

NO. 74338-4

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**COURT OF APPEALS, DIVISION I**

**STATE OF WASHINGTON**

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RACHELLE HONEYCUTT & GABRIEL WESTERGREEN,

Appellants,

v.

PHILLIPS 66 COMPANY

and

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

FILED  
Jun 30, 2016  
Court of Appeals  
Division I  
State of Washington

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**DEPARTMENT OF LABOR & INDUSTRIES  
ANSWER TO BRIEF OF AMICI CURIAE**

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## I. INTRODUCTION

The Family Care Act (FCA) allows an employee to use his or her own available leave to care for a sick family member in certain circumstances. The FCA does not require an employer to provide a certain type or amount of leave to employees for family care; it requires only that an employee have a choice within the types of leave already available.

Here, amici argue that this Court should interpret the FCA to require employers to allow employees to use short-term disability leave for family care, even where the employer allows employees to use other types of paid leave for illness. The Legislature, however, limited access to disability leave to the situation where the employer does not allow the employee to use any type of paid leave for illness.

## II. ARGUMENT

### A. **The FCA Does Not Create a Right to Vacation or Any Particular Type of Paid Leave, nor Does It Limit Paid Leave to Its Stated Purpose**

The Department agrees with amici that the Legislature recognized the value of caregiving and the public interest in accommodating employees by providing reasonable leave from work for family reasons. Amici Br. 2. Amici's arguments, however, fail to recognize the other legislative purpose in the FCA—that of not mandating employers to provide a certain type of leave.

The FCA thus allows employers to define the scope of short-term disability leave and its other paid leave when it offers such leave. Under the statute for family care purposes, “[s]ick leave or other paid time off” means “time allowed . . . for illness, vacation, and personal holiday.” RCW 49.12.265(5).<sup>1</sup> It also extends to use of a disability plan if the employer does not compensate the employee through anything but a short-term disability plan when an employee has to take time off for illness: namely, “[i]f paid time is not allowed to an employee for illness.” *Id.*

“[T]ime allowed . . . to an employee for illness” includes any type of paid “[s]ick leave or other paid time off” as long as an employer allows an employee to use it for illness. RCW 49.12.265(5). This includes compensation from vacation leave or a personal day if the employer allows employees to use such time for illness.

Amici divert from the facts of this case by assuming that employees cannot use leave labeled “vacation leave” for any other purpose. Amici Br. 11. But here the Director’s order found that employees may use vacation leave for illness. CP 6-8, 17; Finding of Fact

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<sup>1</sup> Once leave qualifies for family leave purposes, the employer has no choice but to allow the employee to use leave if banked. RCW 49.12.270.

(FF) 5.4.<sup>2</sup> Amici's arguments also ignore that the Legislature shows no intent that an employer cannot provide multiple purposes for vacation leave. Just as an employer does not have to label leave as "sick leave" for use for illness, an employer's labeling of leave as "vacation leave" does not preclude the employer from allowing use of it for other purposes.

Likewise, the provisions of the collective bargaining agreement do not change the result here. Amici argue that employees should not have to use vacation leave for family care because Phillips 66 employees bargained for vacation leave for the purpose of "rest and recuperation." Amici Br. 11-12. This ignores the facts and the law here.

First, Phillips 66 did not limit use of vacation leave to "rest and recuperation." CP 7, 17; FF 5.2, 5.4. The purpose of the CBA clause was to prevent people from working on their vacation, not to preclude the use of vacation leave for other types of leave. CP 7, 17, 524; FF 5.2, 5.4.

Second, the relevant legal inquiry is whether the employer allowed its employees to use vacation leave for sick leave. RCW 49.12.265(5) ("time allowed . . . to an employee for illness"). The plain language of the

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<sup>2</sup> Honeycutt has not assigned error to this finding and it is a verity. App. Br. 2. See *Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 879, 288 P.3d 390 (2012) (failure to assign error to agency findings on summary judgment renders them verities on appeal). Likewise, the Court should disregard Honeycutt's belated attempt to argue in its reply brief that the employees may only use the leave for vacation. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court does not consider argument raised for the first time in a reply brief).

word “allow[]” in RCW 49.12.265(5) indicates there is employer discretion or permission given to the employee to use paid time in the event the employee is ill. *See Webster’s Third New International Dictionary* 58 (2002) (“allow” includes the meaning “permit”). Here, Phillips 66 allowed Honeycutt and Westergreen to take time off using their vacation leave. CP 7, 17, 18; FF 5.6, 5.7, 5.12, 5.14; Conclusion of Law 6.24. The FCA thus did not require their employer to allow access to the short-term disability plan.

By asserting that employers should not allow employees to use vacation leave for illness in the context of family care, amici do not give effect to the Legislature’s intent that employers do not have to provide a certain type of leave to its employees. They argue that under the Department’s interpretation, “employers could easily prevent employees from accessing non-ERISA-covered STD leave for family care by simply ‘allowing’ employees to use their vacation leave or personal holidays for family care . . . .” Amici Br. 10. Their argument assumes that all employers would want to allow employees to access vacation leave for

illness and family care. But some employers may have business needs for not allowing use of vacation leave for an employee's own illness.<sup>3</sup>

In any event, employers can tailor to their individual business needs by offering a certain type of leave that employees may use for multiple types of purposes. The Legislature had the opportunity to preclude this sort of decision, but instead made the policy choice to adapt to the existing type of leave, with its requirements offered by employers. It did this by weighing the competing societal interests: the need to promote family care balanced with the cost to industry.

This Court should uphold the Legislature's intent that employers may choose what type of benefit to provide and as such, allow multiple uses for leave.<sup>4</sup>

**B. Neither the Domestic Violence Leave Act nor the FCA Create a Right to a Certain Type of Leave**

The Court need not address amici's arguments regarding the impact of the Court's interpretation of the FCA on the Domestic Violence Leave Act (DVLA) raised for the first time in amici's brief. *State v. Jordan*, 160 Wn.2d 121, 128 n.5, 156 P.3d 893 (2007).

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<sup>3</sup> There are employers who do not allow employees to use vacation leave for illness because of advance vacation scheduling policies (it is a separate question how family care is handled for the vacation time under those circumstances). See Dep't Admin. P. ES.C.10, Q.9 at <http://lni.wa.gov/WorkplaceRights/files/policies/esc10.pdf>.

<sup>4</sup> Once an employer provides the leave, the employee may use it for family leave. RCW 49.12.270.

Both the DVLA and the FCA lack a requirement for employers to provide a certain type of leave to employees. *See* RCW 49.76.010(4); RCW 49.76.030. In enacting the DVLA, the Legislature considered the needs of domestic violence victims and their families and chose to define “sick leave and other paid time off” in the same way as the FCA, which provides the same limitations to employees covered by the DVLA as those seeking family care leave under the FCA. RCW 49.76.010(1); RCW 49.76.020(4). Under these acts, the Legislature allows the employee to use leave already provided by the employer.<sup>5</sup> The FCA and the DVLA do not create a right to leave. They are both limited by the reasonable leave employers provide to their employees.<sup>6</sup>

### III. CONCLUSION

Amici point to valid social and policy concerns about balancing the needs of employees to care for their families with the needs of the workplace. The Legislature, however, considered those concerns in enacting the FCA and its 2005 amendment and decided not to require

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<sup>5</sup> In addition to the “sick leave and other paid time off” employees can use under both acts, employees covered by DVLA also have job and pay protections if they take periods of paid or unpaid leave. RCW 49.76.050.

<sup>6</sup> Amici’s other arguments have no merit. Amici argues that Phillips 66 administers its short-term disability leave in the same manner as sick leave, and because it is like sick leave it should be treated the same. Amici Br. 13. The court should not consider an issue raised solely by amicus. *Jorden*, 160 Wn.2d at 128 n.5. Contrary to amici’s arguments, the employer did not merely label the plan a short-term disability plan; it was one. CP 14. Honeycutt does not contest the Director’s finding that Phillips 66 had a short-term disability plan. CP 7, 17; FF 5.3.

employers to provide certain types of leave. Under the plain language of RCW 49.12.265, Phillips 66 complied with the FCA by allowing employees to use paid leave in the form of vacation and personal holiday for illness and family care. It was therefore not required to allow its employees to access short-term disability leave. The Court should affirm.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of June 2016.

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CERTIFICATE OF  
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on June 29, 2016, she caused to be served the Department's Answer to Brief of Amici Curiae and this Certificate of Service in the below-described manner:

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