

70819-8

70819-8

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 DEC 13 PM 3:00

No. 70819-8-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PAUL WILKINSON,

Appellant,

v.

AUBURN REGIONAL MEDICAL CENTER, UNIVERSAL HEALTH
SERVICES, DR. DANIEL CLERC, TRACY RADCLIFF and MELISSA
POLANSKY,

Respondents.

Appeal from the
Superior Court of the State of Washington for King County
(KSCS Cause No. 12-2-29262-1)

The Honorable Judge Carol Schapira

BRIEF OF RESPONDENTS

BRYAN P. O'CONNOR, WSBA No. 23867
CATHARINE MORISSET, WSBA No. 29682
Jackson Lewis P.C.
520 Pike Street, Suite 2300
Seattle, Washington 98101
(206) 405-0404

Attorneys for Respondents

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES iii

II. INTRODUCTION 1

III. COUNTER STATEMENT OF THE ISSUES RELATED TO ASSIGNMENTS OF ERROR 1

IV. STATEMENT OF THE CASE..... 3

A. Statement of Facts 3

B. Procedural History..... 15

V. SUMMARY OF ARGUMENT 17

VI. ARGUMENT..... 20

A. Standard of Review 20

B. The Trial Court Properly Granted Summary Judgment on Paul Wilkinson’s WLAD Gender Based Discrimination Claim 21

1. Wilkinson Presented No Evidence of Gender-Based Discrimination 21

2. The Same Actor Inference Supports Dismissal of Mr. Wilkinson’s Gender Discrimination Claim 37

C. The Trial Court Properly Granted Summary Judgment on Paul Wilkinson’s WLAD Retaliation Claim 38

D. The Trial Court Properly Granted Summary Judgment on Paul Wilkinson's National Labor Relations Act Allegations 39

E. The Trial Court Properly Entered Judgment on Mr. Wilkinson’s Implied Contract Claim..... 45

1. Mr. Wilkinson had no evidence of an implied contract 45

2. The only existing contract was his collective bargaining agreement. 47

VII. CONCLUSION 49

I. TABLE OF AUTHORITIES

Cases

<i>Ad Art, Inc. v. NLRB</i> , 645 F.2d 669, 678 (9th Cir. 1980)	45
<i>Adkins v. Mireles</i> , 526 F.3d 531, 539 (9th Cir. 2008).....	46
<i>Allied Industrial Workers Region 8</i> , 265 NLRB 566, 566-67	44
<i>Bruce Morgan v. PeaceHealth, Inc.</i> , 101 Wn. App. 750, 753, 14 P.3d 773 (1993)	22
<i>Campbell v. State of Washington</i> , 129 Wn. App. 10, 22, 118 P.3d 888 (2005)	41
<i>Chmiel v. Beverly Wilshire Hotel Co.</i> , 873 F.2d 1283, 1285-86 (9th Cir. 1989))	53
<i>DelCostello v. Int’l Bhd. of Teamsters</i> , 462 U.S. 151, 164-65 (1983).....	33
<i>DeWater v. State of Washington</i> , 130 Wn.2d 128, 134 (1996).....	24
<i>Diamond Parking v. Frontier Bldg.</i> , 72 Wn. App. 314, 319 (1993).....	23
<i>Faragher v. City of Boca Raton</i> , 524 U.S. 775, 787, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998)	25
<i>Folsom v. Burger King</i> , 135 Wn.2d 658, 663, 958 P.2d 301 (1998).....	22
<i>Garner v. Teamsters Local 776</i> , 346 U.S. 485 (1953).....	47
<i>Griffith v. Schnitzer Steel Indus.</i> , 128 Wn. App. 438, 454 (2005).....	40
<i>Grimwood v. Puget Sound</i> , 110 Wn.2d 355, 359-360 (1988)	22
<i>Kennametal, Inc.</i> , 358 NLRB No. 108, 194 LRRM 1016, 1016 (2012)...	45
<i>Lingle v. Norge Div. of Magic Chef, Inc.</i> , 486 U.S. 399, 403 n.2 (1998).	52
<i>Meekins v. Boire</i> , 320 F.2d 445 (5th Cir. 1963)	49

National Labor Relations Act	12, 43
<i>San Diego Building Trades Council v. Garmon</i> , 359 U.S. 236 (1959) 3, 20, 45, 46, 47, 48	
<i>Sears Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters</i> , 436 U.S. 180 (1978)	46, 47
<i>Turgeon v. FLRA</i> , 677 F.2d. 937 (D.C. Cir. 1982).....	49
<i>Vazquez v. County of Los Angeles</i> , 349 F.3d 634, 642 (9th Cir. 2004)	24
<i>Washington v. The Boeing Company</i> , 105 Wn. App. 1, 10 (2000).....	25
<i>Young v. Key Pharm., Inc.</i> , 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989)	23
Statutes	
29 U.S.C. Section 160 (1937) 1, 2, 12, 20, 42, 44, 45, 46, 47, 48, 49, 50, 54	
29 U.S.C. Section 185 (1947).....	3, 21, 52
RCW 49.12.240	37
RCW 49.60	1, 2, 13, 16, 17, 22, 38
Rules	
CR 56(c).....	21
Regulations	
29 C.F.R. Section 102.19(a).....	44

II. INTRODUCTION

The case arises from former Sleep Center technician Paul Wilkinson's employment based claims brought against his former employer Auburn Regional Medical Center (ARMC), its parent company Universal Health Services (UHS), ARMC's Sleep Center manager Tracy Radcliff, his former supervisor Melissa Polansky, and Dr. Daniel Clerc, one of the physicians with whom Mr. Wilkinson worked (collectively "Respondents"). On appeal, he asserts that the trial court improperly granted summary judgment dismissal of his claims alleging: (1) gender-based discrimination and retaliation under the Washington Law Against Discrimination, RCW 49.60, (2) a violation of the Labor Relations Act, 29 U.S.C. Section 185(a), (2) a violation of the National Labor Relations Act, 29 U.S.C. § 151, and (3) breach of an implied employment contract under Washington law. Respondents were granted summary judgment on all claims, and this Court should affirm.

III. COUNTER STATEMENT OF THE ISSUES RELATED TO ASSIGNMENTS OF ERROR

Respondents assign no error to the trial court's decision granting them dismissal, or summary judgment in the alternative, of all of his claims and acknowledge that Mr. Wilkinson's assigns error to the trial court's decision on each of his claims. Respondents disagree, however,

with his statement of the relevant issues for this Court's decision and thus state the following:

1. Whether this Court should affirm the trial court's summary judgment dismissal of Mr. Wilkinson's gender-based claims under Washington's Law Against Discrimination (WLAD) when the overwhelming evidence demonstrates he had serious performance issues and his only evidence of gender discrimination was the mere fact of his and his supervisors' gender?
2. Whether this Court should affirm the trial court's summary judgment dismissal of his purported WLAD retaliation claims when he presented no evidence that his termination was motivated by anything other than his repeated performance errors and failure to improve?
3. Whether this should affirm the trial court's dismissal of any claims Plaintiff's purported claims based on the National Labor Relations Act when preemption doctrine under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) clearly required him to pursue all such claims before the National Labor Relations Board, and even if he could bring this lawsuit, he failed to appeal the Board's decision or bring this action within the applicable six-month statute of limitations?
4. Whether this Court should affirm the trial court's dismissal of Mr. Wilkinson's implied contract claim when § 301 of the Labor

Management Relations Act (29 U.S.C. § 185(a)'s broad preemption doctrine completely displaces any state-based claim for breach of contract as a matter of law and he had no evidence of a contract other than his collective bargaining agreement in any case?

IV. STATEMENT OF THE CASE

A. Statement of Facts

At all times prior to September 30, 2012, Auburn Regional Medical Center was a progressive acute-care facility and medical center owned and operated by a subsidiary of Universal Health Services, Inc. (UHS). ARMC's facilities included a Sleep Disorder Center ("Sleep Center"). In 2012, following months of due diligence and negotiations, the hospital and its related assets were sold to MultiCare, with the formal transfer occurring on September 30, 2012. (CP 515 (¶3)). MultiCare is not a party to this lawsuit.

At all material times, Tracy Radcliff was ARMC's Director Cardio-Pulmonary and Sleep Disorder services. (CP 669 (¶2)) As part of these responsibilities, Ms. Radcliff managed the Sleep Center. (CP669 (¶2)) While she managed the Sleep Center, Ms. Radcliff relied upon a departmental lead, Melissa Polansky, due to her expertise and knowledge. (CP 670 (¶3)) With the exception of the Mr. Wilkinson's limited period of re-employment in June 2012, two medical doctors, - Dr. Morris Chang and

Dr. Daniel Clerc, serviced the Sleep Center and issued orders for sleep-related studies. (CP 670 (¶¶4-5)) Dr. Chang also served as the Sleep Center's medical director. (CP 670 (¶4))

1. Plaintiff's Hire and Collective Bargaining Agreement

In 2005, Tracy Radcliff hired Mr. Wilkinson to work as a Sleep Technician in ARMC's Sleep Center. (CP 670 (¶6)) Mr. Wilkinson, just like all other Sleep Technicians, did not have a separate, individual written employment contract. (CP 515 (¶4, l. 11-12)) Mr. Wilkinson's position was instead covered by a series of successive collective bargaining agreements (CBA) between ARMC and his labor representative, United Food and Commercial Workers Local 21 ("Union"). (CP 515 (¶4, l.12-15)) All of these collective bargaining agreements contained a mandatory grievance and arbitration procedure to resolve all disputes arising under such agreements. (CP 515 (¶4, l.15-20) and 543-44 (Article 16)) The final collective bargaining agreement between these parties prior to the ARMC's transfer to MultiCare covered the period of 2011 through 2014. (CP 515 (¶4, l.17-20) and 522-47)

2. Plaintiff's Poor Performance and Numerous Disciplines Lead to His Successive Terminations

During his first three years of employment, Plaintiff performed relatively well, although his performance started to slip gradually during

this period. (CP 670 (¶7) and 676-700) In 2009, however, Mr. Wilkinson's work performance and attitude began to slip more noticeably. (CP 670 (¶8)) Among other behaviors, Plaintiff began aggressively resisting Ms. Polansky's work instructions and disciplinary counseling because he believed that he knew more than she did. (CP 670 (¶3, 1.4-6))

Between April and October 2009, Mr. Wilkinson received *five* disciplinary write ups for attendance-related problems. CP 670-71 (¶¶8-12) and 701-711) In Plaintiff's 2009 performance evaluation, Ms. Radcliff ranked him at 58% out of a 100% with an overall rating of "requires improvement." (CP 671 (¶13)) and 712-18) As a result, in January 2010, Ms. Radcliff placed Mr. Wilkinson on a performance improvement plan (PIP) highlighting three reasons: (1) his constant complaining about the Sleep Center and how he did not believe it was a good place to work, (2) his negative attitude and verbal attacks directed at Ms. Polansky, and (3) his excessive absenteeism. (CP 671 (¶13, 1.18-22))

Mr. Wilkinson's performance failed to improve while on his PIP. In fact, on January 12, 2010, Mr. Wilkinson received a written "preventative counseling" for failing to clock out. (CP 671 (¶14) and 731-2) Just over two weeks later, Mr. Wilkinson also received a "final written warning" for failing to follow departmental policy, which caused him to work unapproved overtime. (CP 672 (¶15) and 733-34) Shortly

thereafter, on or about March 15, 2010, Mr. Wilkinson received another written "preventative counseling" for conducting a sleep study inconsistent with Dr. Clerc's specific written instructions, which Dr. Clerc deemed to be unacceptable. (CP 672 (¶16) and 736)

On May 18, 2010, Ms. Polansky prepared a performance evaluation for Mr. Wilkinson. Despite his continuing struggle before and during his PIP, she ranked him as a 3 out of 5 in every category, which translated into a 60% rating or "competent." (CP 642 (¶6) and 657-64) In response, however, Mr. Wilkinson refused to sign the performance evaluation deeming himself to be more than just "competent." (CP 642 (¶7) and 666-68) On June 27, 2010, he provided a written statement arguing why he was more than just a competent technician. (CP 642 (¶7) and 666-68) In part, he argued that he was more than just competent because he tried to make life better around the sleep lab by bringing in cake, ice cream and other food. (CP 642 (¶7) and 667)

Shortly thereafter, on or about July 6, 2010, Mr. Wilkinson received a "written warning" for using the wrong sleep study testing modality on a patient without express physician authorization in contravention of the Sleep Center's procedures and protocols. (CP 672 (¶17) and 738-39)

Dr. Daniel Clerc complained several times to Ms. Radcliff about Mr. Wilkinson's mistakes and errors in judgment. (CP 672 (¶18)) On September 8, 2010, Dr. Clerc provided a letter to Ms. Radcliff complaining about the Mr. Wilkinson's poor job performance, pattern of mistakes and errors in judgment, and resistance "to remediation despite ongoing efforts from his supervisors." (CP 672 (¶18) and 741) Dr. Clerc expressed a care that Mr. Wilkinson's "pattern of mistakes" was affecting patient care and exposing ARMC and its doctors to potential legal risk. (CP 672 (¶18) and 741).

Dr. Chang expressed similar concerns and complaints to Ms. Radcliff about Mr. Wilkinson's poor performance. (CP 672 (¶20)) On September 22, 2010, Dr. Chang complained in writing and expressed concerns about Mr. Wilkinson's long-running poor performance. (CP 672 (¶20) and 745) In his letter, Dr. Chang wrote:

Over the past 18 months there have been numerous documented incidents in which Mr. Wilkinson has not followed policies written clearly in our policy and procedure manual. This lack of adherence to our established sleep center protocols appears to have persisted despite repeated verbal discussion with our lead technologist [Melissa Polansky] regarding specific aspects of polysomnographic recording and patient care, such as bilevel positive airway pressure titration. In addition, on several occasions sleep center physician orders for polysomnographic testing have been disregarded or not followed accurately by Mr. Wilkinson. I am concerned that such discrepancies between established protocol and Mr.

Wilkinson's actions have the potential to compromise the quality of patient care and the effective operation of the sleep center.

(CP 672 (¶20) and 745)

On or about September 17, 2010, a "final written warning" was issued to Mr. Wilkinson for yet again failing to follow proper procedures during a sleep study. (CP 672 (¶19) and 751) In September 2010, there were *three more* performance incidents discovered where Mr. Wilkinson failed to follow a doctor's instructions during a sleep study and performed two separate sleep studies incorrectly. (CP 672-73 (¶21) and 746-51)

ARMC commenced an investigation of Mr. Wilkinson's performance problems in September 2010. As a result of multiple problems and concern for patient care, Mr. Wilkinson was placed on administrative leave pending completion of ARMC's investigation of the last three incidents discovered in September 2011. ARMC expressly directed him to stay away from the facility unless and until he was told otherwise or he needed personal medical care. Contrary to these explicit instructions, Mr. Wilkinson appeared at the hospital on October 17, 2010, questioning whether he would be working. ARMC deemed this action to be insubordination. (CP 516-17 (¶¶10-11) and 563-4)

With review and approval from ARMC's Human Resources, Ms. Radcliff terminated Mr. Wilkinson in October 2010 based on the well-

established series of performance mistakes and related disciplines. (CP 670 (¶6) and 672-3 (¶21)) Specifically, on October 21, 2010, Mr. Wilkinson was terminated as a result of the final three September 2010 performance issues and his insubordination in returning to the facility while the internal investigation was still on-going. (CP 517 (¶11), 563-4, and 672-3 (¶21))

In 2012, ARMC and United Food and Commercial Workers Local 21 arbitrated the grievance related to Mr. Wilkinson's October 21, 2010 termination. On May 14, 2012, the Arbitrator sustained the grievance in part and reasoned:

Both at the Arbitration Hearing and later reviewing the record, the Arbitrator was struck by what appeared to be a very brief period between [Mr. Wilkinson's] final warning and his termination. There was no time for the Grievant to come to grips with the fact that his discharge was imminent and little or no time for him to improve his work and avoid termination. [Mr. Wilkinson] was never given a disciplinary suspension which might have brought home to him that he needed to change his behavior. Plainly the various written and oral warnings and the performance appraisals only seemed to have had the effect of encouraging [Mr. Wilkinson] to think it all was simply a matter of debate and discussion. Thus, he responded more in an effort to score debating points rather than making the necessary effort to change his job performance.

(CP 517 (¶13) and 572) As a result, the Arbitrator concluded that Mr. Wilkinson was "entitled to the opportunity to demonstrate his competence by a return to employment." (CP 517 (¶13) and 572) However, Mr.

Wilkinson was not awarded back pay or any other compensation. (CP at 517 (¶13) and 572)

Subsequent to Arbitrator Harrison's ruling, Mr. Wilkinson protested the work schedule being offered to him because they conflicted with his other personal commitments. ARMC and the Union sought clarification from Arbitrator Harrison concerning the intent of his ruling. On June 1, 2012, Arbitrator Harrison wrote that his arbitration remedy was akin to a "last chance agreement" and, thus, Mr. Wilkinson was not in a bargaining position. If he wished to return, Mr. Wilkinson was required to accept the job offer and "to perform it well to avoid discharge." (CP 518 (¶14) and 574-76)

Mr. Wilkinson returned to work in early June 2012 and, consistent with the Arbitrator's order, he was placed on a new PIP. On this first night back to work, however, Mr. Wilkinson performed a sleep study in direct contravention of a doctor's instructions that the patient should lie on his side throughout the study due to lower back problems.¹ On June 14

¹ Throughout his brief, Mr. Wilkinson alleges that ARMC destroyed a patient video that would have exonerated him about this incident. This claim is baseless and misleading. It was ARMC's long-standing practice not to maintain such videos after a sleep study was reviewed and scored the next day. The scored study became part of a patient's medical record. In making this policy decision early on, ARMC chose to avoid the large computer infrastructure and associated high costs required to maintain video clips covering a number of hours for literally thousands and

and 16, 2012, Mr. Wilkinson performed two other sleep studies incorrectly. Similarly, on June 13, 2012, Mr. Wilkinson showed up thirty minutes late for a mandatory staff meeting. (CP 518 (¶15))² Following another investigation, on June 25, 2012, Mr. Wilkinson was terminated for a second time as a result of these new performance deficiencies. (CP 518 (¶15) and 577-79)

3. Mr. Wilkinson Claims Discrimination and Retaliation Based Upon his Union Membership or Activities Filed with the National Labor Relations Board

On March 24, 2011, Mr. Wilkinson filed an unfair labor practice charge with Region 19 of the National Labor Relations Board (“NLRB”). (CP 641 (¶2) and 644-45) His charge alleges that ARMC disciplined him in September and October 2010 in retaliation for his union and/or protected concerted activities under the National Labor Relations Act (“NLRA”). (CP 641 (¶2) and 645) Further, it alleges that ARMC

thousands of patients. In this case, the referenced video was not maintained consistent with the Sleep Center’s normal practices. By the time Mr. Wilkinson’s performance error came to light a couple of days later, the video was already gone. Most pertinently, there is no evidence or suggestion that ARMC’s policy or its adherence to it was in any way related to Mr. Wilkinson’s gender or motivated by retaliation.

² In his notebook, Mr. Wilkinson disputes he was thirty minutes to the mandatory meeting. Instead, as he writes, “I was 20 minutes late for the meeting not 30.” (CP 32 – I. 12-13) Of course, this distinction completely misses the point for an employee returning to work on a last-chance type agreement.

discharged him on October 21, 2010 in retaliation for his union and/or protected concerted activities under the NLRA. (CP 641 (¶2) and 645)

By letter dated June 23, 2011, the Regional Director dismissed the charge following Region 19's investigation. (CP 642 (¶3) and 646-49)

The dismissal letter states:

The Charge alleges that the Employer disciplined and terminated you in retaliation for your union and/or protected concerted activities. The investigation, however, revealed insufficient evidence to support such a finding. **Rather, the evidence supports the Employer's contention that you were disciplined and terminated due to a series of performance issues.** Further, there was insufficient evidence that the Employer harbored animus toward you for your union and/or protected concerted activities. Under these circumstances, the Employer's conduct in terminating your employment does not violate the Act. Accordingly, further proceedings in this matter are not warranted. I am, therefore, refusing to issue a complaint in this matter.

(CP 642 (¶3) and 647) (emphasis added). The dismissal letter also informed Mr. Wilkinson that he could appeal this decision to the Acting General Counsel of the NLRB in accordance with the NLRB's Rules and Regulations. (CP 642 (¶3) and 647) Such appeal was due on July 7, 2011. (CP 642 (¶3) and 647) Mr. Wilkinson did not file an appeal. (CP 642 (¶3, 1.4-5))

4. Mr. Wilkinson Files Charges of Discrimination under the WLAD and Title VII

On March 22, 2011, Mr. Wilkinson filed a discrimination complaint with the Washington State Human Rights Commission (WSHRC) against ARMC alleging age and gender-based discrimination. (CP 642 (¶4) and 650-53) The charge was “dual filed” with the Equal Employment Opportunity Commission (EEOC). (CP 642 (¶4) and 651)

On July 29, 2011, the WSHRC found “no reasonable cause” to believe an unfair employment practice had occurred under Chapter 49.60 RCW. (CP 642 (¶4) and 651) The WSHRC finding stated:

The information provided by Complainant [Wilkinson] indicated that **he had attendance and performance issues for which he was disciplined over a period of several months, and for which the he was ultimately terminated for failure to improve in these areas.** Complainant further indicates that Respondent’s workforce includes 50% of its employees who are over the age of 40, and other males in the department who have not been disciplined for similar infractions. There is insufficient evidence to show that similarly situated employees, not of Complainant’s protected classes, were treated more favorably, and no causal link between Respondent’s actions and Complainant’s protected classes.³

(CP 642 (¶4) and 652) (emphasis added). The WSHRC mailed notice of its decision to Mr. Wilkinson on July 29, 2011. (CP 642 (¶4) and 651)

³ Mr. Wilkinson has never alleged age discrimination or retaliation claims in his lawsuit.

On October 5, 2011, the EEOC issued and mailed its Dismissal and Notice of Rights, which in part advised Plaintiff that any Title VII (42 U.S.C. 2000e) claims had to be brought in court within 90 days. (CP 642 (¶5) and 654-56) In the Notice, the EEOC indicated its adoption of the WSHRC's findings.⁴ (CP 642 (¶5) and 655)

5. Tracy Radcliff Disciplined Men and Women Alike

While employed by ARMC (prior to MultiCare's acquisition), Ms. Radcliff issued discipline to both men and women for the same or similar infractions to Mr. Wilkinson's. (CP 673 (¶22)) In the Sleep Center, she issued disciplinary write ups to David Ilagan, Carrie Olsen (female), and Anthony Dauley. (CP 673 (¶22) and 752-63, 770-82) During part of Mr. Wilkinson's tenure, one employee - a female named Barbara Rooney - was terminated for poor attendance. (CP 673 (¶22) and 765-69) During Mr. Wilkinson's tenure, Ms. Radcliff also managed employees in Respiratory Care. (CP 673-74 (¶23)) In such capacity, Ms. Radcliff issued written discipline to at least four women - Terri Hawkins, Jane Moore, Teresa Sharpe and Cheryl Zweifel - at various times in 2007 and 2009 through 2011. (CP 673-74 (¶23) and 783- 95).

⁴ Mr. Wilkinson is not appealing the dismissal of his Title VII claims.

B. Procedural History

On September 4, 2012, Paul Wilkinson filed a *pro se* complaint in King County Superior Court assigned Case No. 12-2-29262-1. (CP 461-64) He named Auburn Regional Medical Center (ARMC), United Health Services (UHS), Dr. Daniel Clerc, Tracy Radcliff and Melissa Polansky as defendants. (CP 461-64) Approximately three weeks later, Mr. Wilkinson filed a second, nearly identical complaint against only ARMC and UHS, which was assigned King County Superior Court Case No. 12-2-31215-0. The defendants filed a motion to consolidate the two lawsuits. On December 14, 2012, the motion was granted and the two lawsuits were consolidated under Case No. 12-2-29262-1. (CP 479-81)

On May 15, 2013, Respondents filed a Motion to Dismiss Or, In The Alternative, For Summary Judgment as to all claims. (CP 482-97) On June 25, 2013, Mr. Wilkinson filed a response to this motion. On June 27, 2013, Respondents filed a reply in support of their dispositive motion. (CP 618-24)

On June 28, 2013, Judge Schapira heard oral argument on the motion. (VRP (June 28, 2013)). She granted the motion, in part, and dismissed several of Mr. Wilkinson's claims. (CP 626-30) Respondents' counsel prepared a draft order consistent with her oral ruling, to which Mr. Wilkinson agreed during a subsequent hearing with Judge Schapira on

July 12, 2013. (July 12, 2013 Verbatim Report of Proceedings (VRP) at 5:13-12:5; CP 625) Judge Schapira entered the order that same day. (CP 626-30)

In relevant part, Judge Schapira dismissed all of Mr. Wilkinson's claims except for gender discrimination or retaliation under the Washington Law Against Discrimination (WLAD) and Title VII, plus his claim related to Mr. Wilkinson's unfair labor practice charge filed with the National Labor Relations Board and his implied employment contract claim. (CP 628:17-629:1) Judge Schapira ordered supplemental briefing and evidence on the remaining claims to be filed by August 2, 2013, with oral argument on August 9, 2013. (CP 628:23-629:10)

The parties provided supplemental briefing and documentation to the trial court. (CP 49-457, 618-24, and 641-795). Following oral argument, Judge Schapira granted summary judgment on Mr. Wilkinson's remaining claims. (August 9, 2013 VRP at 46:19-55:17) Relevant to the current appeal, Judge Schapira concluded in her August 9, 2013 oral ruling that Mr. Wilkinson "had no contract" and thus dismissed his implied employment contract claim. (August 9, 2013 VRP at 51:3; CP 799) Further, near the end of her oral ruling, Judge Schapira inquired, "Is there something that, within the contours of the original complaint, that we have not discussed today?" (VRP (August 9, 2013) at 54:16-18) Mr.

Wilkinson responded, “I don’t believe so, Your Honor.” (VRP (August 9, 2013) at 54:19). This appeal followed.

V. SUMMARY OF ARGUMENT

The trial court properly considered and granted summary judgment on Mr. Wilkinson’s claims at issue in this appeal: (1) his gender-based discrimination claim under the Washington Law Against Discrimination, (2) his retaliation claim under WLAD, (3) his National Labor Relations Act claim, and (4) his state law implied employment contract claim.

The record shows that the trial court correctly found that ARMC terminated Mr. Wilkinson in October 2010 following a series of well-documented performance mistakes and errors in judgment, including failing to follow doctor’s order and the Sleep Center’s policies and procedures. Additionally, the two male physicians in the Sleep Center – Dr. Michael Chang and Dr. Daniel Clerc – both complained to Mr. Wilkinson’s boss, Tracy Radcliff, about his mistakes, errors in judgment and inability to correct his deficiencies. Both doctors supplied letters to Ms. Radcliff detailing their concerns about Mr. Wilkinson.

While Mr. Wilkinson wishes to dispute the underlying performance errors, he incorrectly relies on the outcome of his arbitration to show that he was vindicated. Arbitrator Harrison did *not* conclude that Mr. Wilkinson performed correctly or properly. Rather, he reinstated Mr.

Wilkinson without compensation solely in an effort to give him one last chance to correct his job performance. When given yet another chance, however, Mr. Wilkinson went on to commit a series of serious performance issues like he had in the past – ignoring physician instructions, Sleep Center procedures, and appearing late for a mandatory meeting. As a result, ARMC terminated him again in June 2012.

In spite of the above clear evidence, Mr. Wilkinson insists his termination was due to gender-based discrimination. As the trial court correctly found, Mr. Wilkinson failed to present any evidence – let alone *material* evidence – to establish his gender-based claim. As he did below, throughout his appellate brief, Mr. Wilkinson points to irrelevant events or items lacking any support in the record whatsoever in an effort to manufacture a claim. At its core, Mr. Wilkinson’s gender discrimination argument is based upon his personal perception that he was largely infallible as a sleep technician and, as such, his performance problems must have been due to gender discrimination because both Ms. Radcliff and Ms. Polansky are women. This argument is unsupported and woefully deficit. Mr. Wilkinson simply failed to present *material* evidence support his gender-based claim. Further, as Ms. Radcliff both hired and terminated Mr. Wilkinson, the grant of summary judgment is supported by the “same actor” inference.

Mr. Wilkinson's retaliation claim also fails for many of the same reasons. There is no evidence of retaliation being a motive - let alone a substantial one - behind Mr. Wilkinson's lengthy progressive discipline and eventual terminations. The record is replete with evidence of detailed disciplinary write ups and repeated complaints about Mr. Wilkinson's poor job performance, including verbal and written complaints from both male doctors in the Sleep Center. Mr. Wilkinson lost his job due to his numerous performance mistakes and errors in judgment, which he failed and/or refused to correct despite numerous chances.

Mr. Wilkinson's National Labor Relations Act claim is subject to dismissal under the *Garmon* preemption doctrine. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). He was required to pursue his NLRA claims of retaliation exclusively before the National Labor Relations Board. In fact, he filed such a charge, but it was later dismissed by Region 19 of the National Labor Relation Board. In response, he failed and/or refused to appeal such decision to the NLRB's Office of General Counsel, which was his exclusive legal avenue. Stated simply, Mr. Wilkinson is illegally unable to maintain this claim in either state or federal court. Further, even if Mr. Wilkinson could maintain such a claim in state court, he filed his claim too late under the six-month

statute of limitations set forth in Section 10(b) of the National Labor Relations Act.

Finally, Mr. Wilkinson's state-law implied employment contract claim is preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. §185(a). As an employee working under a collective bargaining agreement, Mr. Wilkinson's implied contract claim legally implicates Section 301 of the LMRA. As a result, Section 301's broad preemption doctrine completely displaces any state-based claim for breach of implied contract as a matter of law. Additionally, contrary to Mr. Wilkinson's claim, Judge Schapira did enter judgment and dismissed his implied contract claim after receiving no evidence to support such a claim.

VI. ARGUMENT

A. Standard of Review

Appellate courts review orders granting summary judgment de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). The appellate court will "engage in the same inquiry as the trial court, and will affirm summary judgment if there is no genuine issue of any *material* fact and the moving party is entitled to judgment as a matter of law." *Bruce Morgan v. PeaceHealth, Inc.*, 101 Wn. App. 750, 753, 14 P.3d 773 (1993)(emphasis supplied). All facts and reasonable inferences must be considered in a light most favorable to the nonmoving party, and all

questions of law are reviewed de novo. *Id.*; CR 56(c). Ultimate and conclusory statements of fact are not “material.” *Grimwood v. Puget Sound*, 110 Wn.2d 355, 359-360 (1988) (citations omitted).

When a defendant moves for summary judgment and satisfies the initial burden of establishing the lack of a material factual issue, the inquiry shifts to the plaintiff. To avoid summary judgment, plaintiff, the non-moving party, must present admissible evidence, not mere speculation, that supports the existence of a material fact in issue. *See* CR 56(e); *Diamond Parking v. Frontier Bldg.*, 72 Wn. App. 314, 319 (1993). A defendant may meet the initial burden of showing no issue of material fact by showing that there is an absence of evidence to support the nonmoving party’s case. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). Finally, this Court “will sustain the trial court’s judgment on any theory established in the pleadings and supported by proof.” *Bruce Morgan v. PeaceHealth, Inc.*, 101 Wn. App. at 753.

B. The Trial Court Properly Granted Summary Judgment on Paul Wilkinson’s WLAD Gender Based Discrimination Claim

1. Wilkinson Presented No Evidence of Gender-Based Discrimination

The trial court properly concluded that Mr. Wilkinson failed to present evidence that his performance-based discipline or termination had

anything to do with his gender. The Washington Law Against Discrimination provides that “[i]t is an unfair practice for any employer . . . [t]o discriminate against any person in compensation or in other terms or conditions of employment because of such person’s . . . sex.” RCW 49.60.180(3). To establish sex-based harassment, a plaintiff must show: (1) the harassment was unwelcome, (2) the harassment was because of sex, (3) the harassment affected the terms or conditions of employment, and (4) the harassment is imputed to the employer. *DeWater v. State of Washington*, 130 Wn.2d 128, 134 (1996) (citing *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 407, 693 P.2d 708 (1985)). A harassment claim is not actionable under Washington law, unless the alleged conduct is both unwelcome and “so severe or pervasive” that it alters the conditions of employment and creates an abusive working environment. *Vazquez v. County of Los Angeles*, 349 F.3d 634, 642 (9th Cir. 2004); *Glasgow*, 103 Wn.2d at 406-407.

As courts have repeatedly acknowledged, the “civil rights code is not a general civility code.” *Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 297 (2002) (internal quotation omitted) Dismissal is appropriate when the plaintiff demonstrates nothing more than “[c]asual, isolated or trivial manifestations of a discriminatory environment.” Such manifestations do not affect the conditions of employment “to a

sufficiently significant degree to violate the law.” *Washington v. The Boeing Company*, 105 Wn. App. 1, 10 (2000) (citations omitted). *See also Glasgow v. Ga.-Pac. Corp.*, 103 Wn.2d 401, 406, 693 P.2d 708 (1985)).

To determine whether an environment is sufficiently hostile or abusive, a court will review all of the facts and circumstances including the “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” The conduct must be both objectively and subjectively offensive. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 787, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998). Not every insult or harassing comment constitutes a hostile work environment. *Id.* Mr. Wilkinson cannot meet any of these standards to prove gender discrimination.

a. Ms. Radcliff Issued Discipline Equally to Men and Women

The trial court correctly concluded that, Mr. Wilkinson simply failed to offer any “material” evidence that his numerous disciplines or two terminations were discriminatory “because of gender.” As the record reveals, Ms. Radcliff issued discipline to both men and women in the Sleep Center for the same or similar infractions during Mr. Wilkinson’s tenure. (CP 673 (¶22)) For example:

- **Carrie Olsen.** She worked in the ARMC Sleep Center during Mr. Wilkinson's employment tenure. (CP 673 (¶22)) With no citation to the record, Mr. Wilkinson argues he was the only person disciplined for working overtime without authorization. Appellant's Opening Brief at 9. Yet the record clearly shows that between October 2008 and June 2009, Ms. Olsen received written discipline for working overtime without prior approval (CP 761), failing to pair a patient with a female sleep technician in contravention of Dr. Chang's order (CP 762), failing to correct an EKG tracing in scoring a patient's test results (CP 763), and failing to properly conduct a sleep study in accordance with departmental protocols (CP 764) Ms. Radcliff issued all of this discipline to Ms. Olsen. (CP 673 (¶22))

- **Barbara Rooney.** Mr. Wilkinson argues that Barbara Rooney, who worked in the ARMC Sleep Center during a portion of Mr. Wilkinson's tenure (CP 673 (¶22)), was never disciplined and received preferential treatment. *See* Appellant's Opening Brief at 29. Once again, the record demonstrates this is false. In August 2009, Ms. Radcliff terminated Ms. Rooney for violation of ARMC's attendance problems. (CP 673 (¶22) and 766) Prior to her discipline, Ms. Rooney was suspended for being a "no call / no show" (CP 767-68) and earlier attendance issues (CP 769) In fact, it is undisputed that Ms. Rooney was

the only other employee terminated from the Sleep Center during Mr. Wilkinson's employment tenure. (CP 673 (¶22)) and 752-82)

- **David Ilagan.** Mr. Ilagan worked in the ARMC Sleep Center during Mr. Wilkinson's employment tenure. (CP 673 (¶22)) Between March 15, 2007 and July 22, 2010, Ms. Radcliff issued several disciplinary write-ups to Mr. Ilagan for conducting a study incorrectly which Dr. Clerc deemed to be unacceptable (CP 753), for being a "no call/no show" (CP 754), for clocking in late 43 minutes late one day (CP 755), and for excessive absenteeism and clocking in late on four other occasions (CP 756-59). According to Mr. Wilkinson's notebook, Mr. Ilagan resigned on July 25, 2010. (CP 19-20) After apparently discussing Mr. Ilagan's July 22, 2010 discipline with him, Mr. Wilkinson wrote the following about the discipline issued to this male co-worker:

"He said they had some of the dates wrong and that he did not call in on some of them. I suggested that he request his pay records to make sure the dates were accurate. ***But it is really no big deal, they are doing it to everyone. If the dates were correct they could have suspended him. So they had cut him a break.***"

(CP 19 – last four lines) (emphasis added)

- **Anthony Dauley.** Mr. Dauley worked in the ARMC Sleep Center during Mr. Wilkinson's tenure. (CP 673 (¶22)) Between 2007 and 2010, Ms. Radcliff issued several disciplinary write-ups to Mr. Dauley for

an “inappropriate” personal conversation with a patient (CP 772-73), for failing to follow the hospital’s hand-washing policy after sneezing in his hand while treating a patient who later complained (CP 776), for four incidents of absenteeism and failing to clock in on another occasion (CP 777, 780-82), and for failing to follow a doctor’s orders when conducting a study (CP 778-79). Further, Ms. Polansky placed Mr. Dauley on a performance improvement plan in September 2008 for failure to generate required documentation during a study (CP 774). Prior to Ms. Radcliff’s employment with ARMC, a prior supervisor issued Mr. Dauley a disciplinary notice for a “no call / no show” in December 2003. (CP 771)

Also, inconsistent with his gender-based discrimination claim and lacking any citation to the record, Mr. Wilkinson claims in his opening brief that Mr. Dauley was allowed to work overtime on one occasion without ever being questioned by Ms. Radcliff or Ms. Polansky. *See* Appellant’s Opening Brief at pg. 13. In his purportedly simultaneous journal, Mr. Wilkinson also describes an incident involving Mr. Dauley and the moving of a recliner. (CP 20-21) Suggesting that he did not believe Mr. Dauley’s conveyance of Ms. Polansky’s work instructions, Mr. Wilkinson wrote, “Anthony often leaves out details when he tells people things, so I could not believe that Melissa [Polansky] was given the full details of the situation.” (CP 21 – l. 3-4)

In addition to the Sleep Center, Ms. Radcliff supervised ARMC's Respiratory Care department during Mr. Wilkinson's employment tenure. (CP 673 (¶23)) In such capacity, Ms. Radcliff issued discipline to a number of women for attendance and other performance problems. (CP 673 (¶23)) For example:

- In 2010, **Terri Hawkins** received two disciplinary write-ups for attendance problems. (CP 673-4 (¶23) and 784-86). On or about February 15, 2011, Jane Moore received a final written warning for violation of ARMC's productive work environment / harassment policy. (CP 673-4 (¶23) and 788-89)

- In 2007 and 2010, **Teresa Sharpe** received written discipline for attendance-related problems. (CP 673-4 (¶23) and 791-92)

- In 2009 and 2010, **Cheryl Zweifel** received disciplinary write-ups for attendance-related problems. (CP 673-4 (¶23) and 794-95)

b. No evidence suggests that the male physician's criticisms of Mr. Wilkinson's performance had anything to do with his gender.

As the trial court properly reasoned, Mr. Wilkinson's gender claim is fatally undercut by the fact that both doctors in ARMC's Sleep Center – Dr. Michael Chang and Dr. Daniel Clerc – complained and expressed concerns to Ms. Radcliff about Mr. Wilkinson's repeated performance problems. (CP 670 (¶¶4 and 5) and 672 (¶¶18 and 22)) After verbally

complaining several times about Mr. Wilkinson's mistakes and errors in judgment, on September 8, 2010, Dr. Clerc provided a letter to Ms. Radcliff complaining about Mr. Wilkinson's poor performance, mistakes and errors in judgment, which he stated were affecting the quality of patient care and exposing ARMC and doctors to potential legal risk. (CP 672 (¶18) and 741). Similarly, the Sleep Center's medical director, Dr. Chang, complained to Ms. Radcliff and expressed concerns about Mr. Wilkinson's poor performance. (CP 670 (¶4) and 672 (¶20)) On September 22, 2010, Dr. Chang provided a letter to Ms. Radcliff discussing these issues and his concerns. (CP (¶20) and 745)⁵ Thus, even if Ms. Radcliff were motivated by gender-based discrimination, this does not demonstrate that Dr. Clerc or Dr. Chang were likewise motivated.

In fact, Mr. Wilkinson has never even alleged that Dr. Chang discriminated against him for any reason. Consistently, Dr. Chang was not named as a party defendant. While it is correct that Dr. Daniel Clerc is a named defendant, Mr. Wilkinson submitted no evidence that he discriminated against him in any way. In fact, in his opening brief, Mr.

⁵ In his brief, Mr. Wilkinson argues there is "no proof" that both letters are actually from Dr. Clerc and Dr. Chang. *See* Appellant's Opening Brief at pg. 36. To the contrary, Mr. Radcliff provided a signed declaration that both doctors gave the letters to her after they initially raised verbal complaints and concerns to her about Mr. Wilkinson's work performance and errors in judgment. (CP 672 (¶¶18 and 22))

Wilkinson admits that, “Dr. Clerc was not directly involved in the discrimination, but without his support the disciplinary actions would not have started.” *See* Appellant’s Opening Brief at pg. 30 (first full paragraph). As has been the pattern throughout this litigation, Mr. Wilkinson fails to offer an explanation or evidence of what alleged “support” was given. Mr. Wilkinson may be referring to Dr. Clerc’s reports of Mr. Wilkinson’s performance problems and judgment errors. If so, Dr. Clerc’s actions were totally appropriate and consistent with fundamental obligations he owed to his patients and ARMC, and Mr. Wilkinson presented nothing to the contrary other than his own personal belief that his performance was exemplary.

The record shows undisputed evidence that both Sleep Center doctors, Dr. Michael Chang and Dr. Daniel Chang, were dissatisfied with the Mr. Wilkinson’s long-running mistakes and errors in judgment. There is absolutely no evidence or suggestion that either doctor’s opinions or complaints about Mr. Wilkinson’s poor job performance were shaped or motivated by Mr. Wilkinson’s gender. There is also significant undisputed documentary evidence in the record that Ms. Radcliff disciplined men and women for the same or similar conduct. In fact, a woman (Barbara Rooney) was the only other employee terminated from

the Sleep Center during Mr. Wilkinson's tenure. She was terminated for poor attendance and violation of ARMC's attendance policies.

Moreover, there is substantial documentary evidence establishing that Mr. Wilkinson was given numerous disciplinary warnings and resulting opportunities to correct his numerous performance issues, e.g., absenteeism, failing to follow doctor's orders, failing to following department protocols, and failing to correctly perform required sleep-center tests. After a series of multiple performance mistakes in September 2010, Mr. Wilkinson was terminated in October 2010 by Ms. Radcliff following an investigation by ARMC's Human Resources department.

c. The decision in Mr. Wilkinson's 2010 arbitration does not demonstrate gender discrimination

In addition to those discussed above, Mr. Wilkinson offers other equally unsupported or demonstrably false, non-material allegations in support of his gender discrimination claim. First, Mr. Wilkinson now wants to factually dispute nearly all past disciplines, including the four issued in September 2010 leading to his initial October 2010 termination. For all discipline issued prior to September 2010, Mr. Wilkinson failed to exhaust the grievance and arbitration procedure under the successive collective bargaining agreements covering his sleep technician position, so

he is unable to collaterally attack them now. It is well settled that for claims alleging breach of a collective bargaining agreement, dismissal is required where an employee fails to exhaust the collective bargaining agreement's arbitration remedies. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 164-65 (1983). Here, the applicable CBA specifically requires that any "alleged breach of the terms and conditions" of the agreement must be submitted to its grievance procedure, which includes mandatory and binding arbitration. (CP 515 (§15-20) and 543 (CBA Section 16.01))

As to the discipline issued in September 2010 and his subsequent termination in October 2010, Arbitrator Harrison did *not* conclude that Mr. Wilkinson's work performance was acceptable or that he had no performance problems. (CP 517 (§13)) and 568-72) Rather, in describing Mr. Wilkinson's response to the discipline, Arbitrator Harrison wrote, "[H]e responded more in an effort to score debating points rather than making the necessary effort to change his job performance." (CP 517 (§13)) and 572)⁶ While Mr. Wilkinson's second termination is scheduled to go to arbitration in April 2014, it is worth noting there were four individuals involved in the investigation and/or decision to terminate his

⁶ There is no allegation or suggestion that Arbitrator Harrison discriminated against Mr. Wilkinson on the basis of his gender.

employment for additional performance mistakes and tardiness to a mandatory meeting: two men (Dr. Michael Chang and HR Manager Mason Hudson) and two women (Tracy Radcliff and Dr. Nicole Phillips). (CP 518 (¶16) and 578; *see* Appellants' Opening Brief at pg. 19) None of the foregoing constitutes any *material* evidence to prevent summary judgment on Mr. Wilkinson's gender claim.

d. Mr. Wilkinson's allegations regarding Ms. Polansky do not demonstrate gender discrimination

Mr. Wilkinson also baldly claims that Ms. Polansky treated him differently than female co-workers. He argues that he informed Ms. Polansky in writing that two female technicians were not sterilizing equipment. *See* Appellant's Opening Brief at pg. 13 (citing CP 95-103 and 107) With no citation to the record, Mr. Wilkinson simply claims neither woman received any discipline. *See* Appellant's Opening Brief at pg. 13. Further, while claiming that he reported both women, the record evidence he cites (CP 95-103 and 107) simply indicates that he reported tape being left on EKG leads and/or equipment not being wiped off. There is no indication of any individual – either man or woman – responsible for these alleged events.

Mr. Wilkinson further claims Ms. Polansky “yelled” at him during an employee meeting on May 6, 2009. David Ilagan provided an affidavit

stating that he witnessed Ms. Polansky “yelling” at Mr. Wilkinson, plus she addressed him in a “loud and threatening manner” during the staff meeting in front of Ms. Radcliff, Dr. Chang, Dr. Clerc and others. (CP 79) As Mr. Wilkinson wrote in his notebook, “Melissa started the meeting and said that we did not have a lot of time, so keep comments to yourself.” (CP 9) According to his notebook, he claims that she “actually yelled it” and kept yelling at him throughout the meeting. (CP 9) As Mr. Wilkinson also states in his notebook and contrary to her alleged instructions at the beginning of the meeting, “I finally corrected her about a portion of the union contract at the end of the meeting.” (CP 9) Mr. Wilkinson also writes, “Everyone could see she was very angry for some reason. I do not know why.” (CP 9) Contrary to Mr. Wilkinson’s claims, this single incident is neither *material* nor supportive of any claim of gender-based discrimination. At most, it shows Ms. Polansky was upset at an employee meeting a year and half prior to Mr. Wilkinson’s October 2010 termination and he did not know why she was upset.

Next, Mr. Wilkinson offers evidence that Ms. Polansky stated that she wanted a female sleep technician on each shift. *See* Appellant’s Opening Brief at pg. 28; CP 81 and 85. Mr. Wilkinson claims this was unnecessary because males performed well with female patients, once again failing to cite to the record. *See* Appellant’s Opening Brief at pg.

28. Far from any discriminatory intent, Ms. Polansky desired a female sleep technician on each shift because the Sleep Center services female patients who are sometimes more comfortable working with women during a sleep study. For the same reason, doctors in the Sleep Center have requested female sleep technicians for certain female patients. For example, one female sleep technician, Carrie Olsen, was disciplined for failing to pair a female patient with a female sleep technician in direct contravention of Dr. Chang's order. (CP 673 (¶22) and 762)

e. Mr. Wilkinson also fails to cite to any evidence showing that other female employees were treated differently

Mr. Wilkinson next alleges that he was disciplined for not starting a mandatory split during a sleep study, but a female sleep technician (Lulit Gualu) was not disciplined for the same conduct. *See* Appellant's Opening Brief at 29 (citing to CP 202) The portion of the record he cites does not support his claim. It appears to be one page of a larger journal or website article. Thus, there is no evidence in the record that Ms. Gualu engaged in the same conduct or that ARMC's management was aware of such behavior.

Next, Mr. Wilkinson alleges that he was disciplined for leaving a sleep study patient on air pressure for twenty minutes, but females were not disciplined for the same conduct. *See* Appellant's Opening Brief at

29. There is no citation to any record evidence to support this new claim either. *Id.*

Finally, Mr. Wilkinson alleges that he was disciplined in June 2012 for not offering a full face mask to a sleep study patient, but a female sleep technician (Alisha) was not disciplined when she failed to offer any “documented” mask options beyond nasal. *See* Appellant’s Opening Brief at pg. 29 (citing to CP 190-92). There is no evidence to support this allegation. Mr. Wilkinson cites to three pages of medical records completed by him and bearing his initials “P.W.” (CP 190-92) There is no mention of Alisha or action by her during the June 14, 2012 sleep study, which was conducted by Mr. Wilkinson.⁷

f. Mr. Wilkinson’s personal notebook does not create material issues of fact.

Beyond his recitation of non-material and unsupported factual allegations, Mr. Wilkinson argues that the trial court erred in not allowing use of his notebook. *See* Appellant’s Opening Brief at pg. 34. Judge Schapira did not exclude the evidence in his notebook or prevent him from using the possible evidence contained therein. Rather, she questioned whether she would allow him simply to place his notebook into evidence

⁷ In his opening brief, Mr. Wilkinson claims that he was terminated a second time so Alisha could be re-hired. *See* Appellant’s Opening Brief at pg. 31. There is no citation to the record to support this allegation. *Id.*

with his mental impressions about other individual's subjective beliefs or motivations if this matter went before a jury. Further, she correctly instructed Mr. Wilkinson to come forward with any evidence of gender discrimination and not simply drop voluminous documentation on the court expecting it to scour the documents looking for some evidence to support his claims.

Most pertinently, Mr. Wilkinson's notebook contains *no evidence* – material or otherwise – of gender-based discrimination directed at or involving Mr. Wilkinson. (CP 9-34) In a notebook entry dated May 20, 2010, Mr. Wilkinson writes about a conversation he had with two female co-workers, Carrie Olsen and Lulit Gualu, who were discussing Anthony Dauley's poor performance on the day shift, but Mr. Wilkinson claimed that he heard Barbara Rooney was even worse and she was allowed to remain on the day shift. (CP 18) From this, Mr. Wilkinson simply speculates, "The women are cutting Barbara a break, but not Anthony. Could it be because he is male?" (CP 18) Later, in a notebook entry dated July 25, 2010, Mr. Wilkinson describes how a male sleep technician (David Ilagan) received preferential disciplinary treatment.⁸ (CP 19)

⁸ Throughout his brief, Mr. Wilkinson claims that he was denied *copies* of his personnel file and "financial records" until August 2011. *See* Appellant's Opening Brief at 10 and 16. Mr. Wilkinson's separate claim on this topic was considered and dismissed by the trial court. (CP 627

Stripped to its most basic form, Mr. Wilkinson's gender argument is based upon his perception that he was largely infallible as a sleep technician and, as such, his performance problems must have been due to gender discrimination because both Ms. Radcliff and Ms. Polansky are women. *See* Appellant's Opening Brief at pg. 28) Mr. Wilkinson's suppositions and speculations are not *material evidence* sufficient to prevent summary judgment on his gender-based claim of discrimination. He failed to offer any material evidence to prevent summary judgment on gender discrimination claim. The trial court's decision must be affirmed.

2. *The Same Actor Inference Supports Dismissal of Mr. Wilkinson's Gender Discrimination Claim*

The lack of any material evidence of gender-based discrimination and the baseless nature of the claim is further bolstered by the "same actor" inference. When someone is both hired and fired by the same

(¶2)) RCW 49.12.240 allows employees to "inspect" personnel files. It does not require employers to provide copies, which is what Mr. Wilkinson was demanding. Mr. Wilkinson's own evidence establishes that ARMC allowed him to inspect his personnel file and other records years ago, but he refused to do so because he insisted he was legally entitled to copies. (CP 113 and 117) After repeated threats by Mr. Wilkinson that he was going to sue everyone, ARMC mailed him a copy of his personnel file and payroll records on May 6, 2011. (CP 499 (¶¶3-4)) He acknowledges that he received them. *See* Appellant's Opening Brief at pg. 16. Nevertheless, Mr. Wilkinson made the same request again in June 2012. (CP 517 (¶12 – line12-15)) In response, ARMC mailed another copy of these records to Mr. Wilkinson's home address via certified mail, return receipt requested. *Id.* The envelope was later returned as being unclaimed. *Id.*

decision maker, there is a strong inference that he was *not* discharged because of any attribute the decision maker was aware of at the time of hiring. *Griffith v. Schnitzer Steel Indus.*, 128 Wn. App. 438, 454 (2005)(applying same actor inference where two of the same managers were involved in the decision to promote plaintiff and also to terminate him five years later). In this case, the female manager of the Sleep Center, Defendant Tracy Radcliff, both hired *and* terminated Mr. Wilkinson in October 2010 and June 2012. (CP 670 (¶6)) Indeed, Mr. Wilkinson acknowledges that Ms. Radcliff was responsible for both hiring and terminating personnel at ARMC's Sleep Center. *See* Appellant's Opening Brief at 30. If Ms. Radcliff truly discriminated against males as Mr. Wilkinson alleges, she would never have hired him or another other males in the first place.

C. The Trial Court Properly Granted Summary Judgment on Paul Wilkinson's WLAD Retaliation Claim

Mr. Wilkinson's retaliation claim is equally meritless. Under the WLAD, "[i]t is an unfair practice for any employer . . . to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter." RCW 49.60.210(1). To establish a prima facie case of retaliation, the plaintiff must establish that he "(1) was engaged in a statutorily protected activity; (2) was discharged or had some adverse action taken against [him]; and (3) retaliation was a substantial motive behind the adverse employment action." *Campbell v.*

State of Washington, 129 Wn. App. 10, 22, 118 P.3d 888 (2005) (citation omitted).

Assuming for the sake of argument that Mr. Wilkinson was engaged in statutorily protected activity at some point, he presented *no evidence* of retaliation being a motive - let alone a substantial one - behind his progressive discipline and eventual terminations. The record is replete with detailed disciplinary write ups and repeated complaints about Mr. Wilkinson's poor job performance and errors in judgment, including verbal and written complaints from both male doctors in the Sleep Center. By contrast, all Mr. Wilkinson presented were his subjective beliefs in the righteousness of his conduct. While he claims that everyone else is wrong (including Dr. Michael Chang and Dr. Daniel Clerc) and he knew better, this does not create a material factual dispute that all of discipline must have been for retaliatory reasons. Long-running and well-documented performance issues, and Mr. Wilkinson's refusal to correct them, are what led to his termination in October 2010 and again in June 2012, not any retaliatory animus.

D. The Trial Court Properly Granted Summary Judgment on Paul Wilkinson's National Labor Relations Act Allegations

Mr. Wilkinson's National Labor Relations Act (NLRA) claims were also properly dismissed as a matter of law. In his opening brief, Mr.

Wilkinson's writes, "Under the National Labor Relations Act, it is illegal to retaliate against a union employee for engaging in engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection." *See* Appellant's Brief at 37. Further, with no citation to the record, Mr. Wilkinson alleges that he "fought nearly every disciplinary action, with the union after April 2009." *See* Appellant's Opening Brief at 37. Thereafter, Mr. Wilkinson simply claims he was "held to a different standard than other employees and retaliated against once he enlists the union's aid." *See* Appellant's Opening Brief at 37. In primary support of this statement (again with no citation to the record), Mr. Wilkinson argues that he received only one disciplinary action "before he engaged the union in April, 2009. Fourteen disciplinary actions were leveled against Wilkinson after he engaged the union in April, 2009, till (sic) his termination in 2010." *See* Appellant's Opening Brief at 38.

As detailed below, Mr. Wilkinson's NLRA claims are factually unsupported and legally subject to the exclusive subject-matter jurisdiction of the National Labor Relations Board. Consequently, the trial court again properly granted summary judgment.

1. Mr. Wilkinson's NLRA Claims Were Properly Dismissed Because They Are Subject to the Exclusive Jurisdiction of the National Labor Relations Board

In relevant part, Section 7 of the NLRA provides, "Employees shall have the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" 29 U.S.C. § 157. Section 8(a)(1) of the NLRA states, "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. §158(a)(1). Further, Section 8(a)(3) of the NLRA provides that it is an unfair labor practice for an employer to discriminate against an employee for engaging in Section 7 activities. 29 U.S.C. §158(a)(3).

It is well settled that filing a grievance is protected by Section 7 of the NLRA and, further, that it is a violation of Section 8(a)(1) for an employer to retaliate against an employee for filing grievances or engaging in grievance-related activities. *See e.g., Allied Industrial Workers Region 8*, 265 NLRB 566, 566-67 (1982) (employer violated Section 8(a)(1) for retaliation against employee for filing a grievance); *Kennametal, Inc.*, 358 NLRB No. 108, 194 LRRM 1016, 1016 (2012)(employer violated Section 8(a)(1) for veiled threat to employees against their union's grievance activities); *Ad Art, Inc. v. NLRB*, 645 F.2d

669, 678 (9th Cir. 1980)(filing of grievances is protected by the NLRA and, further, it is a violation of the NLRA to discharge an employee who seeks, with the aid of his union, to grieve complaints).

Under the preemption doctrine announced by the U.S. Supreme Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the National Labor Relations Board (Board) has exclusive jurisdiction over claims that are involving conduct "prohibited" or "arguably prohibited" by Section 8 of the NLRA. *Id.* at 243-44. "The *Garmon* doctrine holds that the national interest in having a consistent body of labor law requires that the [Board] have exclusive jurisdiction to regulate activit[ies] that . . . arguably constitute unfair labor practices." *Adkins v. Mireles*, 526 F.3d 531, 539 (9th Cir. 2008). "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the [NLRA], or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield." *Garmon*, 359 U.S. at 244.

In *Sears Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180 (1978), the U.S. Supreme Court clarified that *Garmon* preemption applies when "the controversy presented to the state court is identical to . . . that which could have been, but was not, presented to the [NLRB]." *Id.* at 197. As the Court explained:

Congress evidently considered that centralized administration of specifically designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudication as are different rules of substantive law.

Id. at 192-93 (quoting *Garner v. Teamsters Local 776*, 346 U.S. 485 (1953)). As the Supreme Court stressed, the Board has “primary” and exclusive jurisdiction to handle such issues. *See Sears Roebuck & Co. v. San Diego District Council of Carpenters*, 436 U.S. at 188 n.12, 199-200.

There is no dispute that Mr. Wilkinson's NLRA claims in state court are subject to *Garmon* preemption. The allegations presented in state court are identical to the ones he actually presented to Region 19 of the Board. On March 24, 2011, he filed an unfair labor practice charge alleging that he was discipline and ultimately discharged "in retaliation of his Union and/or protected concerted activity."⁹ (CP 641 (¶2) and 645) Following an investigation and careful review, Region 19 dismissed the charge due to "insufficient evidence" to support his allegations, instead concluding that the evidence supported ARMC's contention that he was disciplined and terminated due to a series of performance issues. (CP 642

⁹ The NLRA contains an administrative process triggered by the filing of an unfair labor practice charge to investigate and, if necessary, remedy issues arising under Section 8 of the Act. *See* 29 U.S.C. § 160(b).

(¶3) and 647) Mr. Wilkinson had the right to seek review of this decision exclusively with the Office of General Counsel for the Board (29 C.F.R. § 102.19(a)), but he chose not to exercise such option as Judge Schapira correctly found and Mr. Wilkinson does not dispute. (CP 642 (¶3) and 647; VRP (August 9, 2013) at 47:16-20)

Applying *Garmon* preemption, Mr. Wilkinson cannot simply reassert or repackage the same NLRA claims in order to raise them in state court. As stated in *Garmon* and its progeny, Mr. Wilkinson's NLRA claims are subject to the Board's exclusive jurisdiction. Moreover, the NLRA contains no provision for review, either by the Board itself or courts, of the Regional Director's refusal to issue a complaint. See *Meekins v. Boire*, 320 F.2d 445 (5th Cir. 1963). It is well settled law that the NLRA delegates to the Board's Office of General Counsel "the unreviewable authority to determine whether a complaint shall be filed." *Turgeon v. FLRA*, 677 F.2d. 937 (D.C. Cir. 1982).

Mr. Wilkinson's NLRA claims were properly dismissed. Under the facts presented, all courts lacked jurisdiction to adjudicate these claims. The Board possessed exclusive jurisdiction to consider Mr. Wilkinson's NLRA claims. While he may have been disappointed with Region 19's determination and dismissal of his allegations, this fact does not confer jurisdiction on state courts to reconsider such determination or

the same NLRA allegations. His exclusive avenue to appeal the Regional Director's decision was to the Board of General Counsel, which he did not exercise even though Region 19 informed him of his appeal rights and the July 7, 2011 due date. (CP 642 (¶3) and 647)

2. Even Assuming They Could Be Asserted In State Court, Mr. Wilkinson's NLRA Claims Are Also Barred by the NLRA's Six-Month Statute of Limitations

Mr. Wilkinson's claims arising under the NLRA are subject to a six-month statute of limitations. *See* 29 U.S.C. § 160(b). On September 4, 2012, Plaintiff filed the first of his two lawsuits, which were later consolidated. Thus, even assuming *arguendo* he can directly pursue his NLRA claims in state court (which he cannot as argued above), all such allegations arising prior to March 4, 2012, including everything up to and including his first termination in October 2010, are time barred.

E. The Trial Court Properly Entered Judgment on Mr. Wilkinson's Implied Contract Claim

1. Mr. Wilkinson had no evidence of an implied contract

In his Assignment of Error No. 3, Mr. Wilkinson alleges that the Judge Schapira failed to enter judgment on his alleged state implied employment contract claim and requests that this claim be remanded to the trial court or judgment entered in his favor. He goes on to fail to point out Judge Schapira's rulings dismissing this claim. *See* Appellant's Opening

Brief at 39-40. Contrary to Mr. Wilkinson's allegations, the trial court did enter judgment on his implied employment contract claim. In her August 9, 2013 ruling, Judge Schapira concluded that Mr. Wilkinson "had no [implied] contract." (August 9, 2013 VRP at 51:3)

Mr. Wilkinson presented to evidence to the trial court of an implied contract in any case – even with opportunity to do so. Near the end the ending of her August 9, 2013 ruling, Judge Schapira specifically inquired if there was anything else within Mr. Wilkinson's complaint that was not discussed. (August 9, 2013 VRP at 54:16-18) Mr. Wilkinson responded, "I don't believe so, Your Honor." (*Id.* at 54:19) On appeal, Mr. Wilkinson simply alleges that he is able to rely upon other (unknown) things - without identifying them – merely vaguely claiming they involve subjects not covered by the collective bargaining agreement covering his employment position at ARMC. *See* Appellant's Opening Brief at pg. 39. With no citation to the record, Mr. Wilkinson simply asserts that the collective bargaining agreement "does not specify what policies and procedures the employer may institute or how an employer will conduct investigations, how it will discipline employees, or even if an employer is obligated to do any of those things." *See* Appellant's Opening Brief at pg. 39. Mr. Wilkinson is factually and legally wrong.

2. *The only existing contract was his collective bargaining agreement.*

It is undisputed that neither Mr. Wilkinson nor any other ARMC Sleep Technician had a separate, individual written employment contract. (CP 515 (¶4, 1.11-12) Rather, Mr. Wilkinson's position was covered by a series of successive collective bargaining agreements - the last one covering the period of 2011-2014. (CP 515 (¶4, 1.12-20) The collective bargaining agreement contains "just cause" disciplinary protections, plus a grievance and arbitration procedure. (CP 515 (¶4, 1.15-17) and 524 (Section 2.01)) Contrary to Mr. Wilkinson's unsupported argument, "just cause" does provide protections for employees and general standards for employers to follow in conducting disciplinary investigations and in deciding what level of discipline is appropriate. Indeed, this fundamental understanding is consistent with Mr. Wilkinson's own claims about the meaning of "just cause" in his brief. *See* Appellant's Opening Brief at 24.

Further, Mr. Wilkinson's state-law contract claim, even if such factually existed, is preempted by Section 301 of the Labor Management Relations Act (LMRA) grant federal courts jurisdiction over claims arising from collective bargaining agreements. *See* 29 U.S.C. §185(a). State courts have concurrent jurisdiction to hear such claims. *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 403 n.2 (1998). "Even in

state courts, however, federal law must be applied to such claims 'if the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement, the application of state law . . . is pre-empted and federal labor-law principles - necessarily uniform through the Nation - must be employed to resolve the dispute.'" *John Swinford v. Russ Dunmire Oldsmobile*, 82 Wn. App. 401 (1996) (quotations omitted).

As Division Two properly recognized in *Swinford*, "[t]he preemptive force of section 301 is so powerful as to displace entirely any state claim either based on a CBA or whose outcome depends on an analysis of the CBA." *Swinford*, 82 Wn. App. at 410. Relying upon Ninth Circuit precedent, Division Two concluded: "Because any independent agreement of employment concerning a *job position* covered by a CBA can be effective only as part of the CBA, the CBA controls." *Id.* at 410 (emphasis supplied) (citing *Chmiel v. Beverly Wilshire Hotel Co.*, 873 F.2d 1283, 1285-86 (9th Cir. 1989)). As the plaintiff in *Swinford* held a position covered by a collective bargaining agreement, Division Two concluded his implied state breach of contract claim was preempted and completely displaced by federal law. *Id.* at 411.

Similar to the plaintiff in *Swinford*, Mr. Wilkinson held an employment position covered by a collective bargaining agreement. As a result, even if he could properly articulate one, Mr. Wilkinson's implied

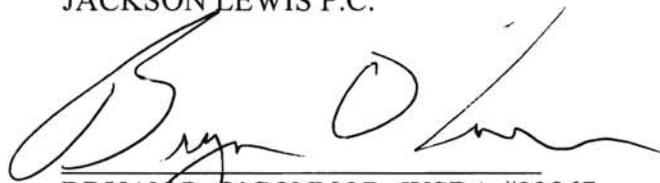
employment contract is completely preempted by federal law. Consequently, it was properly dismissed for this alternative reason.

VII. CONCLUSION

Based upon the foregoing and record evidence, Defendants were properly granted summary judgment on Mr. Wilkinson's claims for gender discrimination and retaliation, violation of the National Labor Relations Act and state implied employment contract. Defendants respectfully request this Court to affirm the trial court's entry of summary judgment on these remaining claims and dismiss this matter its entirety.

RESPECTFULLY SUBMITTED this 13th day of March, 2014.

JACKSON LEWIS P.C.



BRYAN P. O'CONNOR, WSBA #23867
CATHERINE MORISSET, WSBA #29682
Attorneys for Respondents

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day, I mailed a copy of the Brief for Respondents via regular first-class U.S. mail and FedEx, postage prepaid, to the following:

Paul Wilkinson
3041 Mills Park Drive, Apt. 44
Rancho Cordova, California 95670

DATED this 13th day of March, 2014.


Lara Flores