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COURT OF APPEALS
DIVISION II

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NO. 39554-1-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY
DEPUTY

LARRY ANDREWS and MARTHA ANDREWS, husband and wife,
a marital community,

Appellants,

vs.

HARRISON MEDICAL CENTER, a Washington Non-Profit
Corporation,

Respondent.

REPLY BRIEF

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INTRODUCTION

The Brief of Respondent (BR) passes by the issues raised in the opening brief in such dark silence, and at such a great distance, that it makes “two ships passing in the night” seem a weak metaphor. This is more like two ships sailing on different seas, one by day, the other by night. But this is not just bad seamanship by HMC: it is the tack they have taken throughout this case to avoid the relevant issues. HMC slipped safely by on this bearing in the trial court. It cannot escape the engagement here.

This is an employment discrimination case. HMC admits that it discriminated against the Andrews on the basis of their marital status. BR 8. Its “defense” is to rely on the very policy embodying its discrimination, as though that would cure the problem. The Andrews maintain that this policy is a pretext for discrimination against them, which HMC denies. The result is a genuine issue of material fact (one of several requiring a trial) not immunity for HMC from Washington’s anti-discrimination laws.

HMC’s main point seems to be that because a WAC seemingly “authorizes” discrimination, HMC may discriminate with impunity. The WAC is unauthorized and facially unconstitutional. This Court should reverse and remand for trial.

STATEMENT OF THE CASE

HMC not only fails to prove that there are no genuine issues of material fact, but it creates new ones.

Although HMC acknowledges that the facts and all reasonable inferences must be taken in the light most favorable to the Andrews, it cannot help itself. It sets forth “facts” in a light misleadingly favorable to itself. BR 4-6. It also repeatedly makes assertions and inferences designed to place the Andrews in an unfavorable light.

For instance, HMC repeatedly asserts that it kept the Andrews’ on-call shifts “the same,” placing them on “Call A” and “Call B” on “the same” weekends. *E.g.*, BR 4. HMC would like the Court to infer that this is no big deal. But the only reasonable inference favoring the Andrews is that placing them on opposite call shifts on the same weekends directly interfered with their married life and made their lives miserable. CP 45 (“Plaintiffs were forced to be on opposite call times on the same day”).

A second example of presenting misleading facts is HMC’s section on its anti-nepotism policy. BR 5. It quotes a “purpose” statement and a definition of “immediate family members” that were not even in effect at the relevant times. *Compare* BA 6-9. The pertinent policy was primarily designed to avoid liability. CP 47.

The subsequent changes were designed to fix issues identified in the Andrews' litigation. BA 7-9.

The third – and perhaps the most significant – errant inference HMC repeatedly makes is the Andrews “admission” that Martha “supervis[ed]” Larry’s “performance” in the OR. *E.g.*, BR 5 (citing, *inter alia*, CP 36-37). Here is Larry’s actual testimony:

Q. So when I asked you a moment ago whether Martha supervised you when the two of you were working in the OR, and you said she did not, did you answer incorrectly?

A. I was assuming we were speaking in terms of a supervisor in the operating room. There should be some clarification here. In the operating room, the OR tech [Larry] carries his own license, and the RN [Martha] carries her own license. We both work independently in the operating room. My nurse is not always in my room, supervising my every move. If my nurse is pre-oping her patient, the room is left for me to take care of. I’m not always supervised.

A supervisor, in my opinion, in the operating room is somebody that is a patient care supervisor, or Kim Raney. The RNs are not my supervisors. The RNs are people that I work with, in the team mode in the operating room, to perform patient care, and we both work independently.

Q. But you agree –

A. But I can give you the fact that when we’re in a case, Martha – in the hierarchy of who delegates and who has the authority in the room – Martha would have more authority than I would. That would be correct.

Q. Okay. And she, in that instance, would have the authority to direct and supervise you?

A. Yes.

This hardly constitutes the sort of plain vanilla “admission” that would justify HMC’s repeated assertions that Martha had something more than nominal supervisory authority over Larry. This is significant because the nature of Martha’s so-called “supervision” is a disputed issue of material fact underlying HMC’s “business necessity” defense. The Andrews specifically denied that Martha had any authority to discipline or fire Larry. CP 45. Absent the power to fire or discipline, HMC’s alleged “conflict of interest” concerns are meaningless.

ARGUMENT

A. The Standard of Review is *de novo*.

The parties agree on the standard of review.

B. Washington and other States’ laws forbid marital-status discrimination like HMC routinely practices.

The Andrews first set forth Washington’s precedent on marital-status discrimination. BA 11-17. No Washington case has ever addressed whether a defendant like HMC may hide behind WAC 162-16-250 to achieve summary judgment where, as here, it admits to discriminating on the basis of marital status. Nor does HMC cite any authority following such an analysis. Indeed, HMC does not respond at all.

Among the cases discussed as “seminal” in BA Argument § B is ***Wash. Water Power Co. v. Wash. St. Human Rights Comm’n***, 91 Wn.2d 62, 586 P.2d 1149 (1978) (“***WWPC***”). BA 12. As further discussed *infra*, HMC continues to throw this decision around as though it resolves every conceivable issue in this case, when in fact, it resolves none of them. The ***WWPC*** Court addressed an ***employer’s*** challenge to the WHRC’s authority to regulate nepotism policies. Specifically, whether the term “marital status” as used in RCW 49.60.180 encompassed the identity of one’s spouse, permitting the WHRC to forbid employer marital-status discrimination on the basis of the identity of an employee’s spouse, or the spouse’s employment status. 91 Wn.2d at 65. The Court interpreted “marital status” broadly (pursuant to RCW 49.60.020’s liberal-construction mandate) as delegating to WHRC the authority to forbid an employer from firing a spouse simply due to the fact of marriage. *Id.* at 66, 70.

WWPS simply does not address whether WAC 162-16-250 obviates any factual disputes regarding the employer’s discriminatory intent. It is true (as HMC quotes at BR 21) that ***WWPS*** acknowledges in *dicta* the WHRC’s finding “that in most cases there was ***no*** bona fide business justification for” these

discriminatory nepotism policies. 91 Wn.2d at 68 (emphasis added). It is also true that the Court noted, “employers who do *not* have such a policy have generally *not* been subject to the evils feared by those who” do. *Id.* (emphases added).

But the Court did not say, as HMC seems to suggest, that the Legislature granted *carte blanche* to employers any time they dreamed up some potential conflict of interest between their married employees. Rather, the Court said the WHRC “recognized that there *may be* situations in which this type of discrimination is justified for legitimate business reasons, as where one spouse supervises the other” 91 Wn.2d at 68 (emphasis added). This *dicta* obviously is not a holding. Whether discrimination may be justified in a given situation is a question of (a) what the employer’s justification might be, (b) the nature of the employment and supervisory roles, (c) the employer’s evidence (*vel non*) that a conflict of interest actually exists, and (d) whether the employer’s so-called “business justification” is simply a pretext for marital-status discrimination. As further discussed *infra*, these are questions of fact for a jury.

C. Genuine issues of material fact regarding pretext preclude summary judgment here.

The Andrews next explained that under the *McDonnell Douglas*¹ burden-shifting summary-judgment analysis, they raised genuine issues of material fact as to whether HMC's reliance on WAC 162-16-250 and its nepotism policy is just a pretext for marital-status discrimination. BA 18-26. Again, HMC does not respond to this argument. This Court should reverse and remand for trial on this independently sufficient ground.

Instead of responding, HMC simply repeats its false claim that *WWPC* "recognizes" a "business necessity" where, as here, an employer intentionally discriminates on the basis of marital status, but claims that it is "justified" because one spouse has nominal supervisory authority over the other. BR 8-10. As explained above, the *WWPS dicta* says nothing of the kind. A jury could reasonably find that its "business necessity" is just a pretext.

Indeed, HMC's argument simply raises numerous genuine issues of material fact: First, although the Andrews worked together at HMC in the same jobs for years, HMC proffers no

¹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 93 S. Ct. 1817, 36 L.Ed. 2d 668 (1973).

evidence of any conflict-of-interest issue between them, between either of them and HMC, or between either of them and any other employee. Absent some evidence of an actual conflict-of-interest with someone, a jury could reasonably conclude that its so-called “policy” is just a pretext for marital-status discrimination.

Second, since HMC admittedly permits other spouses to work in the same operating room even when one spouse has supervisory authority over the other, a jury could reasonably find that HMC intentionally discriminated against the Andrews simply because they married. Indeed, HMC warned the Andrews that they would be treated differently than other spouses and couples living in a marriage-like relationship, and even differently than they themselves had been treated for years before they married. To the extent that HMC challenges some of these factual assertions, a jury must decide. In any event, the pretext issue is for the jury.

In another attempt to avoid the real issues in this case, HMC next answers an argument that the Andrews never made: it claims that it did not have to add marriage-like relationships to its definition of “immediate family members.” BR 10-12. The Andrews agree. But treating the Andrews less favorably than couples in a marriage-like relationship, and even than the Andrews themselves

before they married, raises a jury question as to whether HMC's "policy" is simply a pretext – *i.e.*, it is ***evidence of pretext***. For instance, if the purpose of HMC's policy is to avoid conflicts of interest where a supervisor is in a close intimate relationship with his or her supervisee, then the only legitimate way to apply the policy without committing rank discrimination against married couples is to apply the policy equally to all persons engaged in such relationships. While some people might find that HMC did not discriminate against the Andrews because they married, reasonable jurors could find that it did.

HMC again raises a red herring in arguing that treating some married couples differently than others fails to establish a *prima facie* case of discrimination on the basis of marital status. BR 12-13. That is beside the point. As noted at BA 18-20, the Andrews have met their burden to establish a *prima facie* case: HMC admits to discriminating against the Andrews on the basis of their marital status, and it undisputedly adversely changed the terms and conditions of their employment simply because they married, treating them differently than unmarried couples in precisely the same circumstances. *Id.* Even HMC admits this is the test. BR 13.

The evidence that HMC treats one married couple worse than all others instead tends to prove that its alleged “policy” is just a pretext – if it really thought that the mere possibility of nepotism (as apposed to an actual conflict of interest) was a sufficient justification to discriminate on the basis of marital status, then it would apply its policy uniformly to all married couples. Its failure to do so tends to prove that it does not really believe nepotism is a serious problem. Its “policy” is just a pretext for marital-status discrimination.

D. This Court should consider the Andrews’ constitutional challenges for the first time on appeal.

The Andrews next argued that if this Court did not reverse and remand on the above grounds, then it should address for the first time on appeal whether WAC 162-16-250(2)(b) is unconstitutional. BA 26-27. The test is manifest error affecting a constitutional right. RAP 2.5(a)(3). The right is marriage, and the manifest error is applying this facially-discriminatory WAC to authorize discrimination using the wrong legal analysis. BA 27-35. Again, HMC fails to confront this argument.

Instead, HMC invents its own test: whether RAP 2.5(a)(3) was previously applied to consider a constitutional challenge to a

WAC for the first time on appeal. BR 13-14. This Court has, of course, previously considered the constitutionality of a WAC. See, e.g., *Maxwell v. Dep't of Soc. & Health Servs.*, 30 Wn. App. 591, 593-94, 636 P.2d 1102 (1981) (“Our first inquiry on appeal is whether the application of the aforementioned WAC regulations was unconstitutional . . .”). But the test for whether this challenge meets the RAP 2.5(a)(3) criteria is to apply those criteria, not to ask whether another court has previously applied them in this context. HMC’s test is unsound. The Court should reach the issue.

HMC’s other assertion on this issue is rather odd: “Appellants’ BFOQ challenge necessarily assumes that WAC 162-16250 [*sic*] is constitutional [*sic*] yet fails to fit within the other exceptions recognized under RAP 2.5(a).” BR 14. As further explained below, this is simply wrong. The Andrews’ BFOQ argument necessarily demonstrates that WAC 162-16-250(2)(b) is facially discriminatory – and hence *un*constitutional – requiring HMC to prove a BFOQ. See *infra*, Arg. § F.

E. The WHRC’s regulation directly and substantially interferes with marriage, is not precisely tailored to meet any compelling state interest, and is unauthorized.

The Andrews next argued that on its face, WAC 162-16-250 unconstitutionally authorizes marital-status discrimination in a broad

array of cases, directly contrary to the WHRC's legislative mandate to eliminate and prevent marital-status discrimination, directly and substantially interfering with the right to marry. BA 27-32. Applying strict scrutiny, no reasonable person could doubt that this rule-swallowing "exception" is not narrowly tailored to meet a compelling state interest. *Id.* As in ***Fahn v. Cowlitz County***, 93 Wn.2d 368, 610 P.2d 857, 621 P.2d 1293 (1980), this regulation not only exceeds, but flies directly in the face of its statutory authorization. *Id.* Beyond any reasonable doubt, this Court should strike down WAC 162-16-250(2)(b).

For the first time, HMC claims that the WAC is narrowly tailored to meet a compelling state interest, but it again fails to confront the real issue. BR 22-23. It focuses instead on how it applied its own policy, rather than confronting the broad language of the WAC that is actually challenged here. *Id.* HMC thus tacitly concedes that the very broad "exception" in WAC 162-16-250(2)(b) cannot pass strict scrutiny. This Court should strike it down.

F. The regulations facially discriminate, the *McDonnell Douglas* burden-shifting rules do not apply, and HMC must establish a BFOQ, which it cannot do.

The Andrews next established that where, as here, a regulation facially discriminates against a fundamental right,

McDonnell Douglas does not even apply, but rather **Johnson Controls**² applies. BA 32-35 (citing **Comty. House, Inc. v. City of Boise**, 490 F.3d 1041, 1049-50 (9th Cir. 2007); **Bangerter v. Orem City Corp.**, 46 F.3d 1491, 1501 n.16 (10th Cir. 1995); **Reidt v. County of Trempealeau**, 975 F.2d 1336, 1341 (7th Cir. 1992)). HMC literally ignores all of this controlling authority, including **Johnson Controls**. Since the trial court applied the wrong test, permitting a facially discriminatory WAC to justify HMC's admitted discrimination on the basis of marital status, and since HMC has no response, this Court should reverse and remand for trial under the proper **Johnson Controls** analysis.

While purporting to address this argument, HMC again merely tries to evade it. BR 23-25. It first argues that because it may rely on the facially unconstitutional exception in subpart (b), subpart (a) does not apply. BR 24. This is willfully obtuse. The Andrews' point is obviously that since subpart (b) is facially discriminatory, **Johnson Controls** – like subpart (a) – requires HMC to establish a BFOQ. BA 34.

² **Int'l Union, United Auto., etc. v. Johnson Controls**, 499 U.S. 187, 197, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991).

HMC also argues that it can establish a BFOQ, citing a Michigan Federal District Court opinion. BR 24-25 (citing *Klanseck v. Prudential Ins. Co.*, 509 F. Supp. 13 (E.D. Mich. 1981)). As an initial matter, *Klanseck* says that the Michigan anti-discrimination statute does not protect against discrimination on the basis of whom one marries, which is directly contrary to our Supreme Court's analysis in *WWPS*, so this Court should not blindly follow *Klanseck*. As for the BFOQ analysis, the *Klanseck* court **heard testimony from witnesses** before reaching the conclusion that the employer had established a BFOQ. Here, HMC put on absolutely no evidence (and indeed cites to no evidence) even explaining, much less establishing, its need to discriminate on the basis of marriage. *Klanseck* is authority that the trial court should have heard testimony about whether HMC could prove a BFOQ defense. The summary judgment was improper.

G. In the alternative, WHRC's and HMC's regulations are not rationally related to a legitimate state purpose.

Finally, the Andrews argued in the alternative that HMC failed to proffer even a rational basis for WAC 162-16-250(2)(b)'s authorization of discrimination in a broad class of cases. BA 35-36. While the Andrews spent less than a page on this issue, HMC

spends most of its argument there. BR 14-22. Notwithstanding the large amount of federal authority – which the Andrews twice acknowledged and HMC nonetheless cites – HMC is incorrect.

Federal courts have been much less concerned about nepotism policies because Title VII simply does not prohibit discrimination on the basis of marital status. But Washington has a strong policy against marital-status discrimination, as the many cases cited and discussed in the opening brief attest. While federal courts often have permitted marital-status discrimination under the guise of these so-called anti-nepotism policies, this Court should reject those analyses, and instead hold that this State has no legitimate or even rational interest in authorizing marital-status discrimination in a huge number of cases. Where, as here, the exception essentially obviates the rule in many, many cases, a facially discriminatory statute is simply irrational.

CONCLUSION

For the reasons stated above, this Court should reverse and remand for trial.

RESPECTFULLY SUBMITTED this 15th day of March, 2010.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 15th day of March 2010, to the following counsel of record at the following addresses:

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