

FILED
February 11, 2016
Court of Appeals
Division I
State of Washington

Case No. 74338-4-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

RACHELLE HONEYCUTT & GABRIEL WESTERGREEN,

Petitioners-Appellants,

v.

PHILLIPS 66 COMPANY

and

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

APPELLANTS' OPENING BRIEF

Danielle Franco-Malone
WSBA No. 40979
Kathleen Phair Barnard
WSBA No. 17896
Schwerin Campbell Barnard Iglitzin & Lavitt LLP
18 West Mercer Street, Ste. 400
Seattle, WA 98119-3971
206-285-2828 (phone)
206-378-4132 (fax)
franco@workerlaw.com
barnard@workerlaw.com

Counsel for Petitioners-Appellants

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	2
III. STATEMENT OF THE CASE	3
A. Phillips 66's STD Plan	3
B. Westergreen And Honeycutt Were Denied Use Of STD Leave To Care For Sick Family Members.	4
C. Procedural History And The Department's Determinations Of Compliance	6
IV. ARGUMENT	8
A. Standard of Review	8
B. The Department Erred In Finding That Phillips 66 Complied With The Act Where The Company Failed To Make Short-Term Disability Leave Available To Employees For Family Care.	9
1. The Family Care Act requires companies to allow employees to use their own paid time off to care for sick family members	9
2. The Company's STD leave is "sick leave or other paid time off" available for employees to use for family leave under the Family Care Act.	10
a. The plain language of the Act makes clear that "sick leave or other paid time off" includes short-term disability plans whenever the employer does not allow paid time off "for illness."	10

b. The legislative history of the definition of “sick leave or other paid time off” also makes clear that Phillips 66’s disability plan is covered by the Act.	15
3. The Department’s Conclusion That Phillips 66 Complied With The Act By Allowing Employees To Use Vacation And Holiday Pay For Family Care Is Erroneous Because Employees Must Be Given Their Choice of Available “Sick Leave or Other Paid Time Off.”	17
C. The Department Erred In Failing To Find That Phillips 66’s STD Plan Is Not An ERISA Plan And Is Therefore Covered Under The Act.	19
V. CONCLUSION	23
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>Bassiri v. Xerox Corp.</i> , 463 F.3d 927 (9th Cir. 2006).....	20, 21
<i>Langley v. Diamler Chrysler Corp.</i> , 502 F.3d 475 (6th Cir. 2007).....	23
<i>McMahon v. Digital Equip. Corp.</i> , 162 F.3d 28 (1st Cir. 1998).....	22, 23
<i>Parker v. Cooper Tire & Rubber Co.</i> , 546 F. App'x 522 (5th Cir. 2014).....	22
State Cases	
<i>Am. Cont'l Ins. Co. v. Steen</i> , 151 Wn.2d 512, 91 P.3d 864 (2004).....	13
<i>Eubanks v. Brown</i> , 180 Wn.2d 590, 327 P.3d 635 (2014).....	11
<i>Medcalf v. Dep't of Licensing</i> , 133 Wn.2d 290, 944 P.2d 1014 (1997).....	12
<i>O.S.T. ex rel. G.T. v. BlueShield</i> , 181 Wn.2d 691, 335 P.3d 416 (2014).....	13
<i>Quadrant Corp. v. State Growth Mgmt. Hearings Bd.</i> , 154 Wn.2d 224, 110 P.3d 1132 (2005).....	8
<i>Tapper v. Emp't Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	8
State Statutes	
Washington Administrative Procedure Act.....	8
Washington Family Care Act.....	1, 2, 9-12, 15, 18

Regulations

29 C.F.R. § 2510.3-1.....20
WAC 296-130-030(1).....18
WAC 296-130-070.....7

Other Authorities

D.J. Simonetti, Opinion No. 94-40A, 1994 WL 694827.....21
Deborah Holland Tudor, Opinion No. 93-27A, 1993 WL 421012.....21
Department of Labor Opinion Letter 93-02A, 1993 WL 68525, *2
(Jan. 12, 1993).....20
Earl M. Pulse, Opinion No. 83-37A, 1983 WL 22522.....21
Family Care Rules Administrative Policy ES.C.10.....14, 18

.

I. INTRODUCTION

This case presents a straightforward question of statutory interpretation: what does it mean to provide employees with paid time off “for illness”? Employees in Washington State are guaranteed the right to use their own paid leave to care for sick family members under the Family Care Act (“the Act”). The Family Care Act requires employers to “allow an employee to use any or all of the employee’s choice of sick leave or other paid time” for family care leave, and goes on to include disability leave in the definition of “sick leave or other paid time off” whenever employees do not have paid time available “for illness.” RCW 49.12.270; RCW 49.12.265(5) (emphasis added). Employees at Phillips 66 do not have sick leave or paid time off “for illness”; the only leave designated by Phillips 66 for their use when they are ill is short-term disability (“STD”) leave. Thus, Phillips 66’s STD leave meets the Family Care Act’s definition of “sick leave or other paid time off,” and Phillips 66 should be required to make that leave available for family care.

Phillips 66 violated the Act when it denied employees Rachelle Honeycutt and Gabe Westergreen (“Petitioners” or “Appellants”) the right to use their STD leave to care for sick family members. Phillips 66 told Honeycutt and Westergreen that they were limited to using vacation or holiday pay, or taking leave without pay, despite the fact that each had

STD leave available to them for their own illness. Petitioners filed complaints alleging violations of the Family Care Act with the Department of Labor and Industries (“Department”), but the Department erroneously interpreted the Act’s definition of “sick leave or other paid time off” as not including Phillips 66’s STD leave, reasoning that access to vacation time qualifies as a paid sick leave benefit. That determination is erroneous because the Company does not provide paid time off “**for illness,**” and therefore under RCW 49.12. 265(5), its STD leave is included as “sick leave or other paid time off” that must be made available for family care purposes.

This Court should reverse the Department’s Final Order and direct it to issue Notices of Infraction against Phillips 66, because the Department’s Order finding that Phillips 66 complied with the law erroneously interpreted RCW 49.12.265(5) and is inconsistent with the Legislature’s mandate that disability leave be available to employees when the employer does not provide paid time of “for illness.”

II. ASSIGNMENTS OF ERROR¹

1. The Department erroneously interpreted RCW 49.12.265(5) when it failed to find that Phillips 66’s Short-Term Disability Plan constitutes “sick leave or other paid time off” and therefore must be

¹ In an administrative appeal, the Court of Appeals reviews the Department action rather than the trial court’s order. *See infra* at p. 8.

made available to employees for family care purposes.

2. The Department erred by failing to make a ruling that Phillips 66's Short-Term Disability Plan is not covered by ERISA and therefore not excluded from the reach of the Family Care Act.

III. STATEMENT OF THE CASE

A. Phillips 66's STD Plan

Phillips 66 does not provide employees with sick leave. It does, however, provide employees with paid short-term disability ("STD") leave, which provides employees with 100 percent or 60 percent (depending on the length of the employee's tenure) of pay for up to 52 weeks for the period of time when an employee is unable to work due to a non-occupational illness or injury. CP² 913 ¶5.3 (ALJ Decision); *See* CP 202 (Declaration of Counsel Danielle Franco-Malone ("Counsel Dec.") Ex. C, p. 4 (Short-Term Disability Plan Booklet)). Employees are automatically enrolled in the plan. *Id.* When employees are sick, they may use their STD benefits by notifying their supervisor within 24 hours of their absence. CP 203 (STD Booklet). The employee's supervisor or plant clerk codes STD-related absence into the timekeeping system when an employee is sick. CP 189 (Counsel Dec. Ex. B (Response to Appellants' Interrogatory No. 5)).

² The Clerk's Papers are cited as "CP" throughout.

In addition to STD leave, employees have vacation time available to them. Employees in certain classifications, including Westergreen's, must bid for vacation by seniority during the year prior to the year when the vacation is to be used. CP 255 at ¶8 (Westergreen Dec.).

B. Westergreen And Honeycutt Were Denied Use Of STD Leave To Care For Sick Family Members.

This case arose when both Honeycutt and Westergreen were denied the right to use their STD leave to care for sick family members. On January 28, 2013, Honeycutt requested leave in order to help assist her mother in recovering from total hip surgery. The request for leave was approved. CP 913 at ¶5.6 (ALJ Decision). However, Honeycutt was later informed that her only options were to use vacation pay or take leave without pay. *Id.* She took leave without pay. *Id.* at ¶5.7. Honeycutt had vacation leave available but considered that time to be “earmarked” for specific plans she had already made throughout the rest of 2013. *Id.* Honeycutt was on FMLA leave from February 19, 2013, through March 1, 2013, helping her mother recovery from hip surgery. CP 914 at ¶5.8 (ALJ Decision). After she returned, she made another request to tap into her STD benefits under the FCA to cover the leave but was again denied. *Id.* at ¶5.9. At the time of her requests, Honeycutt had 26 weeks of full pay and 26 weeks of 60 percent pay available through her STD benefit, *id.*,

and there is no dispute that she would have been allowed to use this leave for her own illness. CP 251, ¶8 (Honeycutt Dec.).

Westergreen requested time off under the FMLA to care for his wife while she was recovering from a medical procedure. CP 914 at ¶5.11 (ALJ Decision). That request was eventually granted. *Id.* at ¶5.12-13. On April 18, 2013, Westergreen asked Lori Waggoner, Phillips 66's Human Resources Business Representative, how to go about requesting pay for the period he would be caring for a family member, pursuant to the Family Care Act. *Id.* at ¶5.11. In response, Waggoner informed him that the Company's STD policy was covered by ERISA and therefore not subject to the Family Care Act. *Id.* As a result, he took leave without pay from May 3, 2013, to May 5, 2013. *Id.* at ¶5.14. Westergreen had approximately eight weeks of paid leave at 100 percent of his normal salary and an additional 44 weeks at 60 percent of his normal salary available to him at the time he made the request for leave. CP 256 at ¶11 (Westergreen Dec.). Westergreen had already bid for his vacation days for all of 2013, and already had plans slated for his available vacation time. CP 255 at ¶8 (*id.*); CP 914 at ¶5.14 (ALJ Decision).

On April 24, 2013, United Steelworkers Local 12-590, on behalf of Westergreen and Honeycutt, wrote to Phillips 66 demanding that it comply with the Family Care Act by allowing employees to access their

STD benefits in order to care for sick family members. CP 255 at ¶10 (Westergreen Dec.). On June 3, 2013, the Company responded, indicating that it believed its STD Plan was an ERISA plan and therefore not subject to the Family Care Act. CP 261 (*Id.* Ex. B). Notably, the Company did not raise the argument eventually relied upon by the Department, that the Company’s STD plan did not meet the definition of “sick leave or other paid time off” under the Act. *Id.*

C. Procedural History And The Department’s Determinations Of Compliance

Shortly after their requests to use STD leave were denied, Westergreen and Honeycutt filed complaints with the Department of Labor and Industries. CP 915, ¶¶5.15, 5.17 (ALJ Decision). Industrial Relations Agent Kelly Kane was assigned to investigate the complaints. CP 351 ¶¶3-4 (Kane Dec.). On July 10, 2013, Kane directed Phillips 66 to respond to the complaints, requesting its explanation for the denial of employees’ access to leave. CP 375-376 (7/10/13 Letter Kane to Phillips 66). Phillips 66 responded on July 31, 2013. CP 379-382 (7/31/13 Letter Blackstone to Kane). As with its June 3, 2013, letter to the Union, the Company notably failed to raise the argument ultimately relied upon by the Department (that its STD plan did not meet the Act’s definition of “sick leave or other paid time off”) and argued exclusively that its STD

plan was an ERISA plan excluded from the Act's scope. *Id.* On November 6, 2013, the Department issued Determinations of Compliance #01-14-PL and #02-14-PL, finding that the Company did not violate the Family Care Act because the Company's STD leave did not qualify as "sick leave or other paid time off" that must be made available for family care under the Act. CP 537-545 (L&I Determinations of Compliance).

Honeycutt and Westergreen appealed the Determinations of Compliance on November 20, 2013, pursuant to WAC 296-130-070. CP 870-873. The parties underwent discovery and submitted cross-motions for summary judgment to Administrative Law Judge Jane Canter Shelfer. On August 22, 2014, the ALJ entered judgment in favor of Phillips 66 and the Department, finding that Phillips 66 did not violate the Family Care Act. Honeycutt and Westergreen timely filed petitions for review with the Director of the Department on September 22, 2014. CP 1037-1049 (Petition for Administrative Review). On February 2, 2015, the Director issued a Final Order affirming and incorporating the ALJ's Initial Order. CP 902-904 (Director's Order). Like the Determinations of Compliance, the Department's Final Order was based on the erroneous conclusion that Phillips 66's STD leave was not included in the Family Care Act's definition of "sick leave or other paid time off."

Honeycutt and Westergreen timely filed a Petition for Review in

Whatcom County Superior Court on March 3, 2015. The trial court entered a final order on November 6, 2015, affirming the Department's decision. CP 1121-1128. Appellants timely filed a notice of appeal on December 1, 2015. CP 1118-1129.

IV. ARGUMENT

A. Standard Of Review

The Washington Administrative Procedure Act (“APA”), chapter 34.05 RCW, governs judicial review of a final decision by the Department. RCW 34.05.070. Although this is an appeal from the superior court affirming the Department's decision, an appellate court “sits in the same position as the superior court” and reviews the agency's decision, applying the APA standards “directly to the record before the agency.” *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The APA allows a reviewing court to reverse if, among other things, the agency's decision erroneously applied the law or is inconsistent with the agency's own rules. RCW 34.05.570(3). The burden of demonstrating the invalidity of the agency action is on the party asserting invalidity. RCW 35.05.070(1)(a). Issues of law are reviewed de novo. *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005). Courts “accord deference to an agency interpretation of the law where the agency has specialized expertise in

dealing with such issues, but [] are not bound by an agency's interpretation of a statute." *Id.* In this case, there are no disputed issues of fact and the Court is presented only with issues of law that must be reviewed de novo.

B. The Department Erred In Finding That Phillips 66 Complied With The Act Where The Company Failed To Make Short-Term Disability Leave Available To Employees For Family Care.

1. The Family Care Act requires companies to allow employees to use their own paid time off to care for sick family members.

The Washington Family Care Act, enacted in 1988, allows employees who receive paid time off work for illness, vacation, and personal holiday to use their leave to care for eligible family members. *See* RCW 49.12.265-70. The law was passed in recognition of "the changing nature of the workforce" and based on a determination that "it is in the public interest for employers to accommodate employees by providing reasonable leaves from work for family reasons." *See* Laws of 1988, ch. 236 § 1.

Under the Act, if an employee has "sick leave or other paid time off" available for their own use, employers must allow an employee to use his or her choice of leave to care for a child, spouse, parent, parent-in-law, or grandparent with a serious health or emergency condition. RCW 49.12.270. In 2002, the Legislature amended the Act to provide a

definition of “sick leave or other paid time off” that includes time allowed under an employer policy for illness, vacation, and personal holiday. Laws of 2002, ch. 243, § 2 (codified at RCW 49.12.265). In 2005, the Legislature again amended that definition to clarify that “If paid time is not allowed to an employee **for illness**, ‘sick leave or other paid time off’ also means time allowed under the terms of...employer policy...to an employee for disability under a plan, fund, program, or practice” that is not covered by ERISA. Laws of 2005, ch. 499, § 1, codified at RCW 49.12.265 (emphasis added).

2. The Company’s STD leave is “sick leave or other paid time off” available for employees to use for family leave under the Family Care Act.

a. The plain language of the Act makes clear that “sick leave or other paid time off” includes short-term disability plans whenever the employer does not allow paid time off “for illness.”

RCW 49.12.265(5) defines “sick leave or other paid time off” as follows:

‘Sick leave or other paid time off’ means time allowed under the terms of an appropriate state law, collective bargaining agreement, or employer policy, as applicable, to an employee **for illness, vacation, and personal holiday**. If paid time is not allowed to an employee **for illness**, ‘sick leave or other paid time off’ also means time allowed under the terms of an appropriate state law, collective bargaining agreement, or employer policy, as applicable, to an employee for disability under a plan, fund or program” not covered by ERISA.

Id. (emphasis added).

The Department erroneously accepted Phillips 66's argument that its disability plan does not constitute "sick leave or other paid time off" because it offers time off for vacation and personal holiday, and that employees may use this paid time when they are ill. CP 919 at ¶6.23 (ALJ Decision).³ This conclusion is contrary to the plain language of the statute, which describes time off "for illness" as something distinct from time off for vacation and personal holiday, and requires that disability leave be available for family care whenever time is not allowed for that specific purpose.

To discern and implement the Legislature's intent, Washington courts "begin by looking at the statute's plain language and ordinary meaning." *Eubanks v. Brown*, 180 Wn.2d 590, 597, 327 P.3d 635 (2014) (internal cites omitted). Where a statute's plain language is unambiguous, "we must give effect to that plain meaning as an expression of legislative intent." *Id.* (internal cites omitted).

³ The ALJ's Initial Order, adopted as the Director's Final Order, did not expressly address whether Phillips 66's STD leave is included in the definition of RCW 49.12.265(5). Instead, the ALJ concluded that: "'Sick leave or other paid time off' is defined to include time allowed under the terms of employer policy to an employee for illness, vacation, and personal holiday. The plain meaning of the phrase 'other paid time off,' therefore includes vacation and personal holidays." CP 919 at ¶6.23 (ALJ Decision). Thus, the ALJ mistakenly focused on the first sentence of RCW 49.12.265(5), the meaning of which was not in dispute, and never analyzed how the second sentence (setting forth when disability leave is included in the definition) applied.

RCW 49.12.265(5) unambiguously requires non-ERISA disability plans to be made available for family care whenever an employer does not provide leave “for illness.” Phillips 66 argues that employees *do* receive time “for illness” because they receive vacation and personal holiday that they may use when they are ill. This argument disregards the plain language of the statute, which makes disability leave available when time is not allowed “for illness.”

Phillips 66’s argument requires this Court to attach different meanings to the phrase “time allowed...for illness” in the first and second sentences of RCW 49.12.265(5). The first sentence refers to “time allowed...for illness” as something other than time allowed for “vacation” or “personal holiday.” The second sentence refers to time allowed “for illness,” specifically excluding “vacation” or “personal holiday.” Phillips 66’s argument requires the Court to conclude that the second sentence’s reference to time allowed “for illness” can include time allowed for “vacation” or “personal holiday,” but that would result in two different meanings of the phrase “time allowed...for illness.” “When the same word or words are used in different parts of the same statute, it is presumed that the words of the enactment are intended to have the same meaning.” *Medcalf v. Dep’t of Licensing*, 133 Wn.2d 290, 300–01, 944 P.2d 1014 (1997) (the word “refuse” has the same meaning in different

subsections of the same statute). The first sentence of the statute unambiguously defines “time allowed...for illness” as something other than time allowed for “vacation” or “personal holiday” and this same meaning must be given to the phrase in the second sentence.

Moreover, the Legislature would not have distinguished between paid time “for illness,” “vacation,” or “personal holiday” in the first sentence, and gone on to refer only to “paid time ... for illness” in the second if it did not intend for there to be a difference between the type of paid time referred to in each of those sentences. *Am. Cont’l Ins. Co. v. Steen*, 151 Wn.2d 512, 91 P.3d 864 (2004) (where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent that must be given effect). The statute clearly includes disability leave in the definition whenever an employer fails to provide “paid time...for illness,” even if it does provide vacation or personal holiday.

This Court should not defer to the Department’s contrary interpretation in this case, as courts “afford the agency interpretation deference only if the interpretation is not contrary to the plain language of the statute.” *O.S.T. ex rel. G.T. v. BlueShield*, 181 Wn.2d 691, 700, 335 P.3d 416, 421 (2014).

Moreover, the validity of the Department’s current interpretation is

undermined by its own duly adopted policies that comport with Appellants’ plain reading of the statute. Family Care Rules Administrative Policy ES.C.10,⁴ an official publication from the Department, reveals that Phillips 66’s STD leave *is* in fact “sick leave or other paid time off” that must be made available to employees for family care. That policy, which provides general information about the Department’s opinion on the Family Care Act, addresses the exact question presented here:

15. Are disability plans included under these rules? ...

If an employer provides both a **paid sick leave benefit** and a disability plan, the employer is not required to allow the employee access to the disability benefit for care of a sick family member. ...

Id. (emphasis added). Employees at Phillips 66 do not have a “paid sick leave benefit.” The only paid sick leave benefit they receive is paid short-term disability leave. Per the Department’s own guidance, Phillips 66’s STD leave is covered by the Family Care Act. That the Department’s final order conflicts with its own duly adopted policy highlights how untenable its legal interpretation of the Act was in this case.

The only sound reading of the definition is that the second sentence’s reference only to time “for illness” means that the Legislature

⁴ See Frequently Asked Questions About the Family Care Act Rules, *available at* <http://www.lni.wa.gov/WorkplaceRights/files/policies/esc10.pdf>.

intended to make disability leave available to employees who do not have paid time “for illness,” even though they may have vacation or personal holiday.

Employees at Phillips 66 do not receive paid time off “for illness.” Instead, they are expected to use short-term disability leave when they are ill. Their disability plan is therefore included in the statute’s definition of “sick leave or other paid time off,” notwithstanding the availability of vacation or holiday time.

b. The legislative history of the definition of “sick leave or other paid time off” also makes clear that Phillips 66’s disability plan is covered by the Act.

While resort to legislative history should not be necessary given that the statute clearly includes Phillips 66’s disability plan in the definition of “sick leave or other paid time off,” to the extent the Court finds any ambiguity in the statute, the legislative history resolves those doubts in favor of appellants’ interpretation.

The Family Care Act definition of “sick leave or other paid time off” in RCW 49.12.265(5) originated from an amendment offered on the House floor by Representative Conway and adopted by the House on April 14, 2005.⁵ The Official Print of that amendment sets forth

⁵ SSB 5850 AMH CL Rein 183 (2005), *available at* <http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Amendments/House/5850-S%20AMH%20CONW%20REIN%20183.pdf>

legislators' intended effect of the amendment: "Clarifies that, if an employee does not have **paid sick leave**, the employee may use disability leave not covered by [ERISA] to care for family members who have certain health conditions." *Id.* (emphasis added). This statement makes absolutely clear that the Legislature intended for the definition to be interpreted as Appellants urge above: when an employer does not provide paid sick leave (time allowed "**for illness**" – *not* vacation or holiday), employees may use their own disability leave for family care. The legislative intent behind the amendment was to incentivize employers to provide a paid sick leave benefit – not vacation or personal holiday. Phillips 66 has chosen not to provide employees with paid sick leave at all and instead has limited them to disability leave when they are ill. Thus, the facts here present *precisely* the scenario the Legislature had in mind when it modified the definition of "sick leave or other paid time off" to cover certain disability plans.⁶

⁶ The Department mistakenly concluded that the legislative intent supported the Company's position, citing to the statute's statement of intent to require "employers to accommodate employees by providing reasonable leaves from work for family reasons," and reasoning that "With the plural 'leaves' in that phrase, the Legislature clearly intended that employers could have available more than one type of leave for employees to use for family care needs." CP 919 at ¶6.22 (ALJ Decision). However, as explained above, Appellants have no quarrel with the notion that employers must make more than one type of leave available. The use of plural "leaves" simply refers to the fact that employees are not limited to a single type of leave for an absence for family care and, indeed, may choose which type of leave, or a combination of available leave types, to use. It was error for the ALJ, and subsequently the Department, to hold that the plural use of "leaves" somehow supported Phillips 66's position.

3. The Department’s Conclusion That Phillips 66 Complied With The Act By Allowing Employees To Use Vacation And Holiday Pay For Family Care Is Erroneous Because Employees Must Be Given Their Choice of Available “Sick Leave or Other Paid Time Off.”

Whether Phillips 66 violated the Family Care Act requires a two-step inquiry:

1) Does the employer have a paid sick leave benefit? If not, STD leave must be made available in the array of “sick leave or other paid time off.” As discussed above, Phillips 66 does not offer paid time off “for illness”; it only offers time off for vacation and personal holiday, and its STD leave is therefore considered “sick leave or other paid time off” available to employees for family care.

2) Did the employer deny employees their choice of leave from available “sick leave or other paid time off”? Westergreen and Honeycutt were denied their right to use their choice of available “sick leave or other paid time off.” The Department erred by holding that the availability of vacation or holiday time for family care meant that the Company complied with the Act. CP 919-920 at ¶¶6.24, 6.25 (ALJ Decision).

It is absolutely not correct that an employer complies with the Family Care Act merely by allowing *some* use of paid time for family care purposes, as the Department appears to have concluded. CP 920 at ¶6.24 (ALJ Decision) (“It is undisputed that Phillips 66 policies allow its

employees to use vacation and personal holidays for family care purposes. In this matter, both Honeycutt and Westergreen had available vacation hours that they could have used to care for their family members. They each made the personal choice, though, not to use their vacation hours...”). Instead, an employer violates the Act when it denies employees their *choice* of leave. RCW 49.12.270 (“an employer shall allow an employee to use any or all of the employee’s choice of sick leave or other paid time off [for family care]...”). For instance, an employer would violate the Act if it allowed an employee to use vacation time, but not sick time, to care for a sick family member. Employees must be allowed their choice of any of the leave the employee has available. *Id.*; WAC 296-130-030(1). *See also* Family Care Rules Administrative Policy ES.C.10, Q. 13 (an employer must allow employee access to the “same paid leave” they have available for their own illness to care for a sick family member).

The Department failed to recognize that Phillips 66 would violate the Act by denying employees the right to use their own STD leave *if* that leave is included in the definition of “sick leave or other paid time off,” and instead appears to have assumed that the inquiry ended with a determination that *some* form of leave (vacation, personal holiday) was available to Appellants. Phillips 66 violated the Act when it denied

Honeycutt and Westergreen access to their own STD leave for family care, denying them the right to choose what type of “sick leave or other paid time off” to use.

C. The Department Erred In Failing To Find That Phillips 66’s STD Plan Is Not An ERISA Plan And Is Therefore Covered Under The Act.

The Family Care Act only includes STD plans in the definition of “sick leave or other paid time off” to the extent such plans are not covered by the Employee Retirement Income Security Act of 1974 (“ERISA”). Having decided that Phillips 66 need not allow employees to access their STD leave for family care, the Department found it unnecessary to pass on whether the STD Plan was subject to the Act’s exclusion of STD plans that are covered by ERISA. CP 920 at n. 2 (ALJ Decision).

While this issue was not ruled upon by the Department below, the Court should nonetheless address it here rather than remanding this matter back to the Department for a determination. This case has already been fully litigated, there are no disputed facts that bear on whether the STD plan is an ERISA plan, and interests of judicial economy weigh in favor of disposing of all issues in this administrative appeal. The undisputed facts in the record below make clear that Phillips 66’s STD Plan is *not* covered by ERISA and is therefore subject to the Family Care Act, and the Department erred by failing to make a finding that the STD plan is not

covered by ERISA.

U.S. Department of Labor regulations set forth certain types of plans that are not covered by ERISA.⁷ 29 C.F.R. § 2510.3-1(a)(1). Among those are “payroll practices,” which are specifically excluded from ERISA’s definition of an “employee welfare benefit plan” or a “welfare plan.” 29 C.F.R. § 2510.3-1(b). “Payment of an employee’s normal compensation out of the employer’s general assets, on account of periods of time during which the employee is physically or mentally unable to work or is otherwise absent for medical reasons, such as pregnancy or psychiatric treatment,” is considered a payroll practice rather than an employee welfare benefit plan. 29 C.F.R. § 2510.3-1(b)(2). In short, a plan that pays employees their normal compensation⁸ out of the

⁷ As the Ninth Circuit has observed, ERISA’s definition of an employee welfare plan as “any plan, fund, or program...established or maintained by an employer” for the purpose of providing various benefits is “fairly tautological” and “The precise coverage of ERISA is not clearly set forth in the Act.” *Bassiri v. Xerox Corp.*, 463 F.3d 927, 933 (9th Cir. 2006). The statute leaves “ample room for the Department of Labor to provide a more helpful definition,” which it has done by clarifying that payroll practices are not considered employee welfare plans and are therefore exempt from the Act. *Id.*

⁸ Under Phillips 66’s STD Plan, employees receive either 100 percent or 60 percent of their normal compensation. The Department of Labor and the Ninth Circuit have explicitly found that payment of a portion of normal compensation is considered “normal compensation” for purposes of determining whether a benefit is a mere payroll practice. *See Bassiri*, 463 F.3d at 932 (finding that a company’s long-term disability plan that paid 60 percent of an employee’s regular salary constituted payment of “normal compensation” under the Department’s regulation and that the plan was thus a payroll practice rather than an ERISA plan.). *See also* Department of Labor Opinion Letter 93–02A, 1993 WL 68525, *2 (Jan. 12, 1993) (“It is the position of the Department that an employer’s payment of less than normal compensation from the employer’s general assets during periods in which an employee is absent for medical reasons may constitute a payroll practice that is not [a]n employee welfare benefit plan.”).

company's general assets for periods of time when an employee is unable to work is not covered under ERISA.

Several Advisory Opinions issued by the Department of Labor also make clear that short-term disability plans paid out of a company's general assets are payroll practices, like the one here, and are not employee welfare benefit plans. *See, e.g., Earl M. Pulse*, Opinion No. 83-37A, 1983 WL 22522 (E.R.I.S.A. 1983); *Deborah Holland Tudor*, Opinion No. 93-27A, 1993 WL 421012 (E.R.I.S.A. 1993); *D.J. Simonetti*, Opinion No. 94-40A, 1994 WL 694827 (E.R.I.S.A. 1994). The Ninth Circuit has reached the same result, finding that a disability plan was a payroll practice rather than an ERISA-regulated employee welfare plan, because the plan "more closely resembles salary: The payments come in regular paychecks, in an amount tied to the employee's salary and not to the variable performance of a fund." *Bassiri v. Xerox Corp.*, 463 F.3d 927, 932 (9th Cir. 2006).

It is undisputed that the STD benefits in this case are part of employees' normal compensation, paid through the Company's payroll department, and that payments are funded through the Company's general assets. Consequently, it is not an ERISA-regulated plan.

Moreover, the fact that Phillips 66's Long-Term Disability (LTD) Plan is regulated by ERISA does not change the fact that the STD Plan is not. The Company argued below that the two plans are integrated to form

one integrated Disability Plan that is regulated by ERISA, but this argument must fail. A company cannot “bootstrap” a non-ERISA Plan onto an ERISA Plan in order to create federal preemption of state laws like the Family Care Act. *See, e.g., McMahon v. Digital Equip. Corp*, 162 F.3d 28 (1st Cir. 1998); *Parker v. Cooper Tire & Rubber Co.*, 546 F. App’x 522, 528 (5th Cir. 2014). Instead, ERISA preemption of two parts of a purportedly integrated plan will only be found when both components are in fact funded from sources beyond the company’s general assets and otherwise meet the characteristics of an ERISA-regulated plan rather than a payroll practice. *McMahon*, 162 F.3d at 37.

In this case, the STD and LTD plans are segregated in all key respects, with the LTD Plan meeting the characteristics of an ERISA-regulated plan and the STD Plan meeting the characteristics of a payroll practice. While the Company’s LTD Plan is legitimately subject to ERISA, its STD Plan is separate and distinct from the LTD Plan in all material respects. *See* CP 208 (Counsel Dec. Ex. D (Other Information Booklet)). STD claims are processed by Phillips 66 directly, while LTD claims are processed by The Hartford or Metlife. CP 219 (Counsel Dec. Ex. F (IRS Schedule A)); CP 188; (Counsel Dec. Ex. B (Response to Appellants’ First Interrogatory No. 4)). Phillips 66 retains total discretion in the processing of STD claims, while determinations regarding eligibility

for LTD claims are made by a third- party administrator. CP 190, 191-192 (Counsel Dec. Ex. B (Response to Appellants’ Interrogatory No. 8, 11)). Employees must pay premiums to be enrolled in the LTD plan, while participation in the STD plan is cost-free and automatic. CP 208 (Counsel Dec. Ex. D (Other Information Booklet)). Most importantly, unlike the LTD Plan, the STD Plan is funded solely from the Company’s general assets. *Id.* (“STD Plan disability benefits are funded through the general assets of the company at no cost to eligible employees”).

Additionally, the fact that Phillips 66 has self-servingly characterized its STD Plan as part of an ERISA plan does not make it so. “An employer’s mere labeling of a plan [does not] determine[] whether a plan is an ERISA plan, since this also could lead to a form of “regulation shopping.” *McMahon*, 162 F.3d at 38. To hold otherwise would allow an employer to “convert an otherwise exempt benefit into one covered under ERISA.” *Langley v. Daimler Chrysler Corp.*, 502 F.3d 475, 481 (6th Cir. 2007).

V. CONCLUSION

The Department erroneously interpreted the Family Care Act to conclude that Phillips 66 acted lawfully in denying employees their choice of leave and prohibiting them from using their short-term disability leave

for family care. The plain language of the Act, the legislative history, and the Department's own interpretations all make clear that Phillips 66's STD plan is considered "sick leave or other paid time off" under the Act. Phillips 66 therefore violated the Act when it denied Appellants access to their STD leave, and the Department's Order finding to the contrary was in error. Appellants respectfully request that this Court reverse the Department's Order, enter a finding that Phillips 66 violated the Act when it denied Appellants access to their STD leave, and order the Department to cause Notices of Infraction to be issued against Phillips 66.

RESPECTFULLY SUBMITTED this 11th day of February, 2016.

s/Danielle Franco-Malone
Danielle Franco-Malone
WSBA No. 40979
s/Kathleen Phair Barnard
Kathleen Phair Barnard
WSBA No. 17896
Schwerin Campbell Barnard Iglitzin
& Lavitt LLP
18 West Mercer Street, Ste. 400
Seattle, WA 98119-3971
206-285-2828 (phone)
206-378-4132 (fax)
franco@workerlaw.com
barnard@workerlaw.com
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 2016, I caused the foregoing Appellants' Opening Brief to be e-filed with the Court of Appeals, Division I, and copies emailed, pursuant to the Court's General Order on RAP 18.5 Electronic Filing, to:

Robert A. Blackstone
Paula Simon
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
bobblackstone@dwt.com
PaulaSimon@dwt.com

Diana S. Cartwright
Assistant Attorney General
Office of the Attorney General
800 5th Ave, Ste. 2000
Seattle, WA 98104-3188
DianaS1@atg.wa.gov

s/Danielle Franco-Malone
Danielle Franco-Malone