

FILED

MAY 10 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 294382

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ROBERT CHANEY

Appellant,

v.

PROVIDENCE HEALTH CARE d/b/a SACRED HEART MEDICAL
CENTER & CHILDREN'S HOSPITAL

Respondent.

BRIEF OF APPELLANT

STEVEN C. LACY
Attorney for Appellant
Lacy Kane
455 6th Street NE
P.O. Box 7132
East Wenatchee, WA 98802
(509) 884-9541
WSBA NO. 10814

FILED

MAY 10 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 294382

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ROBERT CHANEY

Appellant,

v.

PROVIDENCE HEALTH CARE d/b/a SACRED HEART MEDICAL
CENTER & CHILDREN'S HOSPITAL

Respondent.

BRIEF OF APPELLANT

STEVEN C. LACY
Attorney for Appellant
Lacy Kane
455 6th Street NE
P.O. Box 7132
East Wenatchee, WA 98802
(509) 884-9541
WSBA NO. 10814

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| I. ASSIGNMENT OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR | 1 - 5 |
| A. Assignment of Error No. 1 | 1 - 3 |
| 1. Assignment of Error | 1 |
| 2. First Issue Pertaining to Assignment of Error | 1 - 2 |
| 3. Second Issue Pertaining to Assignment of Error | 2 - 3 |
| B. Assignment of Error No. 2 | 3 - 4 |
| 1. Assignment of Error | 3 |
| 2.. Issue Pertaining to Assignment of Error | 3 - 4 |
| C. Assignment of Error No. 3 | 4 - 5 |
| 1. Assignment of Error | 4 |
| 2. Issue Pertaining to Assignment of Error | 4 - 5 |
| II. STATEMENT OF THE CASE | 5 - 23 |
| A. Statement of Facts | 5 - 21 |
| B. Procedural History | 21 - 23 |
| III. ARGUMENT | 23 - 41 |
| A. FMLA was violated as a Matter of Law | 23 - 34 |
| 1. Directed Verdict and the Standard of Review | 23 - 24 |

| | | |
|----|--|---------|
| 2. | The FMLA | 24 |
| 3. | Mr. Chaney should not have been Forced on FMLA | 24 - 27 |
| 4. | In Violation of the FMLA, Chaney was not Returned to Work | 27 - 34 |
| B. | The Trial Court Erred by Refusing Instructions ... | 34 - 41 |
| 1. | Refusal of Instruction concerning the Use of a Controlled Substance by the Driver of a Commercial Motor Vehicle | 34 - 36 |
| 2. | The Trial Court Erred by Refusing to Give an Instruction based on the Health Care Disclosure Act | 36 - 41 |
| V. | CONCLUSION | 41 - 42 |

Washington Cases

Bender v. City of Seattle, 99 Wn.2d 582, 664 P.2d 492 (1983) 23 - 24

Bodin v. City of Stanwood, 130 Wn.2d 726, 927 P.2d 240 (1996) 34

Boeing Co. v. Harker-Lott, 93 Wn. App. 181, 968 P.2d 14 (1998) 34

Dumont v. City of Seattle, 148 Wn. App. 850, 200 P.3d 764 (2009) 40

Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 876 P.2d 435 (1994) 34

Hines v. Todd Pacific Shipyards, 127 Wn. App. 356,
112 P.3d 522 (2005) 39 - 40

Federal Cases

Albert v. Runyon, 6 F. Supp.2d 57 (D. Mass. 1998) 28 - 32

Bachelder v. America West Airlines, Inc., 259 F.3d 1112 (2001) 24

Routes v. Henderson, 58 F.Supp.2d 959 (S.D. Ind. 1999) 29, 30, 33

Sista v. CDC Ixis N. Am. Inc., 445 F.3d 161 (2nd Cir. 2006) 25, 26

Wysong v. Dow Chemical Co., 503 F.3d 441 (6th Cir. 2007) 26

Statutes

RCW 46.32.110 3

RCW 49.60 21, 22

RCW 60.50.206(c)(16) 36

RCW 70.02 5, 38

RCW 70.02.010 (5) 39

| | |
|--------------------------|--------|
| RCW 70.02.010 (7) | 38 |
| RCW 70.02.010 (9) | 38 |
| RCW 70.02.010 (12) | 38 |
| RCW 70.02.020 | 38, 40 |
| RCW 81.04.530 | 35 |

Federal Statutes

| | |
|----------------------------------|----|
| 29 U.S.C. § 2612 (a) | 24 |
| 29 U.S.C. § 2612 (a)(1) | 24 |
| 29 U.S.C. § 2613 (a) | 27 |
| 29 U.S.C. § 2613 (c) | 29 |
| 29 U.S.C. § 2613 (d) | 29 |
| 29 U.S.C. § 2614 (a)(1) | 28 |
| 29 U.S.C. § 2614 (a)(3)(B) | 29 |
| 29 U.S.C. § 2614 (a)(4) | 31 |
| 29 U.S.C. § 2615 (a) | 26 |
| 29 U.S.C. § 2615 (a)(1) | 24 |
| 29 U.S.C. § 2617 | 24 |
| 42 U.S.C. § 12112 (d)(4) | 30 |

Federal Regulations

| | |
|-------------------------|-----------|
| 29 C.F.R. 825.208 | 1, 24, 25 |
|-------------------------|-----------|

| | |
|-----------------------------|-------------------|
| 29 C.F.R. 825.310 | 31 |
| 29 C.F.R. 825.310 (c) | 2, 27, 28, 32, 33 |
| 49 C.F.R. Part 382 | 35 |
| 49 C.F.R. 382.213 | 35 |

I. ASSIGNMENTS OF ERROR

AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Assignment of Error No. 1

1. Assignment of Error: The trial court erred by denying Appellant's motion for a directed verdict.

2. First Issue Pertaining to Assignment of Error: 29 C.F.R. § 825.208 provides that an employer's designation of leave as leave under the Family Medical Leave Act ("FMLA") must be based only on information received from the employee. Respondent, Providence Health Care, d/b/a Sacred Heart Medical Center & Children's Hospital ("Sacred Heart") required that the Appellant, Robert Chaney, submit to a fitness-for-duty examination by its retained physician, Dr. Royce Van Gerpen. After the examination, Dr. Van Gerpen issued a restriction preventing Mr. Chaney from returning to his position of interventional radiologic technologist. Based on the statement from its retained physician, Sacred Heart unilaterally placed Mr. Chaney on FMLA leave because of its perception that Mr. Chaney

had a serious health condition preventing him from performing his duties. However, information provided by Mr. Chaney's doctor indicated that he was able to perform his duties. As a matter of law, did Sacred Heart interfere with Mr. Chaney's rights under the FMLA by placing him on FMLA leave based on the opinion from its doctor which exhausted Mr. Chaney's FMLA leave entitlement and resulted in his termination? Did the trial court err in denying Mr. Chaney's motion for a directed verdict?

3. Second Issue Pertaining to Assignment of Error: The FMLA requires that an employee be restored to his position of employment when he returns from leave. 29 C.F.R. § 825.310 (c) allows an employer to require a fitness-for-duty certification from the employee's health care provider before the employee returns. The certification need only be a simple statement of an employee's ability to return to work. The employer may, with the permission of the employee, seek a clarification from the employee's health care provider of the employee's fitness to return to work. No additional information may be acquired.

Mr. Chaney's health care provider, Dr. Jeffrey Jamison, provided a certification indicating that Mr. Chaney was able to return to work. Sacred Heart did not seek a clarification of Dr. Jamison's statement. Sacred Heart

did not restore Mr. Chaney to his position of employment. Did Sacred Heart interfere with Mr. Chaney's rights under the FMLA to be returned to his position of employment as a matter of law? Did the trial court err by denying Mr. Chaney's motion for a directed verdict?

B. Assignment of Error No. 2

1. Assignment of Error: The trial court erred by refusing to give an instruction based on federal regulations and state law which allow the driver of a commercial motor vehicle to report for duty although using a controlled substance if the controlled substance is taken pursuant to the instructions of a licensed medical practitioner.

2. Issue Pertaining to Assignment of Error: Sacred Heart's retained physician, Dr. Van Gerpen, testified that he restricted Mr. Chaney from returning to his position as an interventional radiologic technologist because Mr. Chaney was prescribed Methadone. Dr. Van Gerpen stated that his opinion was formulated because he understood that a commercial driver is prohibited from driving a semi or dump-truck down a city street if the driver is taking a controlled substance such as Methadone.

Mr. Chaney offered a jury instruction providing a correct statement of the law. The instruction explained that a commercial driver is not

prohibited from driving while using a controlled substance such as Methadone when such use is pursuant to the instructions of a medical practitioner and the medical practitioner has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial vehicle. The trial court refused to provide the instruction stating that the instruction pertained to a collateral issue. Did the instruction pertain to a collateral issue considering the testimony of Dr. Van Gerpen? Did the trial court err by refusing the instruction?

C. Assignment of Error No. 3

1. **Assignment of Error:** The trial court erred by refusing to give an instruction based on Washington law concerning the privacy of health care information.

2. **Issue Pertaining to Assignment of Error:** Sacred Heart's witnesses maintained at trial that they were prevented from contacting Dr. Van Gerpen, Sacred Heart's retained physician, because Mr. Chaney would not sign a full release to his medical information. Sacred Heart's witnesses indicated through testimony and exhibits that this obstacle prevented them from obtaining additional information concerning the restriction issued by Dr. Van Gerpen and, thereby, prevented them from returning Mr. Chaney to his

position before he exhausted his FMLA leave and was terminated.

Mr. Chaney offered an instruction based on the Health Care Disclosure Act, RCW 70.02, providing a correct statement on the law concerning the privacy of health care information. The instruction indicated that Mr. Chaney was not a patient of and did not receive health care from Dr. Van Gerpen through the fitness-for-duty examination. Sacred Heart was not prevented from communicating with Dr. Van Gerpen about the examination or his opinion restricting Mr. Chaney from returning to work. The trial court refused to give the instruction stating that Mr. Chaney had the ability to control the flow of information. Did the trial court err by refusing to give the instruction?

II. STATEMENT OF THE CASE

A. Statement of Facts

Robert Chaney began his employment as an interventional radiologic technologist with Sacred Heart in April, 2001. (RP 425). An interventional radiologic technologist is involved in invasive procedures involving patients which include, among many other things, accessing blood vessels, injecting dye, draining various organs, and dissolving blood clots. (RP 64-65). A common procedure performed in an interventional radiology department is

an arteriogram wherein a stent is utilized to open a blocked blood vessel. (CP 186-87).

Interventional radiologic procedures involve a team of individuals which includes a radiologist (the physician), two interventional radiologic technologists, an x-ray technologist, and a nurse. (CP 187). The two interventional radiologic technologists are divided into a direct scrub assistant and a circulating assistant. (CP 187-88). The scrub technologist prepares the patient for the procedure by preparing the site on the patient with a sterile prep and scrub, lays out the interventional table with the basic tools to start the case, and then assists the radiologist in all aspects of the procedure. (CP 188). The circulating assistant helps position the patient, assists the nurse in connecting the monitoring equipment, and obtains additional equipment and supplies if needed. (CP 188-89). The success of the procedure and the safety of the patient depends on the superior performance of each individual on the team. (CP 193-94).

During the summer of 2005, Mr. Chaney's wife had become ill after giving birth to their child. (RP 419). The delivery involved complications which resulted in subsequent surgeries for Mrs. Chaney. (RP 419-20). Mr. Chaney requested and received leave under the FMLA due to his wife's

condition on an intermittent basis. (RP 419; Ex. P3). Mr. Chaney was absent for significant periods during the first four to five months of his leave and then went back to a more normal schedule. (RP 439). By April 27, 2006, Mr. Chaney's FMLA leave was exhausted. (Ex. P6).

Mrs. Chaney's health situation had not resolved, however. Mrs. Chaney developed leaking of her cerebrospinal fluid which required much bed rest. (RP 421). Beginning January 8, 2007, Mr. Chaney received further leave under the FMLA because of his wife's serious health condition. (Ex. P14).

Mr. Chaney's 2006 annual evaluation reflected that he was missing work due to FMLA leave. (Ex. P8, Bates Stamp No. ("BS#") 101031). Although having an overall rating as "meeting standards", Mr. Chaney was marked "not meeting standard" for work attendance. (Id., BS# 101036). Mr. Chaney's supervisor, Marshall Francis wrote:

His attendance has been sub par, mostly due to family health issues. This has become an area of concern but hopefully this will improve soon. Also of concern is his relations with fellow workers which need to be addressed and improved. I plan on coaching and mentoring Bob in the coming year with his interaction skills with fellow employees. Bob has the potential to be an outstanding member of the team if these two important issues are resolved.

(Id., BS# 101039). At trial, Mr. Francis acknowledged that Mr. Chaney's

attendance suffered because of his wife's condition and the resulting absences. (RP 52-53). Mr. Francis had at least a dozen discussions with Mr. Chaney because of his excessive absenteeism. (RP 53). During these discussions, Mr. Chaney impressed upon Mr. Francis the demands placed upon him because of his wife's condition. (RP 54).

First and second written warnings were issued to Mr. Chaney on January 12, 2007. (Ex.'s P15 and P16). The first written warning pertained to Mr. Chaney's alleged failure to show up for an on-call procedure on January 7, 2007. (Ex. P15). The second written warning was issued due to Mr. Francis's perception that Mr. Chaney was unfit for duty on January 9, 2007. (Ex. P16). Radiology department head Gerry Altermatt convened an investigatory meeting on January 10, 2007, concerning the incidents with Mr. Chaney, Mr. Francis, Mr. Altermatt, and two union representatives in attendance. (Ex. 12). At the end of his investigatory notes, Mr. Altermatt provided the following:

Editorial Comments: It is very difficult to determine when compassion for an employee and their home situations is being taken advantage of. Family health issues have been bothering Bob for over 18 months. His work performance is deteriorating and his attendance is unreliable. He has maxed out his FMLA and is working with HR to see if he can get additional FMLA leave time. He has no (or very little) PTO or EIT left. Other staff are donating PTO to him. For awhile

that was okay, but now it's beginning to be resented and his peers don't consider him a reliable and productive staff member.

Is our compassion helping or has it become a crutch that Bob relies on and if so, are we "enabling" his behavior?

(Ex. P12, BS# 102056). Mr. Altermatt admitted in his testimony that the fact Mr. Chaney was looking into obtaining more FMLA leave at the time "did play into [his] feelings at some level." (RP 309, ln 9-11).

A condition for Mr. Chaney's return to work after the investigatory meeting was that he provide a medical release from his doctor. (Ex. P12, BS# 102056). Mr. Chaney's doctor, Jeffrey Jamison, D.O., provided the release, effective January 19, 2007, for Mr. Chaney's return. (Ex. P13). Dr. Jamison invited Sacred Heart managers to contact him and, with a signed consent by Mr. Chaney, he would discuss Mr. Chaney's condition with them. (Ex. P13).

On June 1, 2007, Mr. Chaney received his annual performance evaluation. (Ex. P20). It was noted that Mr. Chaney's attendance was affected by his FMLA leave. (Ex. P20, pg 1; RP 56). Mr. Chaney was marked as "not meeting standards" for work attendance. (Ex. P20, BS# 101014; RP 56). Mr. Francis wrote his comments at the end of the evaluation:

Bob has had a tumultuous year due to family health issues and friction with coworkers as a result. He is on intermittent FMLA and attendance is spotty. When Bob is here he is technically good. He is compassionate with patients and does a good job of getting the work done. He grasps new technology well and is willing to help wherever needed.

Bob needs to work diligently to get his personal life back on track and also needs to work on better relations with peers. I will work with Bob to help realize these goals as soon as possible.

(Ex. P20, BS# 101017; RP 57). Besides Mr. Marshall, Mr. Altermatt signed the evaluation. (Ex. P20). Mr. Altermatt confirms that, up until Mr. Chaney's termination, Mr. Marshall expressed dissatisfaction with Mr. Chaney's unavailability and his attendance. (RP 286).

Mr. Marshall testified that co-workers were complaining about Mr. Chaney's attendance issues. (RP 58). Mr. Daniel DeLong was the shop steward for the radiology technicians during the years 2005-2007. (RP 94). As shop steward, Mr. DeLong received complaints from technicians about Mr. Chaney's absences taken through the FMLA. (RP 94-95). Mr. DeLong implored upon his co-workers that Mr. Chaney was within his rights taking time off through FMLA. (RP 95). Mr. Marshall did nothing concerning the complaints by the co-workers. (RP 58). Mr. Marshall had never been provided any training or guidance by Sacred Heart for the prohibition and

prevention of retaliation against an employee in the workplace because of the employee's use of FMLA. (RP 58).

From January, 2007, through June, 2007, Mr. Chaney was very fatigued. (RP 458). With the responsibilities of a father with two small children and as a husband assisting his wife while she experienced a serious health condition, Mr. Chaney was "burning the candle at both ends." (RP 458).

On June 25, 2007, Mr. Chaney had put in a 12 hour day at work which involved two long procedures. (RP 461). Mr. Chaney came out of the radiology suite after the last procedure and was informed that he would need to assist in another procedure. (RP 462). The procedure was called a three-dimensional spin of the brain. (RP 464). Another interventional radiologic technologist had been unable to perform the procedure. (RP 464).

Before going to perform the three-dimensional spin, Mr. Chaney attempted to describe one of the procedures he had been involved with that day to two nurses. (RP 463). Ms. Judy Chessar, one of the nurses, testified that Mr. Chaney was incoherent and was having difficulty speaking as he attempted to describe the procedure. (RP 505-06). A phone call was made to Mr. Francis concerning Mr. Chaney's behavior. (RP 86). Mr. Francis was

unavailable to take any action. Mr. Francis called and consulted with Mr. Altermatt. (RP 86-87). Mr. Francis then called the hospital's house supervisor, Ms. Konnie Dietz, who was directed to conduct drug testing. (Id.; Ex. D134). Although his notes indicated that it was a joint decision between Mr. Altermatt and Mr. Francis to order the drug test, Mr. Francis maintains that he had no input on the decision for Chaney to submit to a drug test. (RP 61; Ex. D134).

After the three-dimensional spin which Mr. Chaney was able to complete within three to five minutes, Mr. Chaney sat down to do post processing of the images. (RP 464). Ms. Dietz sat down beside Mr. Chaney, introduced herself, and informed him that he had to submit to a for-cause drug test. (RP 464). Mr. Chaney was allowed by Ms. Dietz to finish his work. (RP 465). Ms. Dietz observed that Mr. Chaney stayed on task with his work and was cooperative with the drug testing process. (Ex. D127). Mr. Chaney commented he was "dead tired" and appeared to Ms. Dietz to grow more drowsy as they went through the testing process. (Ex. D127). Pursuant to policy, Mr. Chaney was suspended from work pending the results from the testing. (Ex. D134).

A couple days later, Mr. Chaney was contacted by Dr. Paula

Lantsberger who was reviewing the drug test results. She asked whether he had a prescription for Methadone and Mr. Chaney answered affirmatively. (RP 466). Dr. Lantsberger issued the test results as negative for illicit drug use. (Ex. P28, BS# 102012). However, Dr. Lantsberger commented that Mr. Chaney:

May need fitness for duty evaluation or visit to his Dr. to fine tune his medication.

(Id.). Lourie Morse then contacted Mr. Chaney and informed him he had to submit to a fitness-for-duty examination. (RP 467). Ms. Morse is the Director of Employee Relations for the hospital. (RP 135).

Ms. Morse arranged for the fitness-for-duty examination for Mr. Chaney. (RP 160). It was Ms. Morse's expectation that through the examination process she would learn what medication Mr. Chaney was taking which required fine tuning. (RP 161). The appointment was arranged with Dr. Royce Van Gerpen of Occupational Medicine Associates ("OMA"). (RP 161-62). Sacred Heart had utilized OMA frequently for the examination of its employees. (RP 162). Ms. Morse assumed that Mr. Chaney would be required to sign a release in order for her to have information regarding the examination. (RP 165-66).

At the end of the fitness-for-duty examination, Mr. Chaney would not

sign the standard release of medical information form. (RP 469; Ex. P32). Mr. Chaney felt that his medical information was privileged and that the release went too far in allowing the hospital to have access to all of his medical records and history. (RP 470). Dr. Van Gerpen discussed the issue with Mr. Chaney and then modified the release to authorize his office to “release a statement about whether [Mr. Chaney was] fit for duty.” (Ex. P32; RP 360-61).

Before submitting to the fitness-for-duty examination, Mr. Chaney visited his doctor, Dr. Jeffrey Jamison. Dr. Jamison’s office issued a letter on July 5, 2007, indicating that Mr. Chaney could safely perform his duties as an interventional/special procedures technologist. (Ex. P25). Dr. Jamison had worked in the settings of interventional radiology and was familiar with the duties of an interventional radiologic technician. (RP 238-39). Dr. Jamison had prescribed Methadone to Mr. Chaney because it is a long-acting pain medication which appeared to effectively address Mr. Chaney’s chronic pain without causing adverse side effects. (RP 234-41). Mr. Chaney’s chronic pain was the result of on-the-job injuries and back surgeries. (RP 429-31).

During the fitness-for-duty examination, Mr. Chaney openly

discussed the medications he had been prescribed due to his chronic pain. (Ex. P33; RP 362-63). After considering the medications prescribed, Dr. Van Gerpen refused to release Mr. Chaney to return to work as an interventional radiologic technologist. (Ex. P34). Dr. Van Gerpen would release Mr. Chaney to perform duties as a “routine x-ray tech.” (Id.). At trial, Dr. Van Gerpen explained that it was his opinion that Mr. Chaney was not well-adjusted to the medication he was taking. Dr. Van Gerpen testified that he based his reasoning on the fact that his employer had sent him in for the exam, that Mr. Chaney had a history of chronic pain, and that he had experienced two personal accidents in the previous six months. (RP 401-02). Dr. Van Gerpen was then confronted with his deposition testimony wherein he testified that his opinion was based on the following:

I think that the reality of it is that somebody on Methadone is not allowed to drive a semi down a city street or a dump truck down a city street because of the imminent danger that medication could cause to a person’s ability to safely drive the vehicle in a public setting. And the use of that particular medication Methadone in this individual, I believe, immediately disqualified him from being able to function in the life and death – potential life and death situation of patient care.

(RP 402-03; see also Ex. P33, pg 2-3; Ex. P47).

At trial, Dr. Van Gerpen claimed that he had observed and worked

with interventional radiologic technicians “a very long time ago.” (RP 391). Dr. Van Gerpen was then presented his testimony from his deposition which pertained to his exposure to routine x-ray technicians during his years as an emergency room physician. (RP 392-96). Dr. Van Gerpen admitted that he had never observed an interventional radiologic technician participating in a procedure in interventional radiology. (RP 396).

Dr. Van Gerpen’s restriction of Mr. Chaney from performing interventional radiologic duties and allowing routine radiologic technologist work exposed his ignorance on the subject. An interventional radiologic technologist is performing as part of a team closely monitored by the radiologist. (RP 429, 456; CP 187, 193). A routine diagnostic x-ray tech regularly works alone performing tasks that could have dire consequences for a patient if the technologist is not alert and focused. (CP 427-29).

Ms. Morse contacted Mr. Chaney and informed him of the information Sacred Heart had received from Dr. Van Gerpen. (RP 210). Ms. Morse informed Mr. Chaney that Sacred Heart needed additional information in order to better understand Dr. Van Gerpen’s restriction of Mr. Chaney from performing the duties of interventional radiologic technologist. (Ex. P36). In order to seek additional information, Ms. Morse requested that Mr. Chaney

sign a full release to his medical information. (RP 169-71). Mr. Chaney refused to sign a full release. (RP 170-71). Without a full release, no one from Sacred Heart made an attempt to speak with Dr. Van Gerpen. (RP 174). Mr. Chaney never told Ms. Morse or anyone from Sacred Heart that they could not speak to Dr. Van Gerpen about his opinion. (RP 173).

Ms. Morse made no attempt to contact Mr. Chaney's doctor, Dr. Jamison. (RP 174-75). Dr. Jamison had issued the letter in January, 2007, inviting representatives of Sacred Heart to talk with him concerning Mr. Chaney. (Ex. P13). Dr. Jamison's office had also indicated that Mr. Chaney could safely perform the duties of an xray/special procedures technologist or an interventional radiologic technologist on July 5, 2007. (Ex. P25). Dr. Jamison recalls telephoning Human Resources at Sacred Heart and speaking with a female who was involved with Mr. Chaney's issue. (RP 241-42). Dr. Jamison could not remember the female's name. (RP 242). Dr. Jamison stated to the individual that Mr. Chaney's medical condition did not prevent him from performing his duties. (RP 242). The individual did not request any clarification from Dr. Jamison. (RP 243).

In a letter dated July 31, 2007, Ms. Morse informed Mr. Chaney that Sacred Heart was unilaterally placing him on FMLA leave for his own health

condition. (Ex. P36). In the letter, Ms. Morse falsely claimed that Sacred Heart had no other information except Dr. Van Gerpen's restriction. (Id.). The letter directed Mr. Chaney to complete the FMLA paperwork and to have Dr. Van Gerpen complete the medical certification portion. (Id.).

Mr. Altermatt made the decision to place Mr. Chaney on FMLA leave. (RP 184). Mr. Altermatt made this decision after consulting with Ms. Morse and Melinda Dakan, Sacred Heart's leave of absence coordinator. (RP 183-84; RP 108). Before drafting the July 31, 2007, letter, Ms. Morse had obtained the number of hours available to Mr. Chaney for FMLA leave from Ms. Dakan. (RP 114-15). If Mr. Chaney was not released to return to his duties as an interventional radiologic technologist before his FMLA leave was exhausted on August 27, 2007, he would be terminated. (P36).

Although having never been taught that an employer could rely upon information contradicted by an employee's own physician but given by a third party hired by the employer, Ms. Morse relied upon Dr. Van Gerpen's opinion. (RP 189). This decision was made, not based on law, but upon Ms. Morse's reasoning that Dr. Van Gerpen specialized in occupational medicine. (RP 189). Despite her actions, Ms. Morse does recognize that, under the FMLA, an employee's physician makes the determination whether the employee is

able to return to work. (RP 190-91).

On August 7, 2007, Dr. Van Gerpen provided a letter to Ms. Morse indicating that he was not the appropriate physician to complete the FMLA medical certification. (Ex. P40). Dr. Van Gerpen correctly stated that Mr. Chaney's attending physician should complete the paperwork. (Id.). When presented this information from Ms. Dakan, Ms. Morse wrote:

Well that's great! This Dr. VanGerpen is the one who restricted his ability to work. I'll be surprised if his own MD will complete it because I don't believe he agrees with the restriction . . . oh, it just gets more complicated!

(Ex. P44).

Dr. Jamison completed a Certification of Health Care Provider on August 10, 2007, indicating that Mr. Chaney could return to work "as soon as Employer allows." (Ex. P45). In the Request for FMLA leave form provided by Sacred Heart, Mr. Chaney indicated on August 16, 2007, that he could return to work immediately. (Ex. P46).

On August 7, 2007, Mr. Chaney dropped off the job descriptions for the routine radiologic technologist and the interventional radiologic technologist positions to Dr. Van Gerpen's office. (Exs. No.'s P38, P39, and P43). In a hand-written note, Mr. Chaney explained to Dr. Van Gerpen that the hospital required additional information why he was released to perform

the routine radiologist technician position, but not the interventional radiologic technologist position. (Ex. P41). Mr. Chaney clarified that he continued to desire that his medical information concerning the medications he was taking and his past medical history not be released. Mr Chaney pleaded to Dr. Van Gerpen to explain to the hospital the reasoning for Mr. Chaney's restriction. (Ex. P41). Dr. Van Gerpen felt restricted from having an oral conversation with anyone at Sacred Heart due to the limited release signed by Mr. Chaney. (RP 388). However, the issue never came up because no one from Sacred Heart called him to obtain information. (RP 388).

Mr. Chaney visited Dr. Van Gerpen on August 23, 2007. (Ex. P47). He explained to Dr. Van Gerpen that Sacred Heart would not allow him to return to work as a routine x-ray tech with the restriction which had been imposed. (Id.). Dr. Van Gerpen, again, explained to Mr. Chaney that, if a commercial driver would not be permitted to drive while prescribed Methadone, he could not release Mr. Chaney to return as an interventional radiologic technologist while on the medication. (Id.). Dr. Van Gerpen would not change his opinion restricting Mr. Chaney from returning to work. (Ex. P47; Ex. P48).

In a letter dated August 27, 2007, Sacred Heart gave notice to Mr.

Chaney that it was terminating his employment. (Ex. P49). Ms. Morse testified that Sacred Heart relied upon the opinion of Dr. Van Gerpen when terminating Mr. Chaney. (RP 215). Mr. Altermatt made the decision to terminate Mr. Chaney in consultation with Ms. Morse and Human Resources. (RP 215-16; RP 299). Mr. Altermatt confirms that his decision was based on Dr. Van Gerpen's opinion. (RP 299). He made the decision despite the June, 2007, evaluation indicating that, for the previous year, Mr. Chaney had met expectations on all criteria for performance expectations. (RP 302-04; Ex. P20, BS# 101015-16). The decision was made without Mr. Altermatt knowing a single reason behind Dr. Van Gerpen's opinion. (RP 304-05).

B. Procedural History

On November 16, 2007, Mr. Chaney filed a complaint for violation of RCW 49.60 for handicap discrimination, violation of the Family Medical Leave Act ("FMLA"), and wrongful discharge in violation of public policy. (CP 1-7). The wrongful discharge claim was based on the public policy that employees should not suffer discharge for taking leave to care for a family member with a serious health condition. (Id.).

The Complaint was later amended to allege an additional claim of wrongful discharge in violation of public policy rather than a handicap

discrimination claim based on RCW 49.60. The RCW 49.60 claim was abandoned due to Sacred Heart's status as a religious, non-profit entity. (CP 23-26; CP 38).

On February 5, 2009, the trial court granted Sacred Heart's motion for summary judgment and dismissed Mr. Chaney's claims. (CP 27-35). The trial court later granted Mr. Chaney's motion for reconsideration as to his claims for violation of the FMLA and wrongful discharge in violation of the public policy for such leave. (CP 36-39).

The matter proceeded to a jury trial on those remaining claims on September 13-16, 2010. The trial concerned only the issues of liability and not damages. At the close of the evidence, Mr. Chaney moved for a directed verdict. (RP 521). Mr. Chaney argued that Sacred Heart had violated the FMLA by not returning him to work based on the opinion of its retained physician rather than adhering to the opinion of Mr. Chaney's doctor who had released him to work. (RP 521). The trial court denied the motion. (RP 523-25).

The trial court refused Mr. Chaney's instruction for the jury instructing that a commercial driver may report for duty when using a controlled substance such as Methadone when such use is under the direction of a

licensed medical practitioner. (RP 537-38, 542-43; CP 61). The trial court also refused to allow Mr. Chaney's instruction concerning the privacy of health care information. Mr. Chaney desired to instruct the jury that a privilege did not prevent Dr. Van Gerpen from sharing information gathered from his examination of Mr. Chaney and did not prevent him from providing an explanation for his opinion restricting Mr. Chaney from returning to work. (RP 538-39, 541-42 CP 65).

The jury returned a verdict in favor of the defendant finding that Sacred Heart was not liable for violation of the FMLA and not liable for wrongful discharge in violation of public policy. (CP 269-70). Judgment for the defendant was entered on September 29, 2010. (CP 271-75).

III. ARGUMENT

A. FMLA was violated as a Matter of Law

1. Directed Verdict and the Standard of Review

The Washington Supreme Court has identified the criteria for granting a motion for a directed verdict:

A motion for a directed verdict may be granted only if it can be said, as a matter of law, that no evidence or reasonable inferences existed to sustain a verdict for the party opposing the motion. The evidence must be considered in the light most favorable to the nonmoving party.

Bender v. City of Seattle, 99 Wn.2d 582, 587, 664 P.2d 492 (1983).

2. The FMLA

The FMLA was enacted by Congress to provide job security to employees who must be absent to care for family members with a serious health condition, because of the birth of a son or daughter and in order to care for such newborns, because of the placement of a son or daughter with the employee for adoption or foster care, and because of an employee's own serious health condition which prevents the employee from working. 29 U.S.C. § 2612 (a); Bachelder v. America West Airlines, Inc., 259 F.3d 1112, 1119 (2001). The FMLA provides up to 12 workweeks of leave for such purposes during any 12-month period. 29 U.S.C. § 2612 (a). The Act provides that, on the return from such leave, the employee must be restored to the position of employment held by the employee before the leave or be restored to an equivalent position. 29 U.S.C. § 2614 (a)(1). A plaintiff may bring an action for an employer's interference with such rights under the FMLA. 29 U.S.C. § 2615 (a)(1); 29 U.S.C. § 2617.

3. Mr. Chaney should not have been Forced on FMLA

29 C.F.R. § 825.208 provides that an employer's designation of leave as FMLA leave must be based only on information received from the employee.

When confronted with a lack of sufficient information about the reason for an employee's use of paid leave, the employer should inquire further of the employee to ascertain if an employee's use of paid leave is potentially FMLA-qualifying. 29 C.F.R. § 825.208.

Sacred Heart unilaterally placed Mr. Chaney on FMLA leave without any information provided by Mr. Chaney. It relied upon the limited information it received from its retained doctor, Dr. Van Gerpen. (See Ex. P34). In its letter, dated July 31, 2007, Sacred Heart informed Mr. Chaney that he was on FMLA leave status and that such leave commenced on July 16, 2007, the date of Dr. Van Gerpen's restriction. (Ex. P36).

By placing Mr. Chaney on FMLA leave with its own developed information, Sacred Heart violated the Act. The violation of the Act set the stage for the termination of Mr. Chaney. The imposition of leave by Sacred Heart extinguished the time under the FMLA that Mr. Chaney would have for a legitimate leave request.

The Sixth Circuit remarked on the nature of a "forced leave claim" in Sista v. CDC Ixis N. Am. Inc., 445 F.3d 161 (2nd Cir. 2006). In Sista, the plaintiff claimed that he was "involuntarily" placed on FMLA leave in violation of the Act. 445 F.3d at 174. The Court observed that the FMLA did not

address the situation when an employer “forces” an employee to take FMLA leave. However, the Court did contemplate that there could be instances where a forced leave did violate the FMLA:

If Sista were able to demonstrate that such a forced leave interfered with, restrained, or denied the exercise or attempted exercise of a right provided under the FMLA, a cause of action might lie.

445 F.3d at 175. In fact, the Sixth Circuit has observed that a plaintiff/employee may make a claim under 29 U.S.C. § 2615 (a) for interference with an employee’s rights under the FMLA when an employer forces an employee to take FMLA leave when the employee does not have a “serious health condition” that prevents the employee from working. Wysong v. Dow Chemical Co., 503 F.3d 441, 449 (6th Cir. 2007)(employer prevented pregnant employee from returning to work thus reducing time available after birth). However, the cause of action ripens when the employee later seeks FMLA leave but is denied due to the exhaustion of the leave entitlement by the improperly imposed leave. 503 F.3d at 449.

In the case at bar, Mr. Chaney was forced to take FMLA leave. Sacred Heart violated the FMLA by placing Mr. Chaney on FMLA on the basis of Dr. Van Gerpen’s information. Unlawful interference under 29 U.S.C. § 2615 (a)

stems from the improper exhaustion of Mr. Chaney's rights under the Act which exposed him to termination. As a matter of law, Sacred Heart is liable for such interference.

4. In Violation of the FMLA, Chaney was not Returned to Work

Mr. Chaney attempted to comply with Sacred Heart's request to have Dr. Van Gerpen complete the Certification of Health Care Provider. Dr. Van Gerpen refused because he was not Mr. Chaney's health care provider. See 29 U.S.C. § 2613 (a) (employer may require certification issued by the health care provider for the employee). Mr. Chaney then obtained the certification from his doctor, Dr. Jamison. (See Ex. P45).

Dr. Jamison certified that Mr. Chaney had a serious health condition. (Id.). He indicated that continuance leave of two to four weeks was warranted. (Ex. P45, pg 2). By the date that Dr. Jamison completed the certification, August 10, 2007, Mr. Chaney's serious health condition no longer prevented him from working. Dr. Jamison indicated that Mr. Chaney "is OK to work as soon as Employer allows." (Ex. P45, pg 3).

29 C.F.R. § 825.310 (c) allows an employer to seek a fitness-for-duty certification from the employee's health care provider. "The certification itself need only be a simple statement of an employee's ability to return to work."

29 C.F.R. § 825.310 (c). Upon receipt of such a statement, the employer may take the following action:

A health care provider employed by the employer may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken.

29 C.F.R. § 825.310 (c). The employee's return to work cannot be delayed while the employer seeks clarification from the employee's health care provider. (Id.).

Under the FMLA, once an employee's health care provider provides a statement indicating that the employee is able to return to work, the employee must be restored to his position pursuant to 29 U.S.C. § 2614 (a)(1). The employer with questions regarding the employee's ability to return to work may take advantage of the option to contact the employee's health care provider to seek clarification. Albert v. Runyon, 6 F. Supp.2d 57, 62-63 (D. Mass. 1998). The employer cannot force an employee to submit to a further examination before allowing the employee to return to work. 6 F. Supp.2d at 63. When promulgating regulations, the Secretary of Labor refused to incorporate the process for obtaining second and third fitness-for-duty examinations for a

returning employee which is provided for in the original certification for FMLA under 29 U.S.C. § 2613 (c) and (d). 6 F. Supp.2d at 63 n.3.

In Albert v. Runyon, the Postal Service sought a fitness-for-duty examination before allowing Ms. Albert's return to her position from FMLA leave. The district court considered the Postal Service's argument that the FMLA does not provide an employee returning from leave any rights or benefits beyond those to which she would have been entitled had she not taken leave. 6 F. Supp.2d at 65; see 29 U.S.C. § 2614 (a)(3)(B). The district court determined that "the proper determinative factor is whether an employer *would* have taken a given action absent an employee's FMLA leave." 6 F. Supp.2d at 65. It determined that the Postal Service could not order the fitness-for-duty examination prior to return from FMLA leave unless it could establish that it would have ordered the examination regardless whether the employee had taken the leave. 6 F. Supp.2d at 65. If an employee presents a medical certification adequate under the FMLA and the employer has no *present* reason to doubt the employee's fitness for duty, "the employer cannot rely on the employee's FMLA leave (or her prior medical condition) to justify such an examination." 6 F. Supp.2d at 66; see also Routes v. Henderson, 58 F. Supp.2d 959, 998 (S.D. Ind. 1999)(unless medical certification regarding ability to work

creates a question about employee's ability to work, employee is to be returned to work).¹

The district court observed that the Postal Service could legitimately order a fitness-for-duty examination upon an employee's return from FMLA leave only if the employee's post-reinstatement behavior provided a reason for doing so. 6 F. Supp.2d at 66. The court elaborated:

Since it appears that the "erratic behavior" Albert allegedly engaged in prior to her leave was related to her depression and the medication she was taking, the Service may not rely on that behavior as reason for an examination at this time.

6 F. Supp.2d at 66.

The Postal Service argued that it was allowed to require a fitness-for-duty examination under the ADA. 6 F. Supp.2d at 67; see 42 U.S.C. § 12112 (d)(4) (allowing employers to require examinations that are "job-related" and "consistent with business necessity"). The Postal Service argued that, since examinations were permitted under the ADA, they were necessarily permissible

1

In Routes, the district court also recognized that a policy of the FMLA is to protect an employee's privacy by having the employer work through the employee's own health care provider. 58 F. Supp.2d at 993-94.

under the FMLA. 6 Supp.2d at 68. The district court discussed the argument:

The Service's purported business justification for requiring the examination goes something like this: the erratic behavior Albert exhibited prior to her leave created a legitimate, job-related reason for concern, and the documentation she has submitted is inadequate to alleviate that concern or to allow us to evaluate her contention that she is fit to return to work. The most basic problem with this argument is that it depends on the alleged inadequacy of a certification sufficient for the FMLA purposes for which it was offered. This alleged justification amounts to a claim that even though an employee's FMLA certification does not indicate any continuing incapacity, and even though there is no present reason to doubt her abilities, the employer's need to determine whether the employee has recovered sufficiently to perform her job functions provides an adequate business reason for a fitness-for-duty examination. Such a "need" could be asserted in the case of *any* employee returning from FMLA leave. This reading would negate the provisions of 29 U.S.C. § 2614(a)(4) and 29 C.F.R. § 825.310 requiring an employer to reinstate an employee upon receipt of her health care provider's certification that she is fit for duty, without demanding additional information, much less an examination. The FMLA makes it the health care provider's responsibility, rather than the employer's, to evaluate an employee's health condition to determine if she is sufficiently recovered to return to work. Accordingly, an employer cannot claim that its inability to independently assess the employee's health justifies requiring an examination.

6 F. Supp.2d 68-69. The district court determined that the Postal Service violated the FMLA by failing to reinstate her once it received a certification from her health care provider that she was fit to return to work. 6 F. Supp.2d at 69.

Sacred Heart had determined that Mr. Chaney was experiencing a serious health condition because of the comments by the MRO and the work restriction imposed by Dr. Van Gerpen. Upon Sacred Heart placing Mr. Chaney on FMLA, it was then subject to the regulations for the Act. Dr. Jamison provided a certification that Mr. Chaney's serious health condition had resolved and that he was able to return to work. Once Dr. Jamison stated that Mr. Chaney was "OK to work," Sacred Heart was required by 29 C.F.R. § 825.310(c) to restore Mr. Chaney to his position. Sacred Heart had no information to doubt Dr. Jamison's statement, issued on August 10, 2007. There was no evidence that Mr. Chaney was not able to resume his duties on or after August 10, 2007. Any instances of behavior which would have caused concern allegedly occurred before Mr. Chaney was placed on FMLA leave and almost two months prior to Dr. Jamison's statement. Any concern caused by Dr. Van Gerpen's restriction was resolved by Dr. Jamison's certification.

Upon receiving Dr. Jamison's statement, Sacred Heart had one option at its disposal. With the permission of Mr. Chaney, Sacred Heart could have contacted Dr. Jamison and sought clarification of Mr. Chaney's fitness to return to work. Sacred Heart could not delay Mr. Chaney's return to work while it sought clarification. See 29 C.F.R. 825.310 (c). Under the FMLA, it was Dr.

Jamison's call whether Mr. Chaney was able to return to work and resume his duties. See Routes v. Henderson, 58 F. Supp.2d at 998 (FMLA leaves it to the employee's health care provider, not the employer, to determine whether employee is sufficiently recovered to return to work). Sacred Heart never sought to contact Dr. Jamison.

Lourie Morse indicated why Sacred Heart did not want to comply with 29 C.F.R. § 825.310(c). Ms. Morse understood that Dr. Jamison's opinion would be that Mr. Chaney was able to return to his duties. (See Ex. P44). Ms. Morse did not want any clarification of Dr. Jamison's determination. This is despite Dr. Jamison on multiple occasions indicating to Sacred Heart that he would be happy to speak with its representatives (Indeed, Dr. Jamison, on his own initiative, called Ms. Morse to provide information concerning Mr. Chaney's condition). Allowing Dr. Jamison's input into the mix posed a "complication" for Ms. Morse. (See Ex. P44).

Although a "complication" for Ms. Morse and Sacred Heart, this was what the law provided. As a matter of law, Sacred Heart violated the FMLA by refusing to restore Mr. Chaney to his position after Dr. Jamison stated he could return.

B. Trial Court Erred by Refusing Instructions

“Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.” Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). It is not error for a trial court to refuse an instruction which is collateral to instructions which are to be given. Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 165-66, 876 P.2d 435 (1994). A decision to refuse a particular instruction is a matter of discretion for the court. Boeing Co. v. Harker-Lott, 93 Wn. App. 181, 186, 968 P.2d 14 (1998). In refusing an instruction, a trial court abuses its discretion if its decision is manifestly unreasonable, or its discretion was exercised on untenable grounds, or for untenable reasons. 93 Wn. App. at 186.

1. Refusal of Instruction concerning the Use of a Controlled Substance by the Driver of a Commercial Motor Vehicle

During cross-examination, Dr. Van Gerpen acknowledged that his opinion why Mr. Chaney was not fit to return to his position was based on the fact Mr. Chaney was on Methadone. According to Dr. Van Gerpen, if a commercial driver—like someone driving a semi or a loaded dump truck down a city street—could not operate a vehicle while on Methadone, an interventional radiologic technician could not perform his duties while taking the medication.

Dr. Van Gerpen’s opinion was in error. His statement is not the law.

Mr. Chaney sought to provide a correct statement of the law to the jury by offering the following instruction identified as No. P3:

It is not unlawful for a driver of a commercial motor vehicle to report for duty or remain on duty when the driver uses a controlled substance such as methadone when the use is pursuant to the instructions of a licensed medical practitioner who has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle. Dr. Jamison is a licensed medical practitioner.

(CP 61; RP 537-38). Mr. Chaney's proffered instruction was denied. (RP 542).

Washington law requires a person or employer operating as a motor carrier to comply with the United States Department of Transportation federal motor carrier safety regulations as contained in Title 49 C.F.R. Part 382. RCW 46.32.110; RCW 81.04.530. 49 C.F.R. § 382.213 prohibits a driver from reporting to duty when the driver uses any controlled substance "except when the use is pursuant to the instructions of a licensed medical practitioner . . . who has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle." Methadone is a Schedule II controlled substance. RCW 60.50.206 (c)(16).

The refusal by the trial court to provide Instruction No. P3 resulted in

the jury considering a misstatement of the law by Dr. Van Gerpen. Without the instruction, Mr. Chaney's counsel was left without the ability to contradict Dr. Van Gerpen's misstatement.

It was Mr. Chaney's theory of the case that Sacred Heart improperly relied on the opinion of its retained physician rather than contact Mr. Chaney's physician. Sacred Heart's reliance on Dr. Van Gerpen becomes more preposterous when it is exposed that Dr. Van Gerpen had an inaccurate understanding of the law.

The trial court refused to provide the requested instruction because it considered the instruction as pertaining to a collateral issue. But the issue was not collateral. Dr. Van Gerpen's opinion placed the matter at issue. (See Ex.'s P33 and P47). The issue involved was the basis for his opinion. Sacred Heart relied upon Dr. Van Gerpen's opinion when making its decision to terminate Mr. Chaney. Mr. Altermatt relied upon nothing else. The refusal to give the instruction was manifestly unreasonable.

2. The Trial Court Erred by Refusing to Give an Instruction based on the Health Care Disclosure Act

Before his termination, Ms. Morse and Sacred Heart persistently requested that Mr. Chaney execute a full release in order that Dr. Van Gerpen could be consulted regarding the restriction he placed on Mr. Chaney. Without

this release, Ms. Morse would not contact Dr. Van Gerpen to seek a clarification from Dr. Van Gerpen. With this purported inability to consult with Dr. Van Gerpen, Sacred Heart allowed the clock to run on Mr. Chaney's FMLA leave until it was exhausted. Once the leave ran out, Mr. Chaney was terminated.

Mr. Chaney desired to present to the jury that Sacred Heart was not prevented from consulting with Dr. Van Gerpen under the law. Mr. Chaney offered the following instruction identified as Instruction No. P6:

“Health care information” is any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care. A “patient” is an individual who receives or has received health care. “Health care” is any care, service, or procedure provided by a health care provider: (a) to diagnose, treat, or maintain a patient's physical or mental condition; or (b) that affects the structure or any function of the human body. A “health care provider” is a person who is licensed, certified, registered, or otherwise authorized by the law of this state to provide health care in the ordinary course of business or practice of a profession.

The plaintiff was not a patient of Dr. Van Gerpin. Dr. Van Gerpin did not provide health care to the plaintiff when he was retained by the defendant to perform a fitness of duty examination on plaintiff. Dr. Van Gerpin was not prevented by law from sharing information gathered from his examination of the plaintiff with the defendant and he was not prevented from providing an explanation to the defendant concerning his opinion regarding the plaintiff's fitness for duty.

(CP 65; RP 538-39). The trial court refused to provide Instruction No. P6. (RP

541-42).

The Health Care Disclosure Act, RCW 70.02 (“HCDA”), prohibits the disclosure of a patient’s health care information without a patient’s written authorization:

[A] health care provider, an individual who assists a health care provider in the delivery of health care, or an agent and employee of a health care provider may not disclose health care information about a patient to any other person without the patient's written authorization. A disclosure made under a patient's written authorization must conform to the authorization.

RCW 70.02.020. A health care provider is “a person who is licensed, certified, registered, or otherwise authorized by the law of this state to provide health care in the ordinary course of business or practice of a profession.” RCW 70.02.010 (9). “Health care information” is information that identifies a patient and directly relates to the patient’s health care. RCW 70.02.010 (7). A “patient” is “an individual who receives or has received health care.” RCW 70.02.010 (12). “Health care” is defined as follows:

“Health care” means any care, service, or procedure provided by a health care provider:

- (a) To diagnose, treat, or maintain a patient's physical or mental condition; or
- (b) That affects the structure or any function of

the human body.

RCW 70.02.010 (5).

Mr. Chaney did not receive “health care” from Sacred Heart’s retained physician, Dr. Van Gerpen. Dr. Van Gerpen did not diagnose, treat, or maintain Mr. Chaney’s physical or mental condition. Dr. Van Gerpen did not provide any service or procedure that affected the structure or any function of Mr. Chaney’s body. The information derived from Dr. Van Gerpen’s fitness-for-duty examination for Mr. Chaney was not health care information under the Act. Dr. Van Gerpen was not prevented from disclosing information from the fitness for duty examination to Sacred Heart, his client.

Similar to the plaintiff in Hines v. Todd Pacific Shipyards, 127 Wn. App. 356, 368, 112 P.3d 522 (2005), Mr. Chaney underwent the fitness-for-duty examination as a condition of his employment. See 127 Wn. App. at 368 (employee’s drug screening test was a condition of employment and was not for health care or medical treatment). Likewise, information from a fitness-for-duty examination is not health care information and disclosure is not prohibited by RCW 70.02.020. See 127 Wn. App. at 368-69 (results of drug screening test is not health care information and disclosure by former employer did not violate HCDA).

Mr. Chaney was prevented from presenting his theory of the case that Sacred Heart conveniently created the issue of its “inability” to consult with Dr. Van Gerpen. By using Mr. Chaney’s refusal to sign a full release for information as an insurmountable obstacle preventing it from communicating with Dr. Van Gerpen, Sacred Heart portrayed itself as having its hands tied. With the requested instruction, Mr. Chaney sought to argue to the jury that Sacred Heart’s proffered obstacle to such information was a red herring. It actually constituted a pretext to Sacred Heart’s actual motivation in discharging Mr. Chaney, that being his use of FMLA leave. See Dumont v. City of Seattle, 148 Wn. App. 850, 867, 200 P.3d 764 (2009)(evidence of falsity regarding employer’s stated reasons for employment decision and pretext for unlawful motivation considerations for jury).

Instead, the jury was left with no instruction on the legalities involved for the disclosure of information held by Dr. Van Gerpen. The jury received the evidence that Mr. Chaney had executed a limited release. (Ex. P32). The jury also heard that Ms. Morse sought a full release of Mr. Chaney’s medical records and information. Likely, without an instruction about the disclosure of health care information, the jury understood that the information possessed by Dr. Van Gerpen was confidential and could not be disclosed by Dr. Van Gerpen

to his client, Sacred Heart, without a release. An instruction was necessary concerning this important issue. The trial court abused its discretion in refusing the instruction.

IV. CONCLUSION

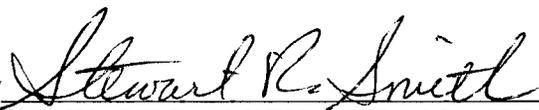
The trial court's decision denying Mr. Chaney's motion for a directed verdict should be reversed. Once Dr. Jamison indicated that Mr. Chaney was able to return to work, Mr. Chaney should have been restored to his position. Sacred Heart violated the FMLA by placing Mr. Chaney on FMLA leave based on Dr. Van Gerpen's opinion and then relying on that opinion to deny Mr. Chaney's return.

The trial court also erred by refusing Mr. Chaney's requested instructions. Such error prevented Mr. Chaney from arguing his theory of the case.

This matter should be remanded to the trial court for a judgment finding liability against Sacred Heart. The matter should then proceed to a trial on damages. If not remanded to the trial court for a judgment for liability, the matter should be remanded for a new trial which includes the refused instructions.

Respectfully submitted this 9th day of May, 2011.

LACY KANE, P.S.

By 
STEWART R. SMITH, WSBA NO. 22746
Attorney for Appellant