SUPREME COURT OF THE STATE OF WASHINGTON 99740-3

CATHERINE THORP,

Petitioner,

v.

NEW LIFE CHURCH ON THE PENINSULA,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF KITSAP COUNTY

PETITION FOR REVIEW

CHALMERS C. JOHNSON
Attorney for Appellant

LONGSHOT LAW, INC.
PO Box 1575
Port Orchard, WA 98366
(425) 999-0900

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Washington Statutes

Washington Court Rules

Other Authorities

A. IDENTITY OF PETITIONER

Ms. Catherine Thorp, the Petitioner, was the Appellant below and the Plaintiff in the initial case. She has since married and taken the surname Drachenberg. For continuity of the record, she will be referred to as Ms. Thorp in this petition. Ms. Thorp requests review under RAP 13.4.

B. COURT OF APPEALS DECISION

Ms. Thorp seeks review of the Court of Appeals decision dated February 23, 2021, attached as an appendix. The Petitioner requested review, which was denied by an Order of April 12, 2021, also attached.

C. ISSUES PRESENTED FOR REVIEW

In a claim for wrongful termination in violation of public policy, does statutory law establish protected classes such that termination because of an employee's membership in the protected class gives rise to employer liability?

Does the WLAD protect Washington Citizens from discrimination based on marital status and cohabitation (unmarried partners living together)?

When an employer/defendant in a wrongful termination public policy suit asserts an overriding reason for termination, should it be treated as an affirmative defense?

D. STATEMENT OF THE CASE

Caty Thorp and Tanner Thorp were married in 2004. He is a chef and she is an accountant/bookkeeper. In 2011, they had a son, Adrian.

Around 2012-2013 they opened a restaurant in Sequim. It was ultimately unsuccessful. In 2013, they moved to Silverdale, WA. Unfortunately, Tanner struggled with alcoholism, a problem which continued to affect him throughout the coming years. When they moved to Silverdale, Caty started attending Crossroads church. The Pastor was Rick Burleson, who eventually started his own church, Connections. Caty continued to attend. During that time, the Thorp family, Caty, Tanner and Adrian, also attended New Life Church, a larger church which had a children's program for Adrian. The family would attend New Life on Saturday and Caty would go to Connections on Sundays. (CP 303-304, 297)

Caty observed that New Life had a large business side and introduced herself to Sarah Plumb in the business office. Caty applied for a bookkeeper position. In order to apply online, she had to "click" a box which said "I accept." The page-long boilerplate included "Should my application be accepted, I agree to be bound by the Constitution and By-Laws and policies of NLC, and to refrain from unscriptural conduct in the performances of my services on behalf of the church." (CP 302-303, 313-315) The job description sated that the applicant was expected to love Jesus, love the church, and participate in team meetings and special events of the church. In the portion that actually described the job, it stated:

THE JOB | What you will do is...

The newlife Bookkeeper takes ownership of ensuring all A/P transactions (bills, reimbursements, credit and PEX card expenses, etc.) for the Network, Campuses, and Events are facilitated on time and recorded correctly in Quickbooks. This includes working with a wide variety of staff and volunteers; by guiding them through newlife's processes and helping them troubleshoot issues as they arise. The Bookkeeper also works together with the existing A/R team, including both staff and volunteers, to ensure that all incoming funds are accurately recorded in QuickBooks. This position is also responsible for Payroll, IRS Tax compliance, production and analysis of high quality financial reports to Campus and Ministry Leads at month-end, year-end, and other times as requested.

(CP 302-303, 316-317)

New Life Church hired Caty as its bookkeeper in March of 2015. She worked in that position until her termination on May 19, 2017. During the two years she worked the "network office," the strictly business side of the church where all of the accounting, HR, and business meetings were. There was a separate space for worship and religious -based activities. Caty was never trained or asked to give religious instruction. She was strictly a bookkeeper for the Church. (CP 303-305)

Sadly, Tanner's struggles with alcoholism grew worse. The couple talked about separating. In October of 2015, Tanner spent a month in a rehabilitation center. This was the last straw for the marriage. Caty and Tanner agreed to separate. Caty stayed the in house with primary custody of Adrian. Tanner agreed to move out in September of 2016. (CP 297, 306-307) This was a difficult time for Caty. She spoke with her co-workers, Jennifer Yost and Sarah Plumb, about it and received approval and moral support from them about her decision to divorce. (306-308) In July of 2016, Caty unexpectedly became pregnant with her and Tanner's

son. (297,307) The couple discussed it and decided to continue with separation. Tanner moved out on September 15, 2016. (CP 307)

After Caty and Tanner separated, Caty lived in the house with Adrian, but was concerned about living in the house alone, pregnant, with a small child. She knew that Casey, a friend since middle school, recently completed remodeling his grandmother's home, where he had been living and was looking for a new place to live. She talked to Tanner about offering Casey a room in the house as a tenant. Caty and Tanner decided to seek counsel from Caty's pastor at Connections, Rick Burleson. He counseled with them and Tanner agreed that Casey should move into the house with Caty and Adrian. (CP 297-298, 307-308) Caty also discussed the move with Mark Middleton, a pastor at New Life and her co-workers, Sarah Plumb, Jennifer Yost, Barb Judkins, and Jeff Welk. As with the decision to divorce, they were supportive, considering that Tanner did not object. (CP 307-308) Caty and Casey signed a formal residential lease for a term of six months, from December through June of 2017 and Casey moved into the house. (CP 308, 318-328)

Over the next couple of months, Caty and Casey grew to have romantic feelings for one another. Caty told Tanner that she and Casey had developed feelings for each other and that she could see a future with him. (CP 308) Tanner had some emotional turmoil about the news, understandably. On New Year's Eve, he spoke, briefly, with Wes Davis, the founder and lead Pastor of New Life Church, confiding that he was

having difficulty accepting that his marriage to Caty was truly over. (CP 298) Pastor Davis is the lead pastor of the 3,000-member New Life Church, a position granted to him for life by its charter, and the last word on any decision made in the Church. (CP 271-273,284) He did not have time for Tanner, so he met with New Life pastor Mark Middleton. They met for coffee, a typical counseling venue. (CP 277, 298-299)

Tanner told Middleton he was having trouble with his emotions over the news that Caty and Casey had feelings for each other. Middleton told Tanner that he would have to report this immediately to Sarah Plumb, Caty's supervisor because it was wrong. (CP 298-299) Tanner reminded Pastor Middleton that they were in a confidential setting for counseling and begged the Pastor not to betray his confidence. He told the Pastor that the he did not want to cause trouble for Caty at work. Middleton refused outright and immediately spread the news about the budding romance to Caty's supervisor and co-workers. (CP 298-299) Tanner was horrified. His relationship with Caty was already strained. With the Pastor's betrayal, he was sure there would be added stress on Caty at work, and she might be fired. Tanner waited for the inevitable phone call from Caty. (CP 298-299)

Caty was working that Thursday (February 2, 2017) at the New Life business office. Around noon, her supervisor, Ms. Plumb, called her into a meeting. She interrogated Caty, asking her why she had told Tanner that she (Ms. Plumb) had supported Caty's decision to pursue a divorce, demanding that Caty explain her living situation, and pressing her to admit

that she and Casey had a romantic relationship, acting as if she had never known any of this. Caty was shocked, but realized what must have happened. She knew Tanner's private conversation with Middleton had been shared with the office. (CP 308-309) The walk through the office after the meeting with Plumb was humiliating. The office was "buzzing" about her living with Casey. As she walked through the room, she actually saw a co-worker, Jeff Welk, looking at Casey's face book page on his computer. She called Tanner. (CP 308-309) Tanner took the call, apologized profusely, and assured Caty that he had demanded the Middleton keep his confidence but that he had refused. (300,308-309)

That night, Ms. Plumb called and ordered Caty to come to the New Life business office the next day, Caty's usual day off. That Friday, she met with Josh Hinman, the CEO of the business side of the church, and Sarah Plumb, Caty's supervisor. They said Caty had until Monday to force Casey to move out or she would be terminated. When she said that they had a binding lease, the two told her they did not care. They brow-beat her for about an hour, calling her "wrong" and "un-Christian" for living with Casey. Caty, in her eighth month of pregnancy, was extremely distressed and began crying, followed by painful contractions. Caty told them they were upsetting her and she was having contractions. Hinman told her coldly, "I hope you don't go into labor this weekend" and left her with the ultimatum of moving Casey out by Monday or losing her job. (CP 309)

That weekend, Hinman called Caty at home and insisted that she drive to the Church on Saturday and to surrender her computer (on which she did her accounting work). She did. By Monday, Casey was still living at her house. Hinson told her that she was granted an "extension" to move Casey out until that Wednesday. He bombarded her with texts of scripture on her phone. She suffered a barrage of harassment from Plumb at work. When Caty explained that there was a binding lease, they insisted she ignore it. They told her that if she did not want to breach the lease, she could move out of her home herself. They offered bribes, telling her that the church would throw her a big baby shower if she would move Casey out, but if she did not move Casey out, she would receive no support from the church or the congregation. They told her that they would send the "mission boys" over to move Casey out (The Mission House is a program for recovering addicts who perform labor projects). As Caty insisted that she felt that she was doing nothing wrong and that her "walk with Jesus was pure" the two repeated that she needed to "submit" to them as higher authorities. Hinman told her that living with Casey would make her a bad mother and condemn her new baby to a difficult life. They even told her that if she submitted to their will and removed Casey from her home, the Church would find a more suitable mate for her. (CP 309-310) Tanner, shocked, called Hinman and Plumb directly, pleading with them not to hurt Caty. He told them that she needed grace from the Church, not condemnation and harassment. He asked them to "walk beside her right

now." Hinman and Plumb steadfastly insisted that Caty was not, in their opinion "walking the path with Jesus" and that unless Caty forced Casey to move out, she would lose her job. (CP 300-301) Caty, very emotional, feared for her health and the baby. She saw her doctor who immediately wrote a letter for her to take to her employer warning that undue stress at work could cause complications in her pregnancy. (CP 300,309-310, 330)

At this point, New Life Church's lead Pastor, Wes Davis, stepped in. He met with Caty. He assured her that he and the Church cared about her health and the baby's. He ordered Hinman and Plumb to stop discussing the issue with Caty and told her that the Church would grant her six weeks of paid maternity leave. He assured Tanner that Caty would not be fired. (CP 259-261,301,310) He did not initiate any kind of investigation into Hinman and Plumb's actions. (CP 261-262) After that, Hinman and Plumb did stop haranguing Caty about Casey. However, they did take a series of adverse employment actions to let her know they had not forgotten. Plumb removed as head of the "counting team," a group of volunteers who tallied up donations. Whereas Caty had always worked from home about half of her work week (a good thing for a single mother of a small child who was well into a pregnancy), Plumb required to spend all of her time at the office, moving Caty from her large office to a small desk in front of the HR director's desk and requiring her to sit there during all work hours. Ms. Plumb told Caty that she would no longer mentor her or work with her. Caty was instructed to start putting together a "standard

operating procedures" document so someone could do her job. Caty spent her time at her little desk trying not to cry, or trying to stop crying as she was shunned and humiliated in front of all her co-workers. (CP 310-311)

Caty had her baby (Sawyer) on the same day that Pastor Middleton's wife had twins and recuperated on the same floor. A steady stream of well-wishing church members came by to visit Ms. Middleton and her twins, but not one stopped by to see her and Sawyer. (CP 301,311) Caty returned to work on May 2, 2017. Hinman and Plumb told her that her job had changed. She was no longer allowed to work from home, which presented child care issues. She was instructed to continue to write a description of how to do her job while they posted her job online. (CP 311, 332-333) They presented Caty with a new job description which included a requirement that the bookkeeper "Loves their family, is "on the mission with Jesus, and Loves His church." (CP 311, 335-336) Meanwhile, Tanner, Casey, and Caty were learning to get along together with new baby in their lives. On May 19, 2017, at lunch, Tanner reminded Caty that Pastor Davis had promised she would not lose her job. (CP 300) That day, Josh Hinman and Sarah Plumb presented Caty with a termination letter. (311, 338-339) New Life Church terminated her employment as a bookkeeper because she was living with Casey but was not married to him. (CP 262-266) Pastor Davis claimed unnamed congregation members were "concerned" and "upset" about it. (CP 274)

New Life Church opted not to provide unemployment protection for its employees. Thus, Caty found herself with a new baby and no unemployment benefits. (CP 275-276) Jennifer Yost, the Church's HR person had offered to write Caty a recommendation letter, but withdrew the offer and would not support Caty's job search when she found out that Caty planned to challenge her termination. (CP 250) Caty had a promising job interview, but after a brief conversation with Pastor Davis, which the Pastor admits to having had, but claims not to remember the content of, the potential employer withdrew his offer. (CP 275-276) Caty started her own bookkeeping business. She and Tanner were granted a divorce, confirming the separation date of September 15, 2016, the date that Tanner moved out of their house. (CP 311-312,341) Caty and Casey were married about six months after Caty's divorce was finalized. (CP 311-312, 363) Tanner gave them a very nice toaster oven as a wedding gift. Casey and Tanner have developed a healthy, amicable relationship and both participate fully in the children's daily lives. (CP 302,311-312)

Wes Davis, the self-appointed Lead Pastor for life of New Life Church (271-273) appears to recognize business exception to grace and mercy when it comes to employment:

A. I'm not sure what your question is, but like as far as like her relationally, I'd be willing to grant grace and mercy. So I guess I -- I see a distinction between, in some ways, relational or relationship, and then there's a work relationship.

Q. So are the business and the church two different things?

A. They're connected. There's overlap.

(CP 268-269)

E. ARGUMENT

Review should be accepted to hold that the WLAD establishes, as a matter of public policy, that citizens have the right to cohabit regardless of marital status and that terminating an employee because she is cohabiting with a partner to whom she is not yet married constitutes a wrongful termination in violation of public policy.

Review should be granted to hold that an employer asserting an "overriding reason" for a wrongful termination is asserting an affirmative defense, and that a Court should not consider evidence regarding an affirmative defense that was not properly plead by the party asserting it.

There are two frameworks for a claim for wrongful termination in violation of public policy. The "Thompson" test recognizes four situations in which this tort can be applied: 1) The employee is fired for refusing to commit an illegal act 2) employee is fired for performing a public duty or obligation; 3) employee is fired for exercising a legal right or privilege, such as filing a workers compensation claim; and 4) employee is fired for reporting employer misconduct i.e. whistleblowing. *Thompson v. St. Regis Paper Co.*, 102 Wash.2d 219, 276, 685 P.2d 1081 (1984).

Where the facts do not readily fall into one of the four categories, the Courts will look to a four-part test known as the "Perritt" framework. The main focus is on determining whether the reason for the termination would tend to jeopardize Washington State's interest in seeing that one of its public policies is followed. In *Gardner v . Loomis Armored, Inc*., 128 Wash.2d 931, 936, 913 P.2d 377 (1996) (citing HENRY H. PERRITT JR., WORKPLACE TORTS: RIGHTS AND LIABILITIES (1991)). There are four elements: "(1) The plaintiffs must prove the existence of a clear public policy (the clarity element). (2) The plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy (the jeopardy element). (3) The plaintiffs must prove that the public-policy-linked conduct caused the dismissal (the causation element). (4) The defendant must not be able to offer an overriding justification for the dismissal (the absence of justification element)." Id. (emphasis and citations omitted). *Martin v. Gonzaga Univ.*, 191 Wash.2d 712, 425 P.3d 8370 (Wash., 2018).

The Appellate Court, in this case, focused on the Church's assertion that Ms. Thorp was terminated because she was cohabiting with a man to whom she was not married, as opposed to being terminated because she was not married to the man she was living with, a subtle difference to be sure. With that, the Appellate panel asserted that the WLAD does not protect cohabitation. The WLAD does establish that Washington Public Policy prohibits both discrimination based on marital status and,

specifically, regarding a cohabitation living situation. In addition, the evidence in the record clearly shows that it was the fact that Ms. Thorp was not yet married to Mr. Drachenberg which caused her termination, not simply the fact that the two were living under the same roof.

1) **The WLAD establishes Washington public policy of respect for the privacy of and protection of marital status and cohabitation**.

Ms. Thorp points to the WLAD (Washington Laws Against Discrimination, RCW 49.60.010) to establish the first element, arguing that the protection of marital status establishes the State's public policy. In 1973 the WLAD was amended to prohibit discrimination on the basis of marital status. In doing so, the State made it a matter of Washington State public policy to include and recognize marital status as a protected category when it comes to discrimination in an employment relationship.

The facts of this case also raise the issue of housing, specifically intertwined with the marital status issue. The Church did not have any problem with the idea of Ms. Thorp having a romantic relationship with her future husband while they were not married to each other. It took exception to the two of them **living together** while their marital status was unmarried. Discrimination in housing based on marital status is illegal in Washington. The WLAD (RCW 49.60.222), makes it illegal to refuse to engage in a real estate transaction or provide different terms, conditions or privileges to a tenant, or prospective tenant, because of the tenant's marital status. After being added to the law, it was less than a year before marital

status protection was being examined. Both the Washington State Human Rights Commission (HRC), the agency that enforces the WLAD, and the legislature further defined the law. In April 1974, the HRC issued Declaratory Ruling No. 9, advising Evergreen State College that it was an unfair practice to permit occupancy of its student housing units by married couples, but not by unmarried couples of the opposite sex. *Washington State Human Rights Commission, Declaratory Ruling No. 9,* April 18, 1974.

In *Loveland v. Leslie,* Steve Leslie contacted the owners of an apartment in North Bend, WA and told Ruby Loveland that he was interested in the 2-bedroom apartment for himself and a male roommate. Ms. Loveland would only rent to married couples. The Superior Court agreed with the HRC's determination that marital status discrimination had occurred, and the property owners appealed. In 1978 Appeals Court agreed that the owners' refusal to rent to two men amounted to marital status discrimination. *Hugo Loveland, et al. v. Steve Leslie, et al.,* 21 Win. App. 84; 583 P.2d 664 (1978) The owners argued the term "marital status" was vague, but the Court disagreed, finding that the term is commonly understood to relate to the existence or absence of a marriage bond.

As for the first element of the Perritt test, the Court should find that Washington has embraced, as a public policy, a respect for the individual’s rights when it comes to marital status, and has made it the

State's public policy that individuals may not be penalized in their employment or in their housing for their choices as to marital status.

Allowing employers to dictate whether their employees should be married or not, or to control their housing decisions based on marital status would certainly erode the State's public policy of supporting marital status as an individual's protected choice. The Church's desire to control Ms. Thorp's private and personal living arrangements by threatening her employment presents a starkly clear example of how the public policy of protecting citizens' rights to decide their marital status would be jeopardized by allowing employers to terminate employees who were unmarried and living together.

2) The record includes evidence that the Defendant terminated Ms. Thorp because of her marital status.

The Appellate Court, in its Opinion for this case, cited to *Waggoner v. Ace Hardware Corp*., 134 Wn.2d 748, 953 P.2d 88 (1998) and noted that the Court determined cohabitation was not protected under the WLAD and that "cohabitation" was not the same thing as "marital status." As shown above, however, the WLAD does protect citizens from discrimination based on cohabitation as well, thus establishing that Washington Public Policy protects cohabitants. The Defendant had no issues with Mr. Drachenberg living in the same home as Ms. Thorp in a state of cohabitation when they believed he was a platonic "roommate" or, "cohabiting" with her. The issue arose only because of Ms. Thorp's

marital status. She was married. She was not married to Casey Drachenberg. She was married to Tanner Thorp. The Appellant's attorney deposed Pastor Davis, the creator, leader and ultimate decision maker for the Defendant Church. His testimony makes it clear, or, at the very least, a genuine issue of material fact as to whether it was marital status that motivated the Defendant to terminate Ms. Thorp:

THE WITNESS: I -- it was expected that if she chose to live like she was married to Casey but she's married to Tanner, that she would not be on staff. By choosing that, she would be choosing to not be on staff. The rest of that, I don't know.

24

BY MR. JOHNSON:

Q. Okay. Choosing to not be on staff means her job would end?

A. Correct.

Q. Okay. And it had to do with the fact that she was married to Tanner and living with Casey?

A. She was married -- it would be if she was married to Tanner and living as she was married to Casey.

Q. Romantically?

A. Yes.

Q. That's what we're talking about.

A. I just want to be clear.

Q. If it were pure roommates, no problem, right?

A. If it was pure roommates, I would -- when you so no problem, I would just question judgment, but it wouldn't be an issue of employment.

(Deposition of Davis, CP Index # 21, pp. 262-263)

In *Waggoner*, neither of the cohabiting parties were married. This sets the Waggoner holding apart from what happened to Ms. Thorp. In this case, the Defendant's issue with Ms. Thorpe began because one of its pastors decided to breach confidentiality when Tanner Thorp, Ms. Thorp's legal spouse, came to him to work through his emotional turmoil about Ms. Thorp and Mr. Drachenberg's feelings towards each other. The outrage in the Defendant church arose because of who Ms. Thorp was married to and who she was not married to, not because Mr. Drachenberg was living in her house. The Waggoner Court made the distinction: "In general, discrimination against an employee or applicant for employment because of (a) what a person's marital status is; (b) who his or her spouse is; or (c) what the spouse does, is an unfair practice because the action is based on the person's marital status." *Waggoner* at 756-757 A reasonable juror could find that Ms. Thorp was terminated because she was married to Mr. Thorp while she was living with Mr. Drachenberg, rather than because she was living in the same home as Mr. Drachenberg. The third element of the Peritt test is satisfied.

3) Because offering a "overriding reason" for a wrongful termination is an affirmative defense, where Defendant has not asserted the defense, the Court should not consider whether assertions of alternate reasons for termination are "overriding" at summary judgment.

As for the final element of the Perritt test, the employer has not offered any overriding justification for its actions other than a general moral objection to Ms. Thorp living with a man to whom she was not

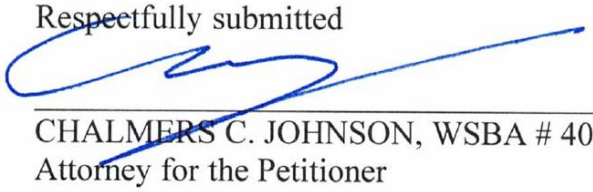
married. It was never, however, asserted as an affirmative defense. As it stands, Washington law recognizes and "overriding reason" for termination where the employer asserts a mixed motive as an affirmative defense and therefore a jury issue. WPI 330.51; *Rickman v. Premera Blue Cross, 184 Wn.2d 300, 314, 358 P.3d 1153 (2015) (citing Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 947–950, 913 P.2d 377 (1996)).* In the Commentary, it is noted that case law has yet to define an "overriding consideration." "The employer's affirmative defense if it terminated the employee is that the termination was justified by an overriding consideration. Thus, there could be a mixed motive situation if the employer terminates for an allegedly proper reason yet a substantial factor in the decision involved a violation of public policy. The employer must prove not only a proper motive but that this motive was the 'overriding consideration' in the termination. What constitutes an 'overriding consideration' is not defined in the case law." WPI 330.51- Commentary This puts this element squarely into the realm of being a jury question and one that is not appropriate for determination at summary judgment, especially when it has not been properly plead.

New Life Church did not plead the affirmative defense in the Answer (CP 12-21) CR 8(c) requires a party to plead an affirmative defense in the party's answer or it is waived. Because New Life Church failed to plead overriding justification, it has never asserted that it had any reason for termination other than Ms. Thorp's marital status.

F. **CONCLUSION**

The Supreme Court accepts petitions for review which present a significant question of law or an issue of substantial public interest. This case presents two issues that should be of interest to the Court and of import to the citizens of our State regarding the evaluation of claims under the tort of wrongful termination in violation of public policy. First, if Washington Statutory law indicates that the State prohibits discrimination against a protected class, evidence showing that an employee's termination based on the employee's membership in that class should present a claim for wrongful termination in violation of public policy that will survive summary judgment. Second, in wrongful termination in violation of public policy claims, the Court should recognize that an assertion of alternate reasons by the employer should be held to the standard of an affirmative defense.

Respectfully submitted



CHALMERS C. JOHNSON, WSBA # 40180
Attorney for the Petitioner

CERTIFICATE OF MAILING

SIGNED at Port Orchard, Washington

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 5th Day of May, 2021, the document to which this certificate is attached, Petition for Review to the Supreme Court, was filed in the Court of Appeals-Division Two under case No. 53680-3-II, and a true copy was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Nathaniel L. Taylor
Peter B. Dolan
Ellis Li McKinstry, PLLC
1700 Seventh Ave, Suite 1810
Seattle, WA 98101-1820

Kristen Waggoner
Alliance Defending Freedom
15100 North 90th Street
Scottsdale AZ 85260

And was concurrently emailed to counsel at ntaylor@elmlaw.com pdolan@elmlaw.com kwaggoner@adflegal.org arossiter@adflegal.org

Chalmers C. Johnson, WSBA # 40180

APPENDIX

Table of Contents

APPENDIX 1

Filed
Washington State
Court of Appeals
Division Two

February 23, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CATHERINE THORP, Appellant, v. NEW LIFE CHURCH ON THE PENINSULA, Respondent.	No. 53680-3-II UNPUBLISHED OPINION

SUTTON, A.C.J. — Catherine Thorp sued her former employer, New Life Church on the Peninsula. She appeals the superior court's summary judgment dismissal of her claims for wrongful termination in violation of public policy under *Thompson*[1] and in violation of the Washington Law Against Discrimination (WLAD).[2]

Catherine[3] argues that the superior court erred by granting New Life's summary judgment dismissal of her claims. She argues that New Life terminated her employment because she refused to breach a residential lease, and thus, her termination violated clear public policy under *Thompson.* She also argues that her termination was based on her marital status in violation of the

[1] *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984).

[2] Ch. 49.60 RCW.

[3] Because Catherine Thorp shares the same last name as her husband Richard "Tanner" Thorp, we use first names for clarity.

WLAD. New Life argues that it did not terminate her in violation of a public policy or based on her marital status.[4, 5]

We hold that New Life did not terminate Catherine in violation of a public policy or based on her marital status, and thus, dismissal of her claims was proper. Thus, we affirm.

FACTS

I. BACKGROUND FACTS

New Life Church is a Christian church. The church expects its employees to adhere to its core beliefs and live a life consistent with those beliefs. One of those beliefs is that sex outside of marriage is sinful.

When New Life hires new employees, it trains them through a process called onboarding. This onboarding includes "training . . . regarding New Life's vision, mission, theological beliefs, and values." Clerk's Papers (CP) at 213.

New Life hired Catherine as a bookkeeper in 2015. When she was hired, Catherine agreed to be bound by the church's constitution, bylaws, and employment policies.

In 2016, Catherine separated from her husband, Tanner. Catherine's co-workers supported this separation. At the time, Catherine was pregnant with their second child, so she and Tanner decided to postpone filing for dissolution until after the child was born. Catherine was living alone, so, with Tanner's consent, she invited an old high school friend, Casey Drachenberg, to live

[4] Amici, Association of Classical Christian Schools, argues that courts are constitutionally prohibited from assessing a religious organization's faith-based reasons for its employment decisions.

[5] Based on our holding, we do not reach Catherine's or New Life's constitutional argument.

with her to help pay the mortgage. Catherine entered into a written six-month lease agreement with Drachenberg from January 1, 2017 to June 30, 2017. Catherine and Drachenberg's relationship became romantic.

In early 2017, Tanner met with Mark Middleton, a pastor from New Life, in order to discuss Tanner's and Catherine's marital problems. Tanner disclosed Catherine's new relationship with Drachenberg. Following their meeting, Catherine's immediate supervisors, Sara Plumb and Josh Hinman, were notified of Catherine's new relationship, and they met with her the next day to discuss it. Catherine testified that they were hostile toward her, and that other people in the office were gossiping about her.

Catherine did not believe that her actions violated the church's policies and was surprised that New Life and her supervisors did not support her cohabitating relationship. Plumb and Hinman informed Catherine that she could not continue to work at the church if she stayed in the relationship.

On Friday, February 3, 2017, New Life told Catherine that in order to keep her job, she needed to have Drachenberg move out of the house. New Life told Catherine that she had until the following Monday to force Drachenberg to move out of the house. Catherine informed New Life that she had a binding lease, but the church did not relent. When Catherine did not force Drachenberg to move out by the following Monday, New Life granted her an extension to Wednesday and continued to ignore the lease. New Life told Thorp "to move out of [her] house so that the lease would not be broken." CP at 309. It also told her that if she forced Drachenberg to move, the church would help to take care of her and her baby. It offered to help her do so by increasing her pay to offset the mortgage costs and loss of rent.

During that time, Catherine received a note from her doctor instructing her to limit stress so as to ensure a healthy pregnancy. New Life chose to not approach the issue regarding Drachenberg again until after Catherine's baby was born.

Catherine's child was born in March, after which Catherine took six weeks of maternity leave. During that leave, Catherine made her relationship with Drachenberg public. New Life terminated Catherine's employment in May after she returned from maternity leave.

II. PROCEDURAL FACTS

Catherine sued New Life, alleging wrongful termination in violation of public policy for her refusal to break a residential lease with Drachenberg, and in violation of the WLAD based on her marital status.[6] New Life moved for summary judgment dismissal. New Life argued that it did not terminate Catherine in violation of a clear public policy, it was exempt from the WLAD as a non-profit religious organization, and even if WLAD applied, New Life did not terminate Catherine based on her marital status.

The superior court granted New Life's motion and dismissed Catherine's claims. Catherine moved for reconsideration, which the court denied.

Catherine appeals both orders.

ANALYSIS

I. STANDARD OF REVIEW

We review summary judgment decisions de novo. *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014). Summary judgment is appropriate where the pleadings, admissions

[6] Catherine also alleged intentional infliction of emotional distress/outrage, but she does not argue this on appeal.

on file, and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c). We consider the evidence and all reasonable inferences in favor of the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015).

II. ANALYSIS

A. WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY

A common law claim of wrongful discharge in violation of public policy is a narrow exception to the at-will employment doctrine. *See Thompson*, 102 Wn.2d at 232-33. We construe this exception narrowly to guard against frivolous lawsuits. *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996). Generally, wrongful discharge claims are limited to four categories:

> "(1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistle-blowing."

Martin v. Gonzaga Univ., 191 Wn.2d 712, 723, 425 P.3d 837 (2018) (quoting *Gardner*, 128 Wn.2d at 936). Relevant here is the first category where employees are terminated for refusing to commit an illegal act. Catherine alleges that New Life terminated her for her refusal to break her residential lease with Drachenberg.

To prevail, Catherine must show that her "'discharge may have been motivated by reasons that contravene a clear mandate of public policy.'" *See Martin*, 191 Wn.2d at 725 (quoting *Thompson*, 102 Wn.2d at 232). "'The question of what constitutes a clear mandate of public policy is one of law' and can be established by prior judicial decisions or constitutional, statutory, or

regulatory provisions or schemes." *Martin*, 191 Wn.2d at 725 (quoting *Dicomes v. State*, 113 Wn.2d 612, 617, 782 P.2d 1002 (1989)).

The church did not commit an illegal act in violation of public policy under *Thompson* by terminating Catherine's employment. Although New Life wanted Catherine to break her lease with Drachenberg, which alone could have constituted an illegal act, the church also gave Catherine the option to move out of her home rather than break the lease. Thus, because New Life offered Catherine an option, which was legal, it did not terminate her for failing to do an illegal act, as she claims and thus, she fails to establish a clear violation of public policy under *Thompson*.

We hold that the superior court properly concluded that the *Thompson* test was not met and thus, it did not err by dismissing Catherine's wrongful discharge claim.

B. WASHINGTON LAW AGAINST DISCRIMINATION (WLAD)

Catherine also argues that New Life terminated her due to her marital status in violation of the WLAD, and thus, the superior court erred by dismissing her WLAD claim. We hold that the superior court did not err by dismissing this claim.

Under the WLAD, "marital status" means "the legal status of being married, single, separated, divorced, or widowed." RCW 49.60.040(17). But the church is exempt from the WLAD because it is a religious organization not organized for private profit. RCW 49.60.040(11). Moreover, "cohabitating or dating relationships are not aspects of 'marital status' as these terms are used in the [WLAD]." *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 750, 953 P.2d 88 (1998). New Life terminated Catherine's employment because she refused to stop cohabitating with Drachenberg, not because she was not married to Drachenberg. Therefore, her claim based

on cohabitation is not a protected category under the WLAD. We hold that the superior court did not err by dismissing her WLAD claim.

CONCLUSION

We affirm the superior court's summary judgment dismissal of the wrongful discharge in violation of public policy claim and the WLAD claim.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, A.C.J.

SUTTON, A.C.J.

We concur:

Worswick, J.

WORSWICK, J.

Cruser, J.

CRUSER, J.

APPENDIX 2

Filed
Washington State
Court of Appeals
Division Two

April 12, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CATHERINE THORP, Appellant, v. NEW LIFE CHURCH ON THE PENINSULA, Respondent.	No. 53680-3-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the Court's February 23, 2021, opinion and raises new issues regarding our Supreme Court's holding in *Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060 (Mar. 4, 2021) in her motion. Appellant did not argue nor brief the issue addressed in *Woods*. *See* RAP 12.4(c) (the motion should address points of law or fact which "the moving party contends the court has overlooked or misapprehended"). Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. SUTTON, WORSWICK, CRUSER

FOR THE COURT:

Sutton, A.C.J.

SUTTON, A.C.J.

LONGSHOT LAW, INC.

May 05, 2021 - 9:18 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	53680-3
Appellate Court Case Title:	Catherine Thorp, Appellant v. New Life Church on the Peninsula, Respondent
Superior Court Case Number:	17-2-02133-6

The following documents have been uploaded:

- 536803_Petition_for_Review_20210505091635D2509768_6928.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PETITION FOR REVIEW - Thorp - FINAL.pdf

A copy of the uploaded files will be sent to:

- arossiter@adflegal.org
- kmelin@elmlaw.com
- kwaggoner@adflegal.org
- ntaylor@elmlaw.com
- pdolan@elmlaw.com

Comments:

Sender Name: Chalmers Johnson - Email: chalmersjohnson@gmail.com
Address:
PO BOX 1575
PORT ORCHARD, WA, 98366-0139
Phone: 425-999-0900

Note: The Filing Id is 20210505091635D2509768