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STATE OF WASHINGTON  
SPokane, WA

**IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION III**

**No. 328791-III**

**SHANNON KRIES and PETER KRIES**

**Appellants**

**vs.**

**WA-SPOK PRIMARY CARE, LLC**

**Respondent**

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**APPELLANTS' REPLY BRIEF**

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## I. ARGUMENT

### A. Safety-Based Qualification Standards Are Not Applicable Under the WLAD

In an effort to avoid its legal obligation to reasonably accommodate Kries, the Hospital erroneously argues that the ICP is a “safety-based qualification standard” as established in *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974 (9th Cir. 2007) and that it applies in this case. (*Resp. Br. 23-24*) The concept of a “safety-based qualification standard” is only found in the ADA. Kries’ claim is solely under the WLAD and does not involve the ADA. As the Hospital admits, no Washington court has ever adopted the “safety based qualification standard” in an employment case. (*Resp. Br. 23, FN 3*) Although the WLAD and ADA have similar goals of accommodating disabled workers, there are many differences which make it improper to apply federal precedent to the state law counterpart. *See, e.g. Snyder v. Med. Serv. Corp. of E. Washington*, 145 Wn. 2d 233, 246, 35 P.3d 1158, 1165 (2001)(Court found it improper to apply Federal ADA “disability” definition cases to a WLAD case as the two are substantially different). Washington cases recognize federal authority as helpful in construing the WLAD, but only when it “best further[s] the purposes and mandate of our state statute.” *Grimwood v.*

*University of Puget Sound*, 110 Wn.2d 355, 362, 753 P.2d 577 (1988); but see *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d at 358, and *Martin v. Boeing*, 137 Wn.2d 357, 971 P.2d 45 (1999)(federal law not helpful when the statutory language differs significantly.)

There is no compelling reason to consider the ADA or adopt a safety based qualification standard in Washington. The WLAD provides a basis to assess an employer's efforts to reasonably accommodate an employee. Statutes such as WISHA (Washington Industrial Safety Health Act, RCW 49.17) provide proper and sufficient work place safety standards. The Hospital has not shown that either the WLAD or WISHA are inadequate and that the "safety-based qualification standard" interpreted under the ADA should be adopted.

But even if this Court were to adopt the "safety-based qualification standard" in Washington for the first time, "qualification standards" are not an "essential function." The Hospital argues that the ICP is an "essential function" of any job within the Hospital and that since Kries was out of compliance with the ICP, then she was unable to perform the essential functions of her job. (*Resp. Br. 23-25*). However the Hospital

clearly ignores the distinction between an “essential function” and a “qualification standard.” The court in *Bates*, 511 F.3d at 990, cautioned:

“Essential functions” are not to be confused with “qualification standards,” which an employer may establish for a certain position. Whereas “essential functions” are basic “duties,” [29 C.F.R. § 1630.2(n)(1)], “qualification standards” are “personal and professional attributes” that may include “physical, medical [and] safety” requirements. *Id.* § 1630.2(q). The difference is crucial.

The statute does not require that a person meet each of an employer's established “qualification standards,” however, to show that he is “qualified.” And, indeed, it would make little sense to require an ADA plaintiff to show that he meets a qualification standard that he undisputedly cannot meet because of his disability and that forms the very basis of his discrimination challenge.

The Hospital claims that Kries cannot perform the essential functions of the job *because*, she was unable to meet its qualification standards. (*Resp. Br. 23*). However, compliance with the ICP is not an “essential function” of her job position.

“Essential functions” are job *duties* that are “fundamental, basic, necessary and indispensable to filling a particular position.” 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.37 (6th ed.)

The Hospital has not claimed that Kries was unable to perform a specific job *duty*. Instead, it claims that she was unable to perform *all* her job duties because she could not return to work in any

capacity based on the ICP. So because it refuses to accommodate Kries or allow her to work in any capacity, the Hospital essentially argues that she is unable to perform the essential functions of her job.

The whole point of reasonable accommodation rests on the premise that accommodations are made to *enable* a disabled worker perform the essential functions of a position. As the court stated in *Bates*, it makes little sense to require a worker to meet “a qualification standard that he undisputedly *cannot* meet because of his disability and that forms the very basis of his discrimination challenge.” *Bates*, 511 F.3<sup>rd</sup> at 990. Kries’ discrimination challenge is based upon the Hospital’s failure to accommodate her disability which is claimed to be her failure to comply with the ICP. The Hospital’s position is entirely contrary to the purpose of the WLAD. It would have the effect of avoiding an employer’s legal obligation to reasonably accommodate a disability by merely pointing to a policy and claiming that compliance with it is an “essential function.”

Furthermore, there is no evidence that the clinic established the ICP as a non-discriminatory safety based qualification standard. (*Resp. Br. 29*) No one even knew where the ICP came

from, so how could it have been established as a non-discriminatory standard? (*CP 370, p. 28:23-25; CP 371, p. 29:1, 14-20; p. 30:18-25*)

**B. The Infection Control Policy Is Ambiguous And Subject to Interpretation.**

It is misleading to state that the ICP was drafted by the Deaconess Infection Control Committee (*Resp. Br. 3*). Neither the record nor respondent's citations to the record reflect that fact. In fact, Dr. Gillum did not participate in the policy and there is no evidence that the committee participated in the formation or implementation of the policy. (*CP 370, p.28:24-25; 29:1, 14-20; CP 371, p. 30:18-25*)

1. The Term "Open or Draining Wound" is Subject to Interpretation and Not Defined in the ICP Nor Mentioned in the RWP.

The Hospital claims that the RWP (Policy For Return to Work With Restrictions Following Non-work Related Injury, Surgery or Personal Medical Conditions (*CP 445*)) did not apply to draining wounds. (*Resp. Br. 30.*) If that is the case, then what did it apply to? The policy does not mention open or draining wounds. It simply states that it applies to those employees returning to work after non-work related injury, surgery or personal medical conditions. If the policy restricted an employee

from working with an open or draining wound, then Kries should have been allowed to return to work because there were various points during her employment when her wound was not open and it was covered and draining into an enclosed pouch. (*CP 343, p. 38:12-22; CP 351, p. 71:17-22; CP 348, p. 58:1-13*)

The problem is that there is no definition of “open or draining” wound in the ICP. Nor is it mentioned in the RWP. This creates a moving target. An open wound can range anywhere from one that is not healed (*CP 405, p.14:2-14; CP 408, p. 29:1-7*), one in which the skin is not sutured (*CP 337, p. 11:15-21; p. 12:2-3*), or one which is draining. (*CP 371, p. 32:12-22; CP374, p. 43:9-11*) The Hospital was not consistent in its application of the ICP. When Kries was released to return to work on September 10, 2010, her wound was closed but it wasn’t healed. (*CP 344, p. 44:6-25; CP 345, p. 45:1-9; CP 98-99, 101; CP 408, p. 30:24-25; p. 31 32:1-16*) Yet the Hospital was prepared to allow her to return to work. (*Id.; Resp. Br. 8*) The Hospital relied upon Dr. Olson’s September 10, 2010 release for work, but refused to do so when Dr. Olson released her on July 27, 2010. These are inconsistent responses and create questions of fact regarding the application of the ICP.

The Hospital admits that the testimony cited by Kries establishes that she may have had a closed wound. (*Resp. Br. 19-20*) If so, then under the RWP, she should have been allowed to return to work.

Dr. Gillum, as the Hospital defense expert, would have the court believe that any open wound is a draining wound. (*CP 368, p. 20:6-13; CP 374, p. 43:9-11*) But whether a wound is open or draining is subject to differing interpretations, even within the Hospital personnel charged with infection control (Bergerud) and employee health (Wise). With the lack of any definition in either policy regarding what constitutes an open or draining wound, issues of fact are presented.

2. The RWP Allows Kries to Work With an Open or Draining Wound.

The trial court indicated in Undisputed Fact No. 20, that covering an open wound is not a guarantee against infection (*Resp. Br. 20; CP 485*) If the Hospital policy then is to guarantee against acquiring or transmitting an infection, then why is an employee allowed to work with an open and covered wound under the RWP?

The Hospital contends that the RWP does not address draining wounds. (*Resp. Br. 30; CP 445*) This ignores the fact

that other employees with draining wounds can work, such as a female employee during their menstrual cycle, and those with colostomy bags. The Hospital does not seem to have a problem with conducting an evaluation and assessment for reasonable accommodation of someone with a colostomy bag. (CP 334, p. 15:25, p. 16:1-18)

Furthermore, the RWP and the ICP are in direct conflict with each other. The RWP clearly allows an employee to work with an open wound as long as it's covered. But the Hospital claims that under the ICP, anyone with an open wound cannot return to work. Those are two inconsistent positions. The employer has two inconsistent policies that apply to the same situation. This creates issues of fact that should have been evaluated by the finder of fact, rather than dismissed on summary judgment.

The Hospital ignored returning Kries to work under the RWP claiming that Kries had a draining wound. (*Resp. Br. 30*) The Hospital claims that Kries needed her initial surgery on July 14, 2010, to close an open and draining wound. But that is not accurate. (*Resp. Br. 5*) She packed it and taped it shut. (*CP 385, p. 65:4-25*) Her wound was not open. (*Id.*) After that surgery, Dr. Olson closed the wound and placed two drains that were self-

contained. (*CP 343, p. 38:14-19; CP 351, p. 71:17-22; CP 342, p. 33, 34:1-17; CP 351, p. 70: 15-17*) In his opinion the wound was not open. (*Id.*) It was stapled and sutured closed with two separate drains that drained into a sealed pouch/container. (*CP 340, p. 25:3-24; CP 343, p. 38:12-22*) There is no definition of “open” or “draining” anywhere in the ICP. The terms as they relate to the policy are ambiguous and subject to interpretation. “Draining” under that policy could mean a wound that is draining that is not contained. A wound that is saturating bandages and bleeding through is not self-contained.

At all times Kries’ wound was self-contained until her surgery on October 11, 2010. After that she had an open wound that she packed with gauze, taped it shut and wore her clothes over it. (*CP 348, p. 58:1-4; CP 458*) An ambiguous policy should be construed against the employer. Even Dr. Gillum recognized the inconsistency in the vague policy language. (*CP 368, p.20: 6-13; CP 369, p. 21:11-25; p. 22; p. 23:1-2*)

The Hospital takes the position that Ms. Bergerud, the Infection Control Director, determined that an outside physician’s opinion could not override the ICP. (*Resp. Br. 7*) But the opinions of not only Kries’ surgeon Dr. Olson, but her expert, Dr. Riedo are

reasonable but competing interpretations of the ICP. Competing expert interpretations that create issues of fact are for the trier of fact to consider and should not be dismissed on summary judgment. *See, e.g. Volk v. Demeerleer*, 184 Wn. App. 389, 409, 337 P.3d 372, 382 (2014).

**C. Kries was not an Unreasonable Risk To Herself or Others.**

1. Direct Threat is Not a Defense Under the WLAD.

The Hospital claims that Kries posed a “direct threat” to herself or others. (*Resp. Br. 32*) This is a federal based defense under the ADA that has not been adopted in Washington. *See Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1096 (9th Cir. 2007) (“because the Washington Law does not contain an explicit counterpart to the ADA’s “direct threat” provision and its implementing regulation, the possible incorporation of such a defense into the state’s jurisprudence poses an unresolved question.”).

The Hospital admits that it can only cite to federal cases and statutes because that defense has never been applied or adopted in Washington. (*Resp. Br. 24*) Although the Hospital claims that “authorities interpreting the ADA provide guidance to this court, it is well settled that Washington Courts will only look to the ADA

where “doing so “further[s] the purposes and mandates of [the WLAD].” *Kumar v. Gate Gourmet Inc.*, 180 Wn. 2d 481, 493, 325 P.3d 193, 199 (2014); citing *Grimwood*, 110 Wash.2d at 362, 753 P.2d 517.

The legislature never saw fit to enact a “direct threat” defense under the WLAD and the court should not now judicially create such a defense. Even assuming *arguendo* that the ADA’s direct threat provision applies, this defense still fails. Kries was no greater threat than any other employee, much less a direct threat. (*CP 457-459*) The Hospital is treating her differently than other similarly situated employees who also risk infection when their colostomy or ileostomy bag comes loose or breaks, a pic line perforates a vein, or their insulin pump stops working. (*Id.*)

There is an issue of fact as to whether or not Kries posed an unreasonable risk of harm to herself or others. The Hospital claims that an open or draining wound is always a risk of transmitting infection to patients until the wound is no longer open or draining. (*Resp. Br. 34*) If that were the case, then any female in the middle of their menstrual cycle would be screened and kept off work. (*CP 457-459*)

The Hospital claims that covering a wound can *reduce* the risk of transmitting infection, but that the risk is still unacceptable. (*Resp. Br. 34*) If that were true, then how does the Hospital reconcile the RWP policy that allows an employee to cover a wound (as long as it's not on the hand or forearm) and continue to work? Those wounds aren't healed or closed. The fact is that every healthcare employee in the industry poses a potential risk to a patient. Whether it is a sneeze, the chance of a colostomy bag breaking, flu, virus, or other various maladies, there are no guarantees. Something *might* occur. But that is not the basis to prevent someone from working.

The Hospital claims that women's clinic patients are "highly susceptible" to infection, implying there is a greater risk to those patients than to other patients or employees. (*Resp. Br. 22*) There is nothing in the record to support this claim. Kries was in the class of employees designated as "patient care services." That class of employee only had the *potential* for exposure to blood borne pathogens. (*CP 432*)

It is clear that Kries was not an imminent risk or even a probable risk of harm. (*CP 342, pl.36:22-25; CP 343, p. 37:1-5*) She was only a possible or potential risk. (*CP 370, p. 26, p. 27:1-*

5; CP 368, p. 17:1-7; CP 369, p. 23:22-25; p. 24:1) If her wound was covered and contained, the evidence taken in a light most favorable to the appellant reflects that she was at no greater risk of transmitting or acquiring an infection than anyone else. Otherwise, a female employee in the middle of her menstrual cycle would be screened and prevented from working. Those with colostomy bags would be unable to work at Deaconess and those who were carriers of MERSA or other antibiotic resistant bacteria could never work in a hospital. The point is that issues of fact exist regarding whether Kries was an unreasonable risk to either herself or to others.

2. The Business Necessity Defense is Not Applicable.

a) Business Necessity Only Applies In Disparate Impact Claims Which Kries is Not Asserting.

The Hospital also argues that the “business necessity” defense applies in this case. (*Resp. Br. 26*) It does not. Under the WLAD and ADA, “business necessity” has only been adopted and applied in disparate impact cases, not reasonable accommodation or disparate treatment claims. *See, e.g. Fey v. State*, 174 Wash. App. 435, 300 P.3d 435 (2013) (a reasonable accommodation claim under the ADA does *not* implicate *either a BFOQ defense or a defense of business necessity*)(emphasis added); WPI 330.02;

330.03 (applying business necessity only to disparate impact claims). Kries is not asserting a disparate impact claim. Her claim is a failure to accommodate and disparate treatment claim. (CP 1-7) The “business necessity” defense is not legally available to the Hospital in this case and should not be considered by the Court.

Even assuming *arguendo* that the defense applies, it fails in this case. The Hospital argues that the clinic’s business and medical judgment regarding necessary safety precaution should not be second guessed by outside physicians such as Dr. Riedo or Dr. Olson who have no responsibility for infection control. (Resp. Br. 27) The issue is implementing the ICP in a non-discriminatory manner. In evaluating the risk involved, the probability of occurrence is an important factor. Here, it is only a possibility of occurrence, not a probability. (CP 370, p. 26, p. 27:1-5; CP 368, p. 17:1-7; CP 369, p. 23:23-25; p. 24:1)

The Hospital contends that the employee must be “safe” to return to work. (Resp. Br. 24, 33-34) So when would it be safe to return to work? When the employee’s wound is fully healed as per Mary Wise, Employee Health Coordinator? (CP 405, p. 14:2-14) When there is a scab? (*Id.*) When the wound is “closed”, as per Sharyl Bergerud, the Infection Control Director? (CP 333, p. 10:1-

23) When it is sutured, covered and any draining is self-contained? (CP 457 ¶1; CP 458 ¶5; CP 360, p. 44:11-18) Or when it is sutured and covered as allowed under the RWP? (CP 445)

The Hospital argues that the choice belongs to the Hospital as Kries has stated no specific facts to dispute the ICP's validity, but merely presents competing medical opinions. (*Resp. Br. 30*) As this Court has mentioned, competing medical opinions present questions of fact. *Volk*, 184 Wn. App. 389, 409, 337 P.3d 372, 382. The breadth, scope and definition of the ICP are in question. Whether it violates the law against discrimination, discriminates against someone who has a wound that is covered and ignores the employer's legal obligation to participate in the interactive process and conduct an assessment, are all questions of fact.

b. No Individualized Assessment was Undertaken

In order to assert a business necessity defense, an employer has to at least perform an individualized assessment to "assess the risk based on "the objective, scientific information available to him and others in his profession." *Echazabal v. Chevron USA, Inc.*, 336 F.3d 1023, 1028 (9th Cir. 2003). "A subjective belief in the existence of a risk, even one made in good faith, will not shield

the decision maker from liability.” *Bragdon v. Abbott*, 524 U.S. 624 (1998).

The Hospital would have the court believe they conducted an individualized assessment of Kries’ risk of returning to work. That is incorrect as no risk assessment was undertaken. (*CP 367, p. 14:7-11*) There was no discussion with Dr. Olson or Dr. Gillum. (*CP 404, p. 10:6-16; CP 332, p. 7:4-14*) Dr. Gillum admitted that no risk assessment was done and that he did not participate in determining whether she was a threat to return to work. (*CP 367, p. 14:7-11; CP 372, p. 34:17-25; p. 35:1-9; CP 373, p. 37:6-11*) He acknowledged that it would have been “reasonable” for him to be involved in that regard. (*Id.*)

Discussion with Dr. Gillum and Dr. Olson would at least qualify as “other providers in the profession” necessary to obtain an objective analysis as envisioned in *Echazabal*. There was no effort to evaluate other options that would reduce any perceived risk.

In reality, all the Hospital did was point to the ICP and refuse to enter into the interactive process and allow any discussion of alternatives for Kries returning to work. How can the Hospital assume she is a threat without an inquiry and without objective evidence of such? There was nothing impractical or

impossible that prevented the Hospital from undertaking a risk assessment.

The Hospital had options regarding minimizing any perceived risk Kries posed as required by the individualized assessment requirement. Dr. Riedo offered practical solutions. (*CP 458 ¶4&6*) At his hospital (Evergreen in Kirkland), he is Director of Infection Control as well as the Medical Director of Employee Health so he deals with these issues. (*CP 353, p.9:1-3*)

c. Blanket Prohibitions are Improper

The Hospital argues it was not obligated to perform an individualized assessment of Kries because a blanket prohibition is allowed when it is impossible or impractical to do a risk assessment for every employee. (*Resp. Br. 37*) The Hospital provides no Washington or Ninth Circuit authority suggesting this exception has been adopted or even applies to avoid the required individualized inquiry. The *E.E.O.C. v. Exxon Corp.*, 967 F. Supp. 208, 213 (N.D. Tex. 1997) decision cited by the Hospital is not binding law in Washington State or in the Ninth Circuit and as such is not applicable here. The only time blanket exclusionary policies based on safety concerns have been held permissible under the ADA and Title VII is where (1) safety is reasonably

necessary to the essence of the business; and (2) the employer had reasonable cause to believe that all or substantially all disqualified employees would be unable to safely perform the job duties, or that it is impossible or highly impractical to individually assess disqualified employees. *Id.*

The Hospital's argument logically fails. The Hospital admits to having an actual policy that requires that they perform individualized assessments on each employee. (*CP 445; CP 335, p. 26:19-23; CP 409, p. 41:24-25; p. 42:1-9*) Each individual circumstance will be assessed on a case by case basis. (*Id.*) Yet in the same breath, they argue that such a policy is impossible to implement under *Exxon*. (*Resp. Br. 37*) The Hospital can't have it both ways. It can't argue that they are relieved from an individual assessment because of a blanket prohibition, when its own policy obligates them to perform such an assessment.

The Hospital claims that all of the testifying physicians agreed that blanket prohibitions are sometimes required. (*Resp. Br. 39*) That is incorrect. There is nowhere in the record that any of the physicians stated that. Even Dr. Gillum agreed it would have been reasonable to consult with him on whether Kries posed an unacceptable risk. (*CP 372, p. 34:17-25; p. 35:1-9*) That

should have been part of an individual assessment that was not conducted.

**D. The Hospital Failed to Accommodate Kries**

1. Providing 4 Months of Leave is not the End-All for Reasonable Accommodation.

The Hospital did provide Kries with four months of medical leave. However, it arbitrarily cut her leave and terminated her without a word of discussion. According to Kries' supervisor, Carolyn Commers, there was a hiring freeze in place. (*CP 420, p. 37:24-25; p. 38:1-3*) If so, they could not and did not hire someone to replace Kries. Extending her medical leave and communicating with her was not an undue burden considering that there was no need to rehire someone into her position. The employer has to show some undue burden to avoid reasonable accommodation. *Easley v. Sea-Land Serv., Inc.*, 99 Wn. App. 459, 994 P.2d 271 (2000)

2. The Hospital Failed in the Interactive Process.

The Hospital claims that their duty to engage in a reasonable accommodation dialogue is only triggered at the time the employee provides the employer with a release from a healthcare professional. (*Resp. Br. 44*) The obligation to participate in the interactive process commences when they are

aware of a disability, not when the employee is released to work. *Goodman v. Boeing*, 127 Wn. 2d 401, 899 P.2d 1265 (1995). The employer can't ignore reasonable accommodation. Kries brought in releases to return to work which the Hospital ignored. (CP 433; CP 434; CP 59:10-25; CP 60: 1-19)

The Hospital claims that the interactive process is not an end in and of itself. (Resp. Br. 40) They blame Kries for her lack of interaction when it was the Hospital that avoided its obligation to identify other job positions and work with her to find a solution. The Hospital argues that Kries could not return to her medical assistant position or any other position because of the risk of infection that she presented. (Resp. Br. 42) Whether or not Kries could return somewhere else within the Hospital out of direct patient care is a question of fact for the jury.

3. Kries Did Present a Release to Return to Work.

The Hospital claims that Kries did not present a release to return to work on September 15, 2010. It claims that Dr. Olson testified by deposition that the September 15, 2010, form was not a return to work authorization. (Resp. Br. 9) Its citation to the record is misleading. Dr. Olson testified that the form used was prepared by his staff, not him, and was the form for return to

work. (CP 345, p. 48:16-25; CP 346, p. 49:1-5; CP 434) But because the language on the form about employment was not checked off, he was unsure what the purpose was. (*Id.*) Kries considered this a return to work authorization and presented it as such. (CP 59:22-23; 401, p. 203:14-19)

The Hospital didn't rely on this form in any event, once again taking the position that Kries could not return to work with an open or draining wound. (CP 386, p. 81:9-16; CP 387, p. 88:9-25; CP 388, p. 89:1-16; CP 404, p. 9:12-25; p. 10:1-5; CP 332, p. 7:16-23) Kries had been told on a number of occasions that if she had an open or draining wound she could not return to work. (*Id.*)

The Hospital argues that Kries did not communicate with them after September 15, 2010. (*Resp. Br. 11*) That is not accurate. Kries communicated frequently with her direct supervisor, Carolyn Commers and Mary Wise, the Employee Health Coordinator, in an attempt to get back to work. (CP 388, p. 89:5-25; p. 90; p. 91:9-25)

#### 4. Kries' Efforts to Turn in Additional Work Releases Would Have Been Futile.

It was obviously futile for her to continue to bring in releases when the hospital was unwilling to accept them.

The response was always “no”. There was no sense in bringing in any more releases and Kries was told not to bother coming back if she had an open wound. (*CP 398, p. 189:16-22; CP 399, p. 194:22-25; p. 195:1-25; CP 400, p. 196:1-18*) It was futile for her to continue this charade only to be rejected.

When she attempted to return to work on September 15, 2010, if the Hospital had questions about the document presented, they could have called Dr. Olson to clarify. But it was rejected off hand without any kind of effort to dialogue. She was simply told that could not work since she still had an open or draining wound. There was really not much Kries could do if the employer was unwilling to participate in the interactive process.

5. There is an Issue of Fact Regarding When Kries’ Wound Finally Healed and She Would Have Been Eligible to Return to Work.

Dr. Gillum testified that from his review of the records, by November 2010, Kries was healed and could have returned to work. (*CP 376, p. 52:5-25; CP 377, p. 53:1-3*) She was terminated on November 16, 2010. There is an inference that had the Hospital inquired of their own physician, Kries could have returned to work. There is an issue of fact in that regard.

The Hospital contends that Kries was never aware of the RWP prior to litigation so there can't be any question of fact as to the interpretation of that policy. The Hospital further argues that *Lamar Outdoor Advertising v. Harwood* (ambiguities in a contract should be construed against the drafter) is not applicable because it is a contract case. (*Resp. Br. 31*) *Lamar* supports the long standing contract law maxim that ambiguities should be construed against the drafter. Kries is not alleging a contract claim under an employee handbook. Nor does she allege that the RWP or ICP itself formed a specific contract. The point is that the employer drafted the policies, they are ambiguous, and that ambiguity should be construed against the Hospital. The Hospital wants to look to one policy when it is favorable and ignore another policy when it's not. Whether Kries saw the policy or not is not relevant as she is not asserting a contract claim based on a handbook provision. The conflict between the RWP and the ICP is objective evidence that the Hospital could have interacted with Kries and accommodated her disability, yet failed to do so.

**E. Kries is Entitled to an Award of Attorney's Fees and Costs on Appeal.**

Kries contends the trial court erred in dismissing her claim on summary judgment. If Kries is successful on appeal before this

Court, she should be entitled to her attorney's fees and costs. The court in *Wheeler v. Catholic Archdiocese of Seattle*, 124 Wn. 2d 634, 642-643, 880 P.2d 29 (1994), found the court of appeals erred in denying attorney's fees and costs on appeal. *Wheeler* was a discrimination case noting that plaintiff could recover fees and costs under RCW 49.60.030. It was also determined that attorney's fees are properly awarded to the "prevailing party," and that a party "prevails when it succeeds on any significant issue which achieves some benefit the party sought in bringing suit." *Wheeler, citing Blair v. WSU*, 108 Wash.2d 558, 572, 740 P.2d 1379 (1987). Kries benefits by reversing the trial court's decision on summary judgment. Like *Wheeler*, if Kries is successful in keeping her claims in court, then this Court should award fees and costs for this appeal.

## **II. CONCLUSION**

The following genuine issues of fact exist in this matter:

1) Whether the Hospital failed to conduct an individualized risk assessment? 2) Whether the Hospital failed to participate in the interactive process? 3) Whether interpretation and application of the ICP and RWP are inconsistent? 4) Whether Kries posed an unreasonable risk of harm to herself or others? In that regard,

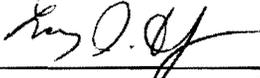
was Kries a risk to transmit or acquire an infection that would prevent her from working? 5) Whether or not there was other non-patient services work Kries could have performed while healing? 6) Whether she was treated differently considering other employees with “open” or “draining” wounds? 7) Whether the competing opinions and inferences from the experts create issues of fact? 8) Whether it was an undue burden on the Hospital to extend her medical leave as a reasonable accommodation? 9) What constitutes an open or draining wound preventing an employee from returning to work? 10) Whether the Hospital failed to accommodate plaintiff even after the employment relationship ceased.

Dismissal by the trial court should be reversed and this matter remanded for trial.

Dated this 1<sup>st</sup> day of April, 2015.

Respectfully submitted:

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By   
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