

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

NO. 70819-8

PAUL WILKINSON

Appellant/Plaintiff,

v.

AUBURN REGIONAL MEDICAL CENTER, UNIVERSAL HEALTH
SERVICES, DR. DANIEL CLERC, TRACY RADCLIFF, MELISSA
POLANSKY,

Respondents /Defendants.

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Appellant Paul Wilkinson's Reply Brief

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TABLE OF CONTENTS

A. Introduction.....3-9
C. Argument in Reply.....9-16
D. Conclusion.....16

INTRODUCTION

According to the 2011 report by the Bureau of Labor and Statistics, women made up 74.4% of healthcare practitioners and technical occupations. Women held 71.4 % of the manager positions in medical and health services. In the field of health diagnostics, which Polysomnography is part of, they filled 73% of the technologist and technician positions. Women are the dominate sex by far in healthcare and continue to outpace men in this growing industry. As women continue to dominate in supervisory and managerial positions, there will be more and more scrutiny of their behavior. Simply saying that a man cannot be discriminated against because his sex maintains a greater percentage of jobs in the workplace is invalid in the healthcare industry and a standard for all, regardless of sex, should be maintained.

The Appellant has presented a case based on the evidence not on conjecture. No one truly knows the mind of another or their motivations. We depend on juries to make those determinations in a civil suit not the judge. Paul Wilkinson was terminated not once but twice for failure to follow the policy and procedure (P/P) at the Auburn Regional Medical Center (ARMC) sleep lab. Defense failed to present material evidence that he did so except in one instance. So why was Wilkinson really terminated? Wilkinson was terminated because he simply requested that

his supervisor and department manager follow the union contract. Wilkinson was fired because he was male, he was good at his job, and his coworkers liked him. Wilkinson's supervisor perceived these things as a threat and reacted by writing him up for perceived infractions without basis in fact. Multiple disciplinary actions have been removed from Paul Wilkinson's personnel file, not because of loopholes or legal wrangling, but because they lacked any basis in fact. Simply put, Tracy Radcliff and Melissa Polansky set out to terminate Wilkinson any way they could, even if they had to make it up. Dr. Chang and Dr. Clerc were simply employees making complaints about another employee. They had no authority to discipline employees because they did not maintain an administrative position at ARMC. It was the responsibility of Tracy Radcliff to investigate those complaints in a fair and impartial manner, not support unsubstantiated complaints. The P/P of the sleep lab at ARMC was readily available to her yet it was not used to substantiate the complaints of Dr. Clerc and Dr. Chang. If Wilkinson failed to follow the P/P, why can't it be brought forward to the court and exact violations pointed out?

What the National Labor Relations Board (NLRB), the Human Rights Commission (HRC), the Equal Employment Opportunity

Commission (EEOC) or even an arbitrator's decision is based upon an incomplete picture of the entirety of events. Even now, the defense for ARMC seeks to control the flow of information in this case by reducing the facts of the case as being non-material. They say that all that matters is the opinions of the doctors and the managers. But opinions not based on facts are insubstantial in a court of law. The volumes of information presented are necessary to refute the opinions of others with material facts. There is a pattern of behavior by the defendants of making unfounded accusations against the appellant again and again. Ultimately, it becomes confusing what the initial matter up for debate was. Again that is the aim of the defense for ARMC. Make the picture incomplete. But I ask the court to make the picture as complete as possible. Take each disciplinary action, look at the P/P and the Practice Parameters of the American Academy of Sleep Medicine (AASM), put the disciplinary action in a pile supported or not supported. What do you see? Paul Wilkinson was not terminated for violating the P/P of ARMC; that was simply a pretext. Take the disciplinary actions alleging violations of doctor's orders, look at the orders and the affidavits of former ARMC sleep techs, Sarin Plork and David Iligan, and separate them into appropriate piles. How many are supported by the evidence?

The defense thinks that Wilkinson perceives himself as “infallible”. If that were true, I do not think I would be making an appeal to this court to correct the mistakes of the Superior Court. Wilkinson has simply asked, at every level, that those investigating allegations against him look at the evidence and judge if they have any merit. If there is not substantial evidence to support the allegations, then they are false. Tracy Radcliff and Melissa Polansky supported the false allegations of Dr. Clerc and Dr. Chang. Radcliff and Polansky have made false allegations against Wilkinson. There is no substantial evidence to support most of the alleged violations of P/P before October 2010. An arbitrator determined in May 2012 that Wilkinson was not given a reasonable amount of time to improve before he was terminated in October 2010. After being reinstated in May 2012, he was allowed to work five shifts before he was terminated again for violations of the P/P. Five work shifts is not reasonable. Again, the violations of P/P are alleged, but no P/P addressing those violations is brought forward. The doctors talk about what they believed he should have done, but isn't that like closing the barn door after the horses have escaped? To assume that any individual could divine the wants of another in a particular situation is a slippery slope indeed. If a doctor wants a study to be done in a particular way, then they would state it on the order,

in a staff meeting, or in the P/P. No such example of this was presented by the defense for the alleged violations that occurred after May 2012. Paul Wilkinson is not infallible, but he did not violate any P/P, and would not have been terminated for such if Radcliff or Polansky were either fair or impartial.

No affidavits exist from any doctor regarding Paul Wilkinson's violations of P/P or the practice parameters of the AASM yet the defense consistently points to the erosion in the confidence of the doctors in Wilkinson's abilities to perform his job as a sleep technologist. Where does this "feeling" come from? There is only one violation of doctor's orders. If the doctors had material facts to present, then they would have been presented at summary judgment in the form of affidavits and references to the P/P. They were not.

Again, harassment has been determined by the courts to be defined as "what the harassed perceives to be harassing." Wilkinson made written and verbal statements to ARMC HR directors that he felt he was being harassed by being falsely accused of various violations of P/P, being yelled at, being given the silent treatment, being treated to a different standard than other employees, and being lied about to his coworkers by Polansky and Radcliff. No evidence was presented that any investigations

were done after multiple complaints were made by Wilkinson to Radcliff and the various HR directors, James Moore and Charmin Patton. And again courts have found that it is generally a question for juries, not a judge, whether the harassment was pervasive enough to constitute a hostile working environment.

Wilkinson shows that there is a disparity between the way he is treated and others are treated. He points out disciplinary actions based on falsehoods that then have to be fought through the union Step process. No other technologist is treated in this manner. Defense says that the time period is artificial, it has to be. In retaliation claims there is no retaliation until the party does something that can be retaliated against. In this case, Wilkinson never engaged the union in any way until he was disciplined unfairly in April 2009 for an unexcused absence and not providing a doctor's note. After that he was subject to disciplinary action after disciplinary action, while others in the sleep lab were not, for violations of policy and procedure and absences. To look at the retaliatory behavior of Radcliff and Polansky before this event is to say that they had some foreknowledge of coming events. To look at the discriminatory behaviors of Radcliff and Polansky in another department in which Polansky has no supervisory capacity, is pointless. To judge people in the present for their

distant past behaviors is to deny their ability to change. So to be fair to all parties involved, we must restrict our view of the events to within a certain time period and in a certain department that is common to all parties.

The major point is that it does not matter at summary judgment whether Tracy Radcliff, Melissa Polansky, Dr. Daniel Clerc, or the entirety of ARMC is guilty of discrimination and/or retaliation against Wilkinson, if the material evidence is not agreed upon by both parties. Once there is a discrepancy there, the court's path is clear. The case must go to trial. Only juries can decide what facts are pertinent. Summary judgment was never meant as a replacement for trial.

ARGUMENT IN REPLY

If the defense had information, beyond hearsay, that proved that Wilkinson violated P/P or the AASM parameters, they would have presented it by this time. Since they have none, they have framed their case around the idea that Tracy Radcliff is not discriminatory because she disciplined female employees in other departments. These instances should not be used. There are different P/P governing these departments and Radcliff directly supervises them. Radcliff at all times depended

upon the expertise that Polansky had in sleep to supervise the sleep lab. Radcliff has no experience in sleep medicine. Instead of reading the P/P of the sleep lab and comparing it to the alleged violations of Wilkinson, she depended on hearsay evidence from Polansky. The administrative structure of the sleep lab was such that a complaint from a doctor would go to Polansky first. Then Polansky would decide if that complaint warranted disciplinary action. Polansky would then write up the disciplinary action and forward it to Radcliff. Radcliff might talk to the doctor about it or she would just take Polansky on her word that the P/P had been violated. Radcliff only once asked Wilkinson to present any information regarding any disciplinary action before presenting said action to Wilkinson and his union representative in Human Resources. Even though Wilkinson said that the doctor told him during their discussion to violate P/P not once but twice for that particular study, Radcliff did not read the P/P before she disciplined Wilkinson. Otherwise Radcliff would have found that Wilkinson was correct in his actions. Or maybe Radcliff did and decide to go forward with disciplinary action contrary to the facts. Radcliff did this to no other employee.

Radcliff's blind faith in Polansky's skills seems strange. Radcliff is a respiratory therapist with over a decade of experience. Radcliff

should be more than capable of understanding the respiratory portion of the sleep lab P/P. By trusting the hearsay of another she just appears to be an incapable manager. By continuing onward with the disciplinary actions against Wilkinson when he and his union representative have provided irrefutable evidence that he did not violate the P/P as alleged, shows retaliation and discrimination. By purposely destroying or allowing to be destroyed evidence in an ongoing grievance shows even greater discrimination and retaliation. ¹ By summarily terminating Wilkinson not once but twice without allowing him to address the allegations against him show that Radcliff is retaliatory and discriminatory. Radcliff waited until violations of P/P by female employees were so egregious that they could no longer be ignored; ex. not showing up to work, commentary against the hospital left in a public forum, and an ectopy (heart trouble) that might have resulted in the death of a patient, but would write up Wilkinson for something as small as a time clock error that occurred routinely in the hospital.

Polansky was in a supervisory position that made her the gate keeper to all disciplinary actions at the sleep center. The violations of P/P would never reach Radcliff unless Polansky allowed them to. If Polansky recommended that a technician be hired, Radcliff would hire them. If

Polansky recommended that a technician be disciplined, Radcliff would discipline them. Polansky managed the technicians, scheduled the technicians, wrote the personnel reviews of the technicians, ordered

¹The defense claims that the video destruction was carried out the day after the study was scored. This is false. "This written response is being provided to you in response to the Paul Wilkinson second step grievance meeting which was held on August 8, 2012.....Following the grievance meeting, a video of the patient's visit was reviewed. The video showed Mr. Wilkinson apparently orienting the patient." (Exhibit 100). Defense also refers to the wrong disciplinary action in their brief. supplies, did 90% of the scoring, wrote P/P, scheduled the patients, and communicated daily with the sleep lab doctors. Radcliff simply signed off on everything because she had no experience in sleep. To look at Radcliff's history of disciplining in other departments is pointless for this reason. Radcliff might have had the title of sleep lab director, but Polansky was the one who fulfilled the position.

The defense claims that the disciplinary actions are not material facts. They are the most important material facts. The disciplinary actions were falsehoods created to harass Wilkinson. The disparate treatment of Wilkinson in comparison to his coworkers was meant to harass Wilkinson further. It has been well documented that Wilkinson was treated to a different standard than other employees. Many false disciplinary actions, that were then removed, were leveled against him. Whereas other technicians were seen in a light most favorable, Wilkinson

was always seen as guilty first. Any absence warranted a disciplinary action even if it was within the standards of ARMC's P/P. Wilkinson was accused of insubordination for not signing a blank sheet of paper and showing up to ARMC when HR director, Charmion Patton, and Radcliff failed to answer his phone calls and messages about whether he was supposed to work his normal schedule.² Wilkinson was given the silent treatment and avoided by Polansky when he tried to give morning report on patients. Wilkinson was shouted at in front of other staff and told he had nothing to say, was cutoff during conversations with Polansky, and was hung up on during phone conversations with Polansky.

Defense would like you to believe that Wilkinson was difficult to work with, but provides no affidavits or evidence from the people who worked with him. Polansky routinely worked an 8am-6pm shift from 2009 onward. Wilkinson always worked a 7pm-7:30am shift during his employment at ARMC. There were very few times a year that Polansky and Wilkinson actually physically met in the same room because of these schedules. But three nights a week, Wilkinson, worked side by side, 12 hours a night, with four individuals. No affidavits or statements are furnished by the defense from them. Wilkinson provides affidavits from two of the technicians. Several negative comments are made against other

employees in the affidavits. Nothing but positive comments for Wilkinson are presented in the affidavits.

²Wilkinson lives over 45 minutes away from ARMC and if he clocked in late for a shift, he would have violated P/P. Investigations on the part of HR had only taken a week before this incident. Radcliff did not respond until 15 minutes into the shift and there was only one technician there for four patients, instead of two technicians, when Wilkinson left.

Implied Contracts

The NLRB is a government agency with limited resources. To expect that they would do a thorough investigation of all allegations that come to them is a very Pollyanna view of the world. They are very much at the mercy of the employer in many cases. The NLRB will not waste resources to subpoena documents and elicit testimony unless there is a great many complainants or the violations are egregious. The documents produced for summary judgment are now quite extensive in comparison to what the NLRB had available at the time of Wilkinson's complaint. ARMC and its lawyers have at every turn controlled the flow of information in an effort to cloud the judgment of everyone looking at the allegations against Paul Wilkinson. It is not very likely that the NLRB would make a reasonably informed decision concerning this matter when

the flow of information is so corrupted. So engaging in a tort in a state court is the only option left to a complainant when the NLRB fails to gather the information necessary to make a reasonable decision concerning violations of the National Labor Relations Act (NLRA). How else can justice be served?

Section 301 of the Labor Management Relations Act is extensive, but not all inclusive. It cannot go beyond what the union contract does not cover. The union contract is quite specific in what it covers. "All matters not covered by the language of this Agreement shall be administered by the Employer in accordance with such policies and procedures as it from time to time shall determine." (CP 127, ARTICLE 2-MANAGEMENT RIGHTS) The evidence given to Judge Schapira to support an implied contract consisted of the investigational procedure outlined in the P/P of ARMC and the implication that when conducting an investigation there would be an implied covenant of good faith and fair dealing. This did not occur in the case of Wilkinson. Wilkinson was the only one with personal knowledge of most of the disciplinary actions. The disciplinary actions that resulted in his termination were based primarily on hearsay. P/P and the parameters of the AASM supported Wilkinson's decisions and refuted the hearsay. Yet, he was still

terminated. This damaged Wilkinson in the form of lost wages, emotional distress, and loss of standing within his chosen profession; polysomnography. Wilkinson should be allowed to pursue a tort claim for these damages.

Title VII claims

Paul Wilkinson never received a letter from the EEOC for permission to continue the case in federal court. He had to request a copy. The Opening Appeal Brief has an overcite because of my inexperience as a pro se attorney. Title VII is also being appealed. There are also issues with the King County Efile system that I was unaware of which lost some of the Exhibits or mixed them up. A full paper copy was provided to Judge Schapira the day of summary judgment and a full copy was sent via email before summary judgment.

CONCLUSION

The Appellant submits that there were errors of law made by the trial court. After reviewing the foregoing and the evidence it is my hope and wish that the Court of Appeals reverse the summary judgment the trial court granted the defendants on August 9, 2013, concerning discrimination under WLAD and Title VII and retaliation under the NLRA and order that the case go forward to trial. It is also my hope that

the Appellate Court will correct the trial court failure to enter a judgment or reverse the judgment concerning the implied contract between Wilkinson and ARMC exclusive of the collective bargaining agreement with UFCW local 21 and send it back to the trial court.

Dated on April 11, 2014

Respectfully submitted,



Paul Wilkinson, Pro Se
Appellant /Plaintiff

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day, I sent had deliver via courier to the following:

Catharine Morisset

Attorney at Law

Jackson Lewis LLP

520 Pike Street, Suite 2300

Seattle, WA 98101-4099

Dated on April 11, 2014

Paul Wilkinson

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Auburn Regional Medical Center

Exhibit 100
2 pages

August 29, 2012

UFCW21

Charles Primm, Union Representative
5030 First Avenue S. Suite 200
Seattle, WA. 98134

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Dear Mr. Primm,

This written response is being provided to you in response to the Paul Wilkinson second step grievance meeting which was held on August 8, 2012. After careful consideration, the information provided by Mr. Wilkinson in this meeting gave no merit to the revocation or reduction of the corrective action.

Responding to the first incident in the documentation related to his termination (attachment 1), Mr. Wilkinson claims the physician's order for a lateral sleep study was non-specific, asserting the order should have specified "only laterally" if the physician had intended for the study to be completed *only* in that position. Mr. Wilkinson acknowledges that usually physician's orders do not include specific instructions regarding positioning unless the physician wants specificity in positioning. In this case, the physician's specific instruction was clear and unambiguous and it was reasonably expected Mr. Wilkinson would follow the order. Instead, in contravention of the physician's instructions, Mr. Wilkinson actually physically awakened the patient and re-positioned the patient in a supine position, a position contraindicated by the patient's documentation.

With respect to the second issue in the documentation, Mr. Wilkinson alleges the patient himself refused a full face mask during the sleep study, although the patient denies this and stated the full face mask was not offered to him. Following the grievance meeting, a video of the patient's visit was reviewed. The video showed Mr. Wilkinson apparently orienting the patient. However, the video does not show orientation to the full face mask. Visible in the video, lying on the bed, are two options; nasal pillows and nasal mask, the only two options the patient stated was offered to him during the study. A full face mask is not visible on the video. After the patient is oriented, Mr. Wilkinson is seen entering the room to apply the chin strap, and he is not again seen entering the room until the moment Mr. Wilkinson documented the patient wished to end the study. There is no evidence Mr. Wilkinson ever offered the full face mask to the patient in accordance with standard practice and protocol and consistent with the patient's statement.

For the final issue, Mr. Wilkinson alleged there was "no medical reason" to increase pressure during the study explaining away multiple snores, respiratory events and arousals as "idiopathic cortical arousals with no association with breathing". In this study (attachment 2), very clearly the patient was experiencing snores, arousals and respiratory events, including while the patient was in REM sleep. Despite these arousals, Mr. Wilkinson failed to increase pressure in an effort to alleviate them until the last thirty minutes, which was an insufficient time frame under improper conditions to validate optimal pressure. Mr. Wilkinson substituted his own judgment over that of the physician, the sleep center and

in violation of policy and ASSM standards and recommendations. Please note; Mr. Wilkinson also claims the study was scored improperly: The study was reviewed and validated by a board certified physician.

There was no compelling evidence or information learned during the grievance meeting which would support that a different course of action should have been taken. This notification will serve as a formal communication that we reject your proposed resolution to the grievance and stand firm in our position the corrective action taken was fair and equitable.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Mason Hudson', with a stylized flourish at the end.

J. Mason Hudson
Director, Human Resources