as to the result of the work. *Leech v. Sultan Ry. & Timber Co.*, 161 Wash. 426, 428, 297 P. 203 (1931).

The indispensable elements to an independent contractor is that she must have (1) contracted to do a specified scope of work and (2) have the right to control the manner and method of doing it. *Leech* at 431. An independent contractor is one who is independent of her employer in doing the work and may work when and how she prefers. *Leech* at 432. The following statement in Argo's underlying Declaration defeats her claim of independent contractor status:¹

¶6. ... The supervisors had the final say over the type of work I was doing, the project I performed, the manner in which I undertook to complete the project, and all other aspects of my work as an employment specialist.

(CP 457.) (Emphasis added.)

Here, it is undisputed that there was no contract between Argo and Port Jobs and that Argo, by her own admission, was not free to accomplish her work pursuant her own terms. Argo's performance of work was under the direction and supervision of her employer, NH. In addition to her

¹ Port Jobs expressly denies that it was Argo's supervisor.

aforementioned arguments denying independent contractors status, Argo alleges in her Appellate Brief that “these supervisors had the final say of the type of work she did, the projects she performed, the manner she undertook to complete the projects, and all other aspects of her work as an independent contractor”; “had final say in her schedule and work, task, and projects”; and that Port Jobs “controlled the manner and means of her work for six years.” (See Appellant’s Brief, p. 4-5 and 17.) Port Jobs disputes Argo’s allegation that Port Jobs controlled Argo. However, Argo’s own statements demonstrate she was not an independent contractor with the right to control the manner and method of her work and defeats her argument that she was an independent contractor.

b. Analysis of WAC 162-16-230’s Factors Support the Trial Court’s Finding That Argo Was Not an Independent Contractor.

WAC 162-16-230 sets forth the factors to be considered in determining whether a person is an employee or an independent contractor for purposes of claims under the WLAD, *i.e.*, RCW 49.60.180 and RCW 49.60.030. It is telling that Argo does not address WAC 162-16-230’s factors in her Appellate Brief. A review of the applicable factors set forth in WAC 162-16-230(3)(a)-(m) support the trial court’s finding that Argo was not an independent contractor:

(a) Control of work. An employment relationship probably exists where the purchaser of work has the right to control and direct the work of the worker, not only as to the result to be achieved, but also as to the details by which the result is achieved.

WAC 162-16-230(3)(a). NH controlled Argo's work per its Agreement with Port Jobs. Argo's contract of employment was with NH. Argo was not rendering her services in the course of an independent occupation. Argo's supervisor was Amy Kickliter at NH. Argo submitted her timesheets to Amy Kickliter at NH and Ms. Kickliter monitored Argo's attendance and schedule. (CP 507-513.) Argo herself alleges that she was not free to choose or control the manner, method, and/or means of performing her job functions.

(b) Tools and place of work. Does the purchaser of the work or the worker furnish the equipment used and the place of work? Generally, the purchaser of work furnishes tools and equipment for employees while independent contractors furnish their own. Some employees furnish some of their own tools, however.

WAC 162-16-230(3)(b). NH provided the tools and equipment necessary for Argo to perform her work, *i.e.*, laptop computer and cell phone. Argo did not purchase her own tools and equipment. (CP 519-525.)

(c) Skill level involved. The skill required in the particular occupation. Skilled workers are typically less closely supervised than unskilled workers, but they are employees if indicia of employment other than close supervision are present.

WAC 162-16-230(3)(c). Here, Argo was supervised by Amy Kickliter at NH. Moreover, Argo herself alleges that she was not free to choose or control the manner, method, and/or means of performing her job functions.

(d) Type of work involved. The kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision....

WAC 162-16-230(3)(d). Here, Argo's work was performed under the direction of a supervisor. Argo was supervised by Amy Kickliter at NH. Again, Argo herself alleges that she was not free to choose or control the manner, method, and/or means of performing her job functions.

(e) Duration of work. The length of time during which the person has worked or the length of time that the job will last. Independent contractors typically are hired for a job of relatively short duration, but there are instances of independent contracts for an indefinite period - for example, contracts for janitorial service.

WAC 162-16-230(3)(e). Argo was employed by NH from 2006 to 2012 and, in fact, was subsequently rehired and is a current employee of NH.

(f) Method of payment. The method of payment, whether by time or by the job. Independent contractors are usually paid by the job but are sometimes paid by time. Employees are usually paid by time but are sometimes paid by the job.

WAC 162-16-230(3)(f). NH compensated Argo for her employment, including salary and benefits, and made decisions in response to Argo's

requests for increases in salary. (CP 105, 107-182, 352, 431-432.) Argo admits that she received wages, salary, and other compensatory payments and benefits solely from NH for the 2006-2012 time period. (CP 362-371.)

(g) Ending the work relationship. Whether the work relationship is terminable by one party or both parties, with or without notice and explanation. An employee is usually free to quit and is usually subject to discharge or layoff without breach of the employment contract. An independent contractor usually has more fixed obligations.

WAC 162-16-230(3)(g). Argo's employment with NH was at-will, *i.e.*, either party was free to terminate the employment relationship. (CP 348-350.) NH terminated Argo's employment. Moreover, Argo was presumably free to quit her position at NH at any time. As discussed, on or about January 24, 2012, prior to the end of the Port Jobs-NH Agreement and NH's terminating Argo's employment, Argo submitted an NH "Internal Job Application" for the position of "Housing and Employment Coordinator." (CP 408.)

(h) Leave. Whether annual leave is afforded. Leave with pay is almost exclusively accorded to employees.

WAC 162-16-230(3)(h). NH provided Argo vacation time and leave and monitored Argo's accrued vacation time. Argo requested vacation time and leave from Amy Kickliter at NH. (CP 482-505.)

(i) Integration of the work in the purchaser's operations. Whether the work is an integral part of the

business of the purchaser of it. Usually, employees rather than independent contractors do the regular work of a business.

WAC 162-16-230(3)(i). Argo's work was an integral part of the services provided by NH to Port Jobs pursuant to the Agreement for Professional Services between Port Jobs and NH.

*(j) **Accrual of benefits.** Whether the worker accumulates retirement benefits. Retirement benefits are almost exclusively accorded to employees.*

WAC 162-16-230(3)(j). Argo accrued 403(b) retirement benefits with NH. (CP 107-179, 415, 431-432.) Argo accrued no benefits from Port Jobs.

*(k) **Taxation.** Whether with respect to the worker the purchaser of work pays taxes levied on employers, such as the Social Security tax, unemployment compensation tax, and worker's compensation tax, or withholds federal income tax. The tax laws do not have the same purposes as the law against discrimination, so employee status for tax purposes is helpful but not controlling.*

WAC 162-16-230(3)(k). Argo's Form W-4 identifies NH as Argo's employer. (CP 105.) Argo signed the Form W-4 as an "employee" of NH. (*Id.*) NH paid and withheld taxes on behalf of Argo, including federal income tax, social security, and Medicare. (CP 107-182, 410-413.) Argo has admitted that at no time did Port Jobs provide her with an IRS Form W-4 or make arrangements for Port Jobs to withhold any amount of income or employment taxes. (CP 366.) Argo never received an IRS

Form W-2 from Port Jobs. (CP 367.) There is no evidence of Argo paying self-employment taxes.

*(l) **Salary or income.** Whether the worker treats income from the work as salary or as business income. See subsection (3)(k) of this section.*

WAC 162-16-230(3)(l). Argo was paid a salary by NH and there is no evidence that Argo treated her income from NH as business income. (CP 107-182.) There is no evidence of Argo paying self-employment taxes as an independent contractor.

*(m) **Employer records.** Whether with respect to the worker the purchaser of work keeps and transmits records and reports required of employers, such as those required under the worker's compensation act. Worker's compensation coverage, like tax coverage, is helpful but not conclusive.*

WAC 162-16-230(3)(m). NH maintained employer records/personnel file for Argo. Port Jobs did not maintain an employee or personnel file for Argo. (CP 311.)

Where a single conclusion can be drawn from the facts, it becomes a question of law as to whether one is an independent contractor. *Hollingberry v. Dunn*, 68 Wn.2d, 75, 80, 411 P.2d 431 (1966). Here, analysis of the above factors unequivocally demonstrates that Argo was an employee of NH and not an independent contractor. Argo cannot be an employee of NH and at the same time an independent contractor performing the same scope of work her employer, NH, contracted to

provide to Port Jobs pursuant to the Agreement for Professional Services. The contractual relationship was between Port Jobs and NH. Argo cannot meet the burden of proving that she was an independent contractor of Port Jobs and the trial court's dismissal of Argo's claims against Port Jobs for alleged violations of RCW 49.60 *et. seq.* should be affirmed.

2. **The NH-Port Jobs Agreement for Professional Services Did Not Confer Argo Independent Contractor Status**

Perhaps recognizing that her own statements, case law, and analysis of WAC 162-16-230's factors clearly establish that that Argo was not an independent contractor, Argo attempts to distort the language in the Agreement for Professional Services between Port Jobs and NH [not Argo] by arguing without any legal authority that, as an employee of NH, Argo steps into the shoes of NH and is an independent contractor to Port Jobs. Argo's argument is surprising considering that she stated in opposition to Port Jobs' motion for summary judgment that the "contract terms Defendant relies upon have little to no bearing on Ms. Argo's employment status." (CP 447.)

There is no basis in the Agreement, fact, or law for Argo's argument. Argo cites no legal authority in support of her argument. Section X of the Agreement provides:

The relationship of Contractor [NH] to Port Jobs shall be that of an independent contractor; and the Contractor

and its ... employees ... shall not be considered employees, agents, or legal representative of Port Jobs for any purpose whatsoever. ...

(CP 319.) (Emphasis added.)

The Court cannot revise or create a contract for the parties which they did not make themselves. *Farmers Insurance Company of Washington v. Miller*, 87 Wn.2d 70, 73, 549 P.2d 9, 11 (1976).

The contract is between Port Jobs and NH. (CP 315-321.) Argo admits she was [and is] an employee of NH, not Port Jobs. The contract specifically states that the NH [not Argo] is an independent contractor and that Contractor's [NH] employees [Argo] "shall not be considered employees, agents, or legal representative of Port Jobs for any purpose whatsoever." Per the contract between NH and Port Jobs, NH out-stationed its employee [Argo] at Port Jobs' Airport office for a portion of the time during her employment with NH. NH, not Argo, contracted to provide the services under the Agreement. Argo is not a party to the Agreement.

Argo cannot be an employee of NH and at the same time an independent contractor performing the same scope of work her employer, NH, contracted to provide services to Port Jobs pursuant to the Agreement. The trial court's ruling should be affirmed.

3. Argo Previously Denied Independent Contractor Status

Argo's argument that she was an independent contractor of Port Jobs is belied by her opposition to Port Jobs' April 22, 2013 motion for summary judgment in which she expressly argued that she was not an independent contractor of Port Jobs. (CP 438-450.) Argo went as far as to analyze the factors set forth in WAC 162-16-230 in support of her argument that she was not an independent contractor. (*Id.*) Argo should be judicially estopped from arguing that she was an independent contractor. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (judicial estoppel precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking clearly inconsistent positions); *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012) (one of the primary purposes behind the doctrine is preservation of respect for judicial proceedings.) Port Jobs [and the trial court] agrees with Argo's original position that she was not an independent contractor to Port Jobs.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING ARGO'S MOTION FOR RECONSIDERATION

Argo argues that the trial court erred in denying her motion for reconsideration of the trial court's October 29, 2013 order dismissing Argo's WLAD claims against Port Jobs. As discussed below, the trial court did not abuse its discretion in denying Argo's motion for

reconsideration for impermissibly presenting new legal theories for the first time. The trial court's order denying Argo's motion for reconsideration should be affirmed.

1. **Argo Was Prohibited from Raising Her "Third-Party Beneficiary" Theory for the First Time in Her Motion for Reconsideration**

After failing to establish that Argo was an employee of Port Jobs or an independent contractor, and dismissal of Argo's WLAD claims against Port Jobs, Argo filed a motion for reconsideration arguing for the first time that she was a "third-party beneficiary" to the Agreement entered into between Port Jobs and NH with standing to pursue a WLAD claim. (CP 243-252.)

It is undisputed that Argo at no time prior to her reconsideration motion, either in her complaint(s), pleadings, discovery, opposition briefing, or oral argument, asserted that she was a third-party beneficiary to the Agreement entered into between Port Jobs and NH. (CP 285-289, CP 1-5, CP 438-450, CP 185-203, 57-83.) The legal claim is completely absent from Argo's complaint. (CP 285-289, CP 1-5.)

Argo never pled or claimed third-party beneficiary status prior the court's dismissal of Argo's claims, and asserted her third-party beneficiary argument for the first time in her motion for reconsideration. Argo's presentation of a completely new legal theory is prohibited by CR 59.

CR 59 does not permit Argo to propose new theories of the case in a reconsideration motion that could have been raised before entry of an adverse decision. *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). In *JDFJ Corp. v. International Raceway, Inc.*, the Court of Appeals, Division I, held:

“Civil Rule 59 does not permit Argo, finding a judgment unsatisfactory, to suddenly propose a new theory of the case. JDFJ’s motion for reconsideration was in essence an inadequate and untimely attempt to amend its complaint in general, violating equitable rules of estoppel, ...” We refuse to permit such a perversion of the rules.”

JDFJ Corp. v. International Raceway, Inc., 97 Wn. App. 1, 7, 970 P.2d 343 (1999) (emphasis added).

Motions for reconsideration are addressed to the sound discretion of the trial court and will not be reversed absent a clear or manifest abuse of discretion. *State v. Scott*, 92 Wn.2d 209, 212, 595 P.2d 549 (1979). A trial court abuses discretion when its decision is based on untenable grounds or reasons. *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). Here, the trial court did not abuse its discretion in denying Argo’s motion for reconsideration based upon Argo’s third-party beneficiary theory raised for the first time in her reconsideration motion.

CR 59 and Washington case law authorized and supports the trial court's order denying Argo's motion for reconsideration on the grounds [amongst others] that Argo's third-party beneficiary theory was never previously pled or presented to the court and that Argo failed to offer any explanation for her failure to do so. (CP 273-275). The trial court did not abuse its discretion in denying Argo's motion for reconsideration in compliance with Washington's civil rules and case law. Thus, the trial court's order should be affirmed on this basis alone without further inquiry. Port Jobs will nonetheless respond to Argo's additional impermissible third-party beneficiary arguments.

2. **Argo Was Not a Third-Party Beneficiary to the Agreement between NH and Port Jobs**

Argo ignores the clear and unambiguous contract language in claiming that she was an alleged third-party beneficiary to the Agreement entered into between NH and Port Jobs only. Section X of the Agreement states:

*The relationship of Contractor [Neighborhood House] to Port Jobs shall be that of an independent contractor; **and the Contractor and its ... employees ... shall not be considered employees, agents, or legal representative of Port Jobs for any purpose whatsoever. Port Jobs is not granted any express or implied right or authority to create or assume any obligation or responsibility on behalf of, or in the name of Contractor, or to bind Contractor in any manner or thing whatsoever.***

(CP 319.) (Emphasis added).

The only parties to the Agreement are NH and Port Jobs. Argo admits that she is an “employee” of NH. Argo, as an employee of NH, is not a party to the contract. Argo is also not a third-party beneficiary to the contract between NH and Port Jobs. The creation of a third-party beneficiary contract requires that the parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they entered the contract. *Burke & Thomas, Inc. v. International Organization of Masters, Mates & Pilots, West Coast and Pacific Region Inland Division, Branch 6*, 92 Wn.2d 762, 600 P.2d 1282 (1979). Both parties must intend that a third-party beneficiary be created. *Postleiae Contr., Inc. v. Great Am. Ins. Co.*, 106 Wn.2d 96, 720 P.2d 805, 806 (1986); *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 361, 662 P.2d 385 (1983).

Here, there was no intent by Port Jobs to create third-party beneficiary status under the NH-Port Jobs contract for NH employees, including Argo. Rather, Section X of the Agreement clearly sets forth an intent by Port Jobs to preclude any contractual relationship between Port Jobs and NH employees, including a third-party beneficiary relationship between Port Jobs and Argo. The Agreement expressly precludes any obligations by Port Jobs to NH employees, including Argo. There is clearly no intent in the contract between Port Jobs and NH to vest Argo with any third-party rights under the contract against Port Jobs.

Vikingstad v. Baggott, 46 Wn.2d 494, 497, 282 P.2d 824 (1955). Port Jobs' contractual obligations ran directly to NH and nobody else.

Moreover, as discussed and recognized by the trial court, Port Jobs did not convey any benefits to Argo. It has been firmly established that NH compensated Argo for her employment, including salary and benefits, and made decisions in response to Argo's requests for increases in salary. Argo was enrolled in NH's Long Term Disability Insurance coverage, dental plan, health insurance, and NH's life and disability insurance program. Argo admits that she did not receive any wage, health, pension, or other employment benefits from Port Jobs and that she received wages, salary, and other compensatory payments and benefits solely from NH for the 2006-2012 time period. The trial court did not abuse its discretion and the denial of Argo's motion for reconsideration should be affirmed.

3. **Washington Law Does Not Provide an Alleged Third-Party Beneficiary Standing to Bring Claims under WLAD**

Argo's WLAD claim is specifically based upon RCW 49.60.030(1)(a) which protects "[t]he right to obtain and hold employment without discrimination." (*Id.*) Washington law only grants "employees" and "independent contractors" standing to pursue claims under WLAD [RCW 49.60.030]. The trial court properly ruled that Argo was not an

“employee” or “independent contractor” of Port Jobs and dismissed Argo’s claims. (CP 6-7 and CP 240-242.)

As discussed above, subsequent to the dismissal of Argo’s WLAD claims based upon the trial court’s finding that Argo was neither an employee of Port Jobs or an independent contractor, Argo impermissibly asserted for the first time in her reconsideration motion that she, as an employee of NH, has standing as an alleged third-party beneficiary to the Agreement between Port Jobs and NH to pursue claims against Port Jobs under RCW 49.60.030(1).

Argo’s impermissible argument raised for the first time in her motion for reconsideration is not supported by Washington law. WAC 162-16-230(1) and (2) identify individuals with standing to pursue claims under WLAD. (*See* WAC 162-16-230(1) and (2)). WAC 162-16-230(1) provides that only an “employee,” and not an independent contractor, is entitled to the protections of RCW 49.60.180. WAC 162-16-230(2) states that an independent contractor [and employee] is entitled to protection under RCW 49.60.030(1) and sets forth the factors to consider whether a person is an independent contractor or an employee. WAC 162-16-230 does not identify alleged third-party beneficiaries as individuals with standing to pursue claims under WLAD [*i.e.*, RCW 49.60.180 and RCW 49.60.030].

In *Marquis v. City of Spokane*, the Washington Supreme Court held that an independent contractor may bring an action for discrimination under RCW 49.60.030 “in the making or performance of a contract for personal services” where the alleged discrimination is based upon sex, race, creed, color, national origin or disability. *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). Argo fails to cite to a single case in which it has been held that an employee of one entity is a third-party beneficiary to a contract between such employee’s direct employer and another entity has standing to pursue claims under WLAD. There is no provision in RCW 49.60, WAC 162-16-230, or Washington case law granting an alleged third-party beneficiary standing to pursue claims for alleged employment discrimination under the WLAD.

4. Federal Law Does Not Provide an Alleged Third-Party Beneficiary Standing to Pursue Claims under WLAD

a. Argo’s Reference to 42 U.S.C. §1981 Was Raised for the First Time in Argo’s Motion for Reconsideration and Was Properly Disregarded by the Trial Court

Argo’s argument that 42 U.S.C. §1981 grants her standing to pursue claims as an alleged third-party beneficiary under WLAD was presented for the first time in Argo’s motion for reconsideration of the trial court’s October 29, 2013 dismissal order. (CP 243-252.) As discussed in section F.1. above, CR 59 does not permit Argo to propose new theories of

the case that could have been raised before entry of an adverse decision. *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005); *JDFJ Corp. v. International Raceway, Inc.*, 97 Wn. App. 1, 7, 970, P.2d 343 (1999). Thus, the trial court did not abuse its discretion in denying Argo’s motion for reconsideration and the arguments therein.

b. 42 U.S.C. §1981 Does Not Grant Argo Standing to Pursue Claims against Port Jobs

Argo erroneously claims that 42 U.S.C. §1981 grants her standing to pursue claims against Port Jobs under WLAD as an alleged third-party beneficiary of the contract between Port Jobs and NH.² 42 U.S.C. §1981 provides:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to ***make and enforce contracts***, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment,

² Argo cites *Allison v. Housing Authority of the City of Seattle*, 118 Wn.2d 79, 821 P.2d 34 (1992) and *Xieng v. Peoples National Bank of Washington*, 120 Wn.2d 512, 844 P.2d 389 (1993) for the proposition that “Washington courts frequently use federal anti-discrimination law to construe WLAD’s employment discrimination provisions.” Neither *Allision* nor *Xieng* address claims under RCW 49.60.030 or an alleged third-party beneficiary’s standing to pursue a claim under RCW 49.60.030(1). The issue in *Allison* was the appropriate standard of causation for alleged age discrimination and retaliation claims under RCW 49.60.210. *Allision* at 85. In *Xieng*, the issue was whether an employer was entitled a “good faith belief” defense and recoverable damages.

pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (Emphasis added.)

(b) “Make and enforce contracts” defined

For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

* * * * *

It is undisputed that the contract at issue in this matter was entered into by and between Port Jobs and NH, that Argo’s contract of employment was [and is] with NH [not Port Jobs], that there was no employment contract between Port Jobs and Argo, and that Port Jobs was not a party to the contract between Port Jobs and NH. (CP 244, 315-319.)

Argo ignores the fact that she was not a party to NH-Port Jobs contract and claims that she has standing to pursue claims under 42 U.S.C. §1981.³ The United States Supreme Court rejected such an argument in *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 126 S. Ct. 1246 (2006)⁴

³ The United States Supreme Court’s decision in *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 126 S. Ct. 1246 (2006) takes precedence over the federal circuit court decisions cited, but not discussed by Argo.

⁴ *Domino’s Pizza, Inc. v. McDonald* was decided after *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. (1989) cited by Argo in her Appellate Brief [and for the first time in her reconsideration motion]. *McLean* held that right to “make” contracts without discrimination protected by §1981 did not extend to conduct by employer after contract relation has been established, including breach of terms of contract or discriminatory working conditions. *McLean* at 177. Argo’s reliance on *McLean* is misplaced

where McDonald argued that “any person who is an “actual target” of discrimination, and who loses some benefit that would otherwise inured to him had a contract not been impaired, may bring a suit” under §1981. *Domino’s Pizza, Inc. v. McDonald* at 478. The United States Supreme Court held that McDonald’s argument ignored the statutory requirement that the plaintiff must be the person whose right to make and enforce contracts was impaired on account of race:

... we hold that a plaintiff cannot state a claim under §1981 unless he has (or would have) rights under the existing (or proposed) contract that he wishes “to make and enforce.” **Section 1981 plaintiffs must identify injuries flowing from a racially motivated breach of their own contractual relationship, not of someone else’s.**

Domino’s Pizza, Inc. v. McDonald, 546 U.S. 470, 478, 479-480, 126 S. Ct. 1246, 1252 (2006). (Emphasis added.)

The United States Supreme Court’s ruling in *Domino’s Pizza, Inc. v. McDonald* nullifies Argo’s argument. Here, there was no contractual relationship between Port Jobs and Argo. The Agreement for Professional Services was entered into by and between Port Jobs and NH and there is no claim of discrimination by NH against Port Jobs related to the cessation of the NH-Port Jobs contractual relationship. Argo is not a party to the contract between NH and Port Jobs, and has no right to enforce the

considering *McLean* involved a direct dispute between an employee and an employer and because it has been superseded by statute.

contract between NJ and Port Jobs. Thus, Argo has no viable claim for the non-renewal of the contract between Port Jobs and NH.

E. ARGO’S DISCRIMINATION CLAIMS UNDER WLAD WERE PROPERLY DISMISSED

1. Argo Was Not an Employee of Port Jobs or Independent Contractor with Standing to Pursue WLAD Claims

Argo’s sole cause of action alleged against Port Jobs is Racial Discrimination and Wrongful Termination of Employment Pursuant to RCW 49.60 *et seq.* [WLAD]. Washington law only grants “employees” and “independent contractors” standing to pursue claims under WLAD, RCW 49.60 *et. seq.*

Argo does not specify in her First Amended Complaint whether her claim is premised upon RCW 49.60.030 or RCW 49.60.180. Argo’s claims against Port Jobs fail under either statutory section. RCW 49.60.180 [Unfair Practices of Employers] only applies to alleged unfair employment practices by an “employer.” *See* RCW 49.60.180(1)-(3). A person who works or seeks work as an independent contractor is not entitled to the protections of RCW 49.60.0180. *See* WAC 162-16-230(1). Here, Argo admits that she is not an “employee” of Port Jobs and, thus, Argo does not have standing to pursue any claims under RCW 49.60.180. Argo does not contest or appeal this issue.

RCW 49.60.030(1)(a) provides a “right to obtain and hold employment without discrimination.” See RCW 49.60.030(1)(a). Washington law grants “employees” and “independent contractors” standing to pursue claims under RCW 49.60.030(1)(a). See *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996) and WAC 162-16-230(2) (independent contractors [and an employee] are entitled to protection under RCW 49.60.030(1)). The trial court ruled that Argo was not an independent contractor.

Here, the trial court correctly dismissed Argo’s WLAD claims against Port Jobs under the WLAD after finding that Argo was not an “employee” of Port Jobs or an “independent contractor” with standing to pursue claims under the WLAD. The trial court’s ruling should be affirmed.

2. Port Jobs Did Not Terminate Argo’s Employment

Argo’s claim against Port Jobs for wrongful discharge is premised upon under RCW 49.60.030(1)(a) which provides a “right to obtain and hold employment without discrimination.” See RCW 49.60.030(1)(a). An action for wrongful discharge depends, by definition, upon termination of an employer-employee relationship. *Awana v. Port of Seattle*, 121 Wn. App. 429, 433, 89 P.3d 291 (2004). Argo’s claims against Port Jobs under WLAD fail because there was no employer-employee relationship

between Port Jobs and Argo, *i.e.*, Argo was not an employee of Port Jobs, nor an independent contractor. Moreover, Port Jobs did not affect Argo's right to obtain or hold employment with NH. NH terminated Argo's employment with NH. Argo fails to disclose the undisputed fact that after the discontinuation of the NH-Port Jobs contract in February 2012, Argo continued her employment with NH for another month until March 30, 2012 with no change in her salary paid by NH or benefits. (CP 415-419, 423.) NH terminated Argo's employment with NH effective March 30, 2012. (*Id.*)

Argo continued her employment with NH after the end of the Port Jobs-NH contract until NH made the decision to terminate Argo's employment. Port Jobs did not terminate Argo's employment with NH [her admitted employer]. Argo's claims for wrongful termination of employment [if any] should be directed towards NH who was her undisputed employer and who terminated her employment.

IV. CONCLUSION

Argo's claims for racial discrimination and wrongful termination against Port Jobs under WLAD were properly dismissed by the trial court based upon the absence of an employer-employee relationship between Port Jobs and Argo. Only an "employee" or "independent contractor" has standing to pursue employment discrimination claims under WLAD.

Argo admits that she is an “employee” of NH, not Port Jobs, and the trial court properly ruled that Argo was not an independent contractor.

The trial court did not abuse its discretion in denying Argo’s motion for reconsideration asserting her “third-party beneficiary” theory for the first time on reconsideration. Argo’s presentation of a completely new legal theory was properly prohibited the trial court pursuant CR 59 and case law. Moreover, Port Jobs’ contractual obligations ran directly to NH and there was no intent in the contract between Port Jobs and NH to vest Argo with any third-party rights under the contract against Port Jobs and NH. Moreover, an alleged “third-party beneficiary” is not a protected party under WLAD.

Argo did not have standing to pursue her WLAD claims against Port Jobs under the WLAD. The trial court’s rulings should be affirmed in total.

Respectfully submitted this 9th day of May, 2014.

FORSBERG & UMLAUF, P.S.

By: 

Martin J. Pujolar, WSBA #36059
John P. Hayes, WSBA #21009
Attorneys for Respondent Port Jobs

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing RESPONDENT PORT JOBS' BRIEF on the following individuals in the manner indicated:

Mr. Lincoln C. Beauregard
Ms. Anna L. Price
Connelly Law Offices
2301 North 30th Street
Tacoma, WA 98403

(X) Via Hand Delivery

SIGNED this 9th day of May, 2014, at Seattle, Washington.



Veronica M. Waters

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