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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. \_\_\_\_\_

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

NO. 29438-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIV. III

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ROBERT CHANEY,

Respondent,

v.

PROVIDENCE HEALTH CARE D/B/A SACRED HEART MEDICAL  
CENTER & CHILDREN'S HOSPITAL,

Petitioner.

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PETITION FOR REVIEW

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## **I. IDENTITY OF PETITIONER**

Petitioner, Providence Healthcare d/b/a Sacred Heart Medical Center and Children's Hospital (Sacred Heart), seeks review of the Court of Appeals decision designated in Part II.

## **II. COURT OF APPEALS DECISION**

Sacred Heart seeks review of the published decision of the Court of Appeals, Division III, *Chaney v. Providence Health Care*, \_\_\_ Wn. App. \_\_\_, 267 P.3d 544WL 63546448 (2011). Sacred Heart moved for reconsideration, which was denied on January 23, 2012. A copy of the published decision at issue is provided in Appendix A. A true and correct copy of the Order Denying Reconsideration is provided in Appendix B.

## **III. ISSUES PRESENTED FOR REVIEW**

1. Whether the Court of Appeals holding that Robert Chaney was entitled, as a matter of law, to reinstatement to his former job even though he failed to provide a contemporaneous fitness for duty certificate at the end of his FMLA leave is contrary to the FMLA, its regulations, and federal case law such that the Court should accept review under RAP 13.4(b)(1), (3) and (4).

2. Whether the Court of Appeals reversal of the trial court's denial of Mr. Chaney's motion for directed verdict is in conflict with

decisions of this Court such that the Court should accept review under RAP 13.4(b)(1).

#### IV. STATEMENT OF THE CASE

Robert Chaney was employed by Sacred Heart from April 9, 2001 to April 27, 2007 as an interventional radiology technician in the Radiology Department. RP 425. The invasive procedures performed by an interventional radiology technician can involve “life and death.” RP 478. Being alert at all times is an essential function of the job. RP 485. That is because the procedures involve accessing blood vessels, draining various organs, and dissolving blood clots utilizing special equipment. RP 65.

While employed at Sacred Heart, Mr. Chaney had taken leave under the FMLA on several occasions. RP 419; Ex. P3; Ex. P14. He experienced chronic back pain for which he received drug therapy involving nine or more medications. Ex. P33; RP 362-363. Among the drugs that Mr. Chaney would take while on the job was the narcotic methadone prescribed by his physician. RP 436; Ex. P33. Methadone is absorbed into the body over a long period of time and reaches peak intensity at about twenty-four (24) hours. RP 373. Potential side effects include depressed brain function, marked drowsiness, slurred speech, and inability to walk normally. *Id.* It can also affect judgment, impact

reaction times, and slows the ability to judge, respond, and react in a timely fashion. *Id.*

On July 16, 2007, Mr. Chaney had a fitness for duty exam by Dr. Royce Van Gerpen, a healthcare provider who specializes in occupational medicine. RP 469; Ex. P29. Dr. Van Gerpen determined that Mr. Chaney should not be working as an interventional radiology technician at Sacred Heart because the medications he was taking “could adversely affect his ability to concentrate and make rapid and appropriate sequential decisions.” Exs. P33; P34; RP 367; RP 400-403.

Based on Dr. Van Gerpen’s assessment, Sacred Heart advised Mr. Chaney that he appeared to have a serious health condition making him eligible for FMLA leave effective July 16, 2007, the date of Dr. Van Gerpen’s assessment. Ex. P36. Sacred Heart gave Mr. Chaney notice of FMLA eligibility, indicating that his FMLA leave was provisional pending receipt of a certification from his treating physician regarding his serious medical condition. *Id.* Sacred Heart also notified Mr. Chaney that his eligibility for FMLA leave would expire on August 27, 2007 (based on his then-remaining allotment of FMLA leave). *Id.* Finally, Sacred Heart advised Mr. Chaney that to be eligible for reinstatement at the end of his FMLA leave, he would need to obtain a release to resume work. *Id.*

On August 23, 2007, four days prior to the expiration of his FMLA leave, Mr. Chaney had a consultation with Dr. Van Gerpen. Ex. P47. Dr. Van Gerpen advised Sacred Heart that Mr. Chaney still was not fit for duty as an interventional radiology technician. *Id.* Subsequently, Mr. Chaney did not provide a medical certification that he was fit for duty or that he was released to return to work as of August 27, 2007.

On August 27, Sacred Heart advised Mr. Chaney that his FMLA had expired and that he was effectively terminated because he did not have a release to return to his prior job. Ex. 49.

Mr. Chaney sued Sacred Heart for, among other things, alleged violation of the FMLA because it failed to reinstate him to his previous position. At the close of evidence, Mr. Chaney moved for a directed verdict regarding his FMLA claim for failure to reinstate. RP 521-22. The trial court denied the motion. RP 523-525. The case went to the jury on the issue of liability. The jury rendered a 12-0 defense verdict finding that Sacred Heart did not interfere with Mr. Chaney's FMLA rights. CP 269-270.

On appeal, the Court of Appeals reversed the judgment, not on the instructions or evidence provided to the jury, but based on the trial court's denial of Mr. Chaney's motion for directed verdict. The Court of Appeals held that the trial court should have granted a directed verdict on the issue

of liability. The Court of Appeals remanded the case for a determination of damages.

**V. REVIEW OF THE COURT APPEALS DECISION  
SHOULD BE GRANTED**

**A. The Court of Appeals Decision Involves a Significant  
Question of Federal Law and Public Interest.**

The right to reinstatement under the FMLA expires when the FMLA leave expires. Here, there is no dispute that Mr. Chaney's FMLA leave expired August 27, 2007. Review is warranted under RAP 13.4(b)(3) and (b)(4) because the Court of Appeals decision involves a significant question of federal law and of public interest.

"If an employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration ...." 29 C.F.R. § 825.214(b), and there is no substantive claim for interference with the employee's FMLA rights.<sup>1</sup> *Colburn v. Parker/Hannifin/Nicholas*, Portland Div., 429 F.3d 325, 332 (1st Cir. 2005).

Thus, an employer may condition an employee's right to reinstatement to his former position on the employee obtaining

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<sup>1</sup> In analyzing Mr. Chaney's claim for directed verdict, the Court of Appeals relied, in part, on FMLA regulations that were not in effect in 2007 at the time of Mr. Chaney's leave. See Opinion at 10-16 (citing to 29 C.F.R. § 307(a); 29 C.F.R. § 312(b); 29 C.F.R. § 313(d)). These sections did not become effective until January 16, 2009.

certification of his ability to return to work from his healthcare provider. 29 U.S.C. § 2614(a)(4); *Conoshenti v. Public Service Elec. & Gas Co.*, 364 F.3d 135, 148 (3d Cir. 2004). The certification must attest “that the employee is able to resume work.” 29 C.F.R. § 825.310(a). “[U]nless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated.” 29 C.F.R. § 825.311(c); *Brumbalough v. Camelot Care Centers, Inc.*, 427 F.3d 996, 1001 (6th Cir. 2005); *Mondaine v. American Drugstores, Inc.*, 408 F. Supp. 2d 1169, 1206 (D. Kan. 2006) (employee is only protected under FMLA if he reports for work with the required work release certification indicating his ability to resume work when his FMLA leave concludes); *Hanson v. Sports Authority*, 256 F. Supp. 2d 927, 926 (W.D. Wis. 2003) (employee may be terminated if she does not submit required doctor’s work release certification indicating she is capable of performing her full-time duties *at the time FMLA leave concludes*).

An employee must provide an unconditional release to return to work before the duty to reinstate the employee arises. 29 C.F.R. § 825.311(c) (“the employee must provide medical certification at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee’s serious health condition, that the employee is fit for duty and

able to return to work”); *Burkett v. Beaulieu Group, LLC*, 382 F. Supp. 2d 1376, 1381 (N.D. Ga. 2005), *aff’d* 168 F. Appx. 895 (11th Cir. 2006). While the fitness for duty certification need only be a simple statement of an employee’s ability to return to work, “it is axiomatic that the ‘simple statement’ be made *contemporaneously* with the employee’s ability to work.” *Id.* at 1380-81 (N.D. Ga. 2005), *aff’d* 168 F. Appx. 895 (11th Cir. 2006) (emphasis added). A prospective statement to the effect that a health care provider *believes* the employee will be able to return to work at the end of the FMLA leave is not sufficient. Indeed, the “‘simple statement of the employee’s ability to return to work’... must be relevant to the employees’ condition *at the time FMLA leave is concluded.*” *Barnes v. Ethan Allen, Inc.*, 356 F. Supp. 2d 1306, 1311-12 (S.D. Fla. 2005), *aff’d*, 149 F. Appx. 845 (11th Cir. 2005) (emphasis added) (letter from doctor stating that plaintiff could prospectively return to work in 4-6 weeks was not a valid release to work under the FMLA). “Allowing a six-week old note to qualify as a fitness-for-duty certification would not be reasonable under the FMLA.” *Id.* at 1312.

If an employee does not provide a contemporaneous, unconditional certification of fitness for duty at the end of his disability leave, an employer is not required to reinstate the employee. *See generally Bloom v. Metro Heart Group of St. Louis, Inc.*, 440 F.3d 1025, 1031 (8th Cir.

2006) (non-FMLA disability leave; employee had no right to reinstatement when she did not submit a contemporaneous fitness-for-duty certification at the end of her leave).

Here, it is undisputed that Mr. Chaney did not provide a certification of fitness for duty or a release to return to work at the time his FMLA leave expired. On the contrary, the statement he obtained from Dr. Van Gerpen four days before the expiration of his FMLA leave concluded that he was not fit for duty and that he could not be released to return to work as an interventional radiology technician. Dr. Jamison's August 10 certification at the outset of Mr. Chaney's FMLA leave that he had a serious health condition and would need two to four weeks of leave was not a contemporaneous medical release at the conclusion of Mr. Chaney's FMLA leave. P45; RP 264-267. *See Diaz v. Transatlantic Bank*, 367 F. Appx. 93, 96 (11th Cir. 2010) (statement from doctor that plaintiff would be out for six to eight weeks was the "very opposite of medical clearance").

Consequently, the Court of Appeals decision directly conflicts with the FMLA, its regulations, and federal case law stating that an employer is entitled to terminate an employee if the employee does not submit a medical clearance or release to return to work at the conclusion of his

FMLA leave. Accordingly, this Court should accept review under RAP 13.4(b)(3).

This matter also involves a substantial issue of public interest because it deals not only with an employee's obligation to provide a fitness for duty certificate when seeking reinstatement from an FMLA leave, but also Sacred Heart's duty to protect the safety and health of its patients from potential and serious harm that could be caused by an impaired employee performing invasive procedures.

Mr. Chaney argued that Sacred Heart, as a matter of law, was required to reinstate him based on statements made by Dr. Jamison in his August 10 certification of a serious health condition making him eligible for "2-4 weeks" of FMLA leave. As in *Diaz v. Transatlantic* (supra), this is only a certification of the right to FMLA leave, not a medical clearance to return to work. Dr. Jamison indicated that Mr. Chaney needed "continuous" leave for "2-4 weeks" after August 10, 2007. Ex. P45; RP 265-267. And, like the plaintiff in *Barnes*, the certification of a serious health condition included a prospective potential return to work date(s) – in this case, anywhere between August 24 and September 7 (well beyond the August 27 expiration of FMLA leave for Mr. Chaney). However, the potential return date(s) suggested by Dr. Jamison was not a medical clearance based on Mr. Chaney's condition at the time his FMLA leave

concluded. To the contrary, Dr. Jamison's statement was prospective and was written 17 days before the conclusion of his FMLA leave. Dr. Jamison was only certifying that Mr. Chaney needed *continuing* FMLA leave. Dr. Jamison never provided a medical release for Mr. Chaney at the *end* of his leave.

The FMLA regulations specifically permit an employer to require a fitness for duty certification prior to reinstating an employee and to terminate an employee who does not submit such a certification by the end of their leave. 29 C.F.R. § 825.311(c).

When requested by an employer pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work. . . . In this situation, unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated.

Thus, Mr. Chaney's lack of a medical clearance to return to work at the end of his FMLA leave made him ineligible for reinstatement. The trial court correctly denied his motion for directed verdict.

**B. The Court of Appeals Decision Overruling the Trial Court's Denial of a Directed Verdict is in Conflict With Prior Decisions of This Court.**

Review is warranted under RAP 13.4(b)(1) of the Court of Appeals decision to reverse the trial court's denial of plaintiff's motion for directed verdict because the Court of Appeals' reversal is in conflict with prior decisions of this Court.

A motion for directed verdict "should be granted only if the court can say, as a matter of law, that no reasonable person could have found in favor of the nonmoving party." *Ayers v. Johnson & Johnson Baby Products*, 117 Wn.2d 747, 753, 818 P.2d 1337 (1991). Or, stated another way, a directed verdict is appropriate only if there is no substantial evidence or reasonable inferences to sustain a verdict for Sacred Heart, the nonmoving party. *Harris v. Drake*, 152 Wn.2d 480, 493, 99 P.2d 872 (2004). If there was sufficient evidence or reasonable inference from that evidence to warrant submitting the case to the jury and to sustain the jury's verdict, it would be inappropriate for the Court of Appeals to reverse the trial court's denial of plaintiff's motion for directed verdict. *Industrial Indemnity Co. of the NW., Inc. v. Kallevig*, 114 Wn.2d 907, 916, 792 P.2d 520 (1990).

When reviewing a trial court's denial of a motion for directed verdict, the Court of Appeals inquiry is limited to whether the evidence

presented was insufficient to sustain the jury's verdict. *Industrial Indemnity Co. of the NW., Inc. v. Kallevig*, 114 Wn.2d at 916. See also *Hizey v. Carpenter*, 119 Wn.2d 251, 272, 830 P.2d 646 (1992) (reversal is appropriate "only where it is clear that the evidence and all reasonable inferences are insufficient to support the jury's verdict").

The Court must accept as true Sacred Heart's evidence and all favorable inferences from it. *Stiley v. Block*, 130 Wn.2d 486, 504, 925 P.2d 194 (1996).

Here, construing Sacred Heart's evidence and all favorable inferences as true, Mr. Chaney lacked a contemporaneous release pronouncing him fit for duty to return to work at the conclusion of his FMLA leave. The only report he submitted at the conclusion of his FMLA leave indicated that he was not fit to return to duty. Contrary to the Court of Appeals holding, Dr. Jamison's August 10 certification of eligibility for FMLA leave, including a statement that Mr. Chaney needed to be on a continuous leave for "2-4 weeks," is insufficient to constitute a certification of fitness for duty as of August 27 as a matter of law. And, as a matter of fact, the jury agreed that it did not constitute a release to return to work as of August 27 even though it contained a prospective statement that Mr. Chaney would be "okay to work as soon as Employer allows."

Thus, the trial court's denial of Mr. Chaney's motion for directed verdict was proper and there is substantial evidence to justify the jury's verdict.<sup>2</sup>

## VI. CONCLUSION

Mr. Chaney failed to provide a certification of fitness for duty or release to return to work based on his medical condition at the conclusion of his FMLA leave on August 27, 2007. The Court of Appeals decision to the contrary is in conflict with federal decisions interpreting the FMLA and this Court's decisions regarding when it is appropriate to overrule a jury verdict and hold that a motion for directed verdict by the opposing party should have been granted.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of February, 2012.

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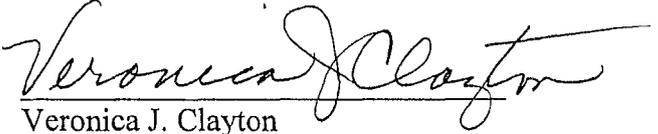
<sup>2</sup> In reversing the trial court's denial of a directed verdict for Mr. Chaney, the Court of Appeals observed that, "here, Dr. Jamison's certificate was not inadequate." Op. at 14. This double negative misstates the test and incorrectly shifts the burden to the nonmoving party, Sacred Heart. The burden was on Mr. Chaney to prove, as a matter of law, that Dr. Jamison's certificate was adequate as a matter of law, which it was not. The absence of a contemporaneous release to return to work at the conclusion of his FMLA leave means that Mr. Chaney was not entitled to a directed verdict.

**CERTIFICATE OF SERVICE**

I hereby certify that Respondent's Motion for Reconsideration was served by the method indicated below to the following this 17<sup>th</sup> day of February, 2012:

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX) to:  
(509) 884-4805
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APPENDIX A

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In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROBERT CHANEY,	)	No. 29438-2-III
	)	
Appellant,	)	
	)	
v.	)	
	)	Division Three
PROVIDENCE HEALTH CARE d/b/a	)	
SACRED HEART MEDICAL	)	
CENTER & CHILDREN'S	)	
HOSPITAL,	)	
	)	PUBLISHED OPINION
Respondent.	)	

SWEENEY, J. — The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601-2654, and its implementing regulations clearly directs when an employer must return an employee to his job. The triggering event is a return-to-work certification by the employee's physician. Here, the employee provided his physician's return-to-work certification with the caveat "as soon as Employer allows." We conclude that the certification was sufficient to trigger the employer's obligation to return the employee to work and we therefore reverse the judgment entered on a jury verdict in favor of the employer.

FACTS

Robert (Bob) Chaney worked at Sacred Heart Medical Center & Children's Hospital as an interventional radiologic technologist. Mr. Chaney's wife became ill after she gave birth to their second child in April 2005. Mr. Chaney took FMLA leave to care for her. He missed significant periods of time from work for four to five months before returning to a more normal schedule. By April 2006, he had used up all of his FMLA leave and his wife's condition had not improved. Mr. Chaney began to rely on donated leave from other employees to continue to care for her before receiving further leave under FMLA in January 2007.

Mr. Chaney's supervisor, Marshall Francis, assessed his performance in a 2006 annual performance evaluation. He noted that Mr. Chaney had missed work with FMLA leave, but was "meeting standards" overall:

[Bob's] attendance has been subpar, 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.

Ex. P8. Mr. Francis talked with Mr. Chaney at least a dozen times about his excessive absenteeism.

Mr. Chaney received first and second written warnings in January 2007 after he failed to show up for an on-call procedure and later appeared unfit for duty (he nodded off with a patient). Sacred Heart temporarily suspended Mr. Chaney. Gerry Altermatt is the director of Sacred Heart's radiology department. He called a group together to discuss the incidents with Mr. Chaney. Mr. Chaney explained that he had been deprived of sleep because of his family situation but he, nonetheless, thought he was doing an excellent job. Mr. Altermatt thought otherwise:

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 [Human Resources] to see if he can get additional FMLA leave time. He has no (or very little) PTO [Paid Time Off] or EIT [Extended Illness Time] 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.

Mr. Altermatt and the group investigating Mr. Chaney imposed a number of conditions on his right to return to work and required that he provide a medical release from his doctor. Mr. Chaney's doctor is Jeffrey Jamison, D.O. Dr. Jamison provided the medical release for Mr. Chaney's return to work on January 12, 2007. It indicated that

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Mr. Chaney had chronic medical problems that were flaring but Dr. Jamison believed he would be "completely fit for full-time duty in one week." Ex. P13.

Mr. Chaney's 2007 annual performance evaluation by Sacred Heart again noted that he was missing work due to FMLA leave, but was "meeting standards" overall:

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.

From January to June 2007, Mr. Chaney showed signs of fatigue. On one occasion, two nurses noticed that Mr. Chaney had dilated or constricted pupils, glassy or reddened eyes, slurred speech, and a staggering or unsteady gait. He also had difficulty speaking when he attempted to describe to the nurses the three dimensional spin procedure he was about to perform on a patient. The nurses notified Mr. Francis and he consulted with Mr. Altermatt about the concerns. Mr. Francis and Mr. Altermatt ordered that Mr. Chaney submit to a drug test. Sacred Heart placed Mr. Chaney on leave pending the results.

Mr. Chaney tested negative for illicit drugs, but positive for methadone. Mr. Chaney explained that he had a prescription for methadone to treat chronic back pain. Dr. Paula Lantsberger was Sacred Heart's medical review officer. She recommended that Mr. Chaney undergo a fitness-for-duty evaluation or a visit to his doctor to fine-tune his medication. Mr. Chaney visited Dr. Jamison before Sacred Heart's fitness-for-duty evaluation. Dr. Jamison's office sent a letter to Sacred Heart that said Mr. Chaney "can safely perform his duties as an xray/special procedures technologist." Ex. P25. It appears that Dr. Jamison did not sign this authorization and there is some dispute over whether he authorized the same.

Mr. Chaney then went for his fitness-for-duty examination and evaluation by a physician selected by Sacred Heart, Dr. Royce Van Gerpen. Dr. Van Gerpen specializes in occupational medicine. He asked Mr. Chaney to sign a standard release of information form. Mr. Chaney refused to sign it because he thought that his medical history was privileged and the release went too far; it allowed Sacred Heart access to all of his medical records and history. Dr. Van Gerpen modified the release to allow only "a statement about whether [Mr. Chaney was] fit for duty." Ex. P32; Report of Proceedings (RP) at 360-61. The examination and evaluation proceeded.

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Mr. Chaney reported to Dr. Van Gerpen that he had a long history of chronic back pain and severe anxiety that required treatment with prescription medications. He also brought medical reports from Dr. Jamison's office.

Dr. Van Gerpen concluded that Mr. Chaney should not be released to return to work because Mr. Chaney was not well adjusted to his medications. Dr. Van Gerpen explained that the six to eight different medications Mr. Chaney was taking (Soma, Ambien, Imitrex, Wellbutrin, methadone, Lorazepam, Norco, etc.) "could adversely affect his ability to concentrate and make rapid and appropriate sequential decisions." Ex. P33. Dr. Van Gerpen also opined that "an individual with this level of medication usage would not be allowed to operate a commercial motor vehicle." Ex. P33. Dr. Van Gerpen provided a limited release for Mr. Chaney to return to work as a general x-ray technician.

Sacred Heart's human resources department informed Mr. Chaney that it needed more information to better understand Dr. Van Gerpen's restriction. Sacred Heart requested that Mr. Chaney sign a full release for his medical information. He again refused. Sacred Heart concluded that Mr. Chaney's absence from work was due to his health. Sacred Heart then sent him a letter explaining that his time off was being designated as provisional under the FMLA and that benefits were being used as of July 16, 2007. The letter further indicated that his FMLA leave would expire on

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August 27, 2007 and if he was not released to return to his full duties as an interventional radiologic technician by that date, his position would not be held for him. The letter directed Mr. Chaney to complete the FMLA paperwork and have Dr. Van Gerpen complete the medical certification portion.

Dr. Van Gerpen sent a letter to Sacred Heart and explained that he could not complete the FMLA medical certification because he was not Mr. Chaney's physician. Dr. Jamison completed the certification and reported that Mr. Chaney could return to work but added the phrase "as soon as Employer allows." Ex. P45.

Sacred Heart did not ask Dr. Jamison to clarify or explain during this process.

Mr. Chaney filled out a request for FMLA leave and indicated that he could return to work immediately. Mr. Chaney returned to Dr. Van Gerpen's office for a follow-up visit on August 23, 2007. He explained that Sacred Heart would not allow him to return to work even as a routine x-ray technician with the restrictions Dr. Van Gerpen imposed. Mr. Chaney reported to Dr. Van Gerpen that he continued to use four to six methadone tablets per day. But he continued to maintain that Sacred Heart did not need to know all of his medical conditions. Dr. Van Gerpen refused to change his opinion that Mr. Chaney was unfit to do his job. Dr. Van Gerpen believed that federal law prohibited a commercial driver from driving while using methadone. Based on this understanding, he did not believe that Mr. Chaney could return to work while on that medication.

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Sacred Heart terminated Mr. Chaney on August 27, 2007.

Mr. Chaney sued Sacred Heart for disability discrimination (RCW 49.60.180), failure to reasonably accommodate a disability (RCW 49.60.180), violation of the FMLA (29 U.S.C. §§ 2601-2654), and wrongful discharge in violation of public policy. Clerk's Papers (CP) at 1-7. He later amended the complaint to allege only wrongful discharge in violation of public policy (retaliation for use of FMLA leave) and violation of the FMLA.

Sacred Heart moved for and the court granted summary judgment and dismissed all of Mr. Chaney's claims. Mr. Chaney moved for reconsideration. The court granted Mr. Chaney's motion as to his FMLA claims: "[Mr. Chaney] is only required to prove use of FMLA was 'a' negative factor, not 'the' factor in a termination. [Mr. Chaney] has produced some evidence." CP at 38.

The matter proceeded to a jury trial on liability; the question of damages was reserved. At the close of evidence, both Mr. Chaney and Sacred Heart moved for directed verdict. Mr. Chaney argued that Sacred Heart violated the FMLA by not returning him to work following Dr. Jamison's return-to-work certification. Sacred Heart argued that Mr. Chaney was preempted from alleging a state tort claim for wrongful discharge on the same basis as his federal claim under the FMLA. The trial court denied both motions.

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The court refused to give Mr. Chaney's proposed instruction that a commercial driver may report for duty when using methadone when prescribed by a physician. Mr. Chaney also asked the court to instruct the jury that Dr. Van Gerpen could share his information with the hospital despite the physician/patient privilege. The court refused to do so.

The jury returned a verdict in favor of Sacred Heart.

#### DISCUSSION

Mr. Chaney contends that the court should have granted him judgment as a matter of law based on the statement of his physician (the employee's physician) that he was fit to return to work. That is, Sacred Heart had the obligation under the FMLA to return him to work following his physician's certification. And he argues that Sacred Heart could not, again, as a matter of law, rely on the fitness-for-duty evaluation of its retained doctor, Dr. Van Gerpen.

Sacred Heart argues that Dr. Jamison's return-to-work authorization was qualified by the words "as soon as Employer allows" and so the question of whether Sacred Heart had to return Mr. Chaney to work was properly submitted to the jury and Sacred Heart properly considered Dr. Van Gerpen's fitness-for-duty evaluation.

Our review of the court's refusal to direct a verdict is essentially *de novo* under the circumstances here. *Winkler v. Giddings*, 146 Wn. App. 387, 394, 190 P.3d 117 (2008).

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We accept as true Sacred Heart's evidence and all favorable inferences from it. *Stiley v. Block*, 130 Wn.2d 486, 504, 925 P.2d 194 (1996). A directed verdict is appropriate only if there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party. *Harris v. Drake*, 152 Wn.2d 480, 493, 99 P.3d 872 (2004).

FMLA—RIGHT TO REINSTATEMENT—EMPLOYEE'S HEALTH CARE PROVIDER

Mr. Chaney contends that he had the right to return to work when Sacred Heart received Dr. Jamison's certification that he was able to return to work; that is, that Sacred Heart had to let him return to work. Mr. Chaney claims that Sacred Heart's attempts to clarify his medical condition with Dr. Van Gerpen prior to returning him to work violated pertinent FMLA regulations.

The question here is not whether Mr. Chaney is fit to perform the essential functions of his job; it is rather whether Sacred Heart had the duty to return Mr. Chaney to his job. Dr. Jamison, his physician, certified that he can do the work. And, under the FMLA, that is all that is required. 29 C.F.R. § 825.312(b); *Brumbalough v. Camelot Care Ctrs., Inc.*, 427 F.3d 996, 1004 (6th Cir. 2005). Sacred Heart argues, based on the report from its physician, Dr. Van Gerpen, that Mr. Chaney cannot perform the essential functions of an interventional radiologic technologist. That fitness for duty evaluation could only be undertaken, however, once Mr. Chaney was returned to work, again, based on his physician's certification. 29 C.F.R. § 825.312(b).

The FMLA requires that an employee “be restored by the employer to the position of employment held by the employee when the [FMLA] leave commenced.” 29 U.S.C. § 2614(a)(1)(A). “[O]nce an employee submits a statement from [his] health care provider which indicates that [he] may return to work, the employer’s duty to reinstate [him] has been triggered under the FMLA.” *Brumbalough*, 427 F.3d at 1004. “[T]he employer may not request additional information from the health care provider.” 29 C.F.R. § 825.307(a). The employer may contact the health care provider for simple clarification of the handwriting or the meaning of a response. *Id.* But “[t]he employer may not delay the employee’s return to work while contact with the health care provider is being made. No second or third opinions on a fitness-for-duty certification may be required.” 29 C.F.R. § 825.312(b).

Here, Sacred Heart sent Mr. Chaney a letter informing him that it was designating his time on suspension as provisional under the FMLA and that his FMLA leave would expire on August 27, 2007. It informed him that if Dr. Van Gerpen did not complete a medical certification releasing him to return to work as an interventional radiologic technician by that date then his position would not be held for him. Mr. Chaney went to Dr. Van Gerpen to complete the certification. On August 7, 2007, Dr. Van Gerpen sent a letter to Sacred Heart explaining that he could not complete the FMLA medical

certification because he was not Mr. Chaney's attending physician. Dr. Van Gerpen was correct. *Id.*

On August 10, 2007, Dr. Jamison certified that Mr. Chaney could return to work "as soon as Employer allows." The court suggested that Dr. Jamison's return-to-work certification was ambiguous:

[F]irst of all we have the opinion of Dr. Van Gerpen that Mr. Chaney is not – he is fit for duty as an x-ray technician, I guess, but not as an intervening radiologist, radiological technician. As a result of that, Mr. Chaney gets a certification from Dr. Jamison, his personal physician, that he is fit to go back to work as soon as the employer will allow, is how he puts it. Which is a bit ambiguous, but be that as it may he says he is fit to go to work. So we have this situation where we have Dr. Van Gerpen saying one thing, Dr. Jamison saying another.

RP at 524.

The purpose of the FMLA is to protect an employee's job while he or she is on a leave for a serious health condition. 29 U.S.C. § 2601(b)(2). And the FMLA protects the employee's medical privacy by having the employer deal with the employee's own health care provider first. *See* 29 C.F.R. § 825.312(b); *King v. Preferred Tech. Grp.*, 166 F.3d 887, 891 (7th Cir. 1999) (calling right of restoration a "guarantee"); *Albert v. Runyon*, 6 F. Supp. 2d 57, 66 (D. Mass. 1998). But the employer's obligation under the FMLA and the implementing regulations is to seek clarification from the employee's health care provider when faced with an ambiguous return-to-work certification. *Albert*, 6

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F. Supp. 2d at 62-63 (citing 29 C.F.R. § 825.310(c)); *c.f.* *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 713 (7th Cir. 1997) (where employer requested second opinion when employee's two treating physicians provided conflicting information about whether employee had serious health condition).

An employee returning from FMLA leave, "shall be entitled" to be restored to his former position, or an equivalent position, of employment. 29 U.S.C. § 2614(a)(1). An employer may condition restoration on a uniform policy that requires each returning employee to obtain a certification of his ability to resume work from his own health care provider. 29 U.S.C. § 2614(a)(4). ~~But the implementing regulations provide that this~~

~~certification need only be a simple statement that an employee is able to resume work."~~

~~29 C.F.R. § 825.312(b).~~ The regulations allow the employer, with the employee's permission, to have its own health care provider contact the employee's health care provider "for purposes of clarifying and authenticating" the employee's fitness to return to work. *Id.* The employer may not request additional information, and may request clarification "only for the serious health condition for which FMLA leave was taken." *Id.* Moreover, "[t]he employer may not delay the employee's return to work while contact with the health care provider is being made." *Id.*

Neither does the FMLA and its implementing regulations authorize an employer to refuse to restore an employee to his job upon submission of a timely

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but inadequate fitness-for-duty report. 29 C.F.R. § 825.313(d) governs employees who fail to provide any certification at all when they return to work. The regulations provide that “[u]nless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated.” 29 C.F.R. § 825.313(d).

The FMLA does not explicitly prohibit an employer from terminating an employee with a timely but inadequate certification. But here Dr. Jamison’s certificate is not inadequate. And, even if it was ambiguous, Sacred Heart’s recourse was to return Mr. Chaney to work and only then seek clarification. *Cf.* 29 C.F.R. § 825.312(b); *Brumbalough*, 427 F.3d at 1003-04 (“The employer may not delay the employee’s return to work while contact with the health care provider is being made.”).

Dr. Jamison was Mr. Chaney’s health care provider and therefore the proper person to complete the return-to-work certification under the FMLA. 29 C.F.R. § 825.312(a). The authorization need not be detailed or explained. *Harrell v. U.S. Postal Serv.*, 415 F.3d 700, 713-14 (7th Cir. 2005), *modified on reh’g on other grounds*, 445 F.3d 913, 927-28 (7th Cir. 2006). In implementing the FMLA, the Secretary of Labor did not intend to make an employee’s job security subject to the nuances of the language in a doctor’s note. Nor does the FMLA empower employers to pass on the meaning of the

employee's treating physician's phraseology. Indeed the legislative purpose here was job security for employees who suffer from serious but temporary health conditions by requiring only a plain statement of the employee's ability to return to work and nothing more from the doctor. *Id.*

Sacred Heart had the obligation then under the FMLA to seek clarification from Mr. Chaney's physician, Dr. Jamison. 29 C.F.R. § 825.312(b). A health care provider employed by the employer may contact the employee's health care provider with the employee's permission to clarify the employee's fitness to return to work. "The employer may not delay the employee's return to work while contact with the health care provider is being made." *Id.*

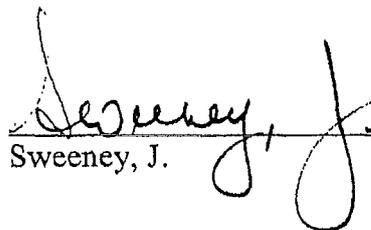
If there was confusion, or some other concerns, about whether Mr. Chaney could perform an essential function of his job, Sacred Heart could have had Dr. Van Gerpen contact Dr. Jamison, with Mr. Chaney's permission, to clarify the employee's fitness to return to work. *See id., Albert*, 6 F. Supp. 2d at 63 (noting Secretary of Labor declined to allow employers to seek second opinion as to employee's fitness for duty on grounds that statute specifically authorizes second opinions with respect to original medical certification for a leave, but not with respect to the fitness-for-duty certification). Sacred Heart could have sought clarification. *See Brumbalough*, 427 F.3d at 1004 ("If Camelot

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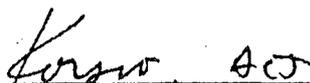
decided that the same note [i.e., the doctor's note] was insufficient as a fitness-for-duty certification, it should have sought clarification from Brumbalough's doctor.").

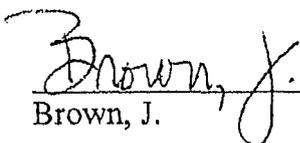
We then conclude that Mr. Chaney was entitled to be restored to his position as an interventional radiologic technologist based on Dr. Jamison's return-to-work certification: 29 C.F.R. § 825.312(b).

We reverse the judgment of the superior court and we remand for further proceedings.

  
Sweeney, J.

WE CONCUR:

  
Korsmo, A.C.J.

  
Brown, J.

APPENDIX B

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JAN 23 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**

ROBERT CHANEY,

Appellant,

v.

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

Respondent.

No. 29438-2-III

ORDER DENYING  
MOTION FOR  
RECONSIDERATION

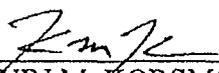
THE COURT has considered respondent's motion for reconsideration, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's opinion of December 20, 2011, is denied.

PANEL: Judges Sweeney, Korsmo, Brown

DATED: January 23, 2012

FOR THE COURT:

  
\_\_\_\_\_  
KEVIN M. KORSMO  
Acting Chief Judge

AO