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NO. 65167-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ANGELA HARRIS

Appellant,

v.

PROVIDENCE EVERETT MEDICAL CENTER,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

In this case the Plaintiff claims she was discriminated against by her employer, Defendant Providence Everett Medical Center (“Defendant” or “the Medical Center”), when she became pregnant. The case was dismissed shortly after it was filed, without any discovery, based on the Medical Center’s claim that it was immune from employment discrimination claims because of the exemption in the Washington Law Against Discrimination (WLAD) of “religious or sectarian organizations.” RCW 49.60.040(3). The dismissal was in error because the Medical Center had expressly promised Plaintiff it would not discriminate against her on the basis of sex, and it is estopped from later contradicting that promise based on the religious exemption. The federal court in Seattle recently reached precisely this conclusion in a similar case against the Medical Center last year.

In addition, the judgment was erroneous because the Medical Center did not and cannot establish that it is in fact a “religious organization” properly exempted from the WLAD. In fact, it is a major medical institution serving the entire population of the northern Puget Sound, employing thousands of people, without any

of the specific factual indicia required to establish religious immunity. Furthermore, granting broad immunity to religious organizations from all claims of discrimination, rather than from only claims of religious discrimination, is unconstitutional under the First and Fourteenth Amendments. And even if the Medical Center were immune from claims under the WLAD, it is firmly established that Plaintiff can pursue an alternative claim of wrongful discharge in violation of public policy on precisely the same facts she alleged in her Complaint, and should have been permitted leave to amend to add that claim. Finally, the trial court erred in denying Plaintiff oral argument prior to granting summary judgment, as mandated by local court rule.

II. ASSIGNMENTS OF ERROR

1. Where an employer has provided an employee with a policy handbook that expressly states it will not discriminate against her on any basis prohibited by state law, and the employee relies upon that policy in remaining employed and taking maternity leave, is the employer estopped from later denying that it is subject to state anti-discrimination laws?

2. Where an employer cannot show that its organizational purpose is a religious one; that its employees or clients are religious or participate in religious activities; or that it has any formal ties to any church, has it established that it is a “religious or sectarian organization” entitled to immunity from state anti-discrimination law?

3. Does a statutory exemption for “religious or sectarian organizations” violate the Establishment Clause and/or the Equal Protection Clause where it immunizes an employer from all kinds of discrimination claims, even those that have nothing to do with religion, for which there is no rational legislative purpose?

4. Should the trial court have permitted the Plaintiff to pursue alternative common law claims that are clearly viable on the facts stated in her Complaint?

5. Did the trial court err in granting summary judgment without oral argument where the local court rule provides that all summary judgment motions “shall be decided after oral argument, unless waived by the parties”?

III. STATEMENT OF THE CASE

Plaintiff began working as a nurse for the Defendant Medical Center in July 2004, and performed her job well. Clerk's Papers ("CP") 2. In about January 2006, she became pregnant. *Id.* Her supervisor became aware of her pregnancy by about May 2006. *Id.* At that time, the supervisor criticized Plaintiff for a work-related incident that had occurred approximately three months earlier. *Id.* In August 2006 Plaintiff's supervisor criticized her for her attendance, and for sitting while doing entries on patient charts. *Id.* In October 2006, Plaintiff took maternity leave. CP 3. In January 2007 Plaintiff returned from leave. Almost immediately, she was disciplined again by her supervisor. *Id.* In August her employment was terminated. *Id.*

Plaintiff filed suit in King County Superior Court in July 2009, alleging one count of sex discrimination under the WLAD, RCW 49.60.180. CP 1. Defendant filed an answer on September 30, and a motion for judgment on the pleadings on October 1. CP 8, 14. The motion was noted without oral argument. *Id.* In the motion, Defendant offered only one basis for dismissal: It claimed

that it was a religious organization and therefore immune from employment discrimination claims under the WLAD. CP 19. Although the motion was characterized as a motion for judgment “on the pleadings,” the Defendant submitted a witness declaration and other evidence in support of the motion. CP 22-64. The parties had not yet conducted any discovery.

Plaintiff opposed the motion and submitted her own testimony in support of that opposition. *See* CP 90-91. In its reply, the Defendant submitted yet more evidence, and Plaintiff moved to strike. CP 98-117, 118. On November 12, 2009, the trial court denied Plaintiff’s motion to strike. CP 122. The trial judge signed the order lodged by the Defendant, but interlineated, on the second page of the order, that the motion to dismiss would be converted to a motion for summary judgment, and that Plaintiff could file a surreply by November 30, 2009. CP 123. Plaintiff’s counsel did not see the handwritten interlineation and did not file a surreply. *See* CP 128-29. On December 3, 2009, the Court granted the Defendant’s motion and dismissed Plaintiff’s case. CP 126. Plaintiff filed a motion for reconsideration, which the court denied. CP 173.

IV. ARGUMENT

This Court's review of a summary judgment is de novo. The moving party bears an initial burden "of demonstrating an absence of any genuine issue of material fact and entitlement to judgment as a matter of law." *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). All evidence on such a motion must be viewed in the light most favorable to the non-moving party, and all reasonable inferences must be drawn in her favor. *Id.*

A. The Medical Center Promised Not to Discriminate Against Plaintiff and is Therefore Estopped From Asserting Immunity From the Law Against Discrimination.

It is undisputed that the Medical Center had a policy that expressly promised that it would not discriminate against its employees based on sex or any other basis prohibited by law "in any aspect of its employment or pre-employment practices." *See French v. Providence Everett Medical Center*, 2008 U.S. Dist. LEXIS 80125, *24-25 (W.D. Wash. 2008) (citing Ex. 6 to declaration of defense counsel herein, at CP 133 ¶ 7 & CP 164).¹ As the court held

¹ The Medical Center did not deny that this policy existed or that it was in use during Plaintiff's employment and at the time of her termination.

in *French*, this policy estops the Medical Center from later claiming it is immune from claims of employment discrimination.

Estoppel has three elements:

(1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the party to contradict or repudiate such admission, statement, or act.

Farnam v. CRISTA Ministries, 116 Wn.2d 659, 678-79, 807 P.2d 830 (1991). “Estoppel focuses on the justified reliance of the person asserting it.” *Id.* at 679. Plaintiff expressly testified that she relied on the Medical Center’s EEO policy in working for the Medical Center and in taking leave for her pregnancy. CP 90-91. The Medical Center’s representative admitted (in testimony it gave in *French*) that such reliance was reasonable. CP 167. Estoppel is easily established, and summary judgment should be reversed.

Arguably, Defendant should have alerted the trial court to the policy, because the federal court had already decided that the policy estopped Defendant from asserting the exemption defense it made here, and the federal decision had become final. *See French, supra*, at *29 (granting partial summary judgment against Providence); *National Union Fire Ins. Co. v. Northwest Youth Servs.*, 97 Wn. App. 226, 233, 983 P.2d 1144 (1999) (“A grant of summary judgment is a final judgment on the merits with the same preclusive effect as a full trial.”).

The Medical Center's only argument in the trial court against estoppel was that, because Plaintiff was a member of a union and therefore subject to a collective bargaining agreement (CBA), that document controlled, not its EEO policy. This argument misses the point of estoppel, which focuses on reliance. It is undisputed that Plaintiff relied on the anti-discrimination policy in the employee handbook. CP 90-91. Even if the CBA contradicted the EEO policy, Plaintiff's reliance on the latter may have been reasonable. The Medical Center offered no evidence that Plaintiff even saw the CBA, and no basis to conclude that Plaintiff's reliance on its handbook was not justified.

Furthermore, the CBA does not contradict the EEO policy. In fact, it also contains a non-discrimination policy, under which the Medical Center "agrees not to discriminate or condone harassment in any manner, in conformance with applicable federal and state laws." Surprisingly, the Medical Center claimed this provision was intended to and should be read to exclude any liability for violating state anti-discrimination law, because the religious exemption makes that law not "applicable."

This interpretation emphasizes a single word in the CBA in a manner that would literally render the whole paragraph superfluous as to state law. This, in turn, would make the provision very misleading because any reasonable person reading the paragraph would understand it, as Plaintiff did, to broadly and firmly commit the Medical Center to not discriminate against its employees on the basis of sex or any other recognized basis. The implication of the Medical Center's argument is that the Union and the Medical Center consciously misled employees, putting this anti-discrimination provision into the CBA with the contrary intention that the Medical Center would not be subject to state anti-discrimination law. This is an unreasonable interpretation of the language at issue.

At the very least there are issues of fact that cannot be resolved at this early stage of the case, and summary judgment should be reversed.²

B. Whether the Medical Center Qualifies for the Statutory Exemption in the Law Against Discrimination is a

² Even if these issues could theoretically be resolved in a proper summary judgment context, Plaintiff should be entitled to take discovery of the Medical Center and the Union about the intent and application of the CBA. CP 119, 192 n. 1 (requests for leave to take discovery); *see* Wash. Civil Rule 56(f).

Question of Fact, and It Failed to Establish the Requisite Facts.

Even if the Medical Center were not estopped from asserting the religious exemption, it would have to establish that it was indeed a “religious or sectarian organization,” properly exempt from coverage of the WLAD. On a motion for summary judgment, “the moving party bears the initial burden of showing an absence of a material issue of fact.” *Briggs v. Nova Servs.*, 166 Wn.2d 794, 811, 213 P.3d 910 (2009). “If the moving party does not sustain that burden, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials.” *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977), *quoted in Graves v. P. J. Taggares Co.*, 94 Wn.2d 298, 302, 616 P.2d 1223 (1980). Defendant failed to meet its initial burden of showing that it was a religious organization entitled to immunity from claims of employment discrimination.

There is no statutory definition in the WLAD for a “religious or sectarian organization,” and the phrase has been analyzed in only two published opinions, *Hazen v. Catholic Credit Union*, 37 Wn. App. 502, 681 P.2d 856 (1984), and *Farnam*, 116 Wn.2d 659, 807

P.2d 830 (1991). In both cases, the courts applied the “ordinary meaning” of the terms. *Hazen* concluded that the defendant was not a religious organization, while *Farnam* concluded that the defendant was. Each case turned on specific facts about the defendant organizations. Such facts are not present in the record in this case.

For example, in *Hazen*, the court held that the defendant, Catholic Credit Union, was **not** a religious organization, based on the following facts:

- Although the Credit Union was formed by Catholic laymen to aid members of the Catholic Church, its purpose was not specifically religious but rather to promote thrift. 37 Wn. App. at 504.
- Membership was open to Catholic parishioners; employees of any Catholic institution (including the Credit Union itself); and family members of the same. *Id.*
- The Credit Union had no formal ties to the Catholic Church; it was not required to provide regular reports to the church or to receive input from the church or to pay funds to the church. *Id.*

- No member of the Credit Union’s Board of Directors was a member of the Catholic clergy, though most of its employees were Catholic. *Id.* at 504-05.
- Board meetings opened and closed with a prayer, but the Credit Union itself conducted no prayer or worship services. *Id.* at 505.
- The Credit Union operated like any other credit union under state law. *Id.*

By contrast, the Court in *Farnam* found that CRISTA Ministries **was** a religious organization, based on these facts:

- Its purpose was to promote evangelical churches and missions. 116 Wn.2d at 677.
- Its by-laws expressed the purpose of “ministering as ‘Christianity-in-Action.’” *Id.*
- The by-laws and the staff manual contained a statement of faith, which employees had to sign and adhere to. *Id.* at 678.
- The mission statement for the nursing staff contained a pledge to God. *Id.*
- CRISTA began most days with devotions and prayers. *Id.*

In this case, the Medical Center has not nearly established the kind of factual basis required to establish the religious exemption, even in the absence of any discovery or cross-examination by the Plaintiff. It has not shown that its organizational purpose is a religious one; that its employees or patients are religious or participate in religious activities; or that it has any formal ties to any church. On the present record, the Medical Center has an even weaker claim to the exemption than the credit union in *Hazen*.

The only evidence the Medical Center introduced in support of dismissal was a short declaration by its Human Resource Manager, Todd Fast. Mr. Fast states that the Medical Center is “part of” Providence Health and Services, which he states is “a ministry of the Catholic Church” and is “sponsored by the Sisters of Providence religious community.” CP 22. He does not describe or substantiate this string of connections. Instead, he submits a celebratory pamphlet produced for the Medical Center on its 100th anniversary in 2005. While that document confirms “the religious origins” of the Medical Center in the early 1900s (CP 22), it portrays

an organization that has significantly expanded and changed in the century since then.

According to the pamphlet, “Providence today” is “a major medical center serving all of Northwest Washington,” not a religious organization. CP 43. In 1994, the Medical Center merged with the other major hospital in the region, General Hospital Medical Center, to become the institution it is today, known as Providence Everett Medical Center. CP 41. The Medical Center has continued to join with other secular institutions, such as a physician group called Medalia Medical Group in 1999. CP 41. By 2005, it had 2,200 employees, 362 patient beds, and nearly 600 physicians, with plans to continue significant growth in the near future. CP 43. This contemporary description of the Medical Center does not even mention religion.

The Medical Center’s present-day purpose is not religious. By its own account, the Medical Center is the major health services institution in all of north Puget Sound, serving the entire population. CP 43. There is no evidence that any of its employees or patients are Catholic or religious or participate in any religious activities at the

Medical Center. There is no evidence the Medical Center is led by religious people, operationally driven by religious objectives, or actively engaged in spreading a religious message. Indeed, none of these propositions would even make sense given the breadth and complexity of its present operation. *See* CP 41-43.

Mr. Fast's declaration is also notable for what it does not say. While he asserts that the Medical Center "is a faith-based organization," and quotes a mission statement to that effect, he does not provide any facts, explanation, or evidence to support these vague and conclusory remarks. CP 23. Instead he provides copies of three documents or parts of documents that are barely legible, without any context, and which he merely identifies as "publications." CP 23, 54, 57, 59. This is barely evidence of anything.

Even if it were possible for the Medical Center to establish that it is truly a religious organization like CRISTA Ministries did in *Farnam*, it certainly has not done so here. This is especially surprising given that no discovery has been taken on this issue, so the record contains only the Defendant's own evidence and untested

testimony. The Medical Center has failed to establish that it is exempt from the WLAD and was not entitled to summary judgment.

C. The Statutory Exemption for Religious Organizations is Unconstitutional.

If the WLAD exemption were found to be applicable in this case, it would be unconstitutional. The exemption singles out religious employers for special treatment, exempting them entirely from any liability for employment discrimination under the WLAD. This is inconsistent with the overall statutory scheme and with the constitutional requirements of government neutrality found in the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

1. The WLAD Protects the Vital Public Interest in Deterring and Eliminating Employment Discrimination Against Any of the State's Inhabitants.

The WLAD prohibits many forms of discrimination in employment, including sex, race, age, national origin, disability, and religion. RCW 49.60.180. Originally passed in 1949 and expanded several times since, it is now well-established that the rights it embodies reflect “public policy of the highest priority.” *Marquis v.*

Spokane, 130 Wn.2d 97, 105, 109, 922 P.2d 43 (1996) (citations omitted). The purpose of the law is to deter and eradicate discrimination in Washington, which “threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundations of a free democratic state.” RCW 49.60.010.

The WLAD defines “employer” to exclude “any religious or sectarian organization not organized for private profit.” RCW 49.60.040(3). On its face, this provision would appear to permit religious employers to discriminate against employees on any basis, not just religion. In contrast, the parallel federal law against employment discrimination, Title VII of the Civil Rights Act of 1964, exempts religious employers only from claims of religious discrimination. 42 U.S.C. § 2000e-1. To date, the only published decisions in Washington to have applied the WLAD’s exemption have involved claims of religious discrimination. *See Farnam*, 116 Wn.2d 659, 807 P.2d 830; *City of Tacoma v. Franciscan Found.*, 94 Wn. App. 663, 972 P.2d 566 (1999).

Many courts have expressed concern that the WLAD’s exemption of religious employers from claims of other kinds of

discrimination would violate the First and Fourteenth Amendments to the United States Constitution. *Hazen*, 37 Wn. App. at 507 (citing *King's Garden, Inc. v. FCC*, 498 F.2d 51, 55 (D.C. Cir. 1974)); see also *Elvig v. Ackles*, 123 Wn. App. 491, 500, 98 P.3d 524 (2004) (“Our ruling is a narrow one As such, we are not deciding whether the religious exemption ... is constitutional”); *French*, 2008 U.S. Dist. LEXIS 80125, *24. This Court should conclude that it does.

2. Exempting Religious Employers from All Forms of Discrimination Violates the Constitution.

The Establishment Clause provides that governments “shall make no laws respecting an establishment of religion.” U.S. Const. Am. 1. This clause “prohibits government from abandoning secular purposes in order to put an imprimatur on one religion or on religion as such.” *Gillette v. United States*, 401 U.S. 437, 450, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971).

To survive an Establishment Clause challenge, a statute must satisfy a three-part test: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute

must not foster ‘an excessive government entanglement with religion.’” *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) (citations omitted). The blanket exemption from all forms of discrimination found in the WLAD fails all of these requirements.

First, there is no rational secular purpose for exempting religious employers from sex and pregnancy discrimination claims.³ The main reason advanced for a religious exemption from claims of religious discrimination is to protect the values reflected in the Free Exercise Clause, by preventing excessive government entanglement in the religious affairs of such organizations. *See, e.g., Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987). *Amos* upheld Title VII’s exemption of religious employers from

³ For this reason, even if the statutory exemption did not violate the Establishment Clause, it would violate the Equal Protection Clause of the Fourteenth Amendment, which requires a law that creates distinctions based on religion to be rationally related to a legitimate government purpose. *See Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987). While non-interference with private religious affairs is undoubtedly such a purpose, *id.*, the broad sweep of this exemption from claims of discrimination that have nothing to do with religion is unconstitutionally overbroad to achieve that end.

claims of religious discrimination, on the ground that the law had the permissible purpose of “alleviat[ing] significant governmental interference with the ability of religious organizations to define and carry out their religious missions.” *Id.* at 335.

That justification has no logical application to a claim like Plaintiff’s here, because adjudicating her claim of sex and pregnancy discrimination would not involve the Medical Center’s alleged religious beliefs at all. Holding religious employers accountable for discrimination that does not involve religion would not burden its exercise of religion, and therefore cannot be justified on this ground. *See id.* at 338 (upholding exemption from claims of religious discrimination based on “the proper purpose of lifting a regulation that burdens the exercise of religion”). The Medical Center has not shown and cannot show that Plaintiff’s claim would in any way inhibit or burden its free exercise of religious values or beliefs.

Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989), is particularly on point. There, the Court struck down a Texas law that exempted from state sales tax all religious periodicals published or distributed by a religious faith. “It

is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." *Id.* at 18 (plurality op.) (quoting *Tony and Susan Alamo Found. V. Sec'y of Labor*, 471 U.S. 290, 303, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985)).⁴ There is no rational secular purpose for the WLAD to give preferred treatment to religious employers, except as to claims of religious discrimination.

In fact, permitting broad immunity for religious employers would excessively and unnecessarily entangle the state in religious affairs, in violation of the third prong of the *Lemon* test. As set forth in the preceding section and the cases cited therein, determining whether a particular employer meets the definition of "religious or secular organization" to be entitled to the exemption necessarily

⁴ The federal courts have uniformly rejected the notion that the Establishment Clause would be violated if the courts interpreted Title VII to permit race and sex discrimination claims against religious employers. See *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790 (9th Cir. 2005) (prosecution of sexual harassment claim does not violate religion clauses); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1369-70 (9th Cir. 1986) (prohibiting unequal pay based on sex does not violate free exercise of religion); *St. Elizabeth Community Hosp. v. NLRB*, 708 F.2d 1436, 1440-43 (9th Cir. 1983) (holding that jurisdiction results in only incidental intrusion).

involves the courts in deciding questions about the nature and character of the employer's religious ties and activities. *See supra* subsection B. This is unnecessary and excessive entanglement of government in "the business of evaluating the relative merits of differing religious claims." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 21, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989) (plurality op.).

Similarly, the primary effect of the WLAD's exemption is to provide religious employers like the Medical Center with an advantage over secular competitors. If the Medical Center, a leading player in the health care industry in Washington, can avoid exposure to employment discrimination claims by its thousands of employees, this puts it at a significant advantage over others in the field. The main effect of the exemption would be to give the Medical Center a "free pass" that other similar employers do not have.

One of the important indicia of secular effects is whether the benefits of a law are available to "a broad spectrum of groups," sectarian and non-sectarian. *Texas Monthly*, 489 U.S. at 11-12 (plurality op.) (citing cases); *see also id.* at 28 (conurrence). In the tax exemption case, the Court distinguished the Texas law from

others it had found constitutional because the Texas exemption did not treat religion equally or benefit religion incidentally but instead singled out religion for preferred treatment. *Id.* at 11, 28. The same is true of the WLAD's broad religious exemption from employment discrimination claims.

Another important measure is the degree to which a law benefitting religion burdens non-beneficiaries. *See, e.g., id.* at 18 n. 8; *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709, 105 S. Ct. 2914, 86 L. Ed. 2d 557 (1985). In *Caldor*, the Court struck down a Connecticut statute requiring employers to permit employees not to work on a day they designated as their Sabbath, because "the statute takes no account of the convenience or interests of the employer or those of other employees." *Id.* Similarly, the WLAD's broad exemption would deprive thousands of employees who are victims of sex, race, and other forms of discrimination in their workplaces of the statutory protections that all other employees enjoy.

Just as the state of Connecticut could not "decree[] that those [employees] who observe a Sabbath ... as a matter of religious conviction must be relieved of the duty to work on that day, no

matter what burden or inconvenience this imposes on the employer or other workers,” *id.* at 708-09, Washington cannot decree that those employers who follow a particular religion may be relieved of the duty not to discriminate, no matter what burden this imposes on its employees. The WLAD’s exemption for religious employers is unconstitutionally broad, and its reach should be limited to claims of religious discrimination.

D. The Trial Court Should Have Permitted Plaintiff to Pursue the Alternative Claims She Asserted, Which are Clearly Viable on the Stated Facts.

The trial court also erred in refusing to permit Plaintiff to pursue alternative causes of action, such as wrongful termination in violation of public policy and intentional or negligent infliction of emotional distress. *See* CP 70. Generally, a court should grant leave to amend unless the opposing party can show prejudice. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999) (“The touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party”). Washington courts have repeatedly held that it is an abuse of discretion to refuse to permit amendment of a complaint when the opposing party would

not suffer prejudice. *See, e.g., Estate of Randmel v. Pounds*, 38 Wn. App. 401, 404, 685 P.2d 638 (1984).

Although Plaintiff did not formally move to amend, she made clear in her response to Defendant's motion (which was at the time a motion for judgment "on the pleadings") that she wanted to pursue these specific alternative claims if her lead claim were not viable, CP 70, and she specifically asked for leave to amend in her motion for reconsideration. CP 190. Moreover, the additional causes of action she proposed are only legal variations on the same facts. *Cf.*

Halvorson v. Dahl, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978)

(motion on pleadings should not be granted if there is any possibility consistent with complaint that relief could be granted). Where, as here, the motion for summary judgment was brought very early in the case and no discovery has been taken, courts should be even more lenient in permitting an amendment "in the absence of a showing of undue prejudice, dilatory practice, or undue delay."

Tagliani v. Colwell, 10 Wn. App. 227, 234, 517 P.2d 207 (1973)

(citing 6 J. Moore's Federal Practice ¶¶ 56.02[4], 56.10 (2d ed. 1972)).

The Washington Supreme Court's opinion in *Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000), firmly establishes that, even if the religious exemption applies to the Medical Center in this case, Plaintiff has a claim for wrongful discharge in violation of public policy. The trial court erred in rejecting Plaintiff's request to pursue this alternative remedy.

In *Roberts*, as here, the plaintiff claimed her employer discharged her because she was pregnant. *Id.* at 61. Because the defendant employed less than eight full-time employees, it was exempt from the definition of employer under the WLAD, under the very same statutory provision that the Medical Center relies upon here. *Id.* at 68-69; RCW 49.60.040(3). Nonetheless, the Court held that the plaintiff could pursue a common law wrongful discharge claim based on the same facts and legal principles, because of the strong public policy against sex discrimination. *Id.* at 66-70 (finding clear mandate of public policy in judicial decisions and statutes defining freedom from sex discrimination to be a right of all citizens). As the Court explained, the WLAD's exemption provision "narrows the statutory remedies but does not narrow the public

policy which is broader than the remedy provided.” *Id.* at 70; *see also id.* at 76-77 (discussing differences between statutory claim under WLAD and common law wrongful discharge claim).

Under *Roberts*, it is clear that Plaintiff has, at the very least, stated a claim for wrongful discharge in violation of public policy, and should have been allowed to pursue that claim, as well as other common law causes of action. *See Griffin v. Eller*, 130 Wn.2d 58, 62, 922 P.2d 788 (1996) (plaintiff’s WLAD claim dismissed and common law claims for wrongful discharge and negligent and intentional infliction of emotional distress tried to jury).

E. The Trial Court’s Summary Judgment Should be Vacated Because it Denied Plaintiff Any Oral Argument as Required by Local Civil Rule.

King County Local Civil Rule 56(c)(1) states that “[a]ll summary judgment motions shall be decided after oral argument, unless waived by the parties.” The court converted Defendant’s motion for judgment on the pleadings to a motion for summary judgment, CP 125, but did not hold oral argument. Even after Plaintiff requested oral argument in his motion for reconsideration,

CP 190, the court declined to permit argument. Its judgment should be vacated for this reason as well.

V. CONCLUSION

For each of the foregoing reasons, Plaintiff asks that the judgment in favor of Defendant be reversed and the case remanded for further proceedings.

RESPECTFULLY SUBMITTED this 22nd day of June, 2010



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CERTIFICATE OF SERVICE

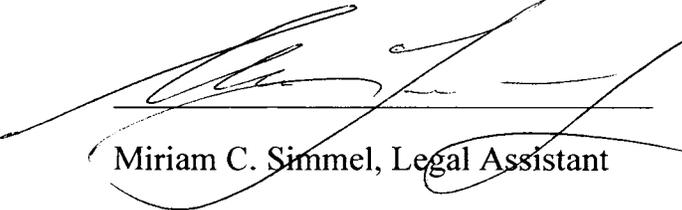
I, Miriam C. Simmel, certify and declare:

I am over the age of 18 years, make this Declaration based upon personal knowledge, and am competent to testify regarding the facts contained herein. On this 22nd day of June 2010, I served true and correct copies of the document to which this Certificate is attached on the following in the matter listed below.

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 Via Messenger
 Via Email

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.


Miriam C. Simmel, Legal Assistant

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