

66407-7

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NO. 66407-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ANGELA HARRIS,

Appellant,

v.

PROVIDENCE EVERETT MEDICALCENTER

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

There are two questions presented in this appeal: First, whether a prior judgment dismissing a different claim should preclude any consideration of the new and different claims brought in this case under *res judicata* principles, even though the prior judgment did not address any of the issues in the present case. The answer should be no, because Washington courts firmly hold that *res judicata* shall not deny a person her day in court. Ms. Harris's claims in this case have plainly never been heard before.

The second question is whether the trial court properly sanctioned Ms. Harris for even trying to bring her claims in this case. The trial court failed to make any findings to support sanctions. Moreover, the case law that says *res judicata* does not bar different causes of action and should not deprive a person of being heard is an objectively reasonable basis for Ms. Harris's assertion of her claims in this case, so there are no grounds for sanctioning her.

II. ARGUMENT

A. ***Res Judicata* Does Not Bar Ms. Harris's Claims in this Case Because Her Claims Have Never Been Considered.**

It is not disputed that Ms. Harris's first lawsuit was brought solely under RCW 49.60.180, and was almost immediately disposed of—without any discovery or hearing on the merits—based on

Providence's alleged exemption from claims under that statute. No consideration was ever given to any other cause of action such as the common law claims asserted here, including wrongful termination in violation of public policy or breach of implied contract of employment. The decision dismissing the first case has recently been affirmed on appeal, and like the trial court, this Court did not address the merits of any other causes of action, finding that any other potential claims were not formally presented to the trial court in that case. *Harris v. Providence Everett Med. Ctr.*, No 65167-6-I (unpublished opinion, May 16, 2011). Dismissing Ms. Harris's claims in this case under *res judicata* is inconsistent with both the letter and the spirit of Washington law.

1. The Claims and Subject Matter are Not Identical.

It is black-letter law that *res judicata* applies only where the subject matter and causes of action are "identical" in both cases. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 866, 93 P.3d 108 (2004). On the face of it, these requirements are plainly not met here.

As Providence acknowledges, causes of action are "identical" for purposes of *res judicata* only if it can show that (1) prosecution of this action would impair the rights established in the earlier action, (2) the evidence would be "substantially the same" in both actions, (3)

infringement of the same right is alleged in both actions, and (4) both actions arise out of the same nucleus of facts. Response Brief at 12 (citing *Rains v. State*, 100 Wn.2d 660, 663-64, 674 P.2d 165 (1983)). Yet Providence offers almost no analysis of this, and fails to respond to or rebut Ms. Harris's arguments.

As previously explained, the rights established by the prior judgment will not be affected at all by prosecution of this action. That is because the prior judgment established only that Providence had sufficiently established its religious exemption from statutory discrimination claims under RCW 49.60.180. The judgment resolved nothing about Providence's decision to terminate Ms. Harris's employment. Indeed, the prior judgment was entered without any litigation or discovery on the merits. It pertains only to a technical aspect of a specific statute, and did not resolve any other factual or legal issues about Ms. Harris's employment and termination. Providence's interests and rights in the prior judgment would be completely unaffected by prosecution of this action.

For this same reason, the rights at issue and the evidence relied upon would be completely different in this action than in the prior action. The prior action concerned solely the alleged religious character of Providence Medical Center and/or its alleged parent

organization, the Sisters of Providence. It did not involve any evidence about Ms. Harris's pregnancy, her employment at Providence, or the context or alleged reasons for her termination. Ms. Harris did claim Providence's written policies promised protection from discrimination, and argued that these policies estopped Providence from claiming exemption. However, the nature, applicability, and enforceability of those policies were not determined in the prior action.

Likewise, and again for the same reasons, it cannot be said that the subject matter of the two cases is the same. As the Supreme Court explained in *Hisle*, which Defendant completely ignores, "the same subject matter is not necessarily implicated in cases involving the same facts." 151 Wn.2d at 866. There, the earlier lawsuit had challenged certain payments that employees would get under a revised union contract, whereas the second suit accepted the contract and challenged the same payments under the minimum wage statute. *Id.* This case is analogous; Ms. Harris's first lawsuit challenged her termination under the anti-discrimination statute, while in this case she accepts that the statute does not apply but challenges her termination under contract and tort theories.

Ms. Harris's present lawsuit does not involve identical subject matter or identical causes of action, and dismissal was inappropriate.

2. Dismissal Would Deny Ms. Harris Any Hearing on Her Claims.

Furthermore, Washington courts have historically viewed *res judicata* as an equitable doctrine which, accordingly, should not be applied mechanistically in a manner that would “ignore principles of right and justice,” *Luisi Truck Lines, Inc., v. Washington Util. & Transp. Comm’n*, 72 Wn.2d 887, 896, 435 P.2d 654 (1967), or “deny the litigant his or her day in court.” *Hisle*, 151 Wn.2d at 865 (quoting *Shoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 860, 726 P.2d 1 (1986)). This was also completely ignored by Providence in its response brief.

Ms. Harris’s first complaint was dismissed at the pleading stage, based entirely on a statutory exemption from RCW 49.60.180. She did not litigate her current claims in any manner. She took no discovery and had no hearing concerning the reasons for her discharge or Providence’s potential liability in tort or contract. She has not had a day in court on these claims, and *res judicata* should not apply.

B. Providence Has Not Established Alternative Grounds to Support Dismissal of Ms. Harris’s Claims.

Although it relied mostly on *res judicata* in the trial court, Providence also argues on appeal that dismissal of Ms. Harris’s claims can be affirmed on the merits. The Complaint asserts two causes of action, both of which are well-recognized and not subject to summary

dismissal under CR 12. First, it is well-established that an employee may assert a cause of action for wrongful termination based on sex discrimination under general public policy principles. The Washington Supreme Court's opinion in *Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000), firmly establishes such a claim on facts almost identical to those alleged here. In *Roberts*, as here, the plaintiff claimed her employer discharged her because she was pregnant. *Id.* at 61. The Court held that the plaintiff could pursue a common law wrongful discharge claim 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).

Providence nonetheless contends that dismissal of Ms. Harris's case on the pleadings can be affirmed on the merits because Ms. Harris cannot establish the "jeopardy" element of the wrongful discharge tort, i.e., that her termination could "jeopardize" the public policy against sex and pregnancy discrimination. Providence relies on *Korslund v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 182-83, 125 P.3d 119 (2005), to argue that Ms. Harris could have pursued a sex discrimination claim under federal law, through the federal anti-discrimination statute known as Title VII, and that this is an adequate

means of protecting Washington's strong public policy against discrimination.

The jeopardy element usually presents a factual question, and is not an appropriate basis for summary dismissal, much less dismissal on the pleadings. *See id.* at 182; *Hubbard v. Spokane County*, 146 Wn.2d 699, 716, 50 P.3d 602 (2002); *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 946, 913 P.2d 377 (1996) ("A jury could easily find Gardner believed his conduct was necessary" to protect the public policy at issue). There are multiple limitations on the relief afforded by federal law which are relevant to assessing "the comprehensiveness, or adequacy, of the remedy provided." *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 61, 821 P.2d 18 (1991). For example, Title VII contains an administrative exhaustion requirement and 180-day statute of limitations. *See* 42 U.S.C. § 2000e-5(e). Providence's arguments on the merits of Ms. Harris's claims involve questions of fact that are not before this Court. Under *Roberts*, it is clear that Plaintiff has stated a claim for wrongful discharge in violation of public policy.

Ms. Harris also alleges breach of contract, based on Providence's explicit policy against sex discrimination. CP 4. According to the Complaint, the policy

was a promise by [Providence] to its female employees, including Plaintiff Harris, of specific treatment in the event that the employee became pregnant and/or needed leave due to her pregnancy that [Providence] would not discriminate against the employee on the basis of sex or gender, and/or the need for maternity leave.

CP 5. The Complaint further states that Providence breached this promise “when it terminated Plaintiff Harris because of her sex or gender and/or because she took approved maternity leave.” *Id.* This plainly states a claim for breach of contract. Under Washington law, where an employer issues policies that it “expect[s] if not demand[s] that employees follow,” employees “may rely on the policies and expect adherence to them by the employer.” *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 230, 685 P.2d 1081 (1984); *see also Gaglidari v. Denny’s Restaurants, Inc.*, 117 Wn.2d 426, 432, 815 P.2d 1362 (1991).

Providence spends only one paragraph urging this Court to affirm dismissal of this claim as a matter of law on the pleadings. The cases it cites do not support this. The first involved a summary judgment concerning a policy that did not contain any specific promises. *Hill v. J.C. Penney*, 70 Wn. App. 225, 236, 852 P.2d 1111 (1993) (dismissing contract claim based on “posted list of rules,” not “a promise to engage in specific treatment in certain situations”). In the

second—also a summary judgment—the language of the policy gave the employer discretion, and its decision was taken within that discretion. *Drobny v. The Boeing Co.*, 80 Wn. App. 97, 104-05, 907 P.2d 299 (1995). It further observed: “Whether or not an employer has made a promise specific enough to create an obligation and justify an employee's reliance thereon is a question of fact.” *Id.* at 101.

Here, the Court is reviewing a dismissal on the pleadings based on *res judicata*; the trial court did not even reach the merits of Ms. Harris's breach of contract claim. Furthermore, there has been no discovery and there is no evidence before the Court with which to assess the facts underlying the claim. The Complaint contains “a short and plain statement of the claim showing [Ms. Harris] is entitled to relief,” as required. Wash. Civ. Rule 8(a). Providence has not demonstrated that Ms. Harris fails to state a claim for breach of contract.

C. The Trial Court's Award of Sanctions Against Ms. Harris is Improper and Should be Reversed.

Providence argues that the trial court's decision to sanction Ms. Harris is not properly before this Court because she did not identify in her notice of appeal the order specifying the amount of the sanctions. See CP 161. However, Ms. Harris does not appeal the amount of

sanctions, but the decision to impose any sanction. CP 139. That decision is properly before this Court.

Indeed, Providence points to that decision, not the later decision, to explain the trial court's reasoning in awarding sanctions. Response Brief at 19-20. However, the decision contains no reasoning whatsoever. CP 139. Thus it is not possible to assess the reasons that the trial court sanctioned Ms. Harris, and it should be reversed on that ground alone. See *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 417, 157 P.3d 431 (2007).

Regardless, sanctioning Ms. Harris was not appropriate. As set forth above and in her opening brief, there are objectively reasonable legal grounds for Ms. Harris to assert her other legal causes of action in this case because they were not litigated in her previous case. Even if this Court were to conclude that Ms. Harris's claims were properly barred by *res judicata*, it cannot fairly be said that she had no reasonable basis for it under existing law or "a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law." Wash. Civ. Rule 11. Where the state's highest court has explicitly stated that *res judicata* does not bar claims "arising out of different causes of action," and should not be used "to deny the litigant his or her day in court," sanctioning a plaintiff

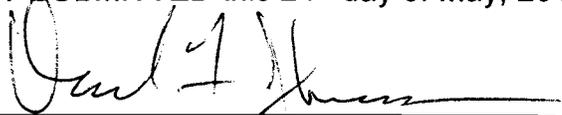
employee for asserting new causes of action would contradict the law as well as basic notions of justice. *Hisle*, 151 Wn.2d at 865.

This Court should vacate the award of sanctions against Ms. Harris. Providence's additional suggestion that this Court should further sanction Ms. Harris for this appeal should also be summarily rejected for all of the reasons stated above.

III. CONCLUSION

Ms. Harris requests that the Court reverse the trial court's dismissal and remand for further proceedings, and vacate the trial court's award of sanctions against her.

RESPECTFULLY SUBMITTED this 24th day of May, 2011



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CERTIFICATE OF SERVICE

I, Miriam 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 24th day of March 2011, I filed in court (original and one copy) and 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 Facsimile
- Via First Class Mail
- Via Messenger within 24 business hours
- 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