



**TABLE OF CONTENTS**

**INTRODUCTION**.....1

**COUNTER-STATEMENT OF ISSUES**.....3

**COUNTER-STATEMENT OF THE CASE** .....4

    A. Appellants’ History with HMC.....4

    B. HMC’s Anti-Nepotism Policy.....5

    C. Application of HMC’s Anti-Nepotism Policy .....5

    D. Mr. Andrew’s Washington State Human Rights Commission  
        Charge.....6

**ARGUMENT**.....6

    A. Standard of Review on Appeal .....6

    B. The Trial Court Properly Granted Respondent’s Summary  
        Judgment Motion Dismissing Appellants’ Marital Discrimination  
        Claim.....7

        1. The Standard for Summary Judgment .....7

        2. Appellants’ Marital Status Discrimination Claim Fails  
            as a Matter of Law Because HMC’s Anti-Nepotism  
            Policy is Lawful and Its Application to Appellants was  
            Justified by Business Necessity .....8

        3. Lawful Application of HMC’s Anti-Nepotism Policy  
            Does Not Require That The Policy be Similarly Applied  
            to Meretricious Relationships .....10

        4. HMC’s Enforcement of its Anti-Nepotism Policy Does  
            Not Support a Finding that it Discriminated Against  
            Married Couples.....12

    C. This Court Should Decline to Consider Arguments Appellants Did  
        Not Raise with the Trial Court.....13

    D. WAC 162-16-250(2) is Not Unconstitutional.....14

1. The Rational Basis Test Applies to the Court’s Consideration of Appellants’ Constitutional Challenge to WAC 162-16-250.....	15
2. WAC 162-16-250 is Rationally Related to a Legitimate State Interest.....	18
3. WAC 162-16-250 is Narrowly Tailored to Meet a Compelling State Interest.....	22
E. Respondent’s BFOQ Argument is Without Merit.....	23
1. Respondent is not Required to Establish a BFOQ .....	24
2. HMC Can Show the Existence of a BFOQ Justifying Application of its Anti-Nepotism Policy .....	24
<b>CONCLUSION</b> .....	25

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Califano v. Jobst</i> , 434 U.S. 47, 54 L. Ed. 2d 228, 98 S. Ct. 95 (1978).....	17
<i>Campbell v. Lehman</i> , 728 F.2d 49 (1st Cir. 1984).....	20
<i>Cutts v. Fowler</i> , 692 F.2d 138 (D.C. Cir. 1982).....	19
<i>Harper v. Trans World Airlines</i> , 525 F.2d 409 (8th Cir. 1975).....	19
<i>Keckeisen v. Indep. Sch. Dist. 612</i> , 509 F.2d 1062 (8th Cir. 1975), <i>cert. denied</i> , 423 U.S. 833 (1975).....	16
<i>Klanseck v. Prudential Ins. Co.</i> , 509 F. Supp. 13 (E.D. Mich. 1980)..	19, 25
<i>Mapes v. United States</i> , 217 Ct. Cl. 115, 576 F.2d 896, 901 (1978), <i>cert. denied</i> , 439 U.S. 1046, 58 L. Ed. 2d 705, 99 S. Ct. 722 (1978).....	17
<i>Montgomery v. Carr</i> , 101 F.3d 1117 (6th Cir. 1996) .....	15, 16, 18, 20
<i>Parks v. City of Warner Robins, Ga.</i> , 43 F.3d 609 (11th Cir. 1995) .....	19
<i>Parsons v. County of Del Norte</i> , 728 F.2d 1234 (9th Cir. 1984) <i>cert. denied</i> , 469 U.S. 846, (1984) .....	16, 17, 19, 20, 21, 22
<i>Ricards v. United States</i> , 652 F.2d 897 (9th Cir. 1981).....	17
<i>Vaughn v. Lawrenceburg Power Sys.</i> , 269 F.3d 703 (6th Cir. 2001).....	16
<i>Von Robinson v. Marshall</i> , 66 F.3d 249 (9th Cir. 1995) .....	18
<i>Yuhas v. Libbey-Owens-Ford Co.</i> , 562 F.2d 496 (7th Cir. 1977), <i>cert. denied</i> , 435 U.S. 934 (1978).....	19
<i>Zablocki v. Redhail</i> , 434 U.S. 374 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978).....	15, 17, 18, 22

## STATE CASES

<i>Amalgamated Transit Union Local 587 v. State</i> , 142 Wn. 2d 183 (2000).....	6, 7
<i>Berrocal v. Fernandez</i> , 155 Wn. 2d 585 (2005).....	6
<i>Connell v. Francisco</i> , 127 Wn. 2d 339 (1995) .....	11
<i>Fahn v. Cowlitz County</i> , 93 Wn. 2d 368 (1980) .....	24
<i>Go2net, Inc. v. Freeyellow.Com., Inc.</i> , 158 Wn. 2d 247 (2006).....	6
<i>Hiatt v. Walker Chevrolet</i> , 120 Wn. 2d 57 (1992).....	7
<i>Ingersoll v. Debartolo, Inc.</i> , 123 Wn. 2d 649 (1994) .....	7
<i>Magula v. Benton Franklin Title Co.</i> , 131 Wn. 2d 171 (1997).....	8
<i>Manhattan Pizza Hut, Inc. v. N.Y. State Human Rights Appeal Bd.</i> , 415 N.E.2d 950 (N.Y. 1980).....	19
<i>Ortiz v. L.A. Police Relief Ass’n.</i> , 98 Cal. App. 4th 1288 (Cal. App. 2d Dist. 2002).....	16
<i>Roberson v. Perez</i> , 156 Wn. 2d 33 (2005).....	13, 14
<i>Scott v. Blanchet High Sch.</i> , 50 Wn. App. 37 (1987) .....	7
<i>Sioux City Police Officers’ Ass’n v. City of Sioux City</i> , 495 N.W.2d 687 (1993).....	17
<i>State v. Ruff</i> , 122 Wn. 2d 731 (1993).....	14
<i>Thomson v. Sanborn’s Motor Express Inc.</i> , 154 N.J. Super. 555, 382 A.2d 53 (NJ. 1977) .....	19
<i>Troxell v. Rainier Public Sch. Dist. No. 307</i> , 154 Wn. 2d 345 (2005) .....	6

<i>Wash. v. Boeing Co.</i> , 105 Wn. App. 1 (2000).....	12
<i>Wash. Water Power Co. v. Wash. State Human Rights Comm'n.</i> , 91 Wn. 2d 62 (1978).....	8, 9, 11, 14, 20, 21
<i>Wilson v. Steinbach</i> , 98 Wn. 2d 434 (1982) .....	6

**STATE STATUTES AND REGULATIONS**

RCW 49.60 .....	13
WAC 162-16-240.....	24
WAC 162-12-250.....	2, 3, 8, 9, 11, 12, 14, 15, 18, 21, 22
WAC 162-16-250(1).....	8
WAC 162-16-250(2).....	2, 11, 14, 24
WAC 162-16-250(2)(a) .....	24
WAC 162-12-250(2)(b) .....	1, 2, 3, 4, 5, 24
WAC 162-16-250(2)(b) .....	8
WAC 162-16-250(2)(b)(i) .....	1, 9, 10, 24
WAC 162-16-250(2)(b) .....	21
WAC 162-16-250(2)(b) .....	22

## I. INTRODUCTION

This case involves a marital discrimination claim by Appellants Larry and Martha Andrews (“Appellants”). Their employer, Respondent Harrison Medical Center (“HMC”), has an anti-nepotism policy that prohibits one spouse from supervising another. HMC reassigned the Andrews from working in the same operating room after they became married because Mrs. Andrews supervised Mr. Andrews.

HMC’s policy tracks the language of WAC 162-16-250(2)(b)(i)-(iv) almost verbatim. The Washington Supreme Court long ago held that the Washington State Human Rights Commission (“Commission” or “WSHRC”) is legislatively empowered to enact a regulation that permits marital discrimination to prevent one spouse from being in a position to supervise another.

In May of 2007, appellants attempted to file a marital discrimination complaint with the WSHRC. They were told that their situation did not constitute marital discrimination because HMC was acting pursuant to an anti-nepotism policy and that what they were alleging did not constitute unlawful disparate treatment in violation of the Washington Law Against Discrimination (“WLAD”). Despite being told by the agency that is charged with enforcing the marital discrimination law that they did not have a valid claim, they proceeded to file this lawsuit.

Appellants admit that Mrs. Andrews supervised Mr. Andrews prior to HMC taking steps to re-assign them. They do not dispute that HMC acted pursuant to its anti-nepotism policy or that the policy complies with WAC

162-16-250(2)(b). They failed to establish the existence of any genuine issue of material fact to overcome summary judgment. The trial court properly dismissed their marital discrimination claim as a matter of law.

In an effort to avoid this outcome, Appellants now argue for the first time that: (1) WAC 162-16-250's exceptions to marital discrimination are unconstitutional; and (2) Respondent cannot establish a Bona Fide Occupational Qualification ("BFOQ") justifying application of its anti-nepotism policy to them. Because Appellants did not raise these issues with the trial court, this Court should not consider them on appeal. Even if this Court were to consider the issues, however, they are without merit and do not warrant reversal of the trial court's order dismissing Appellants' marital discrimination claim.

First, Appellant's constitutional challenge to WAC 162-16-250 fails. Contrary to Appellants' contention, the regulation does not directly or substantially interfere with the right of marriage and, thus, rational basis scrutiny applies. Like virtually every court to have confronted a constitutional challenge to an anti-nepotism policy, WAC 162-16-250(2)(b) passes constitutional muster. The same result exists should this Court determine that a strict scrutiny analysis is applicable.

Second, Appellants' claim that Respondent cannot establish a BFOQ is without merit. Indeed, Respondent is under no legal obligation to show the existence of a BFOQ. Instead, the establishment of a BFOQ is only one of *two* alternatives to marital discrimination under WAC 162-16-250(2). Respondent's anti-nepotism policy was implemented under the alternative

exception, allowing an employer to enforce a documented conflict of interest policy limiting employment opportunities on the basis of marital status. Furthermore, a BFOQ exists justifying Respondent's application of its anti-nepotism policy.

For all of the foregoing reasons, as explained in greater detail below, this Court should uphold the trial court's dismissal of Appellants' marital discrimination claim.

## **II. COUNTER-STATEMENT OF ISSUES**

- A.** Whether the trial court properly granted summary judgment on Appellants' marital discrimination claim.
- B.** Whether this Court should decline to consider Appellants' claims that WAC 162-12-250 is unconstitutional and that Respondent cannot establish a BFOQ justifying application of its anti-nepotism policy when Appellants did not raise these issues with the trial court.
- C.** Whether rational basis scrutiny applies to this Court's consideration of Appellants' constitutional challenge to WAC 162-16-250 when the regulation does not directly or substantially interfere with the right of marriage.
- D.** Whether WAC 162-16-250 is rationally related to a legitimate state interest and/or narrowly tailored to meet an important state interest.
- E.** Whether Respondent is under no legal obligation to establish a BFOQ justifying application of its anti-nepotism policy when Respondent implemented its anti-nepotism policy under the exception to marital discrimination allowed under WAC 162-16-250(2)(b).

F. Whether Respondent can establish a BFOQ justifying application of its anti-nepotism policy.

### III. COUNTER-STATEMENT OF THE CASE

#### A. Appellants' History With HMC.

Mr. Andrews has been employed with HMC as an Operating Room Technician since December 1992. CP 20. Mrs. Andrews has been employed with HMC as an Operating Room Nurse since 2001.<sup>1</sup> *Id.* Appellants reportedly began cohabitating in or about August 2004. CP 34-35. Prior to August 2006, Appellants had reported to HMC Administration that they were married to other persons. CP 33, 58-59. In or about August 2006, Appellants announced their intention to marry, and did so on August 8, 2006. CP 21.

In August 2006, HMC informed Appellants that, due to their marital status, HMC's anti-nepotism policy precluded them from working together in the same operating room. CP 64, 72. Nonetheless, HMC continued to allow Appellants to each work the same schedule that they had worked prior to their marriage, namely, Monday through Friday, 6:30 a.m. to 3:00 p.m., albeit in different operating rooms. CP 60, 73.

HMC utilizes two (2) on-call crews on the weekends, designated as "Call A" and "Call B." CP 73. After their marriage, HMC continued to allow Appellants to be on-call on the same weekend as one another, except it designated one of them as on "Call A" and the other as on "Call B." *Id.*

---

<sup>1</sup> For the purposes of Respondent's brief and because it is so reflected in the record, Respondent refers to Mrs. Andrews as a current HMC employee. In fact, Mrs. Andrews resigned from her employment with Respondent after the trial court ruled on HMC's summary judgment motion.

On May 1, 2008, Mr. Andrews was transferred to HMC's Silverdale campus at his request. *Id.* Mrs. Andrews continued to work at HMC's Bremerton campus. *Id.*

**B. HMC's Anti-Nepotism Policy.**

Since approximately 1993, HMC has maintained an anti-nepotism policy. CP 38-39, 47-52. The purpose of that policy is "[t]o avoid potential conflict of interest employment situations by the hiring or assignment of immediate family members." *Id.* HMC's current definition of "immediate family members" reads as follows:

Immediate Family Members – within the meaning of this procedure include parent (and step-parent), grandparent, spouse, state registered domestic partner, child, grandchild, brother, sister, or the spouse's parent (and step-parent), grandparent, child, grandchild, brother or sister.

CP 22, 65-68, 70-71.<sup>2</sup> The anti-nepotism policy states in pertinent part that HMC may refuse to hire or assign an immediate family member when "[o]ne family member would have the authority or practical power to supervise, appoint, remove or discipline another family member." CP 39-40, 50, 70-71.

**C. Application of HMC's Anti-Nepotism Policy to Appellants.**

Appellants have admitted that in Mrs. Andrews' capacity as an Operating Room Nurse she was responsible for assigning Mr. Andrews tasks and for supervising his performance in his capacity as an Operating Room Technician. CP 36-37, 44-45. Thus, Appellants' spousal relationship and work responsibilities created the exact circumstance set forth in HMC's anti-

---

<sup>2</sup> Although Appellants claim to have co-habitated prior to marrying, they do not claim to have been state registered domestic partners.

nepotism policy, which allows HMC to reassign an immediate family member when “[o]ne family member would have the authority or practical power to supervise, appoint, remove or discipline another family member.” CP 39-40, 50, 70-71.

**D. Mr. Andrews’ Washington State Human Rights Commission Charge.**

In May 2007, Mr. Andrews filed a complaint with the WSHRC alleging that HMC discriminated against him and Mrs. Andrews because of their marital status. CP 41. The factual allegations forming the basis of Mr. Andrews’ complaint with the Commission are the same as those forming the basis of the underlying complaint against HMC. CP 41-43. On May 9, 2007, the Commission sent Mr. Andrews a letter informing him that the information he provided to the Commission did not establish an inference of unlawful marital discrimination. CP 41-42, 53-54.

**IV. ARGUMENT**

**A. Standard of Review on Appeal.**

An order granting summary judgment is reviewed de novo. *Go2net, Inc. v. Freeyellow.Com., Inc.*, 158 Wn.2d 247, 252 (2006) (citing *Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wn.2d 345, 350 (2005)); *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 206 (2000). The court must view the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590 (2005) (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437 (1982)). Summary judgment is proper only where there are no genuine issues of

material fact and the moving party is entitled to judgment as a matter of law. *Amalgamated Transit*, 142 Wn.2d at 206; CR 56(c).

**B. The Trial Court Properly Granted Respondent's Summary Judgment Motion Dismissing Appellants' Marital Discrimination Claim.**

**1. The Standard for Summary Judgment.**

Summary judgment should be granted where “the record before the court shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” CR 56(c). To demonstrate that summary judgment is proper, a defendant need not produce affirmative evidence to negate each of the plaintiffs' contentions; it is sufficient to point out the absence of evidence supporting the plaintiffs' claims. *Ingersoll v. Debartolo, Inc.*, 123 Wn.2d 649, 654 (1994). The plaintiffs must then come forward with evidence to support each element of their case. *Id.*; *Hiatt v. Walker Chevrolet*, 120 Wn.2d 57, 66 (1992).

To carry this burden, the plaintiffs cannot merely express opinions or make conclusory statements. *Hiatt*, 120 Wn.2d at 66. Similarly, they cannot avoid summary judgment by relying on unreasonable inferences. *Scott v. Blanchet High Sch.*, 50 Wn. App. 37, 41, 47 (1987). Rather, the plaintiffs must establish “specific and material facts to support each element” of their claims. *Hiatt*, 120 Wn.2d at 66. If they cannot do so, then summary judgment is proper. *Id.*

**2. Appellants' Marital Status Discrimination Claim Fails as a Matter of Law Because HMC's Anti-Nepotism Policy is Lawful and Its Application To Appellants Was Justified by Business Necessity.**

A prima facie case of marital status discrimination requires a plaintiff to prove that: (1) the employer discriminated against her/him based on her/his marital status; and (2) this discrimination was not justified or excused by "business necessity." *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 176 (1997). Business necessity justifying marital discrimination is recognized under Washington law in the situation where one spouse supervises the other. *Washington Water Power Co.*, 91 Wn.2d 62, 68 (1978); WAC 162-16-250.

HMC does not contest that application of its anti-nepotism policy had the effect of discriminating against Appellants based on their marital status. But, application of the policy is per se justified by business necessity under *Washington Water Power Co.* because appellants admit that Mrs. Andrews supervised Mr. Andrews.

As a general matter, employment actions may not be taken on the basis of an individual's marital status. See WAC 162-16-250(1) ("It is an unfair practice to discriminate against an employee or job applicant because of marital status."). Nonetheless, WAC 162-16-250(2)(b) specifically recognizes exceptions to this rule, whereby an employer's actions do not constitute *unlawful* marital-status discrimination, as follows:

[i]f an employer is enforcing a documented conflict of interest policy limiting employment opportunities on the basis of marital status:

- (i) *Where one spouse would have the authority or practical power to supervise, appoint, remove, or discipline the other;*
- (ii) Where one spouse would be responsible for auditing the work of the other;
- (iii) Where other circumstances exist which would place the spouses in a situation of actual or reasonably foreseeable conflict between the employer's interest and their own; or
- (iv) Where, in order to avoid the reality or appearance of improper influence or favor, or to protect its confidentiality, the employer must limit the employment of close relatives of policy level officers of customers, competitors, regulatory agencies, or others with whom the employer deals.

WAC 162-16-250(2)(b)(i)-(iv) (emphasis added); *see also Washington Water Power Co.*, 91 Wn.2d at 70 (“It was well within the statutory authority of the commission to adopt the rule in question.”).<sup>3</sup> The Washington Supreme Court in *Washington Water Power Co.*, specifically noted that, in promulgating WAC 162-16-250, the Washington State Human Rights Commission “recognized that there may be situations in which [marital status discrimination] is justified for legitimate business reasons, *as where one spouse supervises the other.*” *Washington Water Power Co.*, 91 Wn.2d at 68 (emphasis added).

Pursuant to WAC 162-16-250, HMC maintains a documented anti-nepotism policy providing that it may refuse to hire, transfer or place into a

---

<sup>3</sup> In light of these recognized exceptions to marital discrimination, the litany of cases Appellants discuss in support of their argument that Washington forbids marital discrimination is immaterial. *See* Appellants’ Brief, at 11-17.

position, or schedule an immediate family member when one family member has the actual or potential authority to supervise another family member. CP 39-40, 50, 70-71. Here, Mrs. Andrews *admits* that she had the authority to supervise her spouse when they were together in the operating room. CP 36-37, 44-45. Pursuant to its policy, HMC separated Appellants from working in the operating room together. CP 64-72. Not surprisingly, the WSHRC refused to issue a marital discrimination complaint on Appellants' behalf. CP 41-42, 53-54.

HMC's anti-nepotism policy falls squarely within the marital discrimination exception authorized by WAC 162-16-250(2)(b)(i)-(iv). The Andrews' situation falls squarely within the prohibition of the lawful anti-nepotism policy. Thus, the trial court properly granted HMC's summary judgment motion dismissing Appellants' marital discrimination claim as a matter of law.

**3. Lawful Application of HMC's Anti-Nepotism Policy Does Not Require That The Policy be Similarly Applied to Meretricious Relationships.**

In order to establish that summary judgment was improperly granted, Appellants must show that there is a dispute of material fact requiring trial. There are no disputed facts precluding summary judgment. HMC agrees that the definition of "immediate family members" in its anti-nepotism policy does not include couples sharing casual living relationships. HMC has chosen not to extend its anti-nepotism policy to such relationships for administrative reasons.

Notably, WAC 162-16-250(2) does not require that an employer treat unmarried couples in a similar manner as married couples in order for the recognized exceptions to marital-status discrimination to apply. See WAC 162-16-250(2) (“There are narrow exceptions to the rule that an employer, employment agency, labor union, or other person may not discriminate on the basis of *marital* status.”) (emphasis added). Appellants do not contest that the Washington Supreme Court long ago upheld WAC 162-16-250 as within the Commission’s lawful regulatory authority.<sup>4</sup> *Washington Water Power Co. v. Washington State Human Rights Commission*, 91 Wn.2d 62, 70 (1978).

Indeed, Appellants offer no legal authority for their proposition that an employer must apply its anti-nepotism policy to married couples and couples in meretricious relationships for the policy to comply with WAC 162-16-250. The only case upon which they rely is *Connell v. Francisco*, 127 Wn. 2d 339 (1995), which involved the distribution of property at the end of a meretricious relationship. *Connell* does not involve the lawful exception to marital status discrimination provided for by WAC 162-16-250. *Connell* is noteworthy, however, for its comments on the significant differences between marriage and meretricious relationships:

A meretricious relationship is not the same as a marriage. . . . [A] person cohabiting in a nonmarital relationship with an insured is not a member of the insured's "immediate family". . . .

---

<sup>4</sup> Instead, Appellants now argue that the exceptions to marital discrimination set forth in WAC 162-16-250 are unconstitutional. As discussed *infra*, the Court should not consider Appellants’ claim because they did not raise it with the trial court. Further, Appellants’ argument is without merit.

*Connell*, 127 Wn. 2d at 348-49 (citations omitted). It is not surprising, therefore, that HMC chose not to include persons in meretricious relationships within the definition of “immediate family members” in its anti-nepotism policy, nor is it unlawful.

Because HMC’s anti-nepotism policy and its application to Appellants is consistent with the permitted marital discrimination exception set forth in WAC 162-16-250, the trial court properly granted summary judgment dismissing Appellant’s marital discrimination claim.

**4. HMC’s Enforcement of its Anti-Nepotism Policy Does Not Support A Finding that It Discriminated Against Married Couples.**

Appellants additionally argue that HMC “selectively” enforces its anti-nepotism policy against married couples. *See* Appellants’ Brief, at 3-5, 25-26. This argument inherently fails to state a claim for marital discrimination.

Assuming *arguendo* that the facts as alleged by Appellants are true, Appellants are merely asserting that one married couple was treated more favorably than another married couple. While that may constitute some sort of “disparate treatment,” it is not unlawful discrimination based on marital status. Indeed, as recognized by the WSHRC Investigator who refused to issue a marital discrimination complaint on Appellants’ behalf, allegations of an employer’s more favorable treatment of other married employees does not support a claim of discrimination based on marital status. *See Washington v. Boeing Co.*, 105 Wn. App. 1, 13 (2000) (to create an inference of

discrimination under RCW 49.60, a plaintiff must show that s/he belongs to a protected class and was treated less favorably in the terms or conditions of employment than a similarly-situated, *non-protected* employee); *see also* CP 53-54 (May 9, 2007 Letter from Investigator Winkler to Mr. Andrews) (“The information you provided does not describe marital discrimination because you are married, since you indicated that coworkers, who are married, are treated more favorably . . . [T]he information you provided does not establish an inference of a violation of the state’s discrimination law.”).

For all of the reasons previously stated, the trial court did not err in granting HMC’s motion for summary judgment dismissing Appellants’ marital discrimination claim.

**C. This Court Should Decline to Consider Arguments Appellants Did Not Raise with the Trial Court.**

“In general, issues not raised in the trial court may not be raised on appeal.” *Roberson v. Perez*, 156 Wn.2d 33, 40 (2005); *see also* RAP 2.5(a) (an "appellate court may refuse to review any claim of error which was not raised in the trial court"). Under RAP 2.5(a), this general rule does not apply to a party’s challenge for the first time on appeal to: (1) lack of trial court jurisdiction; (2) failure to establish facts upon which relief can be granted; and (3) manifest error affecting a constitutional right. *See* RAP 2.5(a)(1)-(3); *see also Perez*, 156 Wn.2d at 40 (recognizing that RAP 2.5(a) “contains several express exceptions from its general prohibition against raising new issues on appeal”).

Here, Appellants claim for the first time on appeal that: (1)

WAC 162-16-250 is unconstitutional; and (2) Respondent must establish a BFOQ to support the application of its anti-nepotism policy, which they contend Respondent is unable to do. *See* Appellants' Brief, at 27-35. Neither claim constitutes a recognized exception to the general rule that issues not raised in the trial court may not be raised on appeal. *See* RAP 2.5(a). Although the Washington Supreme Court has held that a challenge to the constitutionality of an underlying statute satisfies RAP 2.5(a), no court has similarly applied RAP 2.5(a)'s exceptions to a regulatory challenge. *See State v. Ruff*, 122 Wn.2d 731, 733 (1993) ("The unconstitutionality of the *statute* under which the defendant was convicted is a manifest error affecting a constitutional right and may, therefore, be raised initially on appeal.") (emphasis added). Further, Appellants' BFOQ challenge necessarily assumes that WAC 162-16-250 is constitutional yet fails to fit within the other exceptions recognized under RAP 2.5(a).

For each of these reasons, this Court should decline to consider Appellants' constitutional and BFOQ challenges raised for the first time on appeal. *See Perez*, 156 Wn.2d at 40 (recognizing that RAP 2.5(a) gives appellate courts the discretion to decline to consider issues not raised in the trial court).

**D. WAC 162-16-250(2) is Not Unconstitutional.**

Even if this Court were to consider Appellants' constitutional challenge, that challenge is entirely without merit. WAC 162-16-250 has already been upheld by the Washington Supreme Court in *Washington Water*

*Power Co.*, 91 Wn.2d 62, 65-66, 70 (1978) (“It was within the statutory authority of the commission to adopt the rule in question.”)

Appellants provide no explanation for why this Court should re-examine WAC 162-16-250. If the Court were to do so, however, it should apply rational basis scrutiny to WAC 162-16-250, which the regulation easily satisfies. Even if the Court were to apply strict scrutiny, WAC 162-16-250 passes constitutional muster.

**1. The Rational Basis Test Applies to The Court’s Consideration of Appellants’ Constitutional Challenge to WAC 162-16-250.**

Appellants erroneously argue that WAC 162-16-250’s marital discrimination exception interferes directly and substantially with the fundamental right to marry and, thus, the regulation is subject to strict scrutiny. *See* Appellant’s Brief, at 28. “Determining the appropriate level of scrutiny to apply to governmental action alleged to infringe the right of marriage requires a two-step analysis.” *Montgomery v. Carr*, 101 F.3d 1117, 1126 (6<sup>th</sup> Cir. 1996) (citing *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978)). First, a court must ask whether the policy or action is a direct or substantial interference with the right of marriage; second, if the policy or action is a direct and substantial interference with the right of marriage, apply strict scrutiny, otherwise apply rational basis scrutiny. *Id.*

Courts have repeatedly concluded that anti-nepotism policies that do not *bar* two employees from getting married but, instead, merely impose a burden on marrying someone in a small group of people (such as an

individual's co-employees) do not interfere directly and substantially with the fundamental right to marry. See *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 712 (6th Cir. 2001); *Keckeisen v. Independent School District 612*, 509 F.2d 1062, 1066 (8th Cir. 1975), *cert. denied*, 423 U.S. 833 (1975). For this reason, "[v]irtually every court to have confronted a challenge to an anti-nepotism policy on First Amendment, . . . due process, equal protection, or other grounds *has applied rational basis scrutiny.*" *Ortiz v. L.A. Police Relief Ass'n*, 98 Cal. App. 4th 1288, 1313 (Cal. App. 2d Dist. 2002) (quoting *Montgomery v. Carr*, 101 F.3d 1117, 1126 (6<sup>th</sup> Cir. 1996) (emphasis added); see also *Parsons v. County of Del Norte*, 728 F.2d 1234, 1237 (9th Cir. 1984).<sup>5</sup>

For example, in *Montgomery*, the Sixth Circuit Court of Appeals determined that the respondent school system's anti-nepotism policy, requiring transfer of one spouse if employees married, was not a direct and substantial infringement upon the right to marry and, consequently, was subject to a rational basis analysis. *Montgomery*, 101 F.3d at 1125. The court noted that virtually every court to have confronted a constitutional challenge to an anti-nepotism policy had applied rational basis scrutiny and had concluded that those policies passed constitutional muster. *Id.* at 1126, 1131.

Similarly, when faced with a constitutional challenge to an anti-nepotism policy precluding married employees from working in the same

---

<sup>5</sup> Notably, Appellants do not cite to a single case in which a court applied strict scrutiny to an anti-nepotism statute or regulation. See Appellants' Brief, at 27-32.

department, the Ninth Circuit Court of Appeals in *Parsons* rejected the appellant's contention that the policy should be strictly scrutinized because it interfered with Mrs. Parson's fundamental right to marry. *See Parsons*, 728 F.2d at 1237. The Court reasoned as follows:

Parsons contends that the no-nepotism rule violates the Equal Protection and Due Process clauses of the Fourteenth Amendment because it interferes with her fundamental right in the marital status [sic]. She argues that the rule must be strictly scrutinized and invalidated unless the County has a compelling interest justifying this burden on marriage.

We think Parsons is mistaken. *The strict scrutiny analysis is inapplicable because no fundamental right is implicated. Parsons' right to marry on [sic] remain married is not threatened, nor unduly burdened. The interest which in fact she seeks to vindicate is a claimed right for her husband and herself to be both given employment in the same County department.*

\* \* \*

*A regulation does not become subject to strict scrutiny as involving a suspect class merely because in some way it touches upon the incidents of marriage. Zablocki v. Redhail*, 434 U.S. 374, 386, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978). Only when a government regulation directly and substantially interferes with the fundamental incidents of marriage is such strict scrutiny applicable. *Id.* Where fundamental rights are not substantially burdened the regulation will be upheld unless there is no rational basis for its enactment. *See Califano v. Jobst*, 434 U.S. 47, 53-54, 54 L. Ed. 2d 228, 98 S. Ct. 95 (1978); *Ricards v. United States*, 652 F.2d 897, 903 (9th Cir. 1981); *Mapes v. United States*, 217 Ct. Cl. 115, 576 F.2d 896, 901 (1978), *cert. denied*, 439 U.S. 1046, 58 L. Ed. 2d 705, 99 S. Ct. 722 (1978).

*Parsons*, 728 F.2d at 1237 (emphasis added); *see also Sioux City Police Officers' Ass'n v. City of Sioux City*, 495 N.W.2d 687, 696 (1993) (applying a

rational basis test when defendant city's anti-nepotism policy did not deny city employees the right to marry but, instead, "only prohibit[ed] the employment of married persons within the same department").

Like the anti-nepotism policies considered by many courts before it, HMC's anti-nepotism policy and, more importantly, the challenged regulation upon which it is based, do not bar or otherwise threaten employees from marrying, Appellants included.<sup>6</sup> Thus, rational basis scrutiny applies to this Court's consideration of Appellants' constitutional challenge to WAC 162-16-250.

## **2. WAC 162-16-250 Is Rationally Related to a Legitimate State Interest.**

"[R]easonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978)); *see also Von Robinson v. Marshall*, 66 F.3d 249, 251 (9th Cir. 1995) (legislation "is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate governmental interest"). "The means chosen need not be the best for achieving these stated ends, but need only be rational in view of those ends." *Montgomery v. Carr*, 101 F.3d 1117, 1130 (6th Cir. 1996).

The majority of courts that have examined the constitutionality of anti-nepotism policies precluding married employees from working together

---

<sup>6</sup> Indeed, the only impact of the application of HMC's anti-nepotism policy to Appellants was that they were precluded from working side-by-side in the same operating room.

and/or supervising one another have found that the policies satisfy the rational basis test. *See e.g., Parks v. City of Warner Robins, Georgia*, 43 F.3d 609, 615 (11th Cir. 1995) (upholding anti-nepotism policy as means of "avoiding conflicts of interests between work-related and family-related obligations; reducing favoritism or even the appearance of favoritism; preventing family conflicts from affecting the workplace . . . "); *Parsons v. Del Norte County*, 728 F.2d 1234 (9th Cir. 1984) (upholding defendant county's prohibition against married permanent employees working in the same department), *cert. denied*, 469 U.S. 846, (1984); *Yugas v. Libbey-Owens-Ford Co.*, 562 F.2d 496 (7th Cir. 1977) (upholding defendant company's refusal to hire plaintiff because of a no-spouse new employee rule), *cert. denied*, 435 U.S. 934 (1978); *Harper v. Trans World Airlines*, 525 F.2d 409 (8th Cir. 1975) (upholding defendant company's requirement that one spouse transfer or resign when co-workers employed in the same department marry); *Cutts v. Fowler*, 692 F.2d 138, 139 (D.C.Cir. 1982) (upholding plaintiff's transfer from her civil service position "to avoid potential nepotism problems" because of her husband's promotion to head her division) *Klanseck v. Prudential Ins. Co.*, 509 F. Supp. 13 (E.D. Mich. 1980) (upholding defendant company's no-spouse rule for district agents based on the company's perception of possible gerrymandering); *Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Board*, 415 N.E.2d 950 (N.Y. 1980) (upholding wife's termination based on a no-family supervisor rule, despite a four year employment of the wife under her husband's supervision); *Thomson v. Sanborn's Motor Express Inc.*, 154 N.J. Super. 555, 382 A.2d 53

(NJ. 1977) (upholding termination of employee's wife based on a no-relatives policy).

Like the anti-nepotism policies considered before by numerous courts, there exists a legitimate governmental interest in, among other things, avoiding conflicts of interest and favoritism in employee hiring, supervision, and allocation of duties, as well as avoiding friction and disharmony in the workplace, particularly where the workplace is an operating room. Such interests have been found to satisfy the rational basis test as applied to anti-nepotism policies barring married employees from working together in the same department and/or supervising one another. *See, e.g., Montgomery*, 101 F.3d at 1130 (anti-nepotism policy rationally related to legitimate interest when it was implemented to avoid friction and disharmony at defendant school); *Parsons*, 728 F.2d at 1237 (“The County asserts justification for the [anti-nepotism] rule [precluding employees from working in the same department] in that it avoids conflicts of interest and favoritism in employee hiring, supervision, and allocation of duties. The structure of the rule bears a rational relationship to this end and therefore passes constitutional muster.”); *Campbell v. Lehman*, 728 F.2d 49, 52 (1st Cir. 1984) (regulation prohibiting persons related by blood or marriage to an employee of the school from being a candidate for school board was designed to prevent potential conflicts of interest in a school board-employee relationship was not unreasonable).

Indeed, as specifically recognized by the Washington State Supreme Court in *Washington Water Power Co.*, 91 Wn.2d 62, 68 (1978), in

promulgating WAC 162-16-250, the Washington State Human Rights Commission acted out of a specific interest in eliminating unlawful marital discrimination while allowing for employers to act to avoid conflicts of interest in the workplace:

Here complaints of citizens that they had been discriminated against because of their marital status drew to the commission's attention the practice of refusing to hire spouses, a practice known as "anti-nepotism." Its investigation revealed that in most cases there was no bona fide business justification for this discrimination. The record indicates that the commission took notice of the fact that employers who do not have such a policy have generally not been subjected to the evils feared by those who utilize it. It concluded therefore that, whether or not it is intended as such, the discharge of an employee or the refusal to hire an applicant because his or her spouse works for the employer necessarily involves an examination of an employee's marital status and therefore is discrimination based upon such status.

*At the same time it 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, or audits his or her work, or where the spouses are in direct or potential competition with each other. Provision was made for such cases.*

*Wash. Water Power Co.*, 91 Wn.2d at 68 (emphasis added). The structure of the marital discrimination exceptions set forth in WAC 162-16-250(b)(2) bears a rational relationship to this end in that it specifically enables employers to reduce or eliminate conflicts of interest and favoritism in the workplace through the enforcement of "a documented conflict of interest policy limiting employment opportunities on the basis of marital status." *Accord, Parsons*, 728 F.2d at 1237.

That the regulation does not require the marital discrimination

exceptions be applied equally to meretricious relationships is of no consequence. Indeed, the Ninth Circuit Court of Appeals in *Parsons* declined to find that there existed no rational basis for the challenged anti-nepotism policy prohibiting spouses from working in the same department when the challenged anti-nepotism was not applied equally to *unmarried* employees (such as those in meretricious relationships). In so finding, the Court reasoned that application of the no-nepotism rule to the immediate family reasonably furthered the county-respondent's interest in having a rule that is clear and enforceable, and specifically noted that "[a] rule which included unmarried cohabitants would be difficult to apply." *Id.*

For all of the foregoing reasons, the exceptions to marital discrimination set forth in WAC 162-16-250(b)(2) satisfy rational scrutiny and are constitutional.

**3. WAC 162-16-250 Is Narrowly Tailored to Meet a Compelling State Interest.**

Even if this Court were to apply a strict scrutiny analysis to WAC 162-16-250's marital discrimination exceptions, the regulation is not unconstitutional. "When a statutory classification significantly interferes with the exercise of a fundamental human right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). Here, there is a sufficiently important state interest in promoting harmony and avoiding actual or apparent conflicts of interest in the workplace. Such an interest is particularly compelling where, as here,

conflicts of interest in the operating room may negatively impact, or otherwise create an imminent threat to, the public's life and limb.

HMC's anti-nepotism policy and the regulation upon which it is modeled are closely tailored to effectuate such interests by providing limited exceptions to marital discrimination for the sole purpose of promoting harmony and eliminating conflicts of interests. Application of Respondent's anti-nepotism policy to Appellants demonstrates how effectively those interests are met with minimal impact on the affected individuals. Indeed, application of HMC's anti-nepotism policy did not bar either Mr. or Mrs. Andrews from employment with Respondent. Instead, the policy merely precluded them from working together in the same operating room. CP 64, 72. Respondent continued to allow Appellants to: (1) each work the same schedule that they had worked prior to their marriage, namely, Monday through Friday, 6:30 a.m. to 3:00 p.m.; and (2) be on-call on the same weekend as one another, except it designated one of them as on "Call A" and the other as on "Call B." CP 60, 73.

In sum, the regulation and anti-nepotism policy upon which it is based is narrowly tailored to meet a compelling state interest in promoting harmony in the workplace and in eliminating conflicts of interest that may, in this case, impact public health and safety. It therefore passes the "strict scrutiny" and is constitutional.

**E. Respondent's BFOQ Argument is Without Merit.**

Even if this Court were to consider Appellants' claim that Respondent cannot establish a BFOQ, that argument fails. As an initial matter,

Respondent is under no legal obligation to establish a BFOQ. Even if it were, however, a BFOQ exists supporting application of its anti-nepotism policy to Appellants.

**1. Respondent Is Not Required to Establish a BFOQ.**

Appellants erroneously argue that Respondent must establish a BFOQ to justify application of its anti-nepotism policy. *See* Appellants Brief, at 32-35. To the contrary, WAC 162-16-250(2) unambiguously provides the establishment of a BFOQ as *one of two* exceptions to the WLAD's prohibition against marital discrimination. As discussed *supra*, HMC properly relied on the other exception set forth in WAC 162-16-250(2)(b).

Indeed, as described above, the facts at issue here mirror those allowed for in WAC 162-16-250(2)(b)(i). Thus, Respondent need not establish a BFOQ under WAC 162-16-250(2)(a) when it acts properly by enforcing a documented conflict of interest policy under WAC 162-12-250(2)(b).

Accordingly, Appellants' BFOQ argument is without merit.

**2. HMC Can Show The Existence of A BFOQ Justifying Application of Its Anti-Nepotism Policy.**

Assuming *arguendo* that Respondent was required to show a BFOQ for its anti-nepotism policy, it can do so. Under WAC 162-16-240, "the burden is on the employer to show that the practice is necessary to the successful performance of the job." *Fahn v. Cowlitz County*, 93 Wn.2d 368, 382 n.4 (1980) (noting that "a practice is prohibited . . . unless the employer can show that no one rendered ineligible by the practice could do the job").

Here, as described above, Respondent's anti-nepotism policy is necessary to prevent conflicts of interest and favoritism in employee hiring, supervision, and allocation of duties, and prevent friction and disharmony in the workplace. Under similar circumstances, the United States District Court for the Eastern District of Michigan concluded that the employer met its burden in establishing a BFOQ justifying application of an anti-nepotism policy precluding married employees from working together as a "spousal team" as district agents. *See Klanseck v. Prudential Ins. Co.*, 509 F. Supp. 13 (E.D. Mich. 1981) (insurance company defendant's BFOQ was reasonably necessary to the normal operation of its business; anti-nepotism policy at issue prohibited one "district agent" from continuing as such after two such agents married and required that one agent transfer to a different capacity as "ordinary agent" to avoid any conflict of interest).

Similarly, a reasonable and necessary BFOQ exists justifying HMC's application of its anti-nepotism policy to Appellants. The risk to the public from conflict or favoritism between spouses working side by side in the operating room needs no further explanation.

## V. CONCLUSION

Appellants have failed to establish genuine issues of material fact that would require their marital discrimination claim to go to trial. Because they did not raise their constitutional challenge or BFOQ argument with the trial court, this Court should not consider such arguments. Even if the Court were to consider them, however, such arguments fail. The trial court properly granted summary judgment, and that decision should be affirmed.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of January, 2010.

SEBRIS BUSTO JAMES

A handwritten signature in black ink, appearing to read "Jeffrey A. James". The signature is written in a cursive style with a horizontal line underneath it.

Jeffrey A. James, WSBA No. 18277  
Jennifer A. Parda, WSBA No. 35308  
Attorneys for Defendant/Respondent  
Harrison Medical Center

**CERTIFICATE OF SERVICE**

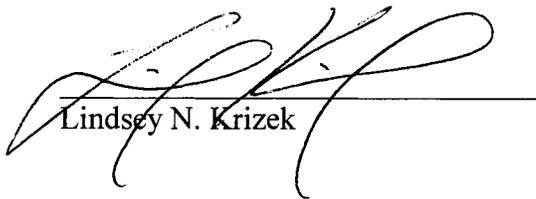
I, Lindsey N. Krizek, certify under penalty of perjury under the laws of the United States and of the State of Washington that, on January 11, 2010, I served the document to which this is attached to the party listed below in the manner shown below his name:

**Attorney for Appellants:**

Kenneth W. Masters  
Wiggins & Masters, PLLC  
241 Madison Ave. N.  
Bainbridge Island, WA 98110

- By United States Mail
- By Legal Messenger
- By Facsimile
- By Federal Express
- By Hand Delivery
- By Electronic Mail

COURT REPORTERS  
SERVICES  
10 JAN 11 PM 2:57  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

  
Lindsey N. Krizek