NO. 352625

96696-6

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

MARIA ESPINDOLA,

Appellant,

v.

APPLE KING, INC.,

Respondent.

APPLE KING'S PETITION FOR DISCRETIONARY REVIEW

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1. IDENTITY OF PETITIONER

Petitioner is Defendant Apple King, Inc. (hereafter "Apple King").

2. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals' published opinion, Espindola v. Apple King (No. 35262-5-III), filed November 29, 2018. The Court of Appeals' decision found that Apple King's attendance policy did not account for an employee's right to take unforeseeable leave under the state and federal family medical leave acts, and as a result, the policy did not provide a legitimate basis for adverse employment action. In addition, the Court of Appeals' decision found that issues of fact precluded entry of summary judgment in regard to Ms. Espindola's claims of retaliation under 29 C.F.R. § 825.220(c). A copy of the opinion is attached to the Appendix. (Appendix 0001).

This case has broad policy implications and involves significant issues of law, meriting review. The Court of Appeals' decision implicates a significant issue for all employers in Washington and for the public at large.

3. ISSUES PRESENTED FOR REVIEW

A. Did the Court of Appeals lack jurisdiction to hear the appeal under RAP 2.2(c)?

B. Does the Court of Appeals' decision conflict with the FMLA regulations by decreasing the employee's notification requirements and increasing the employer's investigatory burden, contrary to the declared purpose of the FMLA/WFLA and the intent of RCW 49.78.410?

C. Does the Court of Appeals' decision conflict with the FMLA regulations permitting employers to require employees to comply with their usual and customary notice and procedural requirements?

D. Does the Court of Appeals' decision conflict with FMLA caselaw characterizing Ms. Espindola's claims as interference claims, contrary to the intent of RCW 49.78.410?

E. Does the Court of Appeals' decision conflict with FMLA caselaw regarding the standard for FMLA retaliation claims, contrary to the intent of RCW 49.78.410?

4. STATEMENT OF THE CASE

On July 18, 2014, a complaint was filed on behalf of Ms. Espindola in Yakima County District Court. The complaint alleged violations of (1) the Washington Law Against Discrimination RCW 49.60 (WLAD); (2) the Americans with Disabilities Act, 42 U.S.C § 12111 (ADA); (3) the Family Medical Leave Act 29 U.S.C. 2614 (FMLA); and (4) the Washington Family Leave Act, RCW 49.78 (WFLA). Specifically,

Ms. Espindola alleged that her employment with Apple King was terminated

> …in retaliation and discrimination for missing work due to her pregnancy and serious health condition during her pregnancy which violated the FMLA 29 U.S.C. § 2614, 29 C.F.R. 825.215 (a)…and RCW 49.78 [the WFLA].
>
> Complaint ¶4.6 (Appendix 0023).

Cross motions for summary judgment were heard by District Court Judge Kevin Roy on January 8, 2016. On February 19, 2016, Judge Roy entered an Order Granting Summary Judgment in favor of Defendant Apple King on Plaintiff's (1) WLAD claims, (2) ADA claims, and (3) interference claims under the FMLA. (Appendix 0030). Ms. Espindola has never appealed the February 19, 2016 Order Granting Summary Judgment.

On June 15, 2016, cross motions for summary judgment were again heard by Judge Roy, regarding Plaintiff's retaliation/discrimination claims under the FMLA. A letter decision was issued on June 22, 2016, and an Order was entered on September 16, 2016, granting Apple King's motion and dismissing Ms. Espindola's retaliation/discrimination claims under the FMLA. (Appendix 0034 & 0036).

On July 22, 2016, Ms. Espindola filed a Notice of Appeal to the Yakima County Superior Court. The notice only requested review of the

"Order granting Defendant's Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment as to FMLA + WSFLA retaliation + discrimination claims. Order date 6/22." (Appendix 0038). No appeal was filed on the other claims.

On May 1, 2017, Superior Court Judge Michael McCarthy upheld the decision of Judge Roy, and again granted summary judgment in favor of Apple King on the claim of retaliation/discrimination. (Appendix 0040). Ms. Espindola's abandoned interference claims were not reviewed by Judge McCarthy.

On August 4, 2017, Division III of the Court of Appeals granted discretionary review. The issue presented for review was, "Whether an employer violates the FMLA and/or WSFLA when he terminates an employee for using protected leave." *Appellant's Motion for Discretionary Review to Court of Appeals*, at 1 (Appendix 0041).

On November 29, 2018, the Court of Appeals reversed and remanded the matter. In reversing the order granting summary judgment, the Court: (1) held that there were issues of fact as to whether Ms. Espindola provided Apple King with sufficient notice to satisfy leave notice requirements, (2) held that Apple King could not rely upon its usual and customary notice policies under 29 C.F.R. §§ 825.302(d), .303(c), and .304 because its policy did not comport with FMLA/WFLA standard for

invoking leave, (3) characterized the issue presented as a retaliation/discrimination claim under the FMLA, (4) held that the *McDonnell Douglas* burden shifting analysis does not apply to retaliation/discrimination claims under the FMLA, and (5) rejected the Ninth Circuit's interpretation of claims based on 29 C.F.R. § 825.220(c) as retaliation/discrimination claims.

5. ARGUMENT

A. Standard for Review

A petition for review will be accepted by this Court:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

This Court should accept review because, as shown below, the Court of Appeals' ruling is contrary to law and involves issues of substantial public interest that should be determined by the Supreme Court.

The Court of Appeals' decision does not simply affect Apple King or this lawsuit. The decision implicates all employers in this State and calls into question the notice necessary for employees to apprise an employer of the need to take qualifying FMLA leave, as well as the adequacy of personnel policies upon which employers rely to maintain order in the workplace and create an understanding of the expectations of employees.

B. The Court of Appeals Lacked Jurisdiction to Hear Ms. Espindola's Appeal

The Washington State Constitution provides that the Court of Appeals may review Superior Court actions "as provided by statute or by rule authorized by statute." WA. Const. Art. IV, § 30(3). Pursuant to RCW 2.06.030, the administration and procedures of the Court of Appeals "shall be as provided by the rules of the supreme court." The Rules of Appellate Procedure do not authorize an appeal from a Superior Court review of a decision of a Court of Limited Jurisdiction unless the review proceeding was a trial de novo. RAP 2.2(c)

The language of RAP 2.2(c) is clear and unambiguous "…a party may appeal **only** if the review proceeding was a trial de novo…" RAP 2.2(c) [emphasis added]. Principles of statutory construction are applied to the interpretation of court rules. *Interstate Prop. Credit Assn. v. MacHugh*,

90 Wn.App. 650, 654 (1998). Language that is clear on its face does not require or permit any construction. *State v. McIntyre*, 92 Wn.2d 620, 622 (1979). One rule of statutory construction is "where there is no ambiguity in a statute, there is nothing for the court to interpret." *McIntyre*, 92 Wn.2d at 622; *State v. Ruth*, 78 Wn.2d 711, 714 (1971).

Here the court rule is clear, an appeal from a superior court review of a district court decision is limited and cannot be taken in this matter because it did not involve a trial de novo. RAP 2.2 does not merely indicate when an appeal is available as a matter of right from a court of limited jurisdiction, it indicates the circumstances in which an appeal is ever permitted from a court of limited jurisdiction (regardless of whether it is as a matter of right or discretionary). The Court of Appeals' decision to accept discretionary review was contrary to the law, and this is a matter of substantial public import because it affects the right to appeal for all litigants involved in Washington State District Court matters; the Supreme Court should accept review to clarify the scope of the Court of Appeals' jurisdiction to hear appeals pursuant to RAP 2.2.

C. The Court of Appeals' Decision Conflicts with FMLA Regulations by Decreasing the Employee's Notification Requirements and Increasing the Employer's Investigatory Burden, Contrary to the Declared Purpose of the FMLA/WFLA and the Intent of RCW 49.78.410

The Court of Appeals' decision alters the requirement for employees to provide adequate or sufficient notice to inform their employer of the need for FMLA/WFLA leave, particularly in the context of intermittent leave. The decision indicates that once an employee provides "notice that he or she 'may' have a condition that qualifies for FMLA/WFLA leave… the employer is obliged to either grant protected leave or investigate whether the employee's condition qualifies for leave." *Espindola v. Apple King*, 430 P.3d 663, 670 (2018) (internal citations omitted). However, the Court of Appeals does not account for the passage of time, or circumstances in which the employee was granted FMLA leave and returns to work without notice of a continuing need for treatment (as in this case).

When an employer has previously provided FMLA leave to an employee, the Court of Appeals' new standard would require the employer to assume (or investigate as to whether) each future absence is related to the prior leave. It is not clear when this obligation would expire, if ever.

The Court of Appeals' decision conflicts with FMLA regulations by placing a burden on employers which the regulations specifically place on employees. To provide notice that an unforeseeable absence may qualify for FMLA leave, the regulations require:

> An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply… Calling in "sick" without providing more information will not be considered sufficient notice…"
>
> 29 C.F.R. § 825.303(b)

Similarly 29 C.F.R. § 825.301(b) provides:

> … An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine whether the leave qualifies under the Act.

Particularly when an employee has not provided notice of a continuing need for treatment, employers are not required to assume that every absence is related to prior FMLA leave. At a minimum, the employee is required to explain the reasons for a particular absence before a "probable basis" for FMLA leave has been raised and the employer is considered on notice that a condition "may" qualify for FMLA/WFLA leave. 29 C.F.R. § 825.303(b); *See also Aubuchon v. Knauf Fiberglass, GmbH*, 359 F.3d 950, 953 (7th Cir. 2004) (Rejecting the position that a demand for leave may trigger a duty to determine whether the requested leave is covered by FMLA – "That is an extreme position… the consequence would be to place a substantial and largely wasted investigative burden on employers.").

Further, the Court of Appeals' decision does not comport with the declared purpose of the FMLA to provide "reasonable leave for medical

purposes" in a manner that "accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b); RCW 49.78.010. The decision removes an employee's obligation to provide *any* notice of the reason for taking subsequent leave, or the need for continuing treatment, as long as the employee had FMLA qualifying leave at some time in the past. The law does not require an employer to guess as to why an employee is absent on a particular occasion, particularly when the prior request did not indicate a continuing need for treatment. At a minimum, when the employee has a subsequent absence, the employee is required to tell the employer why the employee was absent before the employer's obligation to inquire further is triggered. 29 C.F.R. §§ 825.301(b); .303(b).

The Court of Appeals' decision conflicts with numerous Circuits' opinions indicating that notice is deficient where the employee fails to convey the reason for needing leave. *See Nicholson v. Pulte Homes Corp.*, 690 F.3d 819, 826 (7th Cir. 2012); *Sarnowski v. Air Brook Limo*, 510 F.3d 398, 402 (3rd Cir. 2007); *Brenneman v. Med. Central Health*, 366 F.3d 412, 423-24 (6th Cir. 2004); *Woods v. Daimler Chrysler*, 409 F.3d 984, 992-93 (8th Cir. 2005).

As a result, the Court of Appeals' decision has created confusion as to an employee's notice requirements under the FMLA/WFLA, particularly in the context of intermittent leave. The decision conflicts

with the federal regulations, contrary to the intent of RCW 49.78.410. This is an issue of substantial public interest, as it affects all employers and employees in Washington State, and should be resolved by the Supreme Court. RAP 13.4(b).

D. The Court of Appeals' Decision Conflicts with FMLA Regulations Permitting Employers to Require Employee's to Comply with Their Usual and Customary Notice and Procedural Requirements

The Court of Appeals decision alters the requirements for an employer to rely on internal notification procedures pursuant to 29 C.F.R. §§ 825.302(d), .303(c), and .304, by holding that an employer cannot deny an employee's right to protected leave based on noncompliance with the employer's policy, unless the policy also indicates a procedure for notification of unforeseeable leave under 29 C.F.R. § 825.303(a). *See Espindola*, 430 P.3d at 671. The Court's decision implies that an employer's policy must include *all* FMLA/WFLA standards for invoking leave before an employer may rely on the policy. *Id*. This is not an accurate reflection of the law, nor is it a workable standard.[1] The regulations do not require the employer's policy to specifically indicate a procedure for notification of unforeseeable leave, and there is no authority

[1] Under this new rule, the only way to assure compliance would be to include copies of all relevant statutes and regulations in an employer's policies.

requiring employers to notify employees of the right to take unforeseeable leave.

The regulations indicate that, "An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, *absent unusual circumstances*." *See* 29 C.F.R. § 825.302(d) (emphasis added). Even when the leave is not foreseeable, "an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, *absent unusual circumstances*." 29 C.F.R. § 825.303(c) (emphasis added). "Unusual circumstances would include situations such as when an employee is unable to comply with the employer's policy…" 29 C.F.R. § 302(d). But the regulations also specifically state that, "Where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied." 29 C.F.R. § 302(d).

In sum, an employer's policy is not nullified if it lacks a procedure for requesting unforeseeable leave. The regulations contemplate that unusual circumstances are an exception to the policy, to be evaluated separately from the policy. The record in this matter indicates that Apple King complied with these requirements, and did not enforce its attendance

policy when unusual circumstances justified Ms. Espindola's failure to comply with the policy. (Appendix 0056 - Dep. Aparicio 0060:9-24).

Further, there is no authority requiring employers to notify employees of the right to unforeseeable leave, nor the procedures for requesting foreseeable leave. By imputing this requirement into 29 C.F.R. §§ 825.302(d), .303(c), and .304, the Court of Appeals has added requirements not contained in the FMLA and called into question the policies of Washington State employers who relied on the posting requirements of 29 C.F.R. § 825.300 and the Department of Labor's prototype notice (WHD Publication 1420), to meet their notice requirements. A copy of the Department of Labor's notice is attached in the appendix. (Appendix 0062).

Accordingly, the Court of Appeals' decision conflicts with 29 C.F.R. §§ 825.302(d), .303(c), and .304, and added a requirement to personnel/absentee policies that is not required by the FMLA contrary to the intent of RCW 49.78.410, which has created confusion as to the adequacy of employers' policies in Washington State. This is an issue of substantial public interest, as it affects all employers and employees in Washington State, and should be resolved by the Supreme Court. RAP 13.4(b).

E. The Court of Appeals' Decision Conflicts with Federal Caselaw Characterizing Ms. Espindola's Claims as Interference Claims, Contrary to the Intent of RCW 49.78.410

Ms. Espindola has never appealed her interference claims, which were dismissed by Judge Roy in an Order on Summary Judgment dated February 19, 2016. Ms. Espindola only appealed the June 22, 2016 "Order granting Defendant's motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment as to FMLA + WSFLA retaliation + discrimination claims." (Appendix 0038). However, under the applicable Ninth Circuit caselaw, Appellant's Motion for Discretionary Review clearly indicates the purported issue on appeal is an interference claim. (Appendix 0041, at 1). The Court of Appeals' decision mischaracterized the issue on appeal as a retaliation/discrimination claim, and as a result, applied the incorrect standard to the claim. This creates confusion as to the status of the law in Washington State.

1. Retaliation vs. Interference Claims

The WFLA mirrors the provisions of the FMLA. In enacting the WFLA the Washington State legislature provided:

> This chapter must be construed to the extent possible in a manner that is consistent with similar provisions, if any, of the federal family and medical leave act of 1993 (Act Feb. 5, 1996 P.L. 103-3, 107 Stat. 6) and that gives consideration to the rules, precedents, and practices of the federal department of labor relevant to the federal act.

RCW 49.78.410

The courts have recognized two distinct theories for recovery on FMLA claims: (1) retaliation/discrimination and (2) interference. 29 C.F.R. § 825.220(b); *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1133 (9th Cir. 2003) (approving the USDOL interpretation); *see also Smith v. Diffee Ford-Lincoln-Mercury,* 298 F.3d 955, 960 (10th Cir. 2002); *Strickland v. Water Works and Sewer of Birmingham,* 239 F.3d 1199, 1206 N.9 (11th Cir. 2001); *Donald v. Sybra Inc.*, 607 F.3d 757 (6th Cir. 2012). It is important to characterize the claims accurately as the two theories have different analyses.

Retaliation and discrimination claims are based on 29 U.S.C. § 2615(a)(2) and (b), which make it unlawful for an employer to "discharge" or "discriminate against" an employee for "opposing any practice made unlawful by this subchapter," filing a charge, giving information, or testifying in any proceeding related to 29 U.S.C. § 2611 et. seq. Interference claims are based on 29 U.S.C. § 2615(a)(1) and RCW 49.78.300(1)(a). *See Xin Liu,* 347 F.3d at 1133.

An interference claim makes it unlawful for an employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise" any FMLA rights; in particular: the *substantive rights* to take up to twelve weeks of leave for qualifying reasons and the right to be resorted to the

employee's original or equivalent position. 29 U.S.C. § 2615(a)(1); RCW 49.78.300(1)(a); *Washburn v. Gymboree Retail Stores*, 2012 WL 3818540, *5 (USDC WD WA, 2012).

When an employee claims that her employer took negative action simply because she used FMLA, the claim is an interference claim under § 2615(a)(1). *Bachelder v. Am. W. Airlines*, 259 F.3d 1112, 1124 (9th Cir. 2001). "By their plain meaning, the anti-retaliation or anti-discrimination provisions [of 29 U.S.C. § 2615(a)(2) and (b)] do not cover visiting negative consequences on an employee simply because [she] has used FMLA leave." *Id*. Such an action is not a "retaliation" claim, it is an "interference" claim under 29 U.S.C. § 2515(a)(1). *Id*.; *see also Washburn*, 2012 WL 3818540; *accord: Xin Liu*, 347 F.3d at 1133 n.7.

2. The Court of Appeals Mischaracterized the Claim on Appeal

The claim addressed by the Court of Appeals is an interference claim, not a retaliation claim, and the Court should have dismissed the appeal because Ms. Espindola did not appeal her interference claims.

On appeal, the issue presented by Ms. Espindola was, "Whether an employer violates the FMLA and/or WSFLA when he terminates an employee for using protected leave." (Appendix 0042, at 1). As Apple King asserted in its Responsive Brief, this is an interference claim because

Ms. Espindola claims that Apple King discharged her for using FMLA leave. (Appendix 0087-0088); *see also Bachelder*, 259 F.3d at 1124-25; *Washburn*, 2012 WL 3818540; *Xin Liu*, 347 F.3d at 1133. However, Ms. Espindola did not appeal the dismissal of her interference claim from Yakima County District Court, the issue was never reviewed by Yakima County Superior Court, and the issue was not properly before the Court of Appeals.

Aside from the fact that the claim was not properly before the Court of Appeals, by mischaracterizing the claim on appeal, the Court of Appeals applied the incorrect test. As a result, the Court of Appeals' decision has created confusion as to the appropriate characterization for a claim asserting adverse action based on the use of FMLA leave, as well as the appropriate analysis for such claims. In addition, the decision conflicts with the federal courts, contrary to the intent of RCW 49.78.410. This is an issue of substantial public interest, as it affects all employers and employees in Washington State, and should be resolved by the Supreme Court. RAP 13.4(b).

F. The Court of Appeals' Decision Conflicts with Federal Caselaw Regarding the Standard for FMLA Retaliation Claims, Contrary to the Intent of RCW 49.78.410

The elements of an interference claim are: 1) the Plaintiff was eligible for FMLA's protection; 2) her employer was covered by FMLA's

protection; 3) she was entitled to leave under FMLA; 4) she provided sufficient notice of her intent to take leave; and 5) her employer denied her the FMLA benefits to which she was entitled. *Capps v. Mondelez Global, LLC*, 847 F.3d 144, 155 (3rd Cir. 2017). The fact that the Court of Appeals analyzed whether Ms. Espindola provided sufficient notice, also shows that Court improperly heard an appeal of Ms. Espindola's interference claim, which was mischaracterized on appeal as a retaliation/discrimination claim. *See Espindola*, 430 P.3d at 670-73 (analyzing the adequacy of Ms. Espindola's notice).

Again, when an employee claims that her employer took negative action simply because she used FMLA leave, the claim is an interference claim under § 2615(a)(1). *Bachelder*, 259 F.3d at 1124; *see also Washburn*, 2012 WL 3818540; *accord: Xin Liu*, 347 F.3d at 1133 n.7.

The elements of a retaliation claim are: 1) the Plaintiff engaged in protected activity; 2) she suffered an adverse employment action; and 3) there exists a causal connection between the protected activity and the adverse action. *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1176 (10th Cir. 2006); *Hunt v. Radides Healthcare Systems*, 277 F.3d 757, 768 (5th Cir. 2001); *Washington v. Ft. James Operating Co.*, 110 F.Supp.2d 1325, 1331 (D. Ore. 200). Unlike interference claims, once the Plaintiff establishes a prima facie case of retaliation, the *McDonnell*

Douglas, 441 U.S. 792 (1973) burden shifting analysis does apply. *Metzler*, 464 F.3d at 1170.

The Court of Appeals incorrectly indicated that the Ninth Circuit held in *Bachelder* that the *McDonnel Douglas* burden-shifting analysis does not apply to retaliation claims. In *Bachelder* the Ninth Circuit held that the nature of the claim at issue in that case was an interference claim, because the applicable regulation in that case (29 C.F.R. § 825.220(c)) related to interference claims. *Bachelder*, 259 F.3d at 1124-25. After holding that the nature of the claim was one of interference, the Ninth Circuit rejected America West's position that the *McDonnell Douglas* approach applied. *Id*. at 1125.[2] Accordingly, the Court of Appeals misstated the law.[3]

In addition, in a footnote, the Court of Appeals rejected the Ninth Circuit's characterization of claims based on 29 C.F.R. § 825.220(c) as

[2] The Court of Appeals' confusion may have resulted from the Ninth Circuit's reference to America West's argument that the court "should apply a *McDonnell Douglas*-style burden-of-production analysis… to determine whether the company illegally 'retaliated' against Bachelder…" *Bachelder*, 259 F.3d at 1125. However, this reference came after the Ninth Circuit had already clarified that the nature of the claim was an interference claim, and the court placed the word "retaliated" in quotes, likely to highlight America West's flawed reasoning (i.e. a retaliation claim was not at issue, thus the burden shifting analysis was not necessary to determine whether retaliation occurred).

[3] The Court of Appeals also indicated that "Apple King contends that the *McDonnel Douglas* analysis is inapplicable." *Espindola*, 430 P.3d at 670. This is inaccurate as Apple King's Responsive Brief indicated that the *McDonnell Douglas* analysis does apply in the retaliation context. (Appendix 12, at 18-19).

interference claims, opting to treat such claims as retaliation claims. *See Espindola*, 430 P.3d at 670 n. 4. It was unnecessary for the Court to interpret 29 C.F.R. § 825.220(c), as Ms. Espindola did not base her claims on the regulation. (Appendix 0023).

Further, rejecting the Ninth Circuit's interpretation will alter the analysis for all claims based on 29 C.F.R. § 825.220(c) in Washington State going forward. Failing to defer to the Ninth Circuit's FMLA precedent will lead to inconsistent application of the WFLA/FMLA in Washington State contrary to the legislature's intent in RCW 49.78.410. The Federal District Courts in Washington State are bound by Ninth Circuit precedent. Thus, although RCW 49.78.410 indicates that the WFLA is to be construed consistent with the FMLA, under the Court of Appeals' decision, if Ms. Espindola had filed her claims in the U.S. District Court (just four blocks from the Yakima County District Court), her claims would be subjected to a different construction. This undermines the intent of RCW 49.78.410.

Thus, the Court of Appeals' decision altered the test for retaliation claims under the FMLA, creating a conflict with the test applied by the federal courts contrary to the intent of RCW 49.78.410. The decision has created confusion as to the status of the law on an issue of substantial

public interest, which should be resolved by the Supreme Court. RAP 13.4(b).

6. CONCLUSION

For the reasons set out above, this Court should accept review of this case and grant Apple King's Petition for Review.

RESPECTFULLY SUBMITTED this 31st day of December, 2018.

s/*Gary E. Lofland, WSBA No. 12150*
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CERTIFICATE OF TRANSMITTAL

I certify under penalty of perjury under the laws of the state of Washington that I caused a copy of this document to be sent to the attorneys of record listed below as follows:

For Plaintiff: Favian Valencia 402 E. Yakima Ave., Ste. 730 Yakima, WA 98901	X via U.S. Mail ___ via fax X via e-mail ___ via hand delivery

DATED this 31 day of December, 2018, at Yakima, Washington.

Sandra Lepez, legal assistant
MEYER, FLUEGGE & TENNEY, P.S.

APPENDIX

FILED
NOVEMBER 29, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MARIA G. ESPINDOLA, Petitioner, v. APPLE KING, a limited liability company, Respondent.	)	No. 35262-5-III PUBLISHED OPINION

PENNELL, A.C.J. — Under the state and federal family medical leave acts, an employee who is incapacitated due to a serious medical condition, such as pregnancy, has the right to take protected leave from work. This right persists even when an episode of incapacitation is unforeseeable. Should an employee invoke protected leave, including unforeseeable protected leave, an employer cannot use the employee's actions as a negative factor in a subsequent employment decision. Doing so would constitute retaliation in violation of state and federal law.

While employed with Apple King, Maria Espindola discovered she was pregnant. Over the course of her pregnancy, Ms. Espindola experienced medical complications that caused her to miss work. Apple King was aware of Ms. Espindola's pregnancy and knew she had experienced some health problems. Nevertheless, Apple King used some of Ms. Espindola's work absences as negative factors in its ultimate decision to terminate employment. According to Apple King, Ms. Espindola was properly penalized because she failed to comply with the company's attendance policy, requiring at least one day's advance notice of all medical absences not involving hospitalization.

Apple King's reliance on its attendance policy is unavailing. Because Apple King's policy did not account for an employee's right to take unforeseeable protected leave, Ms. Espindola's failure to comply with the policy was not a legitimate basis for an adverse employment action. Given that Ms. Espindola has produced sufficient facts to demonstrate Apple King was on notice of her need for unforeseeable protected leave, Apple King is not entitled to summary judgment on Ms. Espindola's retaliation claim. This matter is therefore reversed.

FACTS

Apple King operates a fruit warehouse and packing facility in Yakima County, Washington. Maria Espindola worked for Apple King from August 2, 2007, to April 20,

2012. On May 1, 2011, Apple King implemented an attendance policy. Ms. Espindola received and signed a copy of the policy on August 14, 2011. The policy provides:

> As of May 1st, 2011, [Apple King] will put into practice a revised 24 point attendance scoring system. Each employee will have 24 points to use up between May 1st and the last day of April. You will start with 0 points and each attendance infraction will be counted in the following manner.
>
> NO POINTS will be counted for appts. with 24 hr. notice and proof of appt.
> 2 Points for not giving 24 hr. notice regardless of proof
> 2 Points for being Tardy
> 2 Points for leaving before end of shift without proof of appointment
> 3 Points per absence without proof of appointment (unless you use a Vacation Day)
> 12 Points for a NO CALL-NO SHOW
> No points will be counted for L&I appointments.
>
> If you reach the 24 point mark before the designated time, your employment with Apple King, LLC will be terminated. It is very important to understand that this will be the same for all Packing House employees. Every 1st of May each employee will start with 0 points once again only if they have managed not to reach the 24 point mark by the end of the last day of April. We strongly encourage you to set up your appointments on your day(s) off.

Clerk's Papers (CP) at 233.

According to an Apple King representative, employees were verbally notified that no points would be assessed against them for attending funerals or for emergencies such as hospitalizations or car accidents. Apple King's attendance policy did not reference the federal or state medical leave acts. Nor did the policy explain how Apple King would

account for leave that is protected under state or federal law. According to testimony from Apple King, the decision of whether to assess points for an employee absence is determined solely by the company's attendance policy.

In June or July 2011, Ms. Espindola discovered she was pregnant and reported her condition to her supervisor. Ms. Espindola was then absent from work on July 20, 21, and 22. She produced a doctor's note dated July 21 stating she had been prescribed two days' bed rest. Pursuant to Apple King's attendance policy, Ms. Espindola was assessed two points for her absence on July 20 because she only provided same-day notice of a medical appointment.

In August 2011, Ms. Espindola developed kidney stones. Ms. Espindola was hospitalized from August 21 to 25, 2011, and submitted a doctor's note stating she was not clear to return to work until after a follow-up appointment on August 31. The doctor's note did not provide the reason for Ms. Espindola's hospitalization, but according to Ms. Espindola she had been hospitalized due to the kidney stones. Apple King did not assess Ms. Espindola any attendance points for her hospitalization. It is unclear whether Apple King knew of the reason for Ms. Espindola's hospitalization, but the company did at least know that Ms. Espindola had been hospitalized during the course of her pregnancy.

In the months following her hospitalization, Ms. Espindola had numerous medical appointments. Apple King was advised of the appointments, and Ms. Espindola was not assessed any attendance points for those absences. Ms. Espindola was also permitted to take time to check her blood sugar at work after reporting that she had been diagnosed with gestational diabetes. Ms. Espindola's gestational diabetes did not cause her to miss work.

The last full month of Ms. Espindola's pregnancy was December 2011. During that month, Ms. Espindola left work early on three occasions. She was assessed two attendance points on each date. Also in December, Ms. Espindola missed a day of work and provided same-day notice of her absence. Ms. Espindola was assessed three points on this occasion. Ms. Espindola did not provide any doctors' notes explaining her December absences. However, Ms. Espindola has testified that she had told her supervisor she was in debilitating pain from kidney stones. According to Ms. Espindola, her supervisor provided permission to either leave work early or stay at home, as at times she was unable to work due to the pain. Apple King did not request medical documentation from Ms. Espindola to verify her explanations.

Ms. Espindola began her maternity leave on January 9, 2012, and returned to work on March 4. During her maternity leave, Ms. Espindola reportedly had her kidney stones

removed. Apple King did not assess Ms. Espindola any attendance points for her maternity leave.

Apple King fired Ms. Espindola on April 20, 2012, because she had exceeded the 24 points allowed annually by the company's attendance policy. The following chart illustrates Ms. Espindola's absences from work between May 1, 2011, and April 20, 2012, and the points she was assessed under the attendance policy:

Date	**Disposition**	**Reason for Absence and/or Disposition**	**Points**	**Record (CP)**
May 20, 2011	Unexcused	Left work early (late proof of appointment)	2	239-40
June 6, 2011	Excused	Dental appointment	0	252-53
June 10, 2011	Excused	Doctor appointment	0	252-53
July 8, 2011	Excused	Illness (bladder infection)	0	254-55
July 12, 2011	Excused	Doctor appointment	0	256-57
July 20, 2011	Unexcused	Left work early (same day notice of appointment)	2	38, 50, 258
July 21, 2011	Excused	Illness (note from doctor dated July 21 calls for 2 days bed rest)	0	38, 50, 258-59

Date	Disposition	Reason for Absence and/or Disposition	Points	Record (CP)
July 22, 2011	Excused	Illness (note from doctor dated July 21 calls for 2 days bed rest)	0	38, 50, 258-59
Aug. 1, 2011	Excused	Doctor appointment	0	260-61
Aug. 21 to 25, 2011	Excused	Hospitalization (note from doctor states she cannot return to work until after her follow-up appointment on Aug. 31)	0	262-63
Sept. 9, 2011	Excused	Doctor appointment (for imaging studies)	0	264-65
Sept. 16, 2011	Excused	Doctor appointment	0	266-67
Sept. 17, 2011	Excused	Left work early (illness)	0	266
Oct. 11, 2011	Excused	Doctor appointment	0	268-69
Oct. 12, 2011	Excused	Doctor appointment (for laboratory studies)	0	268, 270
Oct. 25, 2011	Unexcused	Doctor appointment (no excuse slip)	2	243
Nov. 10, 2011	Unexcused	Absent without advance notice (called same day)	3	134-35, 244, 756
Nov. 22, 2011	Excused	Doctor appointment	0	271
Dec. 9, 2011	Unexcused	Left work early	2	245
Dec. 19, 2011	Unexcused	Left work early	2	246
Dec. 20, 2011	Unexcused	Absent (called same day)	3	134-35, 246
Dec. 27, 2011	Excused	Doctor appointment	0	248
Dec. 30, 2011	Unexcused	Left work early	2	248

Date	Disposition	Reason for Absence and/or Disposition	Points	Record (CP)
Jan. 9 to Mar. 2, 2012	Excused	Maternity leave	0	38, 50, 59, 237, 306-07
Mar. 6, 2012	Excused	Doctor appointment (for her baby)	0	273-74
Mar. 23, 2012	Unexcused	Left work early due to suspension (work performance issue)	2	249, 278
Mar. 24, 2012	Unexcused	Suspension (work performance issue)	3	249, 278
Mar. 26, 2012	Unexcused	Suspension (work performance issue)	3	250, 278
Apr. 4, 2012	Excused	Doctor appointment (for her baby)	0	275-76
Apr. 17, 2012	Unexcused	Left work early	2	251
Ms. Espindola's employment was terminated on April 20, 2012, for accumulating 28 adverse attendance points				237, 251

In July 2014, Ms. Espindola filed suit in Yakima County District Court alleging Apple King had terminated her employment in a discriminatory and retaliatory manner because she missed work due to serious health conditions. In January 2016, the district court dismissed most of Ms. Espindola's claims on summary judgment, leaving only claims for unlawful discrimination and retaliation under the state and federal family medical leave acts. In a letter decision dated June 22, 2016, the district court also granted summary judgment to Apple King on the remaining claims. The superior court affirmed on appeal. Our court granted discretionary review pursuant to RAP 2.3(d)(3).

ANALYSIS

We review orders on summary judgment de novo. *Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014); *Mikolajczak v. Mann*, 1 Wn. App. 2d 493, 496, 406 P.3d 670 (2017). Under this standard, our court engages in the same inquiry as the trial court, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Lyons*, 181 Wn.2d at 783; *Mikolajczak*, 1 Wn. App. 2d at 496-97.

The federal and state medical leave acts

The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601-2654; 29 C.F.R. pt. 825 was implemented by the federal government to address "inadequate job security for employees who have serious health conditions that prevent them from working temporary periods." 29 U.S.C. § 2601(a)(4). The purposes of the FMLA include the need "to balance the demands of the workplace with the needs of families," and "to entitle employees to take reasonable leave for medical reasons" including "the birth . . . of a child." 29 U.S.C. § 2601(b)(1), (2). Similarly, Washington's Family Leave Act (WFLA), chapter 49.78 RCW, states it is "in the public interest to provide reasonable leave for medical reasons." RCW 49.78.010. The WFLA mirrors the FMLA and provides that courts are to interpret its provisions in a manner consistent with similar

provisions of the FMLA. RCW 49.78.410 (The WFLA "must be construed . . . consistent[ly] with similar provisions, if any, of the [FMLA] . . . and [provide] consideration to the rules, precedents, and practices of the federal department of labor relevant to the [FMLA]."); *Shelton v. Boeing Co.*, 702 Fed. App'x 567, 568 (9th Cir. 2017); *Crawford v. JP Morgan Chase NA*, 983 F. Supp. 2d 1264, 1269 (W.D. Wash. 2013).

The substantive right enjoyed by employees under the FMLA and WFLA is the ability to take 12 weeks' leave from work per year for protected health or family reasons without suffering negative employment consequences. 29 U.S.C. §§ 2612(a)(1), 2614(a); RCW 49.78.220, .280. To safeguard this right, both the FMLA and WFLA prohibit employers from discriminating and retaliating against employees who engage in protected conduct.[1] The laws recognize two types of prohibited discrimination and retaliation. First, 29 U.S.C. § 2615(a)(2) and RCW 49.78.300(1)(b), make it unlawful for an employer "to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by" the FMLA and WFLA. Second, 29 C.F.R.

[1] The medical leave statutes also prohibit employers from interfering with an employee's exercise of FMLA/WFLA rights. 29 U.S.C. § 2615(a)(1); RCW 49.78.300(1)(a). However, this case does not involve a straight interference claim, such as what might be asserted if an employer refused to grant an employee the substantive right to reinstatement after the employee exercised protected leave.

§ 825.220(c)[2] "prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights."[3]

The legal test applicable to Ms. Espindola's FMLA/ WFLA claim

Ms. Espindola's complaint alleged the second type of protection from retaliation, i.e., that she was terminated for exercising rights protected by the FMLA and WFLA. 29 C.F.R. § 825.220(c). Pursuant to this form of protection, "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring,

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[2] The statutory source for this regulation is an area of confusion and dispute. *Compare Arban v. W. Publ'g Corp.*, 345 F.3d 390, 401 (6th Cir. 2003) (retaliation for exercising FMLA rights arises under 29 U.S.C. § 2615(a)(2)), and *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 960 (10th Cir. 2002) (same), and *Loveland v. Emp'rs Mut. Cas. Co.*, 674 F.3d 806, 810-11 (8th Cir. 2012) (same) *with Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199, 1206 (11th Cir. 2001) (retaliation for exercising FMLA rights arises under 29 U.S.C. § 2615(a)(1) and (2) as well as 29 C.F.R. § 825.220(c)), and *King v. Preferred Technical Grp.*, 166 F.3d 887, 891 (7th Cir. 1999) (same), and *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 159-60 (1st Cir. 1998) (same), *and with Bachelder v. Am. W. Airlines*, 259 F.3d 1112 (9th Cir. 2001) (retaliation for exercising FMLA rights arises under 29 U.S.C. § 2615(a)(1) and 29 C.F.R. § 825.220(c)). We need not enter this fray. All courts agree that an employee can bring a retaliation claim based on the exercise of FMLA rights. Furthermore, the WFLA provides statutory authority for considering the terms of the federal implementing regulations. RCW 49.78.410.

[3] The WFLA specifically incorporates consideration of regulatory rules applicable to the FMLA. *Id.*

promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies." *Id.*

The parties dispute the test applicable to the type of retaliation claimed by Ms. Espindola. According to Ms. Espindola, we should apply a *McDonnell Douglas*-style burden shifting analysis, under which the employee must first make out a prima facie case of discrimination; then a production burden shifts to the employer to provide a legitimate, nondiscriminatory reason for its adverse employment action and, if this burden is met, the employee bears the ultimate burden of demonstrating that the employer's articulated reason for its action was a mere pretext for discrimination or retaliation. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Apple King contends that the *McDonnell Douglas* analysis is inapplicable. According to Apple King, we should follow the lead of the Ninth Circuit Court of Appeals and find the *McDonnell Douglas* burden-shifting scheme inapplicable to Ms. Espindola's claim. On this legal point, we agree with Apple King. However, as shall be discussed, the Ninth Circuit's test actually favors Ms. Espindola.

In *Bachelder v. America West Airlines*, the Ninth Circuit held that the *McDonnell Douglas* burden-shifting analysis does not apply to retaliation claims under 29 C.F.R. § 825.220(c). *Bachelder v. Am. W. Airlines*, 259 F.3d 1112, 1125 (9th Cir. 2001).

Because the United States Department of Labor's regulation prohibits the use of FMLA-protected leave as a "negative factor" in an employment decision, the Ninth Circuit recognized that an employee "need only prove by a preponderance of the evidence that her taking of FMLA-protected leave constituted a negative factor in the decision to terminate her. She can prove this claim, as one might any ordinary statutory claim, by using either direct or circumstantial evidence, or both. . . . No scheme shifting the burden of production back and forth is required." *Id.* at 1125.

Based on *Bachelder* and the plain language of 29 C.F.R. § 825.220(c), it is apparent that a plaintiff claiming retaliation for the exercise of FMLA/WFLA rights need only prove: (1) he or she was absent from work for reasons covered by the FMLA/WFLA, (2) he or she suffered an adverse employment decision, and (3) the covered leave was a negative factor in the employer's adverse employment decision.[4] Because establishing a regulatory retaliation claim does not require specific proof of discriminatory intent, there is no need to require the employer to proffer a

[4] Because *Bachelder* found 29 C.F.R. § 825.220(c) was adopted pursuant to 29 U.S.C. § 2615(a)(1) (that prohibits interference with the exercise of FMLA rights), it labeled a regulatory claim an "interference" claim. 259 F.3d at 1124-25. However, because the regulation itself employs the words "discriminating" and "retaliating," a regulatory claim is more appropriately labeled a discrimination or retaliation claim. *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 146 n.9 (3d Cir. 2004).

nondiscriminatory basis for its employment decision or for the employee to rebut the employer's proffer.

Application of the applicable standard to Ms. Espindola's claim

Here, it is undisputed Ms. Espindola was fired from Apple King because of absences from work. Thus, the viability of Ms. Espindola's retaliation claim rests on the first factor of the retaliation test—i.e., whether at least some of Ms. Espindola's absences were protected by the FMLA/WFLA. Proof of this factor depends on whether Ms. Espindola can establish that she provided Apple King with adequate notice of a request for FMLA/WFLA protected leave.

Legal requirements for adequate notice

To invoke the right to protected leave, an employee must provide adequate notice to his or her employer. 29 U.S.C. § 2612(e); RCW 49.78.250. The notice requirement is "not onerous." *Preddie v. Bartholomew Consol. Sch. Corp.*, 799 F.3d 806, 816 (7th Cir. 2015). "An employee giving notice of the need for FMLA[/WFLA] leave does not need to expressly assert rights under the Act or even mention the FMLA[/WFLA] to meet his or her obligation to provide notice." 29 C.F.R. § 825.301(b). Verbal notice is sufficient. 29 C.F.R. § 825.302(c). There are three general components of adequate FMLA/WFLA notice: content, timing, and compliance with employer policy. The failure to meet any of

these three components can result in denial of FMLA/WFLA leave and protections. But once an employee provides adequate notice, the employer must take responsive action.

With respect to content, an employee's notice must refer to a condition that qualifies for leave under the FMLA/WFLA. Protected leave does not apply to minor illnesses; merely calling in sick is insufficient to trigger an employee's right to protected leave. 29 C.F.R. § 825.303(b). However, pregnancy-related incapacitation is an explicitly covered condition. 29 C.F.R. § 825.115(b); RCW 49.78.020(16)(a)(ii)(B). Also covered is incapacitation due to a serious medical condition that "makes the employee unable to perform the functions" of the employee's job. 29 U.S.C. § 2612(a)(1)(D); 29 C.F.R. § 112(a)(4); RCW 49.78.220(1)(d).

An employee's responsibility with respect to timing of notice is somewhat flexible. In general, an employee must provide 30 days' advance notice of planned leave. 29 U.S.C. § 2612(e); 29 C.F.R. § 825.302(a); RCW 49.78.250. However, the FMLA/WFLA recognize that 30 days advance notice is not always possible. In such circumstances, an employee need only provide notice as soon as practicable. 29 U.S.C. § 2612(e); 29 C.F.R. § 825.302(a); RCW 49.78.250. When medical or family leave is unforeseeable, no advance notice is required. 29 C.F.R. §§ 825.303(a), .305(b); *Lichtenstein v. Univ. of Pittsburg*, 691 F.3d 294, 301 (3d Cir. 2012); *Kauffman v. Fed.*

Express Corp., 426 F.3d 880, 885-86 (7th Cir. 2005).

When it comes to certain types of conditions, an employee's obligations with respect to content and timing of notice are intertwined. Maternity leave, for example, is something generally governed by a 30-day notice requirement. RCW 49.78.250(1).[5] But during the course of a woman's pregnancy, the need for protected leave will sometimes be unpredictable. *See* 29 C.F.R. § 825.120(a)(4). For example, an expectant mother may find herself surprisingly debilitated by morning sickness. In such circumstances, the FMLA/WFLA recognize the right to take unforeseeable protected leave, even when such leave does not involve hospitalization or other direct medical supervision. 29 C.F.R. §§ 825.115(f), .120(a)(4).

An employee's notice obligations generally include compliance with an employer's internal notification procedures. 29 C.F.R. §§ 825.302(d), .303(c), .304. For example, an employer may require written notice or that notice be directed to a specific individual. If an employee fails to satisfy an employer's internal notification procedures, FMLA/WFLA leave may be delayed or denied, regardless of whether the employee might actually qualify for leave. 29 C.F.R. § 825.303(c).

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[5] Thirty days' advance notice is not required if childbirth is unexpected. In such circumstances, the employee need only provide "such notice as is practicable." RCW 49.78.250(1).

But there is an important limitation to an employer's ability to deny FMLA/WFLA leave based on noncompliance with company policy. When an employer's policy does not comport with FMLA/WFLA standards for invoking leave (such as the standards for invoking unforeseeable leave), an employee's right to protected leave cannot be denied based simply on noncompliance with the employer's policy. *See* 29 C.F.R. § 825.304(e) ("[T]he employer may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances, as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave and the rules are not inconsistent with § 825.303(a) [allowing for unforeseeable leave]."); *see also* 29 C.F.R. §§ 825.302(d), .303(c), .304(a). In circumstances where the employer's policy is insufficient, an employee's notice obligations are governed solely by the terms of the FMLA/WFLA.

Once an employee has provided appropriately timed notice that he or she "may" have a condition that qualifies for FMLA/WFLA leave, the burden falls on the employer to take action. 29 C.F.R. § 825.303(b); *Lichtenstein*, 691 F.3d at 303-04. The employee's notice need not provide definitive proof of the right to take protected leave. All that needs to be raised is "probable basis" to believe the employee is entitled to FMLA/WFLA leave. *Aubuchon v. Knauf Fiberglass, GmbH*, 359 F.3d 950, 953 (7th Cir.

2004). Once this is satisfied, the employer is obliged to either grant protected leave or investigate whether the employee's condition qualifies for leave. 29 C.F.R. §§ 825.301(a), .302(c); *Lichtenstein*, 691 F.3d at 303; *Burnett v. LFW Inc.*, 472 F.3d 471, 480 (7th Cir. 2006).

Application of the adequate notice requirement to Ms. Espindola

Whether Ms. Espindola provided Apple King adequate notice of the need for FMLA/WFLA leave is a question of fact. *Lichtenstein*, 691 F.3d at 303. Thus, Apple King is entitled to summary judgment only if, viewing the record in the light most favorable to Ms. Espindola, no reasonable fact finder could rule in her favor.

It is undisputed that Ms. Espindola notified Apple King of her pregnancy in June or July 2011. Given that pregnancy is the type of condition that can reasonably create the need for unforeseeable protected leave, Ms. Espindola's burden of providing additional notice of incapacitation during the course of her pregnancy was at least somewhat reduced. *See* 29 C.F.R. § 825.302(c) (notice that "employee is pregnant" may be sufficient); *Aubuchon*, 359 F.3d at 953 (note that pregnant woman was having complications would be sufficient, "despite the absence of details"). In like manner, once it was aware of Ms. Espindola's pregnancy, the expectation that Apple King would be

alert to Ms. Espindola's need for unexpected protected leave was at least somewhat enhanced.

The record on appeal suggests at least two pertinent time periods when Ms. Espindola provided adequate notice of the need for protected leave from work.[6] The first time period was late July 2011. On July 20, Ms. Espindola became ill and left work early. She subsequently produced a doctor's note dated July 21 stating she had been prescribed two days' bed rest. A reasonable inference from these facts is that Ms. Espindola's absence on July 20 was related to the need for bed rest prescribed on July 21 and 22. Given that bed rest is a common prescription for pregnancy-related complications, a fact finder could determine that Ms. Espindola's notice was sufficient to reasonably apprise Apple King of the need for protected leave.

The second relevant time period was December 2011. This was the last full month of Ms. Espindola's pregnancy. According to Ms. Espindola, she told her supervisor she suffered from episodic debilitating pain due to kidney stones that required her to stay home from work or leave early. Ms. Espindola's attendance records confirm that in December 2011, Ms. Espindola left work early on three occasions and provided same-day

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[6] It is undisputed that there were other periods for which Ms. Espindola provided adequate notice. However, because Apple King excused those absences, they are not relevant to our inquiry.

notice of an absence on one occasion. A reasonable fact finder could infer that the absences in December were due to the episodic and unforeseeable kidney pain described by Ms. Espindola. Particularly given Apple King's knowledge that Ms. Espindola was having a difficult pregnancy,[7] a reasonable fact finder could conclude that Ms. Espindola's notice of debilitating kidney stone pain was sufficient to place Apple King on notice that Ms. Espindola was invoking the right to FMLA/WFLA protected leave. *See Byrne v. Avon Prods.*, 328 F.3d 379, 381 (7th Cir. 2003) (An employee's unusual behavior, alone, can provide notice that "something had gone medically wrong.").[8]

Although the record supports a finding that Ms. Espindola provided sufficient notice of the need for FMLA/WFLA leave in July and December of 2011, Apple King did not provide protected leave or conduct an investigation. Instead, Apple King used Ms. Espindola's absences on July 20 and December 9, 19, 20, and 30 as negative factors in its ultimate decision to terminate Ms. Espindola's employment. Apple King assessed Ms. Espindola a total of 11 adverse attendance points for the aforementioned absences, causing her to exceed the maximum number of attendance points per year by 5 points.

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[7] Not only had Ms. Espindola been placed on bed rest during her pregnancy, she was also hospitalized as a result of kidney stones and diagnosed with gestational diabetes.

[8] Ms. Espindola also had unexcused absences in October and November. We do not assess whether those absences were governed by the same analysis as the December absences as it is unnecessary for purposes of this appeal.

Apple King claims it was justified in assessing Ms. Espindola points for the foregoing absences because Ms. Espindola's leave requests did not comport with company policy. Had Apple King's policy provided Ms. Espindola an avenue for claiming unforeseeable FMLA/WFLA leave, this defense would almost certainly prevail. 29 C.F.R. §§ 825.302(d), .303(c). But Apple King's attendance policy does not account for the FMLA/WFLA. The policy provides no explanation of how an employee would be expected to claim unforeseeable protected leave not resulting in hospitalization. Because Apple King's policy was not compliant with the FMLA/WFLA, the policy provides no defense to Ms. Espindola's retaliation claim.

Ms. Espindola has made a sufficient claim for retaliation under 29 C.F.R. § 825.220(c). As a consequence, Apple King is not entitled to summary judgment. The trial court's ruling to the contrary is reversed.

ATTORNEY FEES

Ms. Espindola requests attorney fees and costs pursuant to RAP 18.1, 29 U.S.C. § 2617(a)(3), 29 C.F.R. § 825.400(c), and RCW 49.48.030. This request is premature. Because Ms. Espindola has not yet succeeded on her claim against Apple King, we are not in a position to award attorney fees. If, after remand, Ms. Espindola prevails on her FMLA/WFLA claim, she will qualify as a prevailing party and may be awarded attorney

fees, including fees generated during this appeal, under 29 U.S.C. § 2617(a)(3), 29 C.F.R. § 825.400(c), and RCW 49.48.030.

CONCLUSION

The order on summary judgment is reversed. This matter is remanded for trial or further proceedings consistent with the terms of this opinion.

Pennell, A.C.J.

WE CONCUR:

Korsmo, J.

Fearing, J.

FILED
JUL 16 2014
YAKIMA COUNTY
DISTRICT COURT

YAKIMA COUNTY DISTRICT COURT

MARIA G. ESPINDOLA, Plaintiff, vs. APPLE KING, a limited liability company, Defendants.	NO. 144197 COMPLAINT FOR DAMAGES AND JURY DEMAND

Plaintiff, Maria G. Espindola, by way of complaint against Defendant, Apple King, alleges as follows:

I. PARTIES

1.1 Plaintiff, Maria G. Espindola (hereinafter "Ms. Espindola") is and at all times relevant hereto was a resident of Yakima County, Washington.

1.2 Apple King (hereinafter "Defendant") is and, at all times relevant hereto, was a Washington Limited Liability Company doing business and residing in Yakima County, Washington.

II. JURISDICTION AND VENUE

2.1 This Court has subject matter jurisdiction over this cause pursuant Washington State Law Against Discrimination (WLAD) RCW 49.60.030(2) and Washington State Family Leave Act (WSFLA) RCW 49.78.330.

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2.2 This Court also has jurisdiction over the federal claims under the Family Medical leave Act ("FMLA") 29 U.S.C. § 2615 and the American Disability Act ("ADA") 42 USC § 2000e-5 pursuant to RCW 3.66.010.

2.3 Venue is proper in this Court because this is the county seat and Defendants reside, do business, and have a business office in Yakima County.

III. FACTS GIVING RISE TO LIABILITY

3.1 Ms. Espindola was employed by Defendant from August 2, 2007 to April 20, 2012, and worked in various capacities, the last of her positions being as a packer.

3.2 During the year prior to April 2012, Ms. Espindola had worked at least 1,250 hours for the Defendant.

3.3 The Defendant is engaged in commerce and employs fifty (50) or more employees within 75 miles of Ms. Espindola's worksite, and has done so for at least 20 or more calendar workweeks in the current or preceding calendar year.

3.4 Ms. Espindola's immediate supervisors to whom she was expected to report to were German and Armida.

3.5 Defendant has an attendance policy that requires workers to give 24-hour notice and proof of appointments, otherwise points are deducted. If a worker reaches 24 points in the span of a year, the worker is terminated. A worker's points are reset to zero each year on the first of May.

3.6 Ms. Espindola had excellent attendance while working for Defendant. In 2011, Ms. Espindola became pregnant and had to miss work on various occasions due to illness and doctor's appointments. On all instances, Ms. Espindola would notify her

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Yakima W...
Telephone: (800)...

supervisors, call in or provide doctor's notes.

3.7 On May 20, 2011, Ms. Espindola missed work due to a medical appointment and she provided the Defendant with a doctor's note as soon as it became practicable. On this instance, two (2) points were deducted.

3.8 On July 20, 2011, Ms. Espindola became ill and gave the Defendant notice of her appointment the same day. According to the note Ms. Espindola provided from Memorial Hospital, Ms. Espindola was "ill [and] must be on bed rest for 2 days." Despite the doctor's note and the severity of her condition, two (2) points were deducted for July 20, 2011.

3.9 On or about August 21, 2011, Ms. Espindola was hospitalized due to kidney stones during her pregnancy. She provided the Defendant with medical documentation.

3.10 As Ms. Espindola's due date approached, she missed work or left early due to medical appointments and because of the ailments associated with being about nine months pregnant. Even though Ms. Espindola notified the Defendant, a total of nine (9) points were deducted in December 2011 alone, the month before giving birth.

3.11 Ms. Espindola gave birth to her baby on January 12, 2012. She had approved maternity leave from January 9, 2012 to April 2, 2012.

3.12 On or about March 5, 2012, almost a month before her approved maternity leave ran out, Ms. Espindola went back to work after calling German to inform him that, even though she had appointments coming up, she felt ready to go back to work. German said she could return.

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3.13 On March 23, 2012, Ms. Espindola was disciplined and suspended for allegedly allowing bad apples to go past the line that she shared with other employees.

3.14 The Defendant deducted a total of eight (8) points during Ms. Espindola's suspension.

3.15 In years prior to her pregnancy, Ms. Espindola's attendance was outstanding.

3.16 Ms. Espindola was called into the office on April 21, 2012 by German and Armida. Armida was going in and out of their meeting while German informed Ms. Espindola that she was being terminated.

3.17 The reason given to Ms. Espindola for her termination was that she had too many unexcused absences.

3.18 When Ms. Espindola tried to explain and ask for a second chance, she was told that being pregnant was not a sickness and was no excuse for missing work.

3.19 German maintained his position that Ms. Espindola was terminated and April 20, 2012 was the last day Ms. Espindola worked for Apple King.

3.20 On or about October 22, 2012, Ms. Espindola filed a discrimination charge through the Washington State Human Rights Commission, which was dismissed on April 21, 2014, and resulted in the "Right to Sue" annexed hereto as Exhibit A.

IV. CAUSE OF ACTION: DISCRIMINATION AND RETALIATION

Plaintiff re-alleges and incorporates the allegations above to each of the following:

Sunlight Law, PLLC
402 E. Yakima Ave, Ste 730
Yakima WA 98901
Telephone: (509) 972-6917

4.1 Ms. Espindola suffered from a disability as defined in ADA, FMLA, RCW 49.60 and RCW 49.78.

4.2 Defendant is a covered employer under the FMLA, the ADA, 29 U.S.C. § 2615; 29 U.S.C § 2611(4); 29 C.F.R. § 825.110(a)(3), RCW 49.60 and RCW 49.78

4.3 Ms. Espindola is an eligible employee under the FMLA, the ADA, 29 C.F.R. § 825.110(a), RCW 49.60 and RCW 49.78.

4.4 Ms. Espindola's pregnancy and serious health condition entitled her to FMLA Leave and Washington State Family Leave, 29 C.F.R. §§ 825.112(a)(3), 825.11(a)(2); 29 U.S.C. §§ 2611, 2612(a)(1)(D), RCW 49.78 and freedom from discrimination, interference or retaliation under the FMLA, ADA, RCW 49.60 and RCW 49.78.

4.5 Ms. Espindola gave the Defendant notice as soon as practicable as required by the FMLA, 29 C.F.R. § 825.302(b) the ADA, RCW 49.60 and RCW 49.78.

4.6 Defendant terminated Ms. Espindola's employment in retaliation and discrimination for missing work due to her pregnancy and serious health condition during her pregnancy, which violated the FMLA, 29 U.S.C. § 2614; 29 C.F.R. § 825.215(a), the ADA, RCW 49.60 and RCW 49.78

4.7 As a proximate result of Defendant's violation of the FMLA, the ADA, RCW 49.60 and RCW 49.78, Ms. Espindola has been damaged in amounts to be proven at trial.

V. RESERVATION OF RIGHTS

5.1 Ms. Espindola respectfully reserves the right to conduct discovery into alternative claims and additional defendants as necessary.

Sunlight Law, PLLC
402 E. Yakima Ave, Ste 730

5.2 Furthermore, Ms. Espindola also reserves the right to amend and supplement this complaint as formal and informal discovery proceeds.

VI. PRAYER FOR RELIEF

WHEREFORE, Ms. Espindola prays for damages as appropriate to compensate for such injuries, as described above, under law as appropriate, including:

6.1 Back wages and value of benefits;

6.2 Front wages and benefits through the time of trial and for a reasonable period into the future;

6.3 Compensatory monetary double damages for her economic and noneconomic damages pursuant to RCW 49.52.070;

6.4 Prejudgment interest, *Id*;

6.5 Liquidated damages pursuant to the FMLA, *Id*;

6.6 Damages for loss of enjoyment of life, pain and suffering, humiliation, personal indignity, embarrassment, fear, sadness, anger, anxiety, depression, anguish and other forms of emotional distress she has experienced, in amounts to be proven at trial;

6.7 Reinstatement to her previous position pursuant to;

6.8 Compensation for impaired future earning capacity;

6.9 All other available actual damages pursuant to law;

6.10 Attorneys' fees and actual costs pursuant to 29 U.S. C. § 2617(a)(3); 29 C.F.R. § 825.400; and

6.11 For such other future relief as this Court deems just, equitable, and proper.

Sunlight Law, PLLC
402 E. Yakima Ave, Ste 730
Yakima WA 98901
Telephone: (800) 767-1649

VII. JURY DEMAND

Plaintiff hereby demands a jury of six on all issues so triable.

DATED this 16th day of July, 2014.

SUNLIGHT LAW, PLLC

By: _____
Favian Valencia, WSBA #43802

By: _____
Raquel Acosta, WSBA #47465

Attorneys for Maria Espindola, Plaintiff
402 E. Yakima Ave, Ste 730
Yakima, WA 98901
Phone: (800) 307-1261
Email: sunlightlawpllc@gmail.com

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

MARIA G. ESPINDOLA, **Plaintiff,** **v.** **APPLE KING, a limited liability company,** **Defendant.**	**Case No.: 144197** **ORDER ON SUMMARY JUDGMENT**

Cross motions for Summary Judgment came before this court on January 8, 2016. The plaintiff Ms. Espindola was represented by Mr. Favian Valencia of Sunlight Law, the defendant Apple King by Gary Lofland of Meyer, Fluegge and Tenney.

The court having considered the submissions and arguments of counsel:

1. **Denies** the plaintiff's motion for partial summary judgment regarding the Family Medical Leave Act. The theory of law upon which the plaintiff's motion is based (Interference) is not supported by her pleadings which allege a specific statutory violation of 29 U.S.C § 2614 and 29 C.F.R. 825.212 (a) which claimed "retaliation and discrimination";

2. **Grants** the defendant Apple King's motion for summary judgment regarding the Washington Law Against Discrimination, RCW 49.60;

3. **Grants** the defendant Apple King's motion for summary judgment regarding Title VII; and

4. **Grants** the defendant's motion for summary judgment regarding the specific claims of violation Family Medical Leave Act and the Washington Family Leave Act. 29 U.S.C. § 2614 and 29 C.F.R. § 825.215 (a), relating to an interference claim, due to the fact that it was not pled. Any claims pled under the above Acts still remain.

The defendant Apple King may submit a request for attorney's fees and supporting documentation within fifteen (15) days of the date of this order.

Done in open court this ~~8th~~ 19th day of ~~January,~~ Feb. 2016.

Judge Kevin Roy
Yakima County District Court

Presented by:

Gary E. Lofland

Approved as to form:

Favian Valencia

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

MARIA G. ESPINDOLA, **Plaintiff,** **v.** **APPLE KING, a limited liability company,** **Defendant.**	**Case No.: 144197** **CORRECTED ORDER ON SUMMARY JUDGMENT**

Cross motions for Summary Judgment came before this court on January 8, 2016. The plaintiff Ms. Espindola was represented by Mr. Favian Valencia of Sunlight Law, the defendant Apple King by Gary Lofland of Meyer, Fluegge and Tenney.

The court having considered the submissions and arguments of counsel:

1. **Denies** the plaintiff's motion for partial summary judgment regarding the Family Medical Leave Act. The theory of law upon which the plaintiff's motion is based (Interference) is not supported by her pleadings which allege a specific statutory violation of 29 U.S.C § 2614 and 29 C.F.R. 825.212 (a) which claimed "retaliation and discrimination";

2. **Grants** the defendant Apple King's motion for summary judgment regarding the Washington Law Against Discrimination, RCW 49.60;

3. **Grants** the defendant Apple King's motion for summary judgment regarding American's with Disabilities Act; and

4. **Grants** the defendant Apple King's Motion for Summary Judgment regarding the specific claims of violation Family Medical Leave Act and the Washington Family Leave Act. 29 U.S.C. § 2614 and 29 C.F.R. § 825.215 (a), relating to an interference claim, due to the fact that it was not pled. Any claims pled under the above acts still remain.

The documents and evidence considered by the court are contained in Exhibit A.

Dated this 16 day of September, 2016.

Judge Kevin Roy
Yakima County District Court

Presented by:

Gary E. Lofland

Approved as to form; notice and presentment waived:

Favian Valencia

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

MARIA G. ESPINDOLA, **Plaintiff,** **v.** **APPLE KING, a limited liability company,** **Defendant.**	**Case No.: 144197** **ORDER GRANTING DEFENDANT APPLE KING'S MOTION FOR SUMMARY JUDGMENT RE: RETALIATION/DISCRIMINATION**

Cross motions for Summary Judgment on the Plaintiff Espindola's claim of retaliation/discrimination under the FMLA came before the court on Wednesday, June 15, 2016; the Plaintiff was represented by Mr. Favian Valencia of Sunlight Law; the Defendant by Gary Lofland of Meyer, Fluegge & Tenney. The Court having considered the submissions of the parties and argument of counsel **GRANTS** the Defendant's Motion for Summary Judgment on the claims of interference/retaliation and **DENIES** the Plaintiff's motion.

The documents and evidence considered by the court are contained in Exhibit A.

Dated this 16 day of September, 2016.

Judge Kevin Roy
Yakima County District Court

Presented by:

Gary E. Lofland

Approved as to form; notice and presentment waived:

Favian Valencia

Yakima County District Court
128 North Second Street, Room 225
Yakima, WA 98901
Phone: (509) 574-1804 Fax: (509) 574-1801

June 22, 2016

Favian Valencia
402 E. Yakima Ave. Suite 730
Yakima, Wa 98901

Gary Edward Lofland
230 S. 2nd Street
Yakima, Wa. 98901

RE: Maria G. Espindola vs. Apple King, Y14-04197

Gentlemen, the court has reviewed the pleadings and evidence presented in support of parties' motion for summary judgment. In a prior letter decision, the court granted motions for summary judgment in favor of the defendant. The court found their still remained the claim of discrimination/retaliation under the FMLA/WFLA. A discrimination claim makes it unlawful for any employer to discharge, or in any way, discriminate against any individual for opposing any practice made lawful by the FMLA/WFLA.

A plaintiff may prove a FMLA retaliation claim by first establishing a prima facie case of retaliation which gives rise to an inference of discrimination. If a prima facie case is established, the burden of production shifts to the employer to articulate a legitimate nondiscrimination reason for the action. If a non-discriminating reason is articulated, any inference of discrimination is dispelled. Lastly, the burden shifts back to the plaintiff to demonstrate the employer's articulated reason is incredible and unworthy of belief.

Here, based on the evidence presented, the court is unable to find that a prima facie case of discrimination has been made. There are no genuine issues of material fact as to the plaintiff taking "intermittent" leave under the FMLA/WFLA. Plaintiff had returned to work after her allowed FMLA/WFLA leave and given her old job back. Nothing presented to this court would create a genuine issue as to material fact that the employer should have somehow knew, or should have made further inquiry regarding if the leave could be under the FMLA or WFLA. It was some seven weeks after her final FMLA leave ended. Plaintiff was not penalized for taking FMLA/WFLA leave. With the passage of time, unspecific doctor's notes and vague phone calls from plaintiff, with nothing else, doom the discrimination case on summary judgment. The employer is not required to guess that it is allowed leave.

The court finds that the defendant's work attendance policy is not a "no fault" policy which could violate the FMLA/WFLA. It is undisputed that if the rules of the

policy are followed, there are no adverse consequences to the employee. The policy was not followed by the defendant to the extent that she could avoid adverse circumstances.

Even if an argument could be made that a prima facie case has been made by plaintiffs, under the burden shifting law outlined by both parties herein, the employer set forth a nondiscriminatory reason for the firing (violation of an appropriate attendance policy) and the plaintiff has failed to show that the articulated reason by the employer is false or a pretext of some kind.

Therefore, the court finds that there are no genuine issues of material fact regarding the remaining claim by plaintiff and grants defendant's motion for summary judgment on the discrimination/retaliation claim. Plaintiff's motion regarding the same issue is denied.

Sincerely,

Judge Kevin M. Roy
Yakima County District Court

(9)

FILED
JUL 22 2016
YAKIMA COUNTY
DISTRICT COURT

FILED
[illegible] CLERK

'16 SEP 26 P3:46

SUPERIOR COURT
YAKIMA CO. WA

YAKIMA COUNTY DISTRICT COURT

Maria Espindola,
Plaintiff,

Superior Court No. 16 2 02725 39

vs.

District Court No. 14-4197

Apple King, a limited liability company,
Defendant.

NOTICE OF APPEAL AND CERTIFICATE OF FILING STATUS

1. Appellant, Maria Espindola, the (Plaintiff) Defendant above seeks review by the Superior Court of the Yakima County District Court decision in the above cause number entered on the date of _____

2. This case is: ~~Criminal~~. The charge is: _____
(Civil) Infraction Small Claim

3. Decision(s) to be reviewed: Order granting Defendant's motion for Summary Judgment and denying Plaintiff's Motion for summary judgment as to FMLA + WSFLA retaliation + discrimination claims. Order dated 6/22,

4. Within 14 days of the date this Notice of Appeal is filed the appellant will file and serve on all other parties a designation of the part of the record that needs to be transmitted to Superior Court. Appellant will pay the cost of preparing the record to the Clerk of the District Court within 10 days of notification by the Clerk that the record is ready unless payment has been waived by the District Court.

5. Appellant will transcribe the electronic recording of proceedings in accordance with RALJ 6.3A and will file the transcript with the Superior Court.

6. A Defendant in a criminal case must file a statement in the Superior Court and in the District Court indicating any change in his or her address at any time during the appeal.

7. Copies of this notice will be served immediately on all other parties as required in RALJ 2.4(c).

Dated: 9/27/16

Appellant's Lawyer's Signature

Fabian Valencia 43802
Print/Type Name & Bar Number

402 E Yakima Ave, Ste 730
Address

Yakima WA 98901
City State Zip

Appellant's Signature

Print/Type Appellant's Name

Address

City State Zip

Gary Lofland
Print/Type Respondent's Name & Counsel if known

230 S 2nd ST
Address

YAKIMA WA 98901
City State Zip

CERTIFIED COPIES
I do hereby certify that the foregoing instrument is a true and correct copy of the original now on file in Yakima District Court, in Witness Whereof, I hereby set my hand this 26th day of September, 2016
By: Deputy Clerk

CLERK'S CERTIFICATION OF FILING STATUS

This matter is designated:

A criminal appeal for which no filing fee is required at this time [RCW 10.10.060].
* A civil, infraction, parking or contempt appeal for which a filing fee must be paid before the Notice of Appeal will be accepted for filing [RALJ 2.4(b)].
A civil, infraction or parking appeal for which an *In Forma Pauperis* petition has been granted and the filing fee is waived [RCW 36.18.022].
A *de novo* Small Claims appeal for which a filing fee must be paid before the Notice of Appeal will be accepted for filing [RALJ 1.1].

Dated: 9/26/16
* SEE ATTACHED DOCKET NOTES
RE FYE DATE

Clerk of the District Court

35262-5 000002

FILED

'17 MAY -1 AM 9:25

SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

Maria Espindola

NO. 16-2-02725-39

vs.

Apple King

ORDER Affirming S.J. for Apple King

THIS MATTER HAVING COME ON for hearing before the undersigned judge/commissioner of the above-entitled court, it is hereby ORDERED THAT:

The Court after de novo review finds there is no dispute as to a material fact does affirms the decision of the district court granting S.J. in favor of Apple King and denying the Plaintiffs motion for summary judgment on the claims of retaliation under the FMLA + WFLA

DONE IN OPEN COURT this 1st day of May 2017.

JUDGE/COURT COMMISSIONER

Presented by:
(Copy received)

Attorney for Apple King

Approved as to form:
(Copy received)

43802

Attorney for Espindola

35262-5 000892

No. 352625

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

Maria Espindola,

Appellants/Plaintiffs,

v.

Apple King, Inc.,

Respondents/Defendants.

APPELLANT'S MOTION FOR DISCRETIONARY REVIEW

Favian Valencia, WSBA# 43802
Counsel for Appellant
Sunlight Law, Pllc
402 E Yakima Avenue, Suite 730
Yakima, WA 98902
(509) 388-0231

I. IDENTITY OF PARTIES

The moving party is Appellant Maria Espindola (hereinafter "Appellant") individually and Respondent is Apple King, Inc., (hereinafter "Respondent") individually as a Washington State for profit corporation.

II. DECISION

Appellant is seeking review of the district court's order granting summary judgment to Respondent on the claims of employment retaliation pursuant to Family Medical Leave Act (hereinafter "FMLA") and Washington State Family Leave Act (hereinafter "WSFLA"). The superior court of Yakima County affirmed the district Court's order on May 1, 2017, a copy of the order is attached hereto as Exhibit 4. This appeal is brought pursuant to RAP 2.3(d)(3) because the lower courts' decision involve an issue of public interest due to the fact that Appellate Courts of Washington have not weighed in on the practical application of FMLA and WSFLA retaliation claims and the trial courts are having to resort to federal and out of state interpretations of similar laws.

III. ISSUES PRESENTED FOR REVIEW

1. Whether an employer violates the FMLA and/or WSFLA when he terminates an employee for using protected leave.

IV. RELEVANT FACTS

1. Respondent uses a "no-fault" attendance policy. This policy requires employees to give 24-hour notice and proof of appointments, otherwise points are deducted. If a worker reaches 24 points in the span of

a year, the worker is terminated. A worker's points are reset to zero each year on the first of May. Exhibit A, P.1.

2. Respondent uses only this "no-fault" attendance policy and does not have a policy to allow employees leave for medical conditions. Exhibit 4, Armida Aparicio's Dep. at 50.

3. On August 21-25, 2011, Appellant was hospitalized and Appellant provided Respondent with her doctor's note from Memorial Hospital with the following: "Ms. Espindola, has been in the hospital 8/21-8/25. And will be unable to return to work at least until after her follow-up appointment with me on 8/31/11." Exhibit 1, Employer Bates # 25.

4. Thereafter, however, between September 8th and December 30th of 2011, Appellant had to miss work or leave early intermittently a total of twelve times due to her serious health conditions related to her hospitalization. Respondent penalized Appellant with a total of sixteen (16) points for missing or leaving early from work when she was ill or had to go to a doctor's appointment. *Id.* at Exhibit 3, Bates 5, 6, 7, 8, 9, 10, 12, 13. During this period of time, Appellant provided respondent with written doctor's notes indicating that she needed time off work on September 9th, 16th, October 12th, November 22nd and December 27th. *Id.* Bates # 25, 27, 29, 32, 33. and 34.

5. Appellant deducted two points from Respondent on July 20, 2011 despite the fact that Respondent provided a doctor's note that indicate that Appellant needed two days of bed rest. *Id.* Bates # 4.

6. Besides the written notices, Appellant also gave verbal notice to Respondent that she was suffering from kidney stones, diabetes and that she needed maternity leave. Exhibit 2, 9:23-10:5; 22:2-23:15. Appellant even had to ask Employer through supervisors, German and Armida, to be allowed to check her blood sugar at work and she was allowed to do this in the kitchen or the bathroom. *Id.* Appellant gave at least verbal notice every time she was absent. *Id.* 25:12-16. Exhibit 4, Armida Aparicio's Dep. at 41. If Appellant had not at least called her supervisor to give notice, she would have had twelve (12) points deducted and used against her towards the no-fault attendance policy. *Id.*

7. On April 20, 2012, Respondent was terminated because she exceeded the twenty four (24) points allowed by Respondent's no-fault attendance policy. Exhibit 3, Deposition of German Lopez, at 48.

V. ARGUMENT

A. DISCRETIONARY REVIEW

This Court has authority to exercise its discretion to take on review of the lower court's order pursuant to RAP 2.3(d)(3). This case involves an issue of broad public importance because our State's Appellate Courts

have not interpreted and/or directly applied the FMLA and WSFLA. Our State's ordinary citizens do not have any guidance from our Courts as to how to implement the FMLA and WSFLA. Our state's district courts also do not have any direct guidance to implement these regulations and have to resort to federal and other states' interpretations of these regulations. This case provides the perfect opportunity to this Court to breath life into the FMLA and WSFLA so that these can provide clear and sensible guidance to the workforce of our State.

B. STANDARD OF REVIEW ON APPEAL FROM SUMMARY JUDGMENT

The legal standard that the district court was following in making its decision was the standard of summary judgment. Review of an order of summary judgment order is *de novo. McDevitt v. Harborview Med. Ctr.*, 179 Wash.2d 59, 64, 316 P.3d 469 (2013). Summary judgment is proper when the pleadings, depositions, answers, interrogatories, admissions on file, and any affidavits show "there is no genuine issue as to any material fact" and the "moving party is entitled to judgment as a matter of law." CRLJ 56(c). Material facts are those on which the outcome of litigation depends, in whole or in part. Schmitt v. Langenour, 162 Wn. App. 397, 404, 256 P.3d 1235 (2011). Where the parties disagree regarding a question of fact, if "reasonable minds can reach but one conclusion," the

question may be decided "as a matter of law." Roger Crane & Assoc., Inc. v. Felice, 74 Wn. App. 769. 776, 875 P.2d 705 (1994).

Once the moving party meets the burden going forward, the nonmoving party (Respondents) must set forth specific [admissible] facts sufficiently rebutting the moving party's contentions and disclosing the existence of material issues of fact. Pain diagnostics and Rehabilitation Associates, P.S. v. Brockman, 97 Wn. App. 691, 697, 988 P.2d 972 (1999). The nonmoving party can no longer rely on the allegations in its pleadings and must set forth specific facts showing that there is a genuine issue for trial. Aircraft v. Wallingford, 17 Wn. App. 853, 854, 565 P.2d 1224 (1997).

While the moving party has the burden of showing no genuine issue of material fact, the moving party is not required to refute speculation, conjecture, or possibility alleged by the nonmoving party. Bates v. Grace United, 12 Wn. App. 111, 115, 529 P.2d 466 (1974). Also See, Pain diagnostics and Rehabilitation Associates, P.S. at 697 ("[N]onmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or consideration of its affidavits, at face value"). If from the evidence a reasonable person could reach only one conclusion, the motion for summary judgment should be granted. Jacobson v. State, 89 Wn. 2d 104, 108, 569 P.2d 1152 (1977).

B. FMLA AND WSFMLA RETALIATION PRIMA FACIE CASE

An employee may establish a prima facie case of retaliation by showing: exercise of a protected FMLA right; adverse effect on the employee by an employer's action; and a causal connection between the employee's protected activity and the employer's adverse action. Hodgens v. General Dynamics Corp., 144 F3d at 161.

a. Exercise of an FMLA protected right

An employee may establish a prima facie case of retaliation by showing: exercise of a protected FMLA right; adverse effect on the employee by an employer's action; and a causal connection between the employee's protected activity and the employer's adverse action. Hodgens v. General Dynamics Corp., 144 F3d at 161.

To qualify to take an FMLA protected right, a Appellant has to prove the following: 1) she was eligible for FMLA's protection; 2) her employer was covered by FMLA's protection; 3) she was entitled to leave under FMLA; 4) she provided sufficient notice of her intent to take leave; and 5) her employer denied her the FMLA benefits to which she was entitled. FMLA of 1993, § 104(a)(1), 29 U.S.C.A. § 2614(a)(1); 29 C.F.R. § 825.220(b).

An employee is entitled to leave under FMLA and satisfies the third prong when there is a "serious health condition" that makes the

employee unable to perform the functions of her job. *Id.* § 825.112(a)(4). Under FMLA, an employee is also entitled to leave for the birth of a child. *Id.* § 825.112(a)(1)(2)(3). "Serious health condition" is defined as a physical or mental illness, injury or impairment that involves inpatient care or continuing treatment by a healthcare provider. 29 U.S.C. §§ 2611, 2612(a)(1)(D). "Continuing treatment" is defined as a period of incapacity of more than three (3) consecutive calendar days that involves ongoing treatment of a health care provider; any period of incapacity due to pregnancy or for prenatal care; any period of incapacity or treatment due to a chronic serious health condition; or a period of absence to receive multiple treatments for certain conditions. 29 C.F.R. § 825.114(a)(2).

An eligible employee can take continuous leave, intermittent leave, or reduced schedule leave when medically necessary. 29 C.F.R. § 825.203(a). "Intermittent leave" is defined as "leave taken in separate period of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks." 29 C.F.R. § 825.800.

The fourth prong requires that an employee provides sufficient notice of her intent to take leave. When the need for FMLA leave is foreseeable, the employee must give the employer 30 days advanced notice. 29 C.F.R. § 825.302(a). However, when an emergency situation

arises, an employee should give notice "as soon as practicable under the facts and circumstances of the particular case." *Id.* § 825.303. When an employee gives notice of her intent to take leave, the leave requested does not need to be designated as FMLA leave by the employee. Instead, it is the employer's responsibility to designate leave as FMLA leave, and to notify the employee that the requested leave will be "charged" as FMLA leave. 29 C.F.R. §§ 825.301(a), (b). Additionally, an employer can designate the leave as FMLA leave retroactively only when doing so will not harm the employee. 29 C.F.R. § 825.301(d). Notice of an employee's intent to take leave can be communicated to the employer in person, by telephone, or by other electronic means. *Id.* § 825.303(b).

b. Employee has to prove that she suffered an adverse employment action.

Employee has to show that she suffered an adverse employment action such that a reasonable employee would have found the challenged action materially adverse *Wierman v. Casey's General Stores, 638 F3d 984, 999* (8th Cir. 2011); *Millea v. Metro-North R.R. Co.* (2nd Cir. 2011) 658 F3d 154, 164-165; *Breneisen v. Motorola, Inc.* 512 F3d 972, 979 (7th Cir. 2008).. It is undisputed that Appellant's termination constitutes an adverse employment action under the FMLA and WSFLA.

c. **Appellant then has to show a connection between protected activity and adverse action, and that Respondent does not have a legitimate retaliatory reason for the adverse action.**

Appellant has to show a causal connection between the employee's protected activity and the employer's adverse action. *Hodgens v. General Dynamics Corp.*, 144 F3d at 161. Similarly, Respondent then must The employer must respond with a *legitimate, nondiscriminatory reason* for its actions. *King v. Preferred Technical Group* (7th Cir. 1999) 166 F3d 887, 892; *Sabourin v. University of Utah* (10th Cir. 2012) 676 F3d 950, 961-962; *Lovland v. Employers Mut. Cas. Co.* (8th Cir. 2012) 674 F3d 806, 812-813.

An attendance policy is not a sufficient reason to terminate, and is actually prohibited. The regulation provides that FMLA leave may not be considered under an employer's "no-fault" attendance policy. *Bachelder v. America West Airlines, Inc.*, 259 F3d 1112, 1122 , citing 29 CFR § 825.220(c); see also *Xin Liu v. Amway Corp.*, 347 F3d 1125, 1136-1137; *Pagel v. TIN Inc.* (7th Cir. 2012) 695 F3d 622, 631.

C. WASHINGTON STATE FAMILY LEAVE ACT ("WSFLA")

Similarly, RCW 49.78.220, our state's counterpart to the FMLA, entitles an employee to:

> "a total of twelve workweeks of leave during any twelve-month period for one or more of the following: (a) Because of the birth of a child of the employee and in order to care

> for the child; [or] (d) Because of a serious health condition that makes the employee unable to perform the functions of the position of the employee."

Furthermore, RCW 49.78.230(1)(b) establishes that

> "leave may be taken intermittently or on a reduced leave schedule when medically necessary for medical treatment of a serious health condition by or under the supervision of a health care provider, or for recovery from treatment or recovery from a serious health condition."

RCW 49.78.300(1)(b) makes it unlawful for an employer to discharge an individual for taking WSFLA leave.

D. <u>Appellant has presented sufficient evidence to establish each of the elements to overcome summary judgment on her claim of employment retaliation pursuant to FMLA and WSFLA</u>

Respondent's answers to the Complaint admit the elements necessary to establish that it is an employer covered by the FMLA and WSFLA and that Appellant is a covered employee. It is also undisputed that Appellant availed herself of FMLA/WSFLA-protected right by giving notice and taking time off work for her serious health condition and the serious health condition of her children. There is no dispute that Appellant suffered an adverse employment action by being terminated.

The main dispute arises on the issue of whether Appellant's termination was connected to her taking of protected FMLA/WSFLA leave, whether Respondent retaliated against Appellant. The evidence shows that Respondent deducted points against Appellant for taking FMLA/WSFLA as follows:

Date	Points	Bates #
July 20, 2017	2 points	3 and 4
October 25, 2011	2 points	25, 27, 29 and 32
November 10, 2011	3 points	25, 27, 29 and 32
December 9, 2011	2 points	25, 27, 29, 32 and 33
December 19, 2011	2 points	25, 27, 29, 32 and 33
December 20, 2011	3 points	25, 27, 29, 32 and 33
December 30, 2011	2 points	25, 27, 29, 32, 33 and 34
March 23, 2012	2 points	25, 27, 29, 32, 33 and 34
March 24, 2012	3 points	25, 27, 29, 32, 33 and 34
March 26, 2012	3 points	25, 27, 29, 32, 33 and 34
April 17, 2012	2 points	25, 27, 29, 32, 33 and 34
Total Points Used Against Appellant	**23 points**	

Exhibit 1. Furthermore, the Respondent's CR 30(b)(6) representative admitted that Appellant gave, at least verbal notice, besides the written notices illustrated above, when she was going to miss work. Furthermore, the only reason that Appellant was terminated was for having too many points in the no-fault attendance policy. Even one FMLA/WSFLA-protected leave being counted against an employee satisfies the

requirements of a prima facie case of discrimination. *Hodgens v. General Dynamics Corp.*, 144 F3d at 161. In this case there are eleven instances of penalizing Appellant for taking protected leave. This is more than sufficient evidence to establish a genuine issue of material fact to deny summary judgment.

Respondent's alleged non-discriminatory reason to overcome Appellant's prima facie case is also invalid because it merely says that she was terminated due to there no-fault attendance policy. Respondent's no-fault attendance policy is an FMLA violation in and of itself. 29 CFR § 825.220(c). Respondent's no-fault policy is exactly what the regulations are designed to protect employees from because these no-fault policies do not honor the fact that FMLA and WSFLA protect intermittent leave and allow employees to give notice less 30 days notice when there are emergencies related to their health conditions. *Bachelder v. America West Airlines, Inc.*, 259 F3d 1112, 1122 , citing 29 CFR § 825.220(c); see also *Xin Liu v. Amway Corp.*, 347 F3d 1125, 1136-1137; *Pagel v. TIN Inc.* (7th Cir. 2012) 695 F3d 622, 631. Respondent's reason for terminating Appellant is not sufficient to overcome summary judgment.

FMLA and WSFLA are strict liability statutes. Appellant took leave and Respondent terminated her. The only reason that Respondent has given is that she violated its attendance policy. This is a violation of

the FMLA and WSFLA. Therefore, Appellant respectfully requests that the lower court's decision be reversed.

VI. OUR STATE'S WORKFORCE NEEDS GUIDANCE FROM OUR APPELLATE COURT ON IMPLEMENTING THE FMLA AND WSFLA IN OUR STATE

Although there is no statewide case law directly interpreting the WSFLA our Supreme Court has been clear that "remedial statutes in Title 49 RCW should be liberally construed to carry out the legislature's goal of protecting employees." *Bostain v. Food Exp., Inc.*, 153 P.3d 846, 852 (Wash. 2007). The only authority on applying the WSFLA is derived from federal and other states' precedent. Our state has a more progressive and practical view on the application of our laws and it is not appropriate to use authority from other jurisdictions.

VII. CONCLUSION

For all these reasons, Appellants respectfully request this Court to review the trial court's discovery orders.

Respectfully submitted this 16th day of June, 2017.

/S/ Favian Valencia
Favian Valencia, WSBA#43802
Attorney for Maria Espindola, Appellant
Sunlight Law, Pllc.
402 E. Yakima Ave, Ste 730
Yakima, WA 98901
(509)388-0231

CERTIFICATE OF SERVICE

The undersigned makes the following declaration certified to be true under penalty of perjury pursuant to RCW 9A.72.085:

On the date given below, I hereby certify that the attached document hereto was served on the following in the manner indicated:

Gary Lofland **Meyer, Fluegge & Tenney** 230 S. 2nd Street, #101 Yakima, WA 98901	[ ] Electronic mail [ ] Facsimile [x] Legal Messenger [ ] U.S. mail [ ] Other: hand delivered

The Court of Appeals of the State of Washington Division III **500 N Cedar St** **Spokane, WA 99201-1905** **Fax (509)456-4288**	[ ] Electronic mail [ ] Facsimile [ ] Legal Messenger [ ] U.S. first class mail [x] Other: Court website

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

Executed this 10th day of June 2017, at Yakima, Washington.

Mariana Garcia

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON AT YAKIMA

MARIA G. ESPINDOLA,	)	
	)	
Plaintiff,	)	
	)	NO. 144197
vs.	)	
	)	
APPLE KING, a limited liability company,	)	
	)	
Defendant.	)	

DEPOSITION UPON ORAL EXAMINATION OF ARMIDA APARICIO

April 29, 2015
10:53 a.m.
230 South 2nd Street
Yakima, Washington

TAKEN AT THE INSTANCE OF THE PLAINTIFF

REPORTED BY:
SUSAN E. ANDERSON, RPR, CCR

APPEARANCES:

FOR THE PLAINTIFF:

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ALSO PRESENT:

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I N D E X

ESPINDOLA v. APPLE KING
NO. 144197
April 29, 2015

T E S T I M O N Y

E X H I B I T S

BE IT REMEMBERED that on Tuesday, April 29, 2015, at 10:53 a.m. at 230 South 2nd Street, Yakima, Washington, the deposition of ARMIDA APARICIO was taken before Susan E. Anderson, Registered, Professional Reporter and Notary Public. The following proceedings took place:

ARMIDA APARICIO, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

MR. LOFLAND: Before we start let's put a stipulation on the record that we will be using the depositions that were -- excuse me, not the depositions, the exhibits that were introduced and utilized in the previous deposition. In this one anytime we refer to an exhibit by number it will refer to the same exhibit number that is part of the past deposition; is that correct, Counsel?

MR. VALENCIA: That is correct.

MR. LOFLAND: Okay.

EXAMINATION

BY MR. VALENCIA:

Q. All right. Can you please say and spell your full

the next year?
A. Uh-huh.
Q. If they get 24 points they get terminated?
A. Yes, they do.
Q. And then who makes the decision to terminate them?
A. German.
Q. Okay. And does this policy apply to you?
A. Yes.
Q. Okay. And one of the things that I noticed on here, Armida, is that it doesn't talk about -- doesn't say how many points should be awarded for somebody being at the hospital or being ill.

How do you -- how do you take that into account to apply this point policy?
A. Every -- like we -- say that to an employee verbally. If they have an emergency, like being in the hospital or for a funeral or a car accident, something like that, there's no points there. So we don't take any points for -- for absence for the days that they stay in the hospital or any emergency. There's no points there.
Q. Well, what if somebody's sick but is not at the hospital, then in that case do you have to give points or no points in that case?
A. In that case it will be points because their absence.

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss.
COUNTY OF YAKIMA)

This is to certify that I, Susan E. Anderson, Certified Court Reporter and Notary Public in and for the State of Washington, residing at Yakima, reported the within and foregoing deposition; said deposition being taken before me as a Notary Public on the date herein set forth; that the witness was first by me duly sworn; that said examination was taken by me in shorthand and thereafter under my supervision transcribed, and that same is a full, true and correct record of the testimony of said witness, including all questions, answers and objections, if any, of counsel.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties, nor am I financially interested in the outcome of the cause.

IN WITNESS WHEREOF I have set my hand and affixed my seal this 7th day of May, 2015.

Susan E Anderson

SUSAN E. ANDERSON RPR,
CCR NO. 2493
Notary Public in and for the State of Washington, residing at Yakima
My Commission expires on January 9, 2016

SUSAN E. ANDERSON NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 1-09-16

EMPLOYEE RIGHTS
UNDER THE FAMILY AND MEDICAL LEAVE ACT

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

LEAVE ENTITLEMENTS

Eligible employees who work for a covered employer can take up to 12 weeks of unpaid, job-protected leave in a 12-month period for the following reasons:

- The birth of a child or placement of a child for adoption or foster care;
- To bond with a child (leave must be taken within one year of the child's birth or placement);
- To care for the employee's spouse, child, or parent who has a qualifying serious health condition;
- For the employee's own qualifying serious health condition that makes the employee unable to perform the employee's job;
- For qualifying exigencies related to the foreign deployment of a military member who is the employee's spouse, child, or parent.

An eligible employee who is a covered servicemember's spouse, child, parent, or next of kin may also take up to 26 weeks of FMLA leave in a single 12-month period to care for the servicemember with a serious injury or illness.

An employee does not need to use leave in one block. When it is medically necessary or otherwise permitted, employees may take leave intermittently or on a reduced schedule.

Employees may choose, or an employer may require, use of accrued paid leave while taking FMLA leave. If an employee substitutes accrued paid leave for FMLA leave, the employee must comply with the employer's normal paid leave policies.

BENEFITS & PROTECTIONS

While employees are on FMLA leave, employers must continue health insurance coverage as if the employees were not on leave.

Upon return from FMLA leave, most employees must be restored to the same job or one nearly identical to it with equivalent pay, benefits, and other employment terms and conditions.

An employer may not interfere with an individual's FMLA rights or retaliate against someone for using or trying to use FMLA leave, opposing any practice made unlawful by the FMLA, or being involved in any proceeding under or related to the FMLA.

ELIGIBILITY REQUIREMENTS

An employee who works for a covered employer must meet three criteria in order to be eligible for FMLA leave. The employee must:

- Have worked for the employer for at least 12 months;
- Have at least 1,250 hours of service in the 12 months before taking leave;* and
- Work at a location where the employer has at least 50 employees within 75 miles of the employee's worksite.

*Special "hours of service" requirements apply to airline flight crew employees.

REQUESTING LEAVE

Generally, employees must give 30-days' advance notice of the need for FMLA leave. If it is not possible to give 30-days' notice, an employee must notify the employer as soon as possible and, generally, follow the employer's usual procedures.

Employees do not have to share a medical diagnosis, but must provide enough information to the employer so it can determine if the leave qualifies for FMLA protection. Sufficient information could include informing an employer that the employee is or will be unable to perform his or her job functions, that a family member cannot perform daily activities, or that hospitalization or continuing medical treatment is necessary. Employees must inform the employer if the need for leave is for a reason for which FMLA leave was previously taken or certified.

Employers can require a certification or periodic recertification supporting the need for leave. If the employer determines that the certification is incomplete, it must provide a written notice indicating what additional information is required.

EMPLOYER RESPONSIBILITIES

Once an employer becomes aware that an employee's need for leave is for a reason that may qualify under the FMLA, the employer must notify the employee if he or she is eligible for FMLA leave and, if eligible, must also provide a notice of rights and responsibilities under the FMLA. If the employee is not eligible, the employer must provide a reason for ineligibility.

Employers must notify its employees if leave will be designated as FMLA leave, and if so, how much leave will be designated as FMLA leave.

ENFORCEMENT

Employees may file a complaint with the U.S. Department of Labor, Wage and Hour Division, or may bring a private lawsuit against an employer.

The FMLA does not affect any federal or state law prohibiting discrimination or supersede any state or local law or collective bargaining agreement that provides greater family or medical leave rights.

For additional information or to file a complaint:

1-866-4-USWAGE

(1-866-487-9243) TTY: 1-877-889-5627

www.dol.gov/whd

U.S. Department of Labor | Wage and Hour Division

WAGE AND HOUR DIVISION

WH1420 REV 04/16

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

MARIA ESPINDOLA,

Appellant,

v.

APPLE KING, INC.,

Respondent.

APPLE KING'S RESPONSIVE BRIEF

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Counsel for Apple King, Inc.

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I. INTRODUCTION

This is an appeal of the June 22, 2016 decision and order of District Court Judge Kevin Roy in which he granted Apple King's Motion for Summary Judgment on Ms. Espindola's claim of discrimination/retaliation under the Family Medical Leave Act ("FMLA") and Washington Family Leave Act ("WFLA"). (CP 4-5).[1]

In the complaint filed by Espindola it was alleged that her employment with Apple King was terminated

> ...in retaliation and discrimination for missing work due to her pregnancy and serious health condition during her pregnancy which violated the FMLA 29 U.S.C. § 2614, 29 C.F.R. 825.215 (a)...and RCW 49.78 [the WFLA].
>
> Complaint ¶4.6 (CP 40).

Espindola admitted that she was terminated because "she had too many unexcused absences" (CP 39 Complaint p.4 ¶3.17) and that the termination occurred because she accumulated too many points under the Apple King attendance policy (CP 309 Ex. 12 Dep. Espindola 18:13-15).

There is no dispute that Ms. Espindola had a significant number of absences – some twenty nine (29) absences in a one year period (18 of which were excused). However, Ms. Espindola claims that some of the twelve (12) unexcused absences were FMLA/WFLA qualified, should not

[1] On appeal to the Superior Court of Yakima County Judge McCarthy reached the same result granting summary judgment in favor of Apple King.

have been counted, and that the resulting termination was improper. However, eleven (11) of those absences were excused and did not accumulate points under the absentee policy, none of the other absences were because of a "serious health condition."

The focus of the inquiry must be on three areas: (1) is there any evidence of record to show the absences were the result of a serious health condition of Ms. Espindola or a family member which would qualify the absence for protected leave; (2) did Ms. Espindola provide adequate notice to alert Apple King that an absence would qualify for FMLA leave; and (3) did Ms. Espindola comply with the Apple King Attendance Policy.

The answer to each of those questions is no. There is no evidence in the record to support the claim the absences were for a serious health condition, the notice given by Ms. Espindola was not sufficient, and she did not comply with the absentee policy.

II. STATEMENT OF FACTS

A. Procedural History

1. The Washington Human Rights Commission finds "no reasonable cause" and dismisses Espindola's complaint.

On December 10, 2012 Ms. Espindola filed a complaint with the Washington Human Rights Commission ("WHRC") in which she alleged that she had been discriminated against on the basis of gender and

disability. Following investigation, the WHRC issued a "no reasonable cause" determination and dismissed the complaint on July 26, 2013. (CP 294 Ex. 10).

2. The District Court dismisses Espindola's claims.

An unverified complaint was filed on behalf of Ms. Espindola on July 16, 2014. The complaint alleged violations of (1) the Washington Law Against Discrimination RCW 49.60; (2) the Americans with Disabilities Act, 42 U.S.C. § 12111; (3) the Family Medical Leave Act, 29 U.S.C. § 2414; and (4) the Washington Family Leave Act, RCW 49.78. (CP 36-42).

Judge Roy entered an order granting summary judgment in favor of Apple King on the claims of violation of (1) the Washington Law Against Discrimination; (2) the Americans with Disabilities Act; and (3) the Plaintiff's claims of interference under the FMLA. (Order on Summary Judgment date: February 19, 2016 (CP 530-531); Letter Opinion dated January 14, 2016 (CP 453)).

Judge Roy then granted Apple King's motion for summary judgment on the retaliation claims. A letter decision was issued on June 22, 2016 (CP 4-5) and an order was entered on September 16, 2016 (CP 8-9).

Judge Roy found Espindola had not established a prima facie case of discrimination/retaliation. In reaching that decision he found (1) Espindola had taken FMLA/WFLA leave and had been returned to her position; (2) Espindola was not penalized for taking FMLA/WFLA leave; (3) there was no evidence presented that the employer knew or should have known of the need to "intermittent" FMLA leave; (4) the doctor's notes did not provide notice; (5) vague telephone calls did not provide notice; (6) the attendance policy is not a no fault policy; and (7) Espindola did not comply with the policy requirements. The Judge also found that even if a prima facie case had been established Espindola was unable to prove the legitimate non-discriminatory reason was false or a pretext. (CP 4-5).

3. The Superior Court dismisses Espindola's claims.

On July 22, 2016 Espindola's Notice of Appeal was filed (CP 1-2). The notice only requested review of Judge Roy's order of June 22, 2016 (CP 1) dismissing on summary judgment the claims of retaliation/discrimination under the FMLA and WFLA. No appeal was filed on the other claims.

On May 1, 2017 Judge Michael McCarthy upheld the decision of District Court Judge Roy and again granted summary judgment in favor of Apple King on the claim of retaliation/discrimination. (CP 892).

4. The Court of Appeals.

On May 3, 2017 counsel for Ms. Espindola filed a Notice of Appeal to Division III. Thereafter, on June 16, 2017 counsel filed a Motion for Discretionary Review. The Motion for Discretionary Review was granted by the Commissioner on August 4, 2017. Apple King moved to modify the Commissioner's ruling on September 5, 2017. That motion was denied by the court on October 19, 2017. The matter is now before the court.

B. Statement of case.

1. Parties

Apple King is a Washington limited liability company (CP 220 p.1 ¶1). It operates a fruit warehouse and packing facility in Yakima County. (CP 220 p.1 ¶2). Ms. Espindola was employed by Apple King in August 2007 and worked in the packing operation (CP 221 p.2 ¶6).

2. The policy

Apple King adopted and implemented an attendance policy that resulted in termination upon reaching a specified accumulation of points. The policy provided:

> Apple King, LLC understands that there will be times when employees will miss work due to illness or other unforeseen reasons. It is equally important for the employee to understand the importance of maintaining a good attendance record. Good attendance reflects positively on the packing

house as a whole. As of May 1st 2011, we will put into practice a revised 24 point attendance scoring system. Each employee will have 24 points to use up between May 1st and the last day of April. You will start with 0 points and each attendance infraction will be counted in the following manner.

NO POINTS will be counted for appts. With 24 hr. notice and proof of apt.

2 Points for not giving 24 hr. notice regardless of proof

2 Points for being Tardy

2 Points for leaving before end of shift without proof of appointment

3 Points per absence without proof of appointment (unless you use a Vacation Day)

12 Points for a NO CALL-NO SHOW

No points will be counted for L&I appointments.

If you reach the 24 point mark before the designated time, your employment will be terminated. It is very important to understand that this will be the same for all Packing House employees. Every 1st of May each employee will start with 0 points once again only if they have managed not to reach the 24 point mark by the end of the last day of April. We strongly encourage you to set up your appointment on your day(s) off. In order to facilitate this on our behalf we will be rotating the groups less frequently. If we do move the groups we will try to let you know at least 2 weeks in advance.

CP 233 Ex. 1

Under the policy an employee did not accumulate points if the employee had an appointment, provided proof of the appointment, and gave advance notice, or if did not give advance notice used a vacation day (CP 221). No

points were assessed for emergencies, hospitalizations, funerals, or accidents (CP 221). At the time Ms. Espindola was employed by Apple King she received a copy of the attendance policy (CP 235).

3. Ms. Espindola's attendance.

Apple King maintained a daily attendance record for employees, including Ms. Espindola (CP 221). Ms. Espindola's attendance record shows the following history of absences and accumulation of points as follows:

The count of absences begins May 1st of each year. Ms. Espindola's unexcused absences were as follows:

Unexcused (CP 238 Ex. 3)

2011	Points	Reason	Bates No.
May 20	2 points	No excuse slip	1
July 20	2 points	No excuse slip Notice same day	3
October 25	2 points	No excuse slip	5
November 10	3 points	Absent/no notice	6
December 9	2 points	Late/tardy	7
December 19	2 points	Late/tardy	8
December 20	3 points	Absent/no note	9
December 30	2 points	Late/tardy	10
2012	**Points**		**Bates No.**
March 23	2 points	Late/tardy	11
March 24	3 points	Suspended Absent/no note	11
March 26	3 points	Absent/no note	12
April 17	2 points	Late/tardy	13
Total	28 points		

Excused absences (CP 238 Ex. 3):

2011		Bates No.
June 6		14 & 15
June 10		14 & 15
July 8		16 & 17
July 12		18 & 19
July 21		20 & 21
July 22		20 & 21
August 1		22 & 23
August 21-25	One week	24 & 25
September 9		26 & 27
September 16		28 & 29
October 11		30 & 31
October 12		30 & 32
November 22		33
December 28		34
2012		**Bates No.**
March 6		35 & 36
April 4		37 & 38

Ms. Espindola was afforded time off, and no points were assessed when she was hospitalized from August 21-25, 2011. (CP 262 Ex. 3 Bates 24). That absence was supported by a medical provider's note. The note did not provide the reason for the hospitalization and did not indicate a need for continuing treatment. (CP 263 Ex. 3 Bates 25). Ms. Espindola was also afforded time off for childbirth – from January 9-March 2. (CP 237 Ex. 2). No points were accumulated. Upon return from such leaves Ms. Espindola admitted that she was returned to the same job she held at the commencement of the leave. (CP 308 Ex. 12; 10:12-11:24).

As the result of the accumulation of points under the attendance policy Ms. Espindola's employment was terminated on April 20, 2012. (CP 251 Ex. 3).

III. THE STANDARD OF REVIEW

A. The standard provided by RAP 2.2.

RAP 2.2 provides in pertinent part:

> (c) Superior Court Decision on Review of Decision of Court of Limited Jurisdiction. If the superior court decision has been entered after a proceeding to review a decision of a court of limited jurisdiction, **a party may appeal only if the review proceeding was a trial de novo**.
>
> RAP 2.2 (c)
> [emphasis added]

An appeals court review of a superior court's review of a district court decision is limited to those circumstances when there was a trial de novo.

B. Summary Judgment

Generally, an appellate court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Highline School District v. Port of Seattle*, 87 Wn. 2d 6, 15 (1970); *Keck v. Collins*, 181 Wn. App. 67, 78 (Div. III, 2014). Summary judgment is proper if the records of file with the trial court show "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." CR 56(c). All evidence and reasonable inferences are construed in

the light most favorable to the non-moving party. *Keck*, 181 Wn. App. at 79.

However, CR 56(e) is explicit in its requirement that facts are required and such facts must be based upon personal knowledge and would be admissible in evidence. CR 56(e); *Grimwood v. Univ. Puget Sound*, 110 Wn. 2d 355, 359 (1988). "A fact is an event, an occurrence, or something that exists in reality…ultimate facts or conclusions of fact are insufficient…conclusory statements of fact will not suffice." *Grimwood*, 110 Wn. 2d at 359-360.

IV. THE WASHINGTON FAMILY LEAVE ACT

Ms. Espindola brings claims under the Washington Family Leave Act ("WFLA") 48 RCW 78 et seq. as well as the federal FMLA. The WFLA mirrors the provisions of the FMLA. In enacting the WFLA the Washington legislature provided:

> This chapter must be construed to the extent possible in a manner that is consistent with similar provisions, if any, of the federal family and medical leave act of 1993 (Act Feb. 5, 1996 P.L. 103-3, 107 Stat. 6) and that gives consideration to the rules, precedents, and practices of the federal department of labor relevant to the federal act.
>
> RCW 49.78.410

The language is unambiguous and reflects the legislative intent. *State v. Costich*, 152 Wn. 2d 463, 470 (2004) ("we give effect to that language and that language alone because we presume the legislature says what it means

and means what it says."). That requirement is also sensible. A different reading of statutes that mirror each other would lead to confusion and uncertainties.

In light of this statute counsel makes a rather unusual statement that "RCW 49.78.410 does not require that this court construe the FLA after the federal circuit case law" (Appellant Brief p.2). Counsel does not identify any rule, precedent, or procedure of the Department of Labor that is contrary to the decisions and precedent of the federal courts.

In addressing the claims the focus will be on the federal act with citations to the WFLA as appropriate.

V. THE FAMILY MEDICAL LEAVE ACT: AN OVERVIEW

A. The purpose of the FMLA

Enacted in 1993, Congress sought to balance the needs of both employees and their employers. The declared purpose of the FMLA is:

> 1. To balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
> 2. To entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;
> 3. To accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers.
>
> 29 U.S.C. § 2601(b)

See also RCW 49.78.010 ("...the demands of the workplace and of families need to be balanced..."). The application of the Act must therefore balance the needs of employees to take qualifying leave with the recognized needs of employers to operate its business.

B. Serious Health Condition Defined

Under the FMLA eligible employees may take leave for their own "serious health conditions" that make them unable to perform the essential functions of their positions, or to care for an immediate family member (i.e. spouse, parent, child) with a "serious health condition." 29 U.S.C. § 2612(A).

The FMLA defines "serious health condition" as an "illness, injury, impairment, physical or mental condition that involves: (a) inpatient care in a hospital, hospice, or residential care facility; or (b) continuing treatment by a health care provider. 29 U.S.C. § 2611(ii); RCW 49.78.020(16). The regulations adopted by the U.S. Department of Labor[2] recognize a "serious health condition" to include: (1) any period of incapacity due to pregnancy and prenatal care (29 C.F.R. § 825.114 (B)(2)(ii)); (2) a chronic, serious health condition (29 C.F.R. § 825.114 (A)(2)(iii)); (3) a permanent or long term condition for which treatment may not be effective (29 C.F.R. § 825.114 (A)(2)(iv)); and (4) to receive

[2] No regulations have been adopted under the WFLA.

multiple treatments either from restorative surgery after an accident or injury, or a condition that would result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment. 29 C.F.R. § 825.114 (A)(2)(v); RCW 49.78.020 (16(A)(ii)(A)).

The "three day incapacity" rule is coupled with "continuing treatment" and means a period of incapacity (i.e. inability to work) due to the serious health condition of more than three consecutive calendar days, and any subsequent treatment or incapacity or treatment related to the same condition that involves; (a) treatment two or more times by a healthcare provider; or (b) treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of a health care provider. 29 C.F.R. § 825.114 (A)(2)(i).

The legislative history states that the terms "serious health condition" "is not intended to cover short term conditions for which treatment and recover are brief" and "minor illness which last only a few days and surgical procedures that typically do not involve hospitalization and require only a brief recovery period." H.REP No. 103-3 at 28 (1993). The regulations also provide examples of conditions which are not "serious health conditions" such as cold, flu, ear aches, upset stomach,

minor ulcers, headaches, dental and orthodontia, periodontal disease. 29 C.F.R. § 825.114 (c); RCW 49.78.020(16)(c).

C. The Rights Under the FMLA

The Family Medical Leave Act creates two substantive rights for covered employees. First, an employee has the right to take up to twelve (12) weeks of leave "for personal medical reasons, to care for a newborn baby, or care for family members with serious illness." 29 U.S.C. § 2612(a).[3] Second, an employee who takes FMLA leave has the right to be restored to his or her original position or to a substantially equivalent positon. 29 U.S.C. § 2614(e); RCW 49.78.280.

D. The protections afforded under the FMLA.

The courts have recognized two distinct theories for recovery on FMLA claims: (1) retaliation/discrimination and (2) interference. 29 C.F.R. § 825.220(b); *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1133 (9th Cir. 2003) (approving the USDOL interpretation). See also: *Smith v. Diffee Ford-Lincoln-Mercury,* 298 F.3d 955, 960 (10th Cir. 2002); *Strickland v. Water Works and Sewer of Birmingham,* 239 F.3d 1199,

[3] The FMLA permits "intermittent leave" which has been described as: "A series of absences, separated by days during which the employee is at work, but all of which for the same medical reason, subject to the same notice, and taken during the same twelve month period." *Davis v. Mich. Bell Tel. Co.,* 543 F.3d 345, 350-51 (6th Cir. 2008). See: 29 C.F.R. 825.202 (A); 29 C.F.R. 825.202; RCW 49.78.230.

1206 N.9 (11th Cir. 2001); *Donald v. Sybra Inc.*, 607 F.3d 757 (6th Cir. 2012).

E. Interference claims.

The FMLA makes it "unlawful for an employer to interfere with, restrain, or deny the exercise of or the attempt to exercise" such rights. 29 U.S.C. § 2615(a)(1); RCW 49.78.300(1)(A). The Department of Labor has interpreted this provision to preclude "not only refusing to authorize FMLA leave, but discouraging an employee from using such leave." 29 C.F.R. § 825.220(b); *Liu*, 347 F.3d at 1133. This section supports what is known as an "interference" claim. An interference claim is not implicated in this appeal since no appeal was taken from the dismissal of that claim.

F. Discrimination and retaliation claims.

The FMLA also states that it is unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter. 29 U.S.C. § 2615(a)(2); RCW 49.78.300(2); *Saunders v. City of Newport*, 657 F.3d 772, 777 (9th Cir. 2011). A violation of this section is known as a "discrimination" or "retaliation" claim (referred in further argument as "retaliation")

G. Characterizing the claim.

It is important to note that "by their plain meaning," the anti-retaliation or anti-discrimination provisions of 29 U.S.C. § 2615(a)(2) and (b) do not cover visiting negative consequences on an employee simply because she had used FMLA leave. *Bachelder v. Am. W. Airlines*, 259 F.3d 1112, 1124 (9th Cir. 2001). Such action is instead covered under 29 U.S.C. § 2516(a)(1) as an "interference" claim. *Washburn v. Gymboree Retail Stores,* 2012 WL 3818570 (USDC WD WA, 2012); *Bachelder*, 259 F.3d at 1124; accord: *Liu*, 347 F.3d at 1133 n.7.

VI. ARGUMENT AND ANALYSIS

A. RAP 2.2 does not provide for an appeal.

The Rules of Appellate Procedure do not authorize an appeal from a Superior Court review of a decision of a Court of Limited Jurisdiction unless the review proceeding was a trial de novo. The language of RAP 2.2 (c) is clear and unambiguous "...a party may appeal **only** if the review proceeding was a trial de novo..." RAP 2.2 (c) [emphasis added]. Principles of statutory construction are applied to the interpretation of court rules. *Interstate Prop. Credit Assn. v. MacHugh*, 90 Wn. App. 650, 654 (Div. III, 1998). Language that is clear on its face does not require or permit any construction. *State v. McIntyre*, 92 Wn. 2d 620, 622 (1979). One rule of statutory construction is "where there is no ambiguity in a

statute, there is nothing for the court to interpret." *McIntyre*, 92 Wn. 2d at 622; *State v. Ruth*, 78 Wn. 2d 711, 714 (1971).

Here the court rule is clear, an appeal from a superior court review of a district court decision is limited and cannot be taken in this matter because it did not involve a trial de novo. The appeal must be dismissed.

B. Ms. Espindola mischaracterizes the claim.

Ms. Espindola characterizes the claim as one of "retaliation/discrimination." The characterization is incorrect, and not supported by the factual allegations. Espindola's claim is that she was entitled to (but denied) leave for some twelve (12) absences that qualified for FMLA leave (Appellants Brief p.3 ¶7). That assertion is one of interference by denying FMLA leave. 29 U.S.C. § 2615 (a)(1), 29 C.F.R. § 825.220(b). See: *Bachelder*, 259 F.3d at 1124; *Liu*, 347 F.3d at 1113 n.7.

Judge Roy dismissed the claims of interference in his order of February 19, 2016 (CP 530-531). That ruling was not appealed. Espindola should not be permitted to include the claim in this appeal by mischaracterizing it. As demonstrated in the preceding section of this memorandum (§V(f) p.15) the anti-retaliation provisions of the FMLA do not apply and the case is properly characterized as one of "interference." Since Judge Roy dismissed the interference claims and no appeal was taken from that dismissal, this court must dismiss this appeal.

C. The claim of retaliation

1. The analytical framework for claims of retaliation.

In the absence of direct evidence a claim of retaliation may be established through the burden shifting analysis set forth by the court in *McDonald Douglas v. Green*, 441 U.S. 792 (1973). *Saunders v. City of Newport*, 657 F.3d 772, 777 (9th Cir. 2011); *Bushfield v. Donahoe,* 912 F.Supp. 2d 944, 953 (D. Idaho 2012).

The *McDonald Douglas v. Green* analysis requires (1) the employee establish a prima facie case; which, if established gives rise to an "inference" of discrimination. *Metoyer v. Chassman*, 504 F.3d 919, 931 n.6 (9th Cir. 2007). (2) If a prima facie case is established, the burden of production then shifts to the employer to articulate (not prove) a legitimate non-discriminatory reason for its actions. If such a reason is articulated, any inference of discrimination is dispelled and drops from the picture. *Furnco v. Waters*, 438 U.S. 567, 578 (1978); *Fonseca v. Food Service of Ariz.*, 374 F.3d 840, 849 (9th Cir. 2004). (3) The burden then shifts back to the plaintiff to demonstrate the articulated reason is incredible and unworthy of belief. See also: *Grimwood v. University of Puget Sound*, 110 Wn.2d at 355, 362-363 (1988); *Pottinger v. Potlatch*, 329 F.3d 740, 746 (9th Cir. 2003). At all times the ultimate burden of proof remains on the employee. *Grimwood*, 110 Wn.2d at 363-64.

The use of *McDonald Douglas v. Green* order and allocation of proof has been utilized by the Washington courts in analyzing claims of retaliation. *Hollenback v. Shriner's Hospital for Children* 149 Wn. App. 810, 823 (Div. III, 2009).

2. The failure of the prima facie case.

i. The elements of a prima facie case.

To establish a prima facie case of retaliation a plaintiff must prove: (1) that she invoked her right to FMLA leave; (2) she suffered an adverse employment decision; and (3) the adverse decision was causally connected to the invocation of those rights (i.e. because she took the leave). *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1176 (10th Cir. 2006); *Hunt v. Radides Healthcare Systems*, 277 F.3d 757, 768 (5th Cir. 2001); *Washington v. Ft. James Operatin Co.*, 110 F.Supp. 2d 1325, 1331 (D. Ore. 200).

ii. Espindola receives leave on two occasions.

It is undisputed that Espindola requested and received two (2) qualifying leaves. The first occasion was for a hospitalization that occurred from August 21-25, 2011. (CP 262 Ex. 3 Bates 24). That request was supported by a medical provider's note. (CP 263 Ex.3 Bates 25). The second for childbirth from January 9 – March 2. No points were assessed for those leaves. Upon return from those leaves, Espindola admitted that

she was returned to the same job, same shift, and same wages she held at the commencement of the leave. (CP 307; Ex.12 Espindola Dep. 10:12-11:24).

iii. Espindola did not establish entitlement to "intermittent leave".

The FMLA allows an employee to take "intermittent" leave when "medically necessary because of the employee's serious health condition." 29 C.F.R. § 825.203; RCW 49.78.230. Espindola claimed that she was entitled to intermittent leave on "eleven instances." (Appellant Brief p.18). However, no evidence of record supports that claim.

iv. No medical evidence supports the claim.

Espindola presented no competent admissible evidence that she had a "serious health condition" related to her hospitalization. Espindola failed to present any medical evidence that there were any medical conditions[4] or medical conditions related to the hospitalization. The doctor's note regarding the hospitalization from August 21-25, 2011 did not indicate the reason for hospitalization. The note does not indicate a need for continuing treatment. (CP 263 Ex. 3 Bates 25):

[4] Ms. Espindola acknowledges gestational diabetes was temporary in nature and did not cause her to miss work. CP 314 Espindola Dep. Ex. 12; 23:23-24


MEMORIAL
2811 Tieton Drive • Yakima, WA • 98902 Pharmacy: (509) 575-8036
1003774419
Name: Espindola-Salas, Marla, G
F 622444 33Y 4/14/1978
ADM
Address: 8/24/2011 MED M
ATN Shively, Norman
DOB
Date: 8/25/11
Rx
My Espindola-Salas has been in the hospital 8/04 - 8/05 and will be unable to return to work of tour till after her follow up appointment with me on 8/31/11
Substitution Permitted
Dispense as Written
REFILLS: 1 2 3 4 5 PRN NR
DEA
ALLERGIES:
PH-10 Rev. June 2010 Written on colored security paper. May not be scanned, copied, faxed or erased.

The other notes provided by Espindola, even if admissible, which they are not, do not provide the necessary notice of a "serious health condition" or a connection to a "hospitalization" or related conditions:

		CP 238: Ex. 3
5/20/11	YVFWC Dental Appointment* Different name "Marla"	Bates 2 No excuse slip
6/6/11	Dental*	Bates 15 Excused No points
6/17/11	No identification of reason or provider Handwritten notes differ from printed date	Bates 15
7/7/11	Urinary Tract Infection. No indication of appointment or continuing treatment.	Bates 17

7/12/11	Different name on slip "Rogelio Mendoza"	Bates 19 No points
7/21/11	Memorial – Patient ill 2 days	Bates 4 Excused No points
8/1/11	YVFWC appointment	Bates 23 Excused No points
8/25	Hospitalized	Bates 26 Excused No points
9/9/11	Different names	Bates 27 Excused No points
9/16	Doctor appointment	Bates 29 Excused No points
10/11	YVFWC – appointment 2:30	Bates 31 Excused No points
10/12	PAML Lab work	Bates 32 Excused No points
12/27/11	YVFWC	Bates 34 Excused No points
3/6/12	YVFWC – baby appointment	Bates 36 Excused No points
4/4	YVFWC – appointment child	Bates 38 Excused No points

*dental appointments are not included in FMLA coverage 29 C.F.R. § 825.114(c); RCW 49.78.020(16)(C).

None of these appointment slips provide evidence that support Espindola's claim that such absences were related to the hospitalization. They did not establish an independent qualifying "serious health" condition or need for continuing treatment. Twelve (12) of the absences relied upon by Espindola were "excused" with no accumulation of points. Two were dental appointments that do not qualify for FMLA leave.

3. Ms. Espindola did not provide adequate or sufficient notice to inform her employer that "intermittent" leave was needed.

An employer cannot be expected to guess or read an employee's mind. An employee is required to provide "notice sufficient to make the employer aware the employee needs FMLA qualifying leave." 29 C.F.R. § 825.302(c). The "test" is whether the information provided is adequate to apprise the employer of the need to take qualifying leave. The requirement of adequate notice comports with the declared purpose of providing "reasonable leave for medical purposes" in a manner that "accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b); RCW 49.78.010.

Espindola asserts that she gave her employer notice when she was going to miss work (App. Brief p.18) and that she gave notice of taking time off for her serious health condition and the serious health condition of her child. (App. Brief p.17). Here, on those occasions that Espindola

provided an adequate notice of the need for leave, such leave was afforded.

Hospitalization:

A. I called him and told him that I was not going to come back to work until I got out of the hospital.

Q. What did he tell you?

A. He answered that that was all right. To take the time that I felt was necessary.

CP 316 Espindola Dep. 25:12-16 [5] Ex. 12

She was afforded leave with no points accumulated. The testimony and provider's note does not indicate a need for continuing treatment.

Maternity:

Q. Now, before you went on maternity leave, did you go to somebody at Apple King and tell them you needed maternity leave?

A. Yes, I did that to German.

Q. And you told him you needed to take maternity leave?

A. Yes.

Q. And he told you you could take time off?

A. Yes, he gave me 12 weeks.[6]

CP 306 Espindola Dep. 9:23-10:5 Ex. 12

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[5] The need for leave was also supported by a providers note (CP 263)

[6] Espindola voluntarily returned from the maternity leave early. (CP 307 Espindola Dep. 10:6-10)

Espindola was afforded the needed leave. There is no indication of a need for continuing treatment.

What we are left with is only the assertion that Espindola provided adequate notice. However, the testimony is simply that of a supervisor Armida Aparacio who stated "...but she called." (CP 334 Ex.14). No testimony was presented to show anything else was said in the calls.

Calling in "sick" is not sufficient to provide sufficient notice to the employer that FMLA leave may be implicated. The employee "must explain the reasons for needed leave." *Willis v. Coca Cola Co.*, 445 F.3d 413, 419 (5th Cir. 2006). Using general terms such as she "didn't feel good," was "sick," or "needed a couple of days to get better, a few days" is not sufficient notice. *Beaver v. Regis Inventoy Specialist*, 144 Fed. Appx. 452 (6th Cir. 2005); *Carter v. Ford Motor Co.*, 121 F.3d 1146 (8th Cir. 1997); *Collins v. NTN Bower Corp.*, 273 F.2d 1006, 1008 (7th Cir. 2001); *Mackie v. Jewish Foundation*, USOL D. MD. 2001 #DKC C10-0952; *Rogers v. SEBO Nursing Center*, USDC ND Indianan 2010 # 2:09:CU 115 PRC.

Courts have found notice to be deficient where the employee has failed to convey the reason for needing leave. *Nicholson v. Pulte Homes Corp.*, 690 F.3d 819, 826 (7th Cir. 2012) (employee's "casual conversation" about the challenges of dealing with a condition was not

adequate notice); *Sarnowski v. Air Brook Limo*, 510 F.3d 398, 402 (3rd Cir. 2007) ("the critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition"). *Seaman v. CSPH, Inc.*, 179 F.3d 297, 302 (5th Cir. 1999) (finding inadequate notice where employee never informed his supervisor of a serious medical condition); *Brenneman v. Med. Central Health*, 366 F.3d 412, 423-24 (6th Cir. 2004) (finding inadequate notice where employee did not explain that his absence had been due to a serious medical condition until after the fact); *Woods v. Daimler Chrysler*, 409 F.3d 984, 992-93 (8th Cir. 2005) (finding inadequate notice where employee expressed that he was stressed and felt his health was at risk but never provided any information to indicate that his absence from work was due to a serious health condition).

Espindola failed to present competent admissible evidence that she provided adequate notice. Conclusions are never sufficient to withstand summary judgment. *Grimwood*, supra.

4. Apple King articulates a legitimate non-discriminatory reason: violation of attendance policy.

i. The articulated reason.

If it is assumed that Espindola established a prima facie case (which she did not) Apple King articulated the required legitimate non-

discriminatory reason; Espindola accumulated too many points under the absentee policy. Espindola accumulated twenty eight (28) points for unexcused absences (see p. 7 supra and CP 238 Ex.3). Espindola confirmed this by admitting that "she had too many unexcused absences" (CP 39 Complaint p.4 ¶ 3.17).

ii. Apple King's policy was not a "no fault policy."

Apple King maintained a written attendance policy. Espindola had received the policy (CP 235 Def. Ex. 1). The policy provided that if an employee accumulated 24 points between May 1 and April 30 they would be terminated. The policy did not assess points if the employee had an appointment, provided proof of the appointment and 24 hour advance notice, had a hospitalization or emergency. Employees would not accumulate points in those circumstances or if they used a vacation day (CP 233 Def. Ex. 1).

A no fault attendance policy assesses points for various attendance infractions without regard to the reason for the absence. Under a no fault policy it does not matter whether an employee is absent for a good reason, bad reason, or no reason—all absences, regardless of the reason, are counted as an absence and there is no attempt to classify an excused or unexcused absence. Each employee is allocated a specific number of days for absences which, if exceeded, results in discipline. See: *Aubuchon v.*

Knauf Fiberglass, 240 F. Supp. 2d 859, 860 (USDC S.D. Indiana 2003); *Tucker v. MTA*, 2013 WL 55831 (USDC S.D. NY 2013); *Robinson v. UAW Local 1196*, 877 F. Supp. 405, 412 (ND Ohio 1995).

Apple King's policy has no limitations on the number of absences and accumulated points only if the employee failed to comply with the notice provisions (CP 233 Def. Ex. 1). No points were assessed for emergencies (CP 339 Ex. 14 Dep. Aparicio 11:9-24).

The Apple King attendance policy is not a "no-fault" policy.

iii. The resultant shift in the burden.

Once the employer has articulated a legitimate non-discriminatory reason for its action, any inference of discrimination created by a prima facie case is dispelled and drops from the picture. *Furnco*, 438 U.S. at 578. The burden is shifted back to Espindola to demonstrate the employer's articulated reason is a pretext. *Grimwood*, supra.

5. Pretext.

i. Pretext – the legal standard.

To establish pretext a plaintiff must show "weakness, implausibilities, inconsistencies, or contradictions in the [employer's] proffered reasons for its action such as a reasonable fact finder would rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reason. *Morgan*

v. Hilti Inc., 108 F.3d 1319, 1323 (10th Cir. 1997); *Rivera v. City and County of Denver*, 365 F.3d 912, 924-25 (10th Cir. 2004).

In determining whether an employer's belief of employee misconduct was honest, the court examines "the facts as they appear to the person making the decision" without a review of the "wisdom or fairness" of the decision. *Berry v. TMobile*, 490 F.3d 1211, 1220 (10th Cir. 2007). An employer's belief may be honest even if it turns out to be mistaken. *Medley v. Polk Co.*, 260 F.3d 1202, 1207 (10th Cir. 2001). *See also Tran v. Trustees of State Colls. In Colo.*, 355 F.3d 1263, 1268-69 (10th Cir. 2004) (employer's good faith belief "would not be pretextual even if the belief was later found to be erroneous"); *Kariotis v. Navistar Int'l Trans. Corp.*, 131 F.3d 672, 680 (7th Cir. 1997) (when an employee is discharged because of an employer's honest mistake, federal anti-discrimination laws offer no protection).

Temporal proximity cannot be the only basis for finding pretext. *Skrjanc v. Great Lakes Power Service*, 272 F.3d 309, 315-16 (6th Cir. 2001); *Weston v. Pennsylvania*, 251 F.3d 420, 431 (3rd Cir. 2001).

ii. Pretext cannot be shown.

An employee who requests (or receives) FMLA leave has no greater rights than an employee who does not request FMLA leave. 29

C.F.R. § 825.302(d); *Smith v. Diffee Ford-Lincoln-Mercury*, 298 F.3d 955, 960 (10th Cir. 2002).

Recognizing that part of the expressed intent of the FMLA is that the entitlement to leave must be accomplished in a manner that "accommodates the legitimate expectations of employers." 29 U.S.C. § 2601(b); RCW 49.78.010 the USDOL adopted a regulation that provides "an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave." 29 C.F.R. § 825.303(c). "…where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA protected leave may be delayed or denied." 29 C.F.R. § 825.302(d). Relying on that regulation numerous federal courts have ruled that an employer may enforce its customary notice and attendance procedures against an employee claiming FMLA-protected leave, unless unusual circumstances justify the employee's failure to comply with the requirements. *Srouder v. Dana Light Axel Mfg. LLC*, 725 F.3d 608, 615 (6th Cir. 2013). Similarly the Seventh Circuit in *Lewis v. Holsum of Fort Wayne Inc.*, 278 F.3d 706 (7th Cir. 2002) concluded that an employer did not violate the FMLA by discharging an employee "who failed to comply with applicable rules and policies" regarding leave notice where "it was not impossible" for her to do so. 278

F.3d at 710; *Bradsher v. City of Philadelphia Police Dep't.*, No. 04-3309, 2007 WL 2850593 (E.D. Pa, 2007) (holding that the employer did not violate FMLA by terminating employee for violating employer's sick leave policy). Moreover, FMLA leave cannot be used as a guise to evade an employer's attendance policy. *See Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 878 (10th Cir. 2004) ("Bones' request for FMLA leave does not shelter her from the obligation, which is the same as that of any other Honeywell employee, to comply with Honeywell's absence policy"). *Shelton v. Boeing*, 2014 WL 727430 (USDC WDWA Judge Zilly). See also: *Brown v. Auto Components*, 622 F.3d 685, 690-91 (7th Cir. 2010); *Brown v. Hennepin Cty. Med. Ctr.*, 550 F.3d 711, 715 (8th Cir. 2008); *Thornberry v. McGehee Desha Cty. Hosp.*, 403 F.3d 972, 977 (8th Cir. 2005); *Gillam v. UPS*, 233 F.3d 969, 971 (7th Cir. 2000); *Buckman v. MCI World Com*, 374 F. Appx. 719, 720 (9th Cir. 2010).

Ms. Espindola fails to cite a single case in support of the argument that an employer may not require its employees to comply with generally applicable policies. "The FMLA does not replace traditional employer established sick and personal leave policies." *Bushfield v. Donahoe*, 912 F. Supp. 2d 944, 952 (D. Idaho 2012).

Ms. Espindola cannot establish pretext.

VII. CONCLUSION

Ms. Espindola has failed to demonstrate (1) that she had a "serious medical condition" that entitled her to leave; (2) that she provided adequate notice of the need for leave; and (3) that she complied with the employer attendance policy.

The appeal is without merit and must be dismissed.

Dated this 4th day of December, 2017.

s/ Gary E. Lofland, WSBA No. 12150
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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the date stated below I served a copy of this document in the manner indicated:

Favian Valencia 402 E. Yakima Ave., Ste. 730 Yakima, WA 98901	☒ First Class U.S. Mail ☒ Email ☐ Hand Delivery ☐ UPS Next-Day Air

Dated this 4th day of December, 2017.

Sandra Lepez
MEYER, FLUEGGE & TENNEY, P.S.

MEYER, FLUEGGE & TENNEY

December 04, 2017 - 4:21 PM

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Appellate Court Case Title:	Maria Espindola v. Apple King, a Limited Liability Company
Superior Court Case Number:	16-2-02725-2

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NO. 352625

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

MARIA ESPINDOLA,

Appellant,

v.

APPLE KING, INC.,

Respondent.

APPLE KING'S RESPONSE TO APPELLANT'S MOTION FOR DISCRETIONARY REVIEW

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I. HISTORY OF THE CASE

A. The Complaint

This case began with the filing of an unverified complaint in the Yakima County District Court on July 16, 2017. The complaint alleged violations of (1) the Washington Law Against Discrimination, RCW 49.60.030; (2) the Washington Family Leave Act, RCW 49.78.303; (3) the Family Medical Leave Act, 29 U.S.C. 2615; and (4) the Americans with Disabilities Act, 42 U.S.C. § 2000 e-5.

B. The District Court Proceedings

The matter was heard before Judge Kevin Roy of the Yakima County District Court. Judge Roy granted Apple King's Motion for Summary Judgment on the claims of violation of the Washington Law against discrimination, the Americans with Disabilities Act, and the claims of interference under the FMLA and WFLA (See 9/16/16 Corrected Order on SJ Ex. 1). On June 22, 2016 Judge Roy issued a letter opinion granting Apple King's Motion for Summary Judgment on the claim of discrimination/retaliation under the FMLA and WFLA (Ex. 2). The order granting summary judgment was entered on September 16, 2016. (E. 3).

C. The Superior Court Proceedings

On July 22, 2016 an appeal was filed to the Superior Court of Yakima County. The Notice of Appeal only sought review of the order of

June 22nd and which granted Apple King's Motion for Summary Judgment on the claims of discrimination/retaliation under the FMLA/WFLA. On May 1, 2017 Judge Michael McCarthy upheld the decision of Judge Roy and again granted summary judgment in favor of Apple King (Ex. 4).

D. Previous Sanctions

Counsel for Ms. Espindola has been sanctioned three (3) times throughout the course of these proceedings. The first resulted from the failure to respond to discovery (Ex. 5); the second for failing to comply with the RALJ (Ex. 6); and the third for request for continuance on the day of hearing (Ex. 7). The fourth is pending before Judge McCarthy and will be heard on July 7th.

E. The Court of Appeals

On May 3, 2017 counsel filed a "Notice of Appeal" to Division III (Ex. 8). Thereafter, on June 16, 2017 counsel filed the present Motion for Discretionary Review.

II. THE LEGAL STANDARD FOR REVIEW BY THE COURT OF APPEALS

RAP 2.2 provides in pertinent part:

> (c) Superior Court Decision on Review of Decision of Court of Limited Jurisdiction. If the superior court decision has been entered after a proceeding to review a decision of a court of limited jurisdiction, **a party may appeal only if the review proceeding was a trial de novo**. Appeal is not available if: (1) the final judgment is a finding that a

> traffic infraction has been committed, or (2) the claim originated in a small claims court operating under RCW 12.40.
>
> RAP 2.2(c)
> [emphasis added]

An appeals court review of a superior court's review of a district court decision is limited to those circumstances when there was a trial de novo.

III. ARGUMENT

A. No Appeal May be Taken

The rules of appellate procedure do not authorize an appeal from a superior court review of a decision of a court of limited jurisdiction unless the review proceeding was a trial de novo. The language of RAP 2.2(c) is clear and unambiguous: "…a party may appeal only if the review proceeding was a trial de novo…" RAP 2.2 (c). Counsel does not cite RAP 2.2 (c) in his motion. The Commissioner must deny the request for review.

B. Even if a discretionary review is available counsel has not established a legitimate basis for review

(1) The Court's considerations are limited

Even if discretionary review is available, which it is not, counsel has not established legitimate basis for review. The Rules of Appellate Procedure set forth the considerations governing acceptance of review which are limited:

> **(d) Considerations Governing Acceptance of Review of Superior Court Decision on Review of Decision of Court of Limited Jurisdiction.** Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction will be accepted only:
>
> (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
>
> (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
>
> (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

RAP 2.3(d)

Counsel relies upon RAP 2.3(d)(3) to support discretionary review claiming "…the lower courts' decision involve an issue of public interest and to the fact that appellate courts of Washington have not weighed in on the practical application of FMLA and WFMLA retaliation claims and the trial courts are having to resort to federal and out of state interpretations of similar laws." (Appellant Motion § II p.1). The assertion misses the mark.

(2) The WFLA is to be construed and interpreted consistent with the federal FMLA

The Washington legislature has provided:

> This chapter must be construed to the extent possible in a manner that is consistent with similar provisions, if any, of the federal family and medical leave act of 1993 (Act Feb. d, 1996 P.L. 103-3, 107 Stat. 6) and that gives consideration to the riles, precedents, and practices of the federal department of labor relevant to the federal act."
>
> RCW 49.78.410

Both the multitude of cases decided under the federal FMLA, 29 U.S.C 2615; and the regulations adopted by the US Department of Labor, 29 C.F.R. 825 provide ample guidance. A quick search of Washington appellate decisions using the term Washington Family Leave Act results in some ninety seven cases decided by the Washington courts. (Exhibit 13).

The concept of discrimination and retaliation are not new for the Washington courts. It has been addressed in claims of discrimination based upon protected status under RCW 49.60 and retaliation because of protected activity including workers compensation, wage and hour and discrimination.[1] The assertion that there are insufficient resources to guide the courts is simply incorrect.

[1] A search of Washington appellate cases using Westlaw and the search term "discrimination" shows 2,538 cases reported (Exhibit 2). The term retaliation yields 1,009 reported cases. (Exhibit 3).

(3) The factual assertions upon which this motion is based are simply incorrect and misstated

The claim of discrimination and retaliation has been heard by two judges. Judge Roy of the district court and Judge McCarthy of the superior court. They have reviewed the same evidence, heard the same arguments and reached the same conclusion. Counsel for Espindola was not satisfied with the results and wants a third bite of the apple. However, he brings nothing to this court to show the decisions below were factually incorrect and continues to misapprehend and misstate the assertion that there is insufficient legal authority and resources to guide the courts is incorrect.

a. Apple King did not maintain a "no fault policy".

The attendance policy provided that if an employee accumulated 24 points between May 1 and April 30 they would be terminated. The policy did not assess points if the employee had an appointment, provided proof of the appointment and 24 hour advance notice. Employees would not accumulate points in those circumstances and if they used a vacation day (Ex. 9).

Under a no fault policy it does not matter whether an employee is absent for a good reason, bad reason, or no reason—all absences, regardless of the reason, are counted as an absence and there is no attempt to classify an excused or unexcused absence.

Apple King's policy has no limitations on the number of absences and accumulated points only if the employee failed to comply with the notice provisions. No points were assessed for emergencies (Dep. Aparicio Ex.10).

b. Espindola receives FMLA leave on two occasions

It is undisputed that Espindola took FMLA qualifying leave. The first occasion was for a hospitalization that occurred from August 21-25, 2011. (Ex.11 Bates 24). That request was supported by a medical provider's note (Bates 25). The second for childbirth from January 9 – March 2. No points were assessed for those leaves. Upon return from those leaves, Espindola admitted that she was returned to the same job she held at the commencement of the leave. (Ex. 12).

c. Espindola did not establish entitlement to "intermittent leave"

The FMLA and WFLA allows an employee to take "intermittent" leave when "medically necessary because of the employee's serious health condition." 29 C.F.R. 825.203.

i. No medical evidence supports the claim

Espindola failed to present any medical evidence that there were any medical conditions or medical conditions related to the hospitalization. The notes provided by Espindola, even if admissible, which they are not, do not provide the necessary notice of a "serious

health condition" or a connection to a "hospitalization" or related conditions which would require "intermittent" FMLA leave.

ii. Espindola did not provide verbal notice that would lead the employer to believe there was a "serious health condition."

Espindola asserts that she gave the employer "verbal notice every time she was absent" (Motion p.11). The evidence relief upon was the statement of Apple King Supervisor Armida Aparicio who testified "…but she called." However, no testimony was presented to show what was said in the calls. A claim that she was "ill" or "sick" is not sufficient to provide sufficient notice to the employer that FMLA leave may be implicated. The employee "must explain the reasons for needed leave." *Willis v. Coca Cola Co.*, 445 F.3d 413, 419 (5th Cir. 2006). Using general terms such as she "didn't feel good," was "sick," or "needed a couple of days to get better, a few days" is not sufficient. *Beaver v. Regis Inventory Specialists*, 144 Fed. Appx. 452 (6th Cir. 2005); *Carter v. Ford Motor Co.,* 121 F.3d 1146, 1448 (8th Cir. 1997).

d. Espindola's failure to comply with the attendance policy lead to the termination.

An employee who requests (or receives) FMLA or WFLA leave has no greater rights than an employee who does not request FMLA leave. 29 C.F.R. 825.302(d); *Smith v. Diffee Ford-Lincoln-Mercury*, 298 F.3d 955, 960 (10th Cir. 2002). RCW 49.78.280(1)(c)(ii).

A regulation adopted under the FMLA provides "…where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA protected leave may be delayed or denied." 29 C.F.R. 825.302 (d). Relying on that regulation the federal courts have ruled that an employer may enforce its customary notice and attendance procedures against an employee claiming FMLA-protected leave, unless unusual circumstances justify the employee's failure to comply with the requirements. *Srouder v. Dana Light Axel Mfg. LLC*, 725 F.3d 608, 615 (6th Cir. 2013). Similarly the *Seventh Circuit in Lewis v. Holsum of Fort Wayne Inc.*, 278 F.3d 706 (7th Cir. 2002) concluded that an employer did not violate the FMLA by discharging an employee "who failed to comply with applicable rules and policies" regarding leave notice where "it was not impossible" for her to do so. 278 F.3d at 710; *Bradsher v. City of Philadelphia Police Dep't.*, No. 04-3309, 2007 WL 2850593 (E.D. Pa, 2007) (holding that the employer did not violate FMLA by terminating employee for violating employer's sick leave policy). Moreover, FMLA leave cannot be used as a guise to evade an employer's attendance policy. See *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 878 (10th Cir. 2004) ("Bones' request for FMLA leave does not shelter her from the obligation, which is the same as that of any other Honeywell employee, to comply

with Honeywell's absence policy"). Followed by *Shelton v. Boeing*, 2014 WL 727430 (USDC WDWA Judge Zilly).

IV. CONCLUSION

Two judges have reviewed the evidence and heard the same arguments advanced in this motion. Both decided the claim could not survive a summary proceeding. Counsel now wants a third bite of the apple. However, he has demonstrated no ground under the Rules of Appellate procedure that persuades the court to accept review. The petition must be denied.

Dated this 23rd day of June, 2017.

s/ Gary E. Lofland, WSBA No. 12150
MEYER, FLUEGGE & TENNEY, P.S.
Attorney for Apple King, LLC
230 South Second Street
Yakima, WA 98901
(509) 575-8500

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the date stated below I served a copy of this document in the manner indicated:

Favian Valencia 402 E. Yakima Ave., Ste. 730 Yakima, WA 98901	☒ First Class U.S. Mail ☐ Email ☐ Hand Delivery ☐ UPS Next-Day Air

Dated this 23rd day of June, 2017.

Sandra Lepez
MEYER, FLUEGGE & TENNEY, P.S.

Exhibit 1

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

MARIA G. ESPINDOLA, Plaintiff, v. APPLE KING, a limited liability company, Defendant.	Case No.: 144197 CORRECTED ORDER ON SUMMARY JUDGMENT

Cross motions for Summary Judgment came before this court on January 8, 2016. The plaintiff Ms. Espindola was represented by Mr. Favian Valencia of Sunlight Law, the defendant Apple King by Gary Lofland of Meyer, Fluegge and Tenney.

The court having considered the submissions and arguments of counsel:

1. **Denies** the plaintiff's motion for partial summary judgment regarding the Family Medical Leave Act. The theory of law upon which the plaintiff's motion is based (Interference) is not supported by her pleadings which allege a specific statutory violation of 29 U.S.C § 2614 and 29 C.F.R. 825.212 (a) which claimed "retaliation and discrimination";

2. **Grants** the defendant Apple King's motion for summary judgment regarding the Washington Law Against Discrimination, RCW 49.60;

3. **Grants** the defendant Apple King's motion for summary judgment regarding American's with Disabilities Act; and

4. **Grants** the defendant Apple King's Motion for Summary Judgment regarding the specific claims of violation Family Medical Leave Act and the Washington Family Leave Act. 29 U.S.C. § 2614 and 29 C.F.R. § 825.215 (a), relating to an interference claim, due to the fact that it was not pled. Any claims pled under the above acts still remain.

The documents and evidence considered by the court are contained in Exhibit A.

Dated this 16 day of September, 2016.

Judge Kevin Roy
Yakima County District Court

Presented by:

Gary E. Lofland

Approved as to form; notice and presentment waived:

Favian Valencia

Exhibit 2

Yakima County District Court

128 North Second Street, Room 225
Yakima, WA 98901
Phone: (509) 574-1804 Fax: (509) 574-1801

Judges
Kevin M. Roy
Donald W. Engel
Brian K. Sanderson
Alfred G. Schweppe

Court Commissioner
Kevin Eilmes

June 22, 2016

Favian Valencia
402 E. Yakima Ave. Suite 730
Yakima, Wa 98901

Gary Edward Lofland
230 S. 2nd Street
Yakima, Wa. 98901

RE: Maria G. Espindola vs. Apple King, Y14-04197

Gentlemen, the court has reviewed the pleadings and evidence presented in support of parties' motion for summary judgment. In a prior letter decision, the court granted motions for summary judgment in favor of the defendant. The court found their still remained the claim of discrimination/retaliation under the FMLA/WFLA. A discrimination claim makes it unlawful for any employer to discharge, or in any way, discriminate against any individual for opposing any practice made lawful by the FMLA/WFLA.

A plaintiff may prove a FMLA retaliation claim by first establishing a prima facie case of retaliation which gives rise to an inference of discrimination. If a prima facie case is established, the burden of production shifts to the employer to articulate a legitimate nondiscrimination reason for the action. If a non-discriminating reason is articulated, any inference of discrimination is dispelled. Lastly, the burden shifts back to the plaintiff to demonstrate the employer's articulated reason is incredible and unworthy of belief.

Here, based on the evidence presented, the court is unable to find that a prima facie case of discrimination has been made. There are no genuine issues of material fact as to the plaintiff taking "intermittent" leave under the FMLA/WFLA. Plaintiff had returned to work after her allowed FMLA/WFLA leave and given her old job back. Nothing presented to this court would create a genuine issue as to material fact that the employer should have somehow knew, or should have made further inquiry regarding if the leave could be under the FMLA or WFLA. It was some seven weeks after her final FMLA leave ended. Plaintiff was not penalized for taking FMLA/WFLA leave. With the passage of time, unspecific doctor's notes and vague phone calls from plaintiff, with nothing else, doom the discrimination case on summary judgment. The employer is not required to guess that it is allowed leave.

The court finds that the defendant's work attendance policy is not a "no fault" policy which could violate the FMLA/WFLA. It is undisputed that if the rules of the

policy are followed, there are no adverse consequences to the employee. The policy was not followed by the defendant to the extent that she could avoid adverse circumstances.

Even if an argument could be made that a prima facie case has been made by plaintiffs, under the burden shifting law outlined by both parties herein, the employer set forth a nondiscriminatory reason for the firing (violation of an appropriate attendance policy) and the plaintiff has failed to show that the articulated reason by the employer is false or a pretext of some kind.

Therefore, the court finds that there are no genuine issues of material fact regarding the remaining claim by plaintiff and grants defendant's motion for summary judgment on the discrimination/retaliation claim. Plaintiff's motion regarding the same issue is denied.

Sincerely,

Judge Kevin M. Roy
Yakima County District Court

Exhibit 3

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

MARIA G. ESPINDOLA,

Plaintiff,

v.

APPLE KING, a limited liability company,

Defendant.

Case No.: 144197

ORDER GRANTING DEFENDANT APPLE KING'S MOTION FOR SUMMARY JUDGMENT RE: RETALIATION/DISCRIMINATION

Cross motions for Summary Judgment on the Plaintiff Espindola's claim of retaliation/discrimination under the FMLA came before the court on Wednesday, June 15, 2016; the Plaintiff was represented by Mr. Favian Valencia of Sunlight Law; the Defendant by Gary Lofland of Meyer, Fluegge & Tenney. The Court having considered the submissions of the parties and argument of counsel **GRANTS** the Defendant's Motion for Summary Judgment on the claims of interference/retaliation and **DENIES** the Plaintiff's motion.

The documents and evidence considered by the court are contained in Exhibit A.

Dated this 16 day of September, 2016.

Judge Kevin Roy
Yakima County District Court

Presented by:

Gary E. Lofland

Approved as to form; notice and presentment waived:

Favian Valencia

Exhibit 4

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

Maria Espindola

NO. 16-2-02725-39

vs.

ORDER Affirming S.J. for Apple King

Apple King

THIS MATTER HAVING COME ON for hearing before the undersigned judge/commissioner of the above-entitled court, it is hereby ORDERED THAT:

The Court after de novo review finds there is no dispute as to a material fact does affirms the decision of the district court granting S.J. in favor of Apple King and denying the Plaintiffs motion for summary judgment on the claims of retaliation under the FMLA + WFLA

DONE IN OPEN COURT this 1st day of May, 2017.

JUDGE/COURT COMMISSIONER

Presented by:
(Copy received)

Attorney for Apple King

Approved as to form:
(Copy received)

45807

Attorney for Espindola

Exhibit 5

IN THE DISTRICT COURT OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

MARIA G. ESPINDOLA, Plaintiff, vs. APPLE KING, a limited liability company, Defendant.	NO. 144197 ORDER GRANTING ATTORNEY'S FEES

This matter having come before the Court upon the Motion of the Defendant for an award of attorney's fees, and the Court finding that the Defendant is entitled to the requested relief,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Defendant is awarded attorney's fees in the amount of $990.00;

2. The amount of $990.00 is reasonable and was necessarily incurred;

3. The amount of $990.00 shall be paid to Defendant within thirty (30) days of counsel's receipt of this Order.

3. The award of attorney's fees shall bear interest at the rate of twelve percent (12%) per annum.

LAW OFFICES OF
MEYER, FLUEGGE & TENNEY, P.S.
230 South Second Street - P.O. Box 22680
Yakima, WA 98907-2680
Telephone (509) 575-8500

DATED this 12th day of February, 2015.

KEVIN M. ROY
JUDGE

JUDGE/~~COMMISSIONER~~

Presented by:

RACHEL B. SAIMONS, WSBA #46553
GARY E. LOFLAND, WSBA #12150
Meyer, Fluegge & Tenney, P.S.
Attorneys for Defendant

LAW OFFICES OF
MEYER, FLUEGGE & TENNEY, P.S.
230 South Second Street · P.O. Box 22680
Yakima, WA 98907-2680
Telephone (509) 575-8500

Exhibit 6

FILED
PAMELLE RIDOLF, CLERK

'17 JAN -6 P2:25

SUPERIOR COURT
YAKIMA CO WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

MARIA G. ESPINDOLA, **Plaintiff,** **v.** **APPLE KING, a limited liability company,** **Defendant.**	**Case No.: 16-2-02725-39** ORDER DENYING MOTION TO DISMISS

The Appellee Apple King LLC's Motion to Dismiss came before the court on Friday, January 6, 2017; Apple King was represented by Gary Lofland; the Appellant Maria Espindola by Favian Valencia; the court having considered the submissions and arguments of counsel finds the Appellant Espindola has failed to comply with RALJ 7.2(a) and has not filed an opening memorandum as required by the rules or requested an extension of time before the brief was due. However, the court denies the Motion to Dismiss and will allow the Appellant Espindola to file her memorandum on or before 1/6/2017. If the memorandum is not filed by that date the appeal will be automatically dismissed. Apple King's responsive memorandum shall be filed within 45 days of the date the Appellants brief is filed. The Appellant Espindola shall reimburse Apple King the sum of $812.50 necessitated by bringing this motion. Apple King's Time frame for a responsive filing/brief begins to run when the $812.50 is paid. DFL

- 1

Done in open court this 6th day of January, 2017.

Judge
Yakima County Superior Court

Presented by:

Gary E. Lofland
Counsel for Apple King

Exhibit 7

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

A. MINATSPARKA,

vs.

APPLE KING

NO. 16202725391 ~~H0172~~

ORDER APPEAL

THIS MATTER HAVING COME ON for hearing before the undersigned judge/commissioner of the above-entitled court, it is hereby ORDERED THAT:

The matter is set May 1st at 9:00am.

TERMS ARE AWARDED TO ATTY LOFLAND IN THE SUM OF $945.00 PAYABLE BY ATTY VALENCIA

DONE IN OPEN COURT this 20th day of April, 2017.

JUDGE/COURT COMMISSIONER

Presented by:
(Copy received)

Attorney for

Approved as to form:
(Copy received)

Attorney for

Exhibit 8

4

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

Maria G. Espindola,	)	Case No.: 1620272539
Appellant,	)	
vs.	)	**NOTICE OF APPEAL TO COURT OF APPEALS DIVISION III**
APPLE KING, a limited liability company,	)	
Respondent.	)	

TO: Clerk of the Court,
TO: Gary Lofland, Attorney for Defendant.

COMES NOW Plaintiff, Maria Espindola, by and through her attorney of record, Favian Valencia of Sunlight Law, Pllc, and hereby requests review by the Court of Appeals Division III of the summary judgment order entered on May 1, 2017. The portion of the decision to be reviewed is the order affirming the district court's granting of summary judgment in favor of the defendant on Appellant's Family Medical Leave Act and Washington State Family Leave Act claims and denying Appellant's motion for summary judgment on the same claims. A copy of the order affirming the district court's decision is attached to this notice.

SUNLIGHT LAW, PLLC
402 E. Yakima Ave, Ste 730
Yakima, Washington 98901
(509)388-0231

Counsel for Defendant, Apple King, LLC, is Gary Lofland and his address is 230 S. 2nd Street, #101, P.O. Box 22680, Yakima, WA 98907.

Respectfully submitted this 3rd day of May, 2017.

Favian Valencia, WSBA#43802
Attorney for Maria Espindola, Plaintiff

SUNLIGHT LAW, PLLC
402 E. Yakima Ave, Ste 730
Yakima, Washington 98901
(509)388-0231

CERTIFICATE OF SERVICE

The undersigned makes the following declaration certified to be true under penalty of perjury pursuant to RCW 9A.72.085:

On the date given below, I hereby certify that the original Notice of Appeal was served on the following in the manner indicated:

Clerk of Court Yakima County Superior Court Clerk 128 N 2nd St #323 Yakima, WA 98901	[ ] FedEx [X] Legal Messenger [ ] Electronic mail [ ] First Class U.S. Mail [ ] Facsimile [ ] Hand delivered

GARY LOGLAND **Meyer, Fluegge & Tenney** 230 S. 2nd Street, #101 – P.O. BOX 22680 Yakima, WA 98907	[ ] Electronic mail [ ] Facsimile [X] Legal Messenger [ ] U.S. mail [ ] Other: hand delivered

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

Executed this 3rd day of May, 2017, at Yakima, Washington.

Mariana Garcia, Paralegal

SUNLIGHT LAW, PLLC
402 E. Yakima Ave, Ste 730
Yakima, Washington 98901
(509)388-0231

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

_____

NO. _____

vs.

ORDER _____

_____

THIS MATTER HAVING COME ON for hearing before the undersigned judge/commissioner of the above-entitled court, it is hereby ORDERED THAT:

_____

_____

_____

_____

_____

_____

_____

_____

DONE IN OPEN COURT this _____ day of _____, 20____.

_____
JUDGE/COURT COMMISSIONER

Presented by:
(Copy received)

_____
Attorney for _____

Approved as to form:
(Copy received)

_____
Attorney for _____

Exhibit 9

#16

APPLE KING, LLC.
ATTENDANCE POLICY

Apple King, LLC understands that there will be times when employees will miss work due to illness or other unforeseen reasons. It is equally important for the employee to understand the importance of maintaining a good attendance record. Good attendance reflects positively on the packing house as a whole. As of May 1st 2011, we will put into practice a revised 24 point attendance scoring system. Each employee will have 24 points to use up between May 1st and the last day of April. You will start with 0 points and each attendance infraction will be counted in the following manner.

NO POINTS will be counted for appts. with 24 hr. notice and proof of appt.
2 Points for not giving 24 hr. notice regardless of proof
2 Points for being Tardy
2 Points for leaving before end of shift without proof of appointment
3 Points per absence without proof of appointment (unless you use a Vacation Day)
12 Points for a NO CALL-NO SHOW
No points will be counted for L&I appointments.

If you reach the 24 point mark before the designated time, your employment with Apple King, LLC will be terminated. It is very important to understand that this will be the same for all Packing House employees. Every 1st of May each employee will start with 0 points once again only if they have managed not to reach the 24 point mark by the end of the last day of April. We strongly encourage you to set up your appointments on your day(s) off. In order to facilitate this on our behalf we will be rotating the groups less frequently. If we do move the groups we will try to let you know at least 2 weeks in advance.

APPLE KING, LLC.
POLIZA DE ASISTENCIA

Apple King, LLC comprende que van haber ocasiones cuando el empleado falte al trabajo por enfermedad u otras razones imprevistas. Por lo tanto es importante que el empleado comprenda la importancia de mantener un buen historial de asistencia; Un buen historial de asistencia se refleja positivamente en la bodega completa. Apartir del 1ro de Mayo del 2010 pondremos en practica un nuevo sistema que estara basado en puntos .

Cada empleado tendra 24 puntos para utilizar empezando el 1 Mayo hasta al ultimo dia de Abril del siguiente año y cada empleado empezara con 0 puntos y cada infraccion sera contada de la siguiente manera.

NINGUN PUNTO sera rebajado por citas con 24 hrs. de aviso y con comprobante de cita
2 Puntos por citas sin avisar con 24 hrs. de anticipacion
2 Puntos por llegar tarde
2 Puntos por irse temprano sin comprobante
3 Puntos por AUSENCIA sin comprobante (al menos que use un dia de su vacacion)
12 Puntos por 1 DIA DE NO LLAMAR Y NO PRESENTARSE AL TRABAJO
No se contaran puntos por citas de Labor e Industrias.

Si usted llega a la marca de 24 puntos antes del tiempo asignado su empleo con Apple King se dara por terminado.
Es muy importante que comprenda que esto aplicara a todos los empleados sin importar la senoria. El 1ro de Mayo, del 2011, cada empleado empezara con 0 puntos solo si han conseguido no llegar a los 24 puntos antes de el ultimo dia de Abril.
Le aconsejamos que haga sus citas en su dia de descanso. Para facilitar este nuevo sistema de puntuacion estaremos rotando los grupos con menos frecuencia y en dado caso que rotemos los grupos trataremos de hacerles saber con 2 semanas de anticipacion.

Revised

10-18-10

Exhibit 10

the next year?
A. Uh-huh.
Q. If they get 24 points they get terminated?
A. Yes, they do.
Q. And then who makes the decision to terminate them?
A. German.
Q. Okay. And does this policy apply to you?
A. Yes.
Q. Okay. And one of the things that I noticed on here, Armida, is that it doesn't talk about -- doesn't say how many points should be awarded for somebody being at the hospital or being ill.

How do you -- how do you take that into account to apply this point policy?
A. Every -- like we -- say that to an employee verbally. If they have an emergency, like being in the hospital or for a funeral or a car accident, something like that, there's no points there. So we don't take any points for -- for absence for the days that they stay in the hospital or any emergency. There's no points there.
Q. Well, what if somebody's sick but is not at the hospital, then in that case do you have to give points or no points in that case?
A. In that case it will be points because their absence.

Exhibit 11

Date	Appointment	Bates #
5/20/11	YVFWC Dental Appointment	Bates 2
6/6/11	Dental	Bates 15
6/17/11	No identification of reason or provider	Bates 15
7/7/11	Urinary Tract Infection	Bates 17
7/12/11	Different name on slip	Bates 19
7/21/11	Memorial – Patient ill 2 days	Bates 4
8/1/11	YVFWC appointment	Bates 23
8/22/11	Hospitalized	Bates 24 & 25
8/25	Hospitalized	Bates 26
9/9/11	Different name	Bates 27
9/16	Doctor appointment	Bates 29
10/11	YVFWC – appointment 2:30	Bates 31
10/12	PAML Lab work	Bates 32
12/27/11	YVFWC	Bates 34
3/6/12	YVFWC – baby appointment	Bates 36
4/4	YVFWC – appointment child	Bates 38

Yakima Valley
Farm Workers Clinic

Work / School Excuse Form

Date: 5-20-11

To Whom It May Concern:
This letter is to confirm that

Marla Espindola

had an appointment today from

1:45 to 4pm

Late N/C
Claudia 05-24

If you have any questions, please call:

Y.V.F.W.C DENTAL Linda Hughes
Clinic Name

(509) 248-1082
Phone Number

Employer #2

MEMORIAL

2811 Tieton Drive • Yakima, WA • 98902 Pharmacy: (509) 575-8036

Name: Maria Espindola DOB

Address: Date: 7-21-11

℞ Pt is ill & must be on bed rest for 2 days. Cromwell MD

Substitution Permitted Dispense as Written

REFILLS: 1 2 3 4 5 PRN NR DEA

ALLERGIES:

PH-10 Rev. June 2010 Written on colored security paper. May not be scanned, copied, faxed or erased.

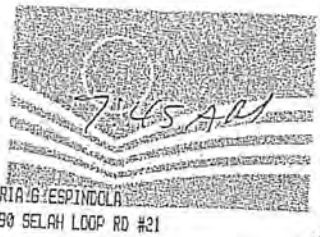
Employer #4

G-17 - Rogelio - D

1:00 - 2:45 Diana Selenne

IB HILL BLVD.
98901

06/10/11
~~05:36A~~
PRACTICE
MD



MARIA G ESPINDOLA
1790 SELAH LOOP RD #21

SELAH WA
98942

G.L.
06-10-11

Maura Espindola

Yakima Valley
Farm Workers Clinic

Work / School Excuse Form

Date: 6-6-11

To Whom It May Concern:
This letter is to confirm that

Maria Espindola

had an appointment today from

2:50 to 3:50.

If you have any questions, please call:

Y.V.F.W.C.
DENTAL DEPT.
~~602 E. NOB HILL BLVD.~~
YAKIMA, WA 98901

Clinic Name

Employer #15

YAKIMA VALLEY MEMORIAL

MARLA ESPINDOLA

Name: Espindola-Salas, M.G.
Age: 33Y DOB: Apr 14, 1978
Gender: F
MedRec: 622444
AcctNum: 1003473483
Attending: MNB
Primary RN: TFL
Bed: ED ED 15

YAKIMA VALLEY MEMORIAL HOSPITAL DISCHARGE INSTRUCTIONS

FINAL DIAGNOSIS
UTI

ADDITIONAL DIAGNOSIS
IUP

TREATED BY:
Attending Physician - Brueggemann, MD, Marty

FOLLOWUP CONTACT

Charles Forster MD, Family Practice
Yakima Farmworkers Clinic
602 East Nob Hill Blvd
Yakima WA 98901
Phone: 2483334

SPECIAL INSTRUCTIONS
Follow up with your OB provider.

MEDICAL INSTRUCTIONS

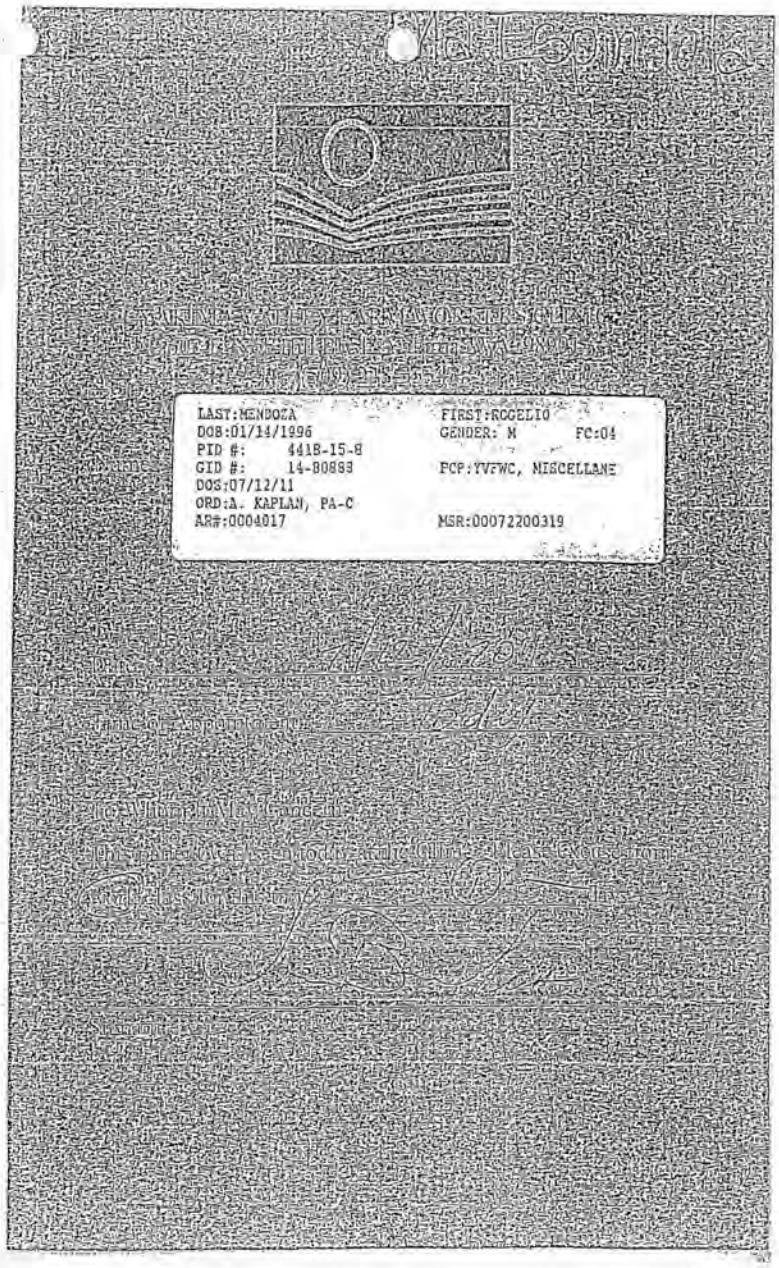
CYSTITIS, UTI (ADULT FEMALE)
INFECCIÓN DE LA VEJIGA,Mujer [Bladder Infection: Female, adult]

Una infección de la vejiga (cistitis [cystitis - UTI]) suele provocar constantes deseos de orinar y ardor al orinar. Es posible que la orina se vea turbia u oscura, o que tenga olor fuerte. Puede haber dolor en la parte baja del abdomen. Una infección de la vejiga se produce cuando las bacterias del área vaginal ingresan al orificio donde desemboca la vejiga (la uretra [urethra]). Puede ocurrir después de haber tenido relaciones sexuales, por usar ropas muy ajustadas, por deshidratación y otros factores.

CUIDADOS EN LA CASA:
Beba abundante líquido (al menos, entre 6 y 8 vasos por día, excepto que le hayan indicado limitar los líquidos por otras razones médicas). Eso hará que el medicamento ingrese mejor al sistema urinario y arrastrará las bacterias fuera de su cuerpo.
Evite tener relaciones sexuales hasta que los síntomas hayan desaparecido.
No consuma cafeína, alcohol ni comidas muy condimentadas, ya que pueden irritar la vejiga.
Una infección de la vejiga (bladder infection) se trata con antibióticos (antibiotics). También es posible que le receten Pyridium (nombre genérico: fenazopiridina [phenazopyridine]) para aliviar el ardor. Ese medicamento hará que su orina sea de color naranja brillante. Es posible que esa orina de color naranja le manche la ropa. Puede usar un protector diario o una toalla femenina para proteger la ropa.

EVITE FUTURAS INFECCIONES:
Después de evacuar el intestino, siempre límpiese con un movimiento de adelante hacia atrás.

Employer #17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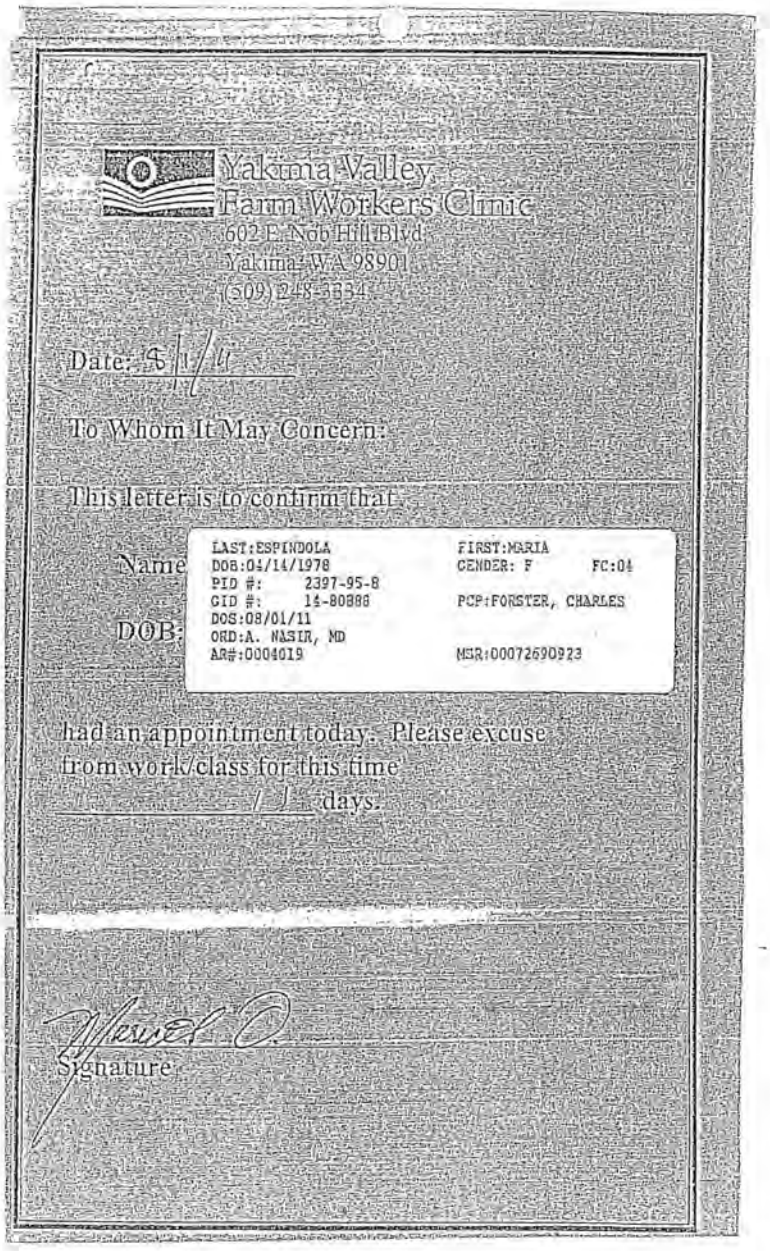
FIRST:ROGELIO
DOB:01/14/1996
GENDER: M
FC:04
PID #: 441B-15-8
GID #: 14-B0883
PCP:YVFWC, MISCELLANE
DOS:07/12/11
ORD:A. KAPLAN, PA-C
AR#:0004017
MSR:00072200319

Employer #19



Yakima Valley
Farm Workers Clinic
602 E. Nob Hill Blvd
Yakima, WA 98901
(509) 248-3834

Date: 8/11/11

To Whom It May Concern:

This letter is to confirm that

Name: LAST:ESPINDOLA FIRST:MARIA
DOB:04/14/1978 GENDER: F FC:04
PID #: 2397-95-8
GID #: 14-80888 PCP:FORSTER, CHARLES
DOS:08/01/11
ORD:A. NASIR, MD
AR#:0004019 MSR:00072690923

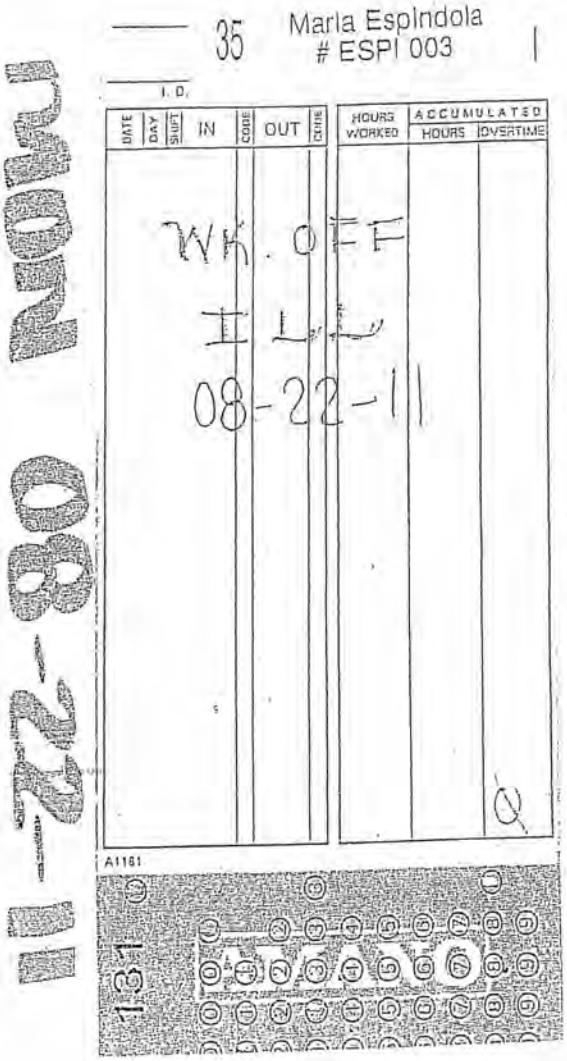
DOB:

had an appointment today. Please excuse from work/class for this time

/ / days.

Signature

Employer #23


35 Maria Espindola
ESPI 003
I. D.
DATE
DAY
SHIFT
IN
CODE
OUT
CODE
HOURS WORKED
ACCUMULATED
HOURS
OVERTIME
Wk. OFF
H L
08-22-11
A1161
11-22-80 MON

Employer #24

MEMORIAL
2811 Tieton Drive • Yakima, WA • 98902
Pharmacy: (509) 575-8036
1003774419
Name: Espindola-Salas, Maria, G
F 622444 33Y 4/14/1978
ADM
Address: 8/24/2011 MED M
ATN Shively, Norman
DOB
Date 8/25/11
Rx
Substitution Permitted
Dispense as Written
REFILLS: 0 1 2 3 4 5 PRN NR
DEA
ALLERGIES
PH-10 Rev. June 2010 Written on colored security paper. May not be scanned, copied, faxed or erased.

Employer #25

35 Maria Espindola
ESPI 003

I.D.

DATE	DAY	SHIFT	IN	CODE	OUT	CODE	HOURS WORKED	ACCUMULATED HOURS	ACCUMULATED OVERTIME
8TH			5:17		3:30		9:10	9:30	
7TH			5:45		3:58		9:15	19:15	-½d
8TH			5:43		3:28		9:15	28:30	
9TH			5:44		12:56	+6½	15:15	15:15	
10TH			5:41		3:27		9:15	40:00	
									2½
AP/ NO PTS. FRI. 09-09-11									
							1000	40	1¾
							1003	~	¾
							total	40	2½

A1131

1414

11-09-09-11

Employer #26

Preparing for Imaging

Name: Rosa Maria Mendoza

Appt. Date: 6/9/2011 Appt. Time: 1:00 PM

Exam Requested:

US-OB cpt 1

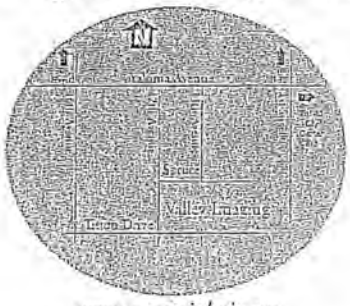
Physician Signature:

Please follow the preparation instructions as noted in this brochure for the study your physician has ordered. If you have questions or need to reschedule your appointment, please contact us at:

MEMORIAL'S Valley Imaging

314 South 11th Avenue, Suite B
Yakima, Washington 98902

Scheduling Department (509) 248-9592
Main Office Telephone (509) 248-7380



www.memorialsvip.org

Employer #27

Yakima Urology Associates, PLLC
2500 Racquet Lane, Suite 100
Yakima, WA 98902
Office (509) 249-3900 · Fax (509) 573-9539

NAME Maria Espindola

ADDRESS DATE 9/16/[illegible]

Maria was in my office today for a doctors appt until [illegible]

REFILL
NR 1 2 3 4 5 PRN

[illegible signature] M.D.
SUBSTITUTION PERMITTED

M.D.
DISPENSE AS WRITTEN

W. Jack Luyten, M.D. · AL7990472
Raymond W. Merrell, M.D. · AM9244675
Mark S. Uhlman, M.D. · AU1196371
Norman P. Shively, M.D. · BS0372956

Dennis M. Gaskin, M.D. · BD0649624
Esther McCorkindale, PA-C · MK0569927
Steven L. Mack, PA-C · MM0363331
Dyane M. Kanzler, PA-C · MK1323411

Employer #29

Yakima Valley
Farm Workers Clinic
602 E. Nob Hill Blvd.
Yakima, WA 98901
(509) 248-3334

Date: 10/11/2011

To Whom It May Concern:

This letter is to confirm that

Name: Maria Espindola

DOB: DOB 4/14/78

had an appointment today. Please excuse from work/class for this time 2:30 pm / ___ days.

Signature

Employer #31

PAML
PATHOLOGY ASSOCIATES
MEDICAL LABORATORIES
602 E. Nob Hill Blvd.
Yakima, WA 98901
(509) 248-3334 ext: 3180

10/12/11

To Whom It May Concern: DOB- 4/14/78

Maria Espindola was seen for lab work today. If you have any further questions please do not hesitate to call us at (509) 248-3334 ext: 3180. Thank you for your cooperation.

Sincerely,

CLA

PAML- Nob Hill Branch

Employer #32

33

Maria Espindola
ESPI 001

DATE DAY SHIFT	IN	CODE	OUT	CODE	HOURS WORKED	ACCUMULATED HOURS	OVERTIME
27TU	6:37		7:57		1:00	1:00	
27TU	9:55		3:26		6:30	6:30	
28WE	6:51		3:30		8:00	14:30	
29TH	6:51		3:25		8:00	22:30	
30FR	6:54		1:00		5:30	~~28:00~~	
						27½	
AP / NO PTS. TUE. 12-27-11							
LE / -2PTS. FRI. 12-30-11					H	8	
					1000	27½	Ø
					total	35½	Ø

A1181

0025

TUE. 12-27-11

FRI. 12-30-11

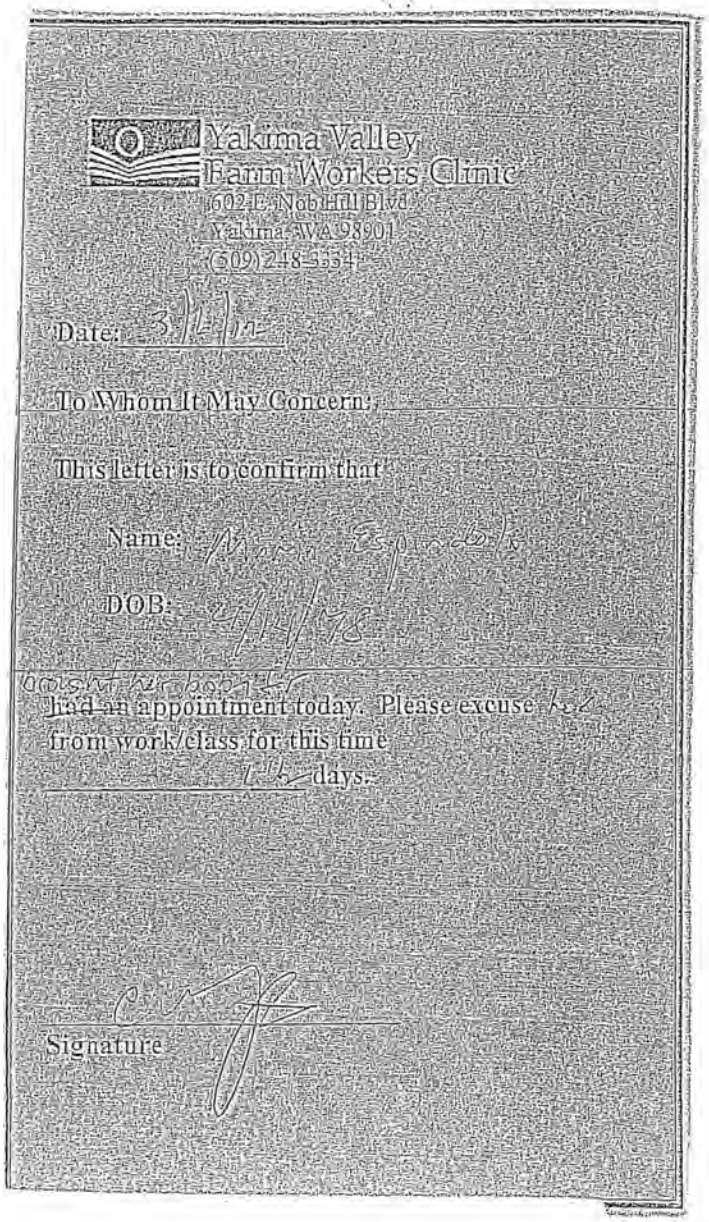
Dr. Tach

Yakima Valley Farm Workers Clinic
602 East Nob Hill Blvd., Yakima, WA 98901

S Maria Espindola

TIENE UNA CITA EL
☐ LUNES ☐ MARTES ☐ MIERCOLES ☐ JUEVES ☐ VIERNES ☐ SABADO
FECHA 12/27/11 A LAS 8:30 A.M./P.M.
SI NO PUEDE ASISTIR A SU CITA, POR FAVOR LLAME 24 HORAS ANTES DE LA CITA. TELEFONO 248-3334
VENGA AL LABORATORIO LA SEMANA ANTES DE SU CITA

Employer #34



Yakima Valley
Farm Workers Clinic
602 E. Nob Hill Blvd.
Yakima, WA 98901
(509) 248-5334

Date: 3/6/18

To Whom It May Concern:

This letter is to confirm that

Name: [redacted]

DOB: [redacted]

had an appointment today. Please excuse her
from work/class for this time
1.5 days.

Signature

Employer #36

Ma. Espindola.

Yakima Valley
Farm Workers Clinic
602 E. Nob Hill Blvd.
Yakima, WA 98901
(509) 248-3334

Date: 04/04/2012

To Whom It May Concern:

This letter is to confirm that

LAST:MENDOZA FIRST:BALERIA
DOB:01/12/2012 GENDER: F FC:08
PID #: 4545-71-1
GID #: 14-80998 PCP:FORSTER, CHARLES
DOS:04/04/12
ORD:M. SCOTVOLD, MD
AR#:0000018 MSR:00076723758

had an appointment today. Please excuse Mother.
from work/class for this time
1 days.

M Scotvold MD
Signature

Child Appt

Employer #38

Exhibit 12

Q. Before you look the leave?
A. Before I took the leave I was repacking.
Q. And that was five days a week?
A. No, we were working four days a week.
Q. Why was that?
A. Because that's the way the schedule was set up.
Q. And were there other times that you only worked four days a week?
A. Yes. Just about all of us worked four days, all of us worked four days a week, just about all of us.
Q. At that time or throughout your employment?
A. That schedule had been that way for quite some time.
Q. How long?
A. I couldn't recall the dates, but more than one year, I believe.
Q. But everybody worked the schedule, not just you?
A. We all changed different days, working different days.
Q. But you were all working four days a week?
A. Yes.
Q. Okay. And then when you came back from maternity leave, do you recall when that was?
A. I came back the 5 of March of 2012.
Q. Now, before you went on maternity leave, did you go to somebody at Apple King and tell them you needed maternity leave?

A. Yes, I did that to German.
Q. And you told him you needed to take maternity leave?
A. Yes.
Q. And he told you you could take time off?
A. Yes, he gave me 12 weeks.
Q. And did you take the entire 12 weeks?
A. No, I did not take them because I did not need them. I came back sooner than that to work.
Q. You felt good enough to come back to work?
A. Yes.
Q. Okay. And when you came back to work after maternity leave, what job did you do?
A. Repacking.
Q. And had you done repacking before?
A. Yes, all the time.
Q. All right. And how many days a week were you working when you returned from maternity leave?
A. Four days.
Q. All right. The same type of hours, 8:00 or 9:00, depending on the day?
A. I worked ten hours.
Q. You worked ten hours?
A. Yes.
Q. So you were working more hours when you returned than when you left for maternity leave?

A. No.
Q. Am I confused about the number of hours you worked when you were working four days a week?
A. We were working four days a week, we worked ten hours a day.
Q. Okay. Thank you.
So when you came back after maternity leave, you then worked four days a week?
A. Yes.
Q. And when you were working four days week, you worked approximately ten hours a day?
A. Yes.
Q. And did your job change in any way?
A. No, I was repacking when I took leave to have my baby. And then when I came back I was repacking again.
Q. And when you left to have your baby, what was your hourly wage?
A. They paid me 9 -- I don not recall now.
Q. Well, let me ask it a different way. When you came back from maternity leave, were you paid the same as when you left?
A. Yes.
Q. So there was no change?
A. No.
Q. Now, tell me please after you stopped working at Apple

Exhibit 13

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- Washington 2,538

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Washington State Cases (2,538)

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1. Hegwine v. Longview Fibre Co., Inc.

Supreme Court of Washington, En Banc. November 29, 2007 162 Wash.2d 340 172 P.3d 688

LABOR AND EMPLOYMENT - **Discrimination**. Pregnancy-based employment **discrimination** claim is one for sex **discrimination**, and is not subject to accommodation analysis.

...action against employer, alleging that employer violated Washington Law Against **Discrimination** (WLAD) in refusing to hire her because of her pregnancy...

...J.M. Johnson , J., held that: (1) claims of employment **discrimination** because of pregnancy are to be analyzed as matters of sex **discrimination**, and are not subject to accommodation analysis; (2) business necessity defense to a claim of pregnancy-based sex **discrimination** is not an affirmative defense; (3) employer's proffered reason...

2. Hume v. American Disposal Co.

Supreme Court of Washington, En Banc. September 22, 1994 124 Wash.2d 656 880 P.2d 988

Preemption. Employees' action, under state statute, alleging that they were harassed and constructively discharged in retaliation for demanding overtime pay was not preempted by federal labor law.

...retaliation for demanding overtime pay. First employee also alleged handicap **discrimination** and first and second employees alleged age **discrimination**. The Superior Court, Pierce County Brian M. Tollefson , J., dismissed handicap **discrimination** claim and entered judgment on jury verdict for all employees...

...employees on discharge claim, and for first employee on age **discrimination** claim. Employers appealed and first employee cross-appealed. On certification...

3. Marquis v. City of Spokane

Supreme Court of Washington, En Banc. September 05, 1996 130 Wash.2d 97 922 P.2d 43

CIVIL RIGHTS - Employment **Discrimination**. Independent contractor may bring action under Washington's law against **discrimination** for **discrimination** in making or performance of contract for personal services.

...27, 1995. Decided Sept. 5, 1996. Golf professional brought sex **discrimination** action against city and its officials, alleging sex **discrimination** in making and performance of her contract to manage municipal...

...of contract for services may bring claim under law against **discrimination**, and (2) summary judgment was precluded by fact questions as...

4. Kastanis v. Educational Employees Credit Union

Supreme Court of Washington, En Banc. October 07, 1993 122 Wash.2d 483 859 P.2d 26

Marital Status **Discrimination**. Employee claiming employment **discrimination** based on marital status had burden to prove that **discrimination** was not justified by business necessity.

...507 Discharged employee brought action against former employer for employment **discrimination** based on marital status, wrongful discharge, sexual **discrimination**, and infliction of emotional distress. After summary judgment was granted...

...entered judgment for employee on jury verdict on marital status **discrimination** claim. Employer appealed. The Supreme Court, Madsen , J., held that: (1)

RELATED DOCUMENTS

Secondary Sources

§ 53:4.Sex or pregnancy

Employment Discrimination Coordinator

...Discrim. Coord. Analysis of State Law § 53:4 Employment **Discrimination** Coordinator June 2017 Update Analysis of State Law Part II. Employment **Discrimination** Law in the Fifty States and Other Jurisdictions Subpart H. South Dakota —Wyoming Chapter 53. Washington II. Types of **Discrimination** or Motivation Prohibited Summary Correlation Table § 53:4. Sex or pregnancy Sex **discrimination** by certain entities (State L § 53:27) is prohibited by the Law Against **Discrimination** unless an exception applies[1 State L § 53:23...

LOOKS SELL, BUT ARE THEY WORTH THE COST?: HOW TOLERATING LOOKS-BASED DISCRIMINATION LEADS TO INTOLERABLE DISCRIMINATION

2005
Washington University Law Quarterly

...BUT ARE THEY WORTH THE COST?: HOW TOLERATING LOOKS-BASED **DISCRIMINATION** LEADS TO INTOLERABLE **DISCRIMINATION** Hannah Fleener [FNa1] Copyright (c) 2005 Washington University; Hannah Fleener...

NON-DETERMINATIVE DISCRIMINATION, MIXED MOTIVES, AND THE INNER BOUNDARY OF DISCRIMINATION LAW

Winter, 1986
Buffalo Law Review

...BUFFALO LAW REVIEW Buffalo Law Review Winter, 1986 NON-DETERMINATIVE **DISCRIMINATION**. MIXED MOTIVES, AND THE INNER BOUNDARY OF **DISCRIMINATION** LAW San Stonefield [FNa] Copyright 1986 by the Buffalo Law...

Briefs

Amicus Curiae Brief by the Washington Employment Lawyers Association

LONGVIEW FIBRE CO., INC., Petitioner, v. Stacy L. HEGWINE, Respondent.
Supreme Court of Washington.
April 10, 2007

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1. Allison v. Housing Authority of City of Seattle

Supreme Court of Washington, En Banc. December 12, 1991 118 Wash.2d 79 821 P.2d 34

Public housing authority employee brought suit alleging age discrimination and **retaliation**. The Superior Court, King County, Mary Wicks Brucker, J., entered judgment for employee, and authority appealed. The Court of Appeals, 59 Wash.App. 624, 799 P.2d 1195, reversed and remanded. Employee sought review. The Supreme...

...Public housing authority employee brought suit alleging age discrimination and **retaliation**. The Superior Court, King County Mary Wicks Brucker , J., entered...

...1) "substantial factor" standard of causation applied to claim alleging **retaliation** for filing age discrimination claim, and (2) evidence was sufficient for jury on issue of **retaliation**. Remanded West Headnotes [1] 78 Civil Rights 78II Employment Practices 78 1241 **Retaliation** for Exercise of Rights 78 1252 k. Causal Connection; Temporal...

2. Currier v. Northland Services, Inc.

Court of Appeals of Washington, Division 1. August 04, 2014 182 Wash.App. 733 332 P.3d 1006

LABOR AND EMPLOYMENT - Discrimination. Contractor's complaint regarding racial comments of another contractor was protected activity under WLAD.

...held that: (1) independent contractor was permitted to bring **retaliation** action under WLAD; (2) contractor engaged in statutorily protected...

...appeal. [3] 78 Civil Rights 78II Employment Practices 78 1241 **Retaliation** for Exercise of Rights 78 1243 k. Practices prohibited or...

3. Vasquez v. State, Dept. of Social and Health Services

Court of Appeals of Washington, Division 3, Panel Two. April 06, 1999 94 Wash.App. 976 974 P.2d 348

LABOR AND EMPLOYMENT - Discrimination. Evidence did not support **retaliatory** discharge claim against state agency.

...In General 316P 435 Exhaustion of Remedies 316P 437 k. **Retaliation**, whistleblowing, and discrimination. (Formerly 283k72.41(2) Officers and Public Employees) Former...

...c) [5] 78 Civil Rights 78II Employment Practices 78 1241 **Retaliation** for Exercise of Rights 78 1247 k. Discharge or layoff...

4. Kahn v. Salerno

Court of Appeals of Washington, Division 1. February 17, 1998 90 Wash.App. 110 951 P.2d 321

LABOR AND EMPLOYMENT - Discrimination. Issues of fact precluded summary judgment in hostile work environment action.

...seq. [21] 78 Civil Rights 78II Employment Practices 78 1241 **Retaliation** for Exercise of Rights 78 1251 k. Motive or Intent...

...1) [22] 78 Civil Rights 78II Employment Practices 78 1241 **Retaliation** for Exercise of Rights 78 1247 k. Discharge or Layoff...

5. Hollenback v. Shriners Hospitals for Children

Court of Appeals of Washington, Division 3. March 17, 2009 149 Wash.App. 810 206 P.3d 337

RELATED DOCUMENTS

Secondary Sources

WHAT CONSTITUTES A CLAIM OF RETALIATION?

Understanding and Preventing Workplace Retaliation

...**RETALIATION** Ch. 2 Understanding and Preventing Workplace **Retaliation** Chapter 2 Understanding and Preventing Workplace **Retaliation** Copyright © 2015 Thompson Information Services By Patricia A. Wise [FNa] Chapter 2: What Constitutes a Claim of **Retaliation**? WHAT CONSTITUTES A CLAIM OF **RETALIATION**? **Retaliation** means seeking revenge, evening the score or striking back at...

APPENDIX PP. EEOC Guidance on Retaliation (EEOC Manual Section 8)

Age Discrimination

...Update Howard C. Eglit APPENDICES APPENDIX PP. EEOC Guidance on **Retaliation** (EEOC Manual Section 8) I. INTRODUCTION A. Background The federal...

RETALIATION CLAIMS ARE ON THE RISE

Washington Employment Law Letter

...101992 Washington Employment Law Letter February 1999 Employer **Retaliation RETALIATION** CLAIMS ARE ON THE RISE Perkins Coie Copyright (c...

Briefs

Petitioner's Response to Briefs of Amici Curiae, City Attorney for the City of Seattle, Washington Association of Municipal Attorneys, and Washington State Trial Lawyers Association

Irene P. ALLISON, Petitioner, v. HOUSING AUTHORITY OF THE CITY OF SEATTLE, a public body corporate and politic, Respondent. Supreme Court of Washington. September 13, 1991

...To any degree" is the appropriate standard to use in **retaliation** cases under RCVM9.60 2 II. "But for" should not...

Petitioner's Supplemental Brief to the Supreme Court

IRENE P. ALLISON, Petitioner, v. HOUSING AUTHORITY OF THE

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Court of Appeals of Washington, Division 1. August 04, 2014 182 Wash.App. 733 332 P.3d 1006

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...1) [22] 78 Civil Rights 78II Employment Practices 78 1241 **Retaliation** for Exercise of Rights 78 1247 k. Discharge or Layoff...

5. Hollenback v. Shriners Hospitals for Children

Court of Appeals of Washington, Division 3. March 17, 2009 149 Wash.App. 810 206 P.3d 337

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APPENDIX PP. EEOC Guidance on Retaliation (EEOC Manual Section 8)

Age Discrimination

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Washington Employment Law Letter

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Briefs

Petitioner's Response to Briefs of Amici Curiae, City Attorney for the City of Seattle, Washington Association of Municipal Attorneys, and Washington State Trial Lawyers Association

Irene P. ALLISON, Petitioner, v. HOUSING AUTHORITY OF THE CITY OF SEATTLE, a public body corporate and politic, Respondent. Supreme Court of Washington. September 13, 1991

...To any degree" is the appropriate standard to use in **retaliation** cases under RCVM9.60 2 II. "But for" should not...

Petitioner's Supplemental Brief to the Supreme Court

IRENE P. ALLISON, Petitioner, v. HOUSING AUTHORITY OF THE

The Court of Appeals
of the
State of Washington
Division III

MARIA ESPINDOLA,	)	No. 35262-5-III
Petitioner,	)	
v.	)	COMMISSIONER'S RULING
APPLE KING, LLC,	)	
Respondent.	)	

Maria Espindola seeks discretionary review of the Yakima County Superior Court's May 1, 2017 Order on appeal from district court. That order affirmed the district court decision, which had dismissed her claims for retaliation and discrimination under the State and the federal family medical leave acts against her former employer, Apple King. She contends that RAP 2.3(d)(3) supports review because the matter "involves an issue of broad public importance", i.e., the interpretation of the notice requirement of the

family medical leave acts.[1]

On August 21-25, 2011, Ms. Espindola was hospitalized with kidney stones. Her doctor provided Apple King with a note that advised it that she would not be able to return to work until after a follow up appointment on August 31, 2011. Ms. Espindola stated in her deposition that she missed work multiple times between September 8 and December 30, due to pain associated with the kidney stones, and that her supervisor knew the cause. She was also pregnant during this time and had developed gestational diabetes. Her supervisor permitted her to use the break room to test her blood sugar. On April 20, 2012, Apple King terminated Ms. Espindola because she had exceeded the 24 points allowed in its leave policy for leave that it believed did not qualify as family medical leave.

At issue in this motion for discretionary review is the adequacy of the notice Ms. Espindola gave Apple King that the leave she took qualified as family medical leave. The district court granted summary judgment to Apple King. It held that

> based on the evidence presented, the court is unable to find that a prima facie case of discrimination has been made. *There are no genuine issues of material fact as to the plaintiff taking "intermittent" leave under the FMLA/WFLA. Plaintiff had returned to work after her allowed FMLA/WFLA leave and given her old job back. Nothing presented to this court would create a genuine issue as to material fact*

[1] The Court notes Apple King's argument that RAP 2.2(c) applies and only appeals from de novo superior court reviews of district court decisions are appealable as a matter of right. Ms. Espindola is not seeking a direct appeal. She wants discretionary review under RAP 2.3(d)(3). The latter rule applies in this circumstance.

> *that the employer should have somehow knew, or should have made further inquiry regarding if the leave could be under the FMLA or WFLA. It was some seven weeks after her final FMLA leave ended.* Plaintiff was not penalized for taking FMLA/WFLA leave. With the passage of time, unspecific doctor's notes and vague phone calls from plaintiff, with nothing else, doom the discrimination case on summary judgment. The employer is not required to guess that it is allowed leave.

(Emphasis added.) Letter Opinion, June 22, 2016.

On May 1, 2017, the superior court affirmed the district court decision. It found no dispute of material fact.

Ms. Espindola agrees that to qualify for leave under the act, the employee must prove that she provided the employer sufficient notice of her intent to take the type of leave that the act covers. She cites a federal regulation under the federal Family Medical Leave Act[2] to argue that when the leave is unforeseeable – such as the leave she says she took because of her kidney stones and to manage her gestational diabetes – the employer is responsible to "designate leave as FMLA-qualifying, . . . based only on information received from the employee or the employee's spokesperson". CFR 825.301(a). Ms. Espindola reasons that her supervisor knew the causes of the leave she took, given the circumstances under which she asked for leave. Therefore, she asserts that Apple King

[2] RCW 49.78.410 states, as follows: "This chapter must be construed to the extent possible in a manner that is consistent with similar provisions, if any, of the federal family and medical leave act of 1993 (Act Feb. 5, 1993, P.L. 103-3, 107 Stat. 6), and that gives consideration to the rules, precedents, and practices of the federal department of labor relevant to the federal act." Repealed by 2017 3d special session, ch.5, substitute senate bill 5975, effective October 19, 2017.

was required to designate that leave as family medical leave and not deduct it from the 24 points its attendance policy gave each employee every year.

This Court agrees with Ms. Espindola that the adequacy of her notice for leave associated with her intermittent health conditions is an issue that has public import such that it should be determined by an appellate court. *See* RAP 2.3(d)(3).

Accordingly, IT IS ORDERED, the motion for discretionary review is granted pursuant to RAP 2.3(d)(3). The Clerk of Court shall set a perfection schedule for this matter.

Monica Wasson
Commissioner

NO. 352625

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

MARIA ESPINDOLA,

Appellant,

v.

APPLE KING, INC.,

Respondent.

MOTION TO MODIFY COMMISSIONER'S RULING

Gary Lofland, WSBA No. 12150
MEYER, FLUEGGE & TENNEY
230 S. Second St.
Yakima, WA 98902
(509) 575-8500

Counsel for Apple King, Inc.

I. NATURE OF THE MOTION

Apple King LLC moves to modify the ruling of the Commissioner filed August 4, 2017. This motion is based upon RAP 17.7. The underlying case involves the federal Family Medical Leave Act (FMLA) 29 U.S.C. 2601 and the Washington Family Leave Act (WFLA) RCW 49.78.010.

The Commissioner believed that the "adequacy of [sic: Espindola's] notice for leave associated with her intermittent health condition is an issue that has great public import such that it should be determine by an appellate court," and grated discretionary review under RAP 2.3 (d)(3).

The Commissioner overlooked the fact that the adequacy of notice to trigger FMLA has been thoroughly discussed and resolved by the federal courts considering federal FMLA claims. The Commissioner also misapprehended the evidence presented by Espindola which was deliberately misleading, confusing, and conclusory. Rather than look at the actual evidence the Commissioner accepted the conclusory (and incorrect) statement in the Petitioner's memorandum.

While the issue may be important to the individual petitioner, the issue of adequacy of notice in this case does not raise a fundamental and urgent issue of broad public importance.

II. THE REQUIREMENTS UNDER THE FMLA AND WFLA

Both the FMLA and WFLA provide that an eligible employee is entitled to leave "because of a serious health condition that makes the employee unable to perform the functions of the position." RCW 49.78.220 (1)(d); 29 U.S.C. 2612(a). A serious health condition means an illness, injury, impairment, physical or mental condition that involves either (1) inpatient care in a hospital or residential medical care facility, or (2) continuing treatment by a health care provider. 29 U.S.C. 2611 (ii); RCW 49.78.020 (16). Both laws provide "intermittent leave," (leave that may be taken in separate blocks of time due to a single qualifying reason). 29 U.S.C. 2612(b)(1); 29 U.S.C. (a)(1), (3); RCW 49.78.230.

The WFLA mirrors the provisions of the FMLA. The Washington legislature provided guidance as to the interpretation and application of the WFLA:

> This chapter must be construed to the extent possible in a manner that is consistent with similar provisions, if any, of the federal family and medical leave act of 1993 (Act Feb. 5, 1996 P.L. 103-3, 107 Stat. 6) and that gives consideration to the rules, precedents, and practices of the federal department of labor relevant to the federal act."
>
> RCW 49.78.410

III. THE NOTICE REQUIRED

The "test" is whether the information provided is reasonable adequate to apprise the employer of the employee's intent to take the

protected leave. Where courts have found notice to be deficit it has been where the employee has failed to convey the reason for needing leave. *Nicholson v. Pulte Homes Corp.*, 690 F.3d 819, 826 (7th Cir. 2012) (employee's "casual conversation" about the challenges of dealing with a condition was not adequate notice); *Sarnowski v. Air Brook Limo*, 510 F.3d 398, 402 (3rd Cir. 2007) ("the critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition"). *Seaman v. CSPH, Inc.*, 179 F.3d 297, 302 (5th Cir. 1999) (finding inadequate notice where employee never informed his supervisor of a serious medical condition); *Brenneman*, 366 F.3d at 423-24 (finding inadequate notice where employee did not explain that his absence had been due to a serious medical condition until after the fact); *Woods*, 409 F.3d at 992-93 (finding inadequate notice where employee expressed that he was stressed and felt his health was at risk but never provided any information to indicate that his absence from work was due to a serious health condition). Informing the employer that you are "sick" or "ill" is insufficient notice. *Collins v. NTN Bower Corp.*, 273 F.2d 1006, 1008 (7th Cir. 2001); *Mackie v. Jewish Foundation*, USOL D. MD. 2001 #DKC C10-0952; *Rogers v. SEBO Nursing Center*, USDC ND Indianan 2010 # 2:09:CU 115 PRC.

The employee must do more than merely disclose that he or she is sick and will be out without an anticipated return date or any further information about the reason for leave. *Curtis v. Costco*, 807 F.3d 215, 220 (7th Cir. 2016) (employee's comment that he was contemplating taking "medical leave" did not provide sufficient notice); *Spurling v. C&M Fine Pack*, 739 F.3d 1055, 1062-63 (7th Cir. 2014) (night shift employee must provide more information then she needed time off to figure out why she was falling asleep).

This court is unlikely to develop a different "test" to determine the adequacy of the notice provided by an employee then has the various federal appeals courts. The issue in this case is the notice given by Espindola did not provide the employer adequate notice.

IV. THE COMMISSIONER'S RULING MISINTERPRETED EVIDENCE

A. The doctor's note did not provide any indication of a serious health condition or need for continuing medical treatment.

The Commissioner found that Espindola had been hospitalized with kidney stones from August 21-25 and the doctor presented a note that Espindola could not return to work until after a follow up appointment. While it is true there was a doctor's note, the note only mentioned hospitalization but did not provide the reason. The note provided:

> Ms. Espindola-Salas has been in the hospital 8/21-8/25 and will be unable to return to work at least till after her follow up appointment with me on 8/31/11.

The note provided no indication of the reason for the hospitalization or that there was a need for continuing treatment. It provided no basis for the claim the employer was on notice.

B. The deposition testimony presented did not support the assertion that the supervisor knew of the kidney stones or that kidney stones cause absences.

The Commissioner found that Espindola stated in her deposition that the supervisor knew of the cause (kidney stones) of absences. The deposition testimony did not support the assertion. Despite Espindola's assertion that she gave verbal notice to respondent that she was suffering from kidney stones, and diabetes (App. Motion Disc. Rev. p.3) a reading of the deposition pages relied upon by Espindola do not show that she told her employer that absences resulted from kidney stones or diabetes. (Ex. A). The deposition testimony upon which Espindola relies does not support the assertion that she gave adequate notice that would invoke "intermittent leave" because of continuing treatment. The testimony on 9:23-10:5 (Ex. A) of Espindola's deposition provides:

> Q. Now, before you went on maternity leave, did you go to somebody at Apple King and tell them you needed maternity leave?
>
> A. Yes, I did that to German.

Q. And you told him you needed to take maternity leave?

A. Yes.

Q. And he told you you could take time off?

A. Yes, he gave me 12 weeks.

That testimony only dealt with maternity leave which she was provided and for which there was no adverse consequence. The testimony at pages 22:2-23:15 (Ex. A) of Espindola's deposition provided:

Q. And so what effect did the diabetes have on you?

A. Well, it affected me because of my diet. I had to be checking my sugar content.

Q. So how did it affect your diet?

A. It affected me because, for example, I had to ask for permission there at work to go out to check with the sugar back there in the kitchen or the bathroom.

Q. And who did you ask –

A. German.

Q. And when you asked German what was his response?

A. It was okay to go. To check.

Q. And how long did you have to check your blood sugar? How long did it last form the time you discovered it to the time you stopped?

A. The months?

Q. As best you can remember?

A. I didn't recall if it was September or October. Until January when I left work to have the baby.

That testimony did not indicate that notice was provided. (Espindola acknowledged that gestational diabetes did not prevent her from working (Espindola Ex. A 23:23-25). There was nothing in the statement that would provide adequate notice to the employer that leave was needed. Espindola also relies on pages 25:12-16 (Ex. A) of her deposition:

A. I called him and told him that I was not going to come back to work until I got out of the hospital.

Q. What did he tell you?

A. He answered that that was all right. To take the time that I felt was necessary.

None of this testimony provided notice to the employer sufficient or adequate to provide notice to the employer of a need for leave continuing or intermittent.

Unfortunately the Commissioner accepted the bald assertion in the memorandum but never bothered to read the transcript upon which Espindola relied. Had the Commissioner done so, she would have discovered the claimed evidence was not present.

C. Espindola admitted that gestational diabetes did not cause her to miss work.

The Commissioner appears to have believed that gestational diabetes somehow implicated the FMLA. (Comm. Decision p.2).

However, Espindola testified that the condition did not cause her to miss work:

> Q. Did the gestational diabetes cause you to miss any work?
>
> A. No.
>
> Espindola 23:23-25
> (Attached Ex. A)

Thus the condition admittedly had no bearing on the claim.[1]

D. The absences of which Espindola complains do not implicate the FMLA.

The absences Espindola relies upon do not provide notice sufficient to implicate FMLA. Ex. B.

		CR 26: Ex. 3
5/20/11	YVFWC Dental Appointment	Bates 2
6/6/11	Dental	Bates 15
6/17/11	No identification of reason or provider	Bates 15
7/7/11	Urinary Tract Infection	Bates 17
7/12/11	Different name on slip	Bates 19
7/21/11	Memorial – Patient ill 2 days	Bates 4
8/1/11	YVFWC appointment	Bates 23
8/25	Hospitalized	Bates 26
9/9/11	Different name	Bates 27

[1] The need to check blood sugar levels was a reasonable accommodation under RCW 49.60. Because there was no showing that it caused Espindola to miss work it is not relevant or material to the issue at hand.

9/16	Doctor appointment	Bates 29
10/11	YVFWC – appointment 2:30	Bates 31
10/12	PAML Lab work	Bates 32
12/27/11	YVFWC	Bates 34
3/6/12	YVFWC – baby appointment	Bates 36
4/4	YVFWC – appointment child	Bates 38

RCW 49.78.020 (16)(a)(ii)(E)(b) excludes physical examinations, eye examinations, dental examinations. It also excludes bed rest or similar activities that can be initiated without a visit to a health care provider. None of these appointment slips provide evidence that support Espindola's claim that such absences were related to the hospitalization. None provided the employer with notice that leave or continuing treatment was needed.

V. THE COMMISSIONER IGNORED ESPINDOLA'S VIOLATION OF THE ATTENDANCE POLICY

A regulation adopted under the FMLA provides "...where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA protected leave may be delayed or denied." 29 C.F.R. 825.302 (d). Relying on that regulation the federal courts have ruled that an employer may enforce its customary notice and attendance procedures

against an employee claiming FMLA-protected leave, unless unusual circumstances justify the employee's failure to comply with the requirements. *Srouder v. Dana Light Axel Mfg. LLC*, 725 F.3d 608, 615 (6th Cir. 2013). Similarly the *Seventh Circuit in Lewis v. Holsum of Fort Wayne Inc.*, 278 F.3d 706 (7th Cir. 2002) concluded that an employer did not violate the FMLA by discharging an employee "who failed to comply with applicable rules and policies" regarding leave notice where "it was not impossible" for her to do so. 278 F.3d at 710; *Bradsher v. City of Philadelphia Police Dep't.*, No. 04-3309, 2007 WL 2850593 (E.D. Pa, 2007) (holding that the employer did not violate FMLA by terminating employee for violating employer's sick leave policy). Moreover, FMLA leave cannot be used as a guise to evade an employer's attendance policy. See *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 878 (10th Cir. 2004) ("Bones' request for FMLA leave does not shelter her from the obligation, which is the same as that of any other Honeywell employee, to comply with Honeywell's absence policy"). Followed by *Shelton v. Boeing*, 2014 WL 727430 (USDC WDWA Judge Zilly).

Here Espindola clearly violated the attendance policy and it was those violations that lead to her termination. This was a fact specific inquiry, not an issue of broad public import.

VI. WHILE THE ISSUES RAISED MAY BE IMPORTANT TO THE INDIVIDUAL PETITIONER, THE CASE DOES NOT RAISE A FUNDAMENTAL AND URGENT ISSUE OF BROAD PUBLIC IMPORTANCE.

The court typically grants review under RAP 2.3(b)(3) only when the issue to be resolved is of broad public importance. Here the petitioner and Commissioner have failed to articulate how this case involves an issue of broad public importance. The legislature has provided that the WFLA is to be interpreted and applied consistent with the "rules, practices and precedents" of the FMLA RCW 49.78.410. The federal courts have established the standards required to trigger the applicable leave. This court is unlikely to create a different standard then the federal courts. The question in this case is fact specific and clear. Despite conclusory statements about the notice being given, the actual evidence shows no notice was provided.

Espindola received two protected leaves, once for hospitalization (for unknown reasons), the other for childbirth. On both occasions it is undisputed that she was returned to the same job, shift, pay and benefits. She cannot create entitlement to leave out of thin air – two judges have heard the case and found against her.

This is not a case of great public interest. It cannot be reasonable anticipated that this case will result in additional guidance on the requirement of notice.

VII. CONCLUSION

The decision of the Commissioner should be overturned and review denied.

Dated this 5th day of September, 2017.

s/ Gary E. Lofland, WSBA No. 12150
MEYER, FLUEGGE & TENNEY, P.S.
Attorney for Apple King, LLC
230 South Second Street
Yakima, WA 98901
(509) 575-8500

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the date stated below I served a copy of this document in the manner indicated:

Favian Valencia 402 E. Yakima Ave., Ste. 730 Yakima, WA 98901	☒ First Class U.S. Mail ☒ Email ☐ Hand Delivery ☐ UPS Next-Day Air

Dated this 5th day of September, 2017.

Sandra Lepez
MEYER, FLUEGGE & TENNEY, P.S.

Exhibit A

Q. Before you look the leave?
A. Before I took the leave I was repacking.
Q. And that was five days a week?
A. No, we were working four days a week.
Q. Why was that?
A. Because that's the way the schedule was set up.
Q. And were there other times that you only worked four days a week?
A. Yes. Just about all of us worked four days, all of us worked four days a week, just about all of us.
Q. At that time or throughout your employment?
A. That schedule had been that way for quite some time.
Q. How long?
A. I couldn't recall the dates, but more than one year, I believe.
Q. But everybody worked the schedule, not just you?
A. We all changed different days, working different days.
Q. But you were all working four days a week?
A. Yes.
Q. Okay. And then when you came back from maternity leave, do you recall when that was?
A. I came back the 5 of March of 2012.
Q. Now, before you went on maternity leave, did you go to somebody at Apple King and tell them you needed maternity leave?

A. Yes, I did that to German.
Q. And you told him you needed to take maternity leave?
A. Yes.
Q. And he told you you could take time off?
A. Yes, he gave me 12 weeks.
Q. And did you take the entire 12 weeks?
A. No, I did not take them because I did not need them. I came back sooner than that to work.
Q. You felt good enough to come back to work?
A. Yes.
Q. Okay. And when you came back to work after maternity leave, what job did you do?
A. Repacking.
Q. And had you done repacking before?
A. Yes, all the time.
Q. All right. And how many days a week were you working when you returned from maternity leave?
A. Four days.
Q. All right. The same type of hours, 8:00 or 9:00, depending on the day?
A. I worked ten hours.
Q. You worked ten hours?
A. Yes.
Q. So you were working more hours when you returned than when you left for maternity leave?

Q. Okay. How often did you have the pain?
A. The pain never went away. I always had the pain.
Q. And do you recall on what date or dates you went to the doctor because of pain from the kidney stones?
A. I would go there very often to -- down to the hospital.
Q. You told me very often. And I asked you do you recall the date or dates?
A. No. No.
Q. Do you recall how many times you saw the doctor because of kidney stones?
A. I don't recall. But often I was at the hospital.
Q. You also claim that you had gestational diabetes?
A. Yes, that also.
Q. And that was a condition that came about as a result of your pregnancy; is that correct?
A. Yes, it was because of the pregnancy.
Q. And when was that condition first diagnosed?
A. They told me in the final days of August. I was at the hospital because of the stones in my kidneys. I was in September, because it was after they told me about the diabetes.
Q. And so what effect did the diabetes have on you?
A. Well, it affected me because of my diet. I had to be checking my sugar content.

Q. So how did it affect your diet?
A. It affected me because, for example, I had to ask for permission there at work to go out to check with the sugar back there in the kitchen or the bathroom.
Q. And who did you ask --
A. German.
Q. And when you asked German what was his response?
A. It was okay to go. To check.
Q. And how long did you have to check your blood sugar? How long did it last from the time you discovered it to the time you stopped?
A. The months?
Q. As best you can remember?
A. I didn't recall if it was September or October. Until January when I left work to have the baby.
Q. And so after you had the child the gestational diabetes went away?
A. Yes, never had it anymore. I never had to check anymore.
Q. So by the time you came back to work you no longer had the gestational diabetes?
A. No.
Q. And did the gestational diabetes cause you to miss any work?
A. No.

A. No.
Q. Okay. And you mentioned that in August of 2011 you were hospitalized?
A. Yes.
Q. And what was it for?
A. Because I had rocks in my kidney. They were checking me and then when they told me that I had rocks in my kidney -- or stones in my kidney.
Q. And did you tell your employer?
A. Yes. German, I told German.
Q. What did you tell him?
A. I called him and told him that I was not going to come back to work until I got out of the hospital.
Q. What did he tell you?
A. He answered that that was all right. To take the time that I felt was necessary.
Q. After that week that you were hospitalized for a week in August, did you have any other doctors' appointments?
A. Yes, I had a lot of appointments with the doctor.
Q. And what was -- so during 2011, after the week that you were in the hospital, what were the appointments for? What were the appointments for?
A. For my pregnancy.
Q. And did you tell German or Armida?

Exhibit B

Yakima Valley
Farm Workers Clinic

Work / School Excuse Form

Date: 5-20-11

To Whom It May Concern:
This letter is to confirm that

Marla Espindola

had an appointment today from

1145 to 4pm

Late
N/C
Claudia 05-24

If you have any questions, please call:

Y.V.F.W.C DENTAL Linda Hughes
Clinic Name

(509) 248-1082
Phone Number

Employer #2

DOCUMENT CONTAINS A COPY PROTECTION PANTOGRAPH - THERMOCHROMIC INK - CHEMICAL VOID ALTERATION URES - AN OPAQUE WATERMARK ON THE BACK THAT READS "SECURITY PRESCRIPTION" - SECURITY REVERSE HX

MEMORIAL

2811 Tieton Drive • Yakima, WA • 98902 Pharmacy: (509) 575-8036

Name: Maria Espindola DOB

Address: Date: 7-21-11

℞ Pt is ill & must be on bed rest for 2 days. Cromwell MD.

Substitution Permitted Dispense as Written

REFILLS: 1 2 3 4 5 PRN NR DEA:

ALLERGIES:

PH-10 Rev. June 2010 Written on colored security paper. May not be scanned, copied, faxed or erased

Employer #4

[redacted]

6-17 - Rogelio - D

1:00 - 2:45 Diana Selenne

)B HILL BLVD.
98901

06/10/11
~~08:00A~~
PRACTICE
, MD

7:45 AM

MARIA G ESPINDOLA
1790 SELAH LOOP RD #21

SELAH WA
98942

G.L.
06-10-11

Maria Espindola

Yakima Valley
Farm Workers Clinic

Work / School Excuse Form

Date: 6-6-11

To Whom It May Concern:
This letter is to confirm that

Maria Espindda

had an appointment today from

250 to 350.

If you have any questions, please call:

Y.V.F.W.C.
DENTAL DEPT.
~~602 E. NOB HILL BLVD.~~
YAKIMA, WA 98901

Clinic Name

Employer #15

YAKIMA VALLEY MEMORIAL

MARLA ESPINDOLA

Name: Espindola-Salas, M.G.
Age: 33Y DOB: Apr 14, 1978
Gender: F
MedRec: 622444
AcctNum: 1003473483
Attending: MNB
Primary RN: TFL
Bed: ED ED 15

YAKIMA VALLEY MEMORIAL HOSPITAL
DISCHARGE INSTRUCTIONS

FINAL DIAGNOSIS
UTI

ADDITIONAL DIAGNOSIS
IUP

TREATED BY:
Attending Physician – Brueggemann, MD, Marty

FOLLOWUP CONTACT

Charles Forster MD, Family Practice
Yakima Farmworkers Clinic
602 East Nob Hill Blvd
Yakima WA 98901
Phone: 2483334

SPECIAL INSTRUCTIONS
Follow up with your OB provider.

MEDICAL INSTRUCTIONS

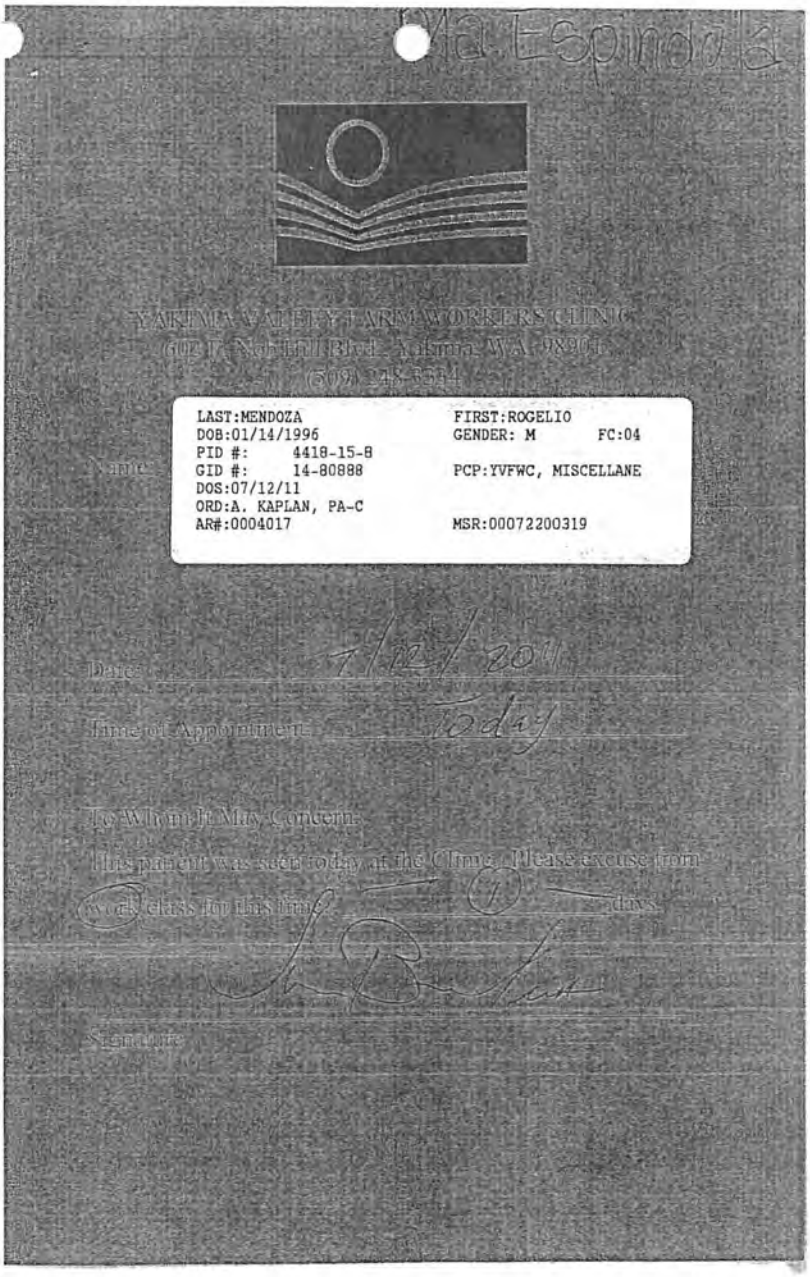
CYSTITIS, UTI (ADULT FEMALE)
INFECCIÓN DE LA VEJIGA,Mujer [Bladder Infection: Female, adult]

Una infección de la vejiga (cistitis [cystitis – UTI]) suele provocar constantes deseos de orinar y ardor al orinar. Es posible que la orina se vea turbia u oscura, o que tenga olor fuerte. Puede haber dolor en la parte baja del abdomen. Una infección de la vejiga se produce cuando las bacterias del área vaginal ingresan al orificio donde desemboca la vejiga (la uretra [urethra]). Puede ocurrir después de haber tenido relaciones sexuales, por usar ropas muy ajustadas, por deshidratación y otros factores.

CUIDADOS EN LA CASA:
Beba abundante líquido (al menos, entre 6 y 8 vasos por día, excepto que le hayan indicado limitar los líquidos por otras razones médicas). Eso hará que el medicamento ingrese mejor al sistema urinario y arrastrará las bacterias fuera de su cuerpo.
Evite tener relaciones sexuales hasta que los síntomas hayan desaparecido.
No consuma cafeína, alcohol ni comidas muy condimentadas, ya que pueden irritar la vejiga.
Una infección de la vejiga (bladder infection) se trata con antibióticos (antibiotics). También es posible que le receten Pyridum (nombre genérico: fenazopiridina [phenazopyridine]) para aliviar el ardor. Ese medicamento hará que su orina sea de color naranja brillante. Es posible que esa orina de color naranja le manche la ropa. Puede usar un protector diario o una toalla femenina para proteger la ropa.

EVITE FUTURAS INFECCIONES:
Después de evacuar el intestino, siempre límpiese con un movimiento de adelante hacia atrás.

Employer #17



YAKIMA VALLEY FARMWORKERS CLINIC
602 E. North Belt Blvd., Yakima, WA 98901
(509) 248-5514

LAST:MENDOZA FIRST:ROGELIO
DOB:01/14/1996 GENDER: M FC:04
PID #: 4418-15-8
GID #: 14-80888 PCP:YVFWC, MISCELLANE
DOS:07/12/11
ORD:A. KAPLAN, PA-C
AR#:0004017 MSR:00072200319

Name:

Date: 7/12/2011

Time of Appointment: today

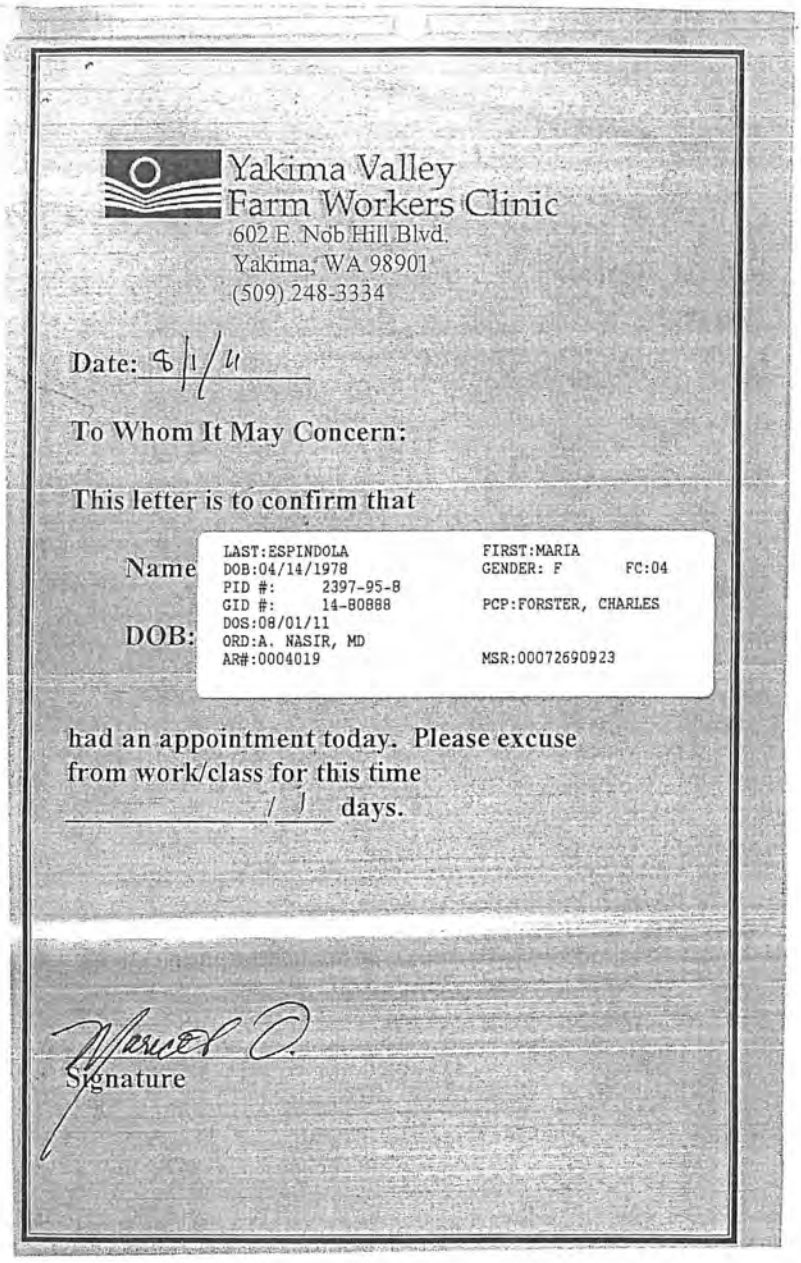
To Whom It May Concern:

This patient was seen today at the Clinic. Please excuse from work/class for this time. 1 days.

Signature:

Ma. Espinoza

Employer #19



Yakima Valley
Farm Workers Clinic
602 E. Nob Hill Blvd.
Yakima, WA 98901
(509) 248-3334

Date: 8/1/11

To Whom It May Concern:

This letter is to confirm that

Name

DOB:

LAST:ESPINDOLA FIRST:MARIA
DOB:04/14/1978 GENDER: F FC:04
PID #: 2397-95-8
GID #: 14-80888 PCP:FORSTER, CHARLES
DOS:08/01/11
ORD:A. NASIR, MD
AR#:0004019 MSR:00072690923

had an appointment today. Please excuse from work/class for this time 1 1 days.

Signature

Employer #23

FRI. 09-09-11

35 Maria Espindola
ESPI 003 1

I. C

DATE	DAY	SHIFT	IN	CODE	OUT	CODE	HOURS WORKED	ACCUMULATED HOURS	ACCUMULATED OVERTIME
4TH			5:57		2:30		8:30	8:30	
7TH			5:45		3:59		9:15	19:15	-½d
8TH			5:47		3:26		9:30	28:30	
9TH			5:44		3:56	=6½	9:15	75:15	
10TH			5:41		3:27		9:15	40:00	2½
							1000	40	1¾
							1003	~	¾
							total	40	2½

AP / NO PTS.
FRI. 09-09-11

A1181

144

Employer #26

Preparing for Imaging

Name: Rodolfo & Maria Mendoza

Appt. Date: 9/9/2011 Appt. Time: 1:00 pm

Exam Requested:

US-OB appt

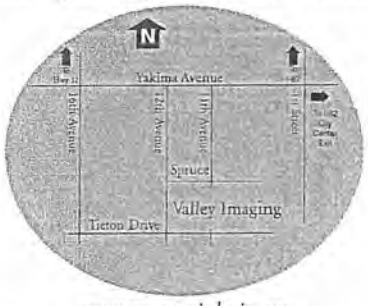
Physician Signature:

Please follow the preparation instructions as noted in this brochure for the study your physician has ordered. If you have questions or need to reschedule your appointment, please contact us at:

Valley Imaging *MEMORIAL'S

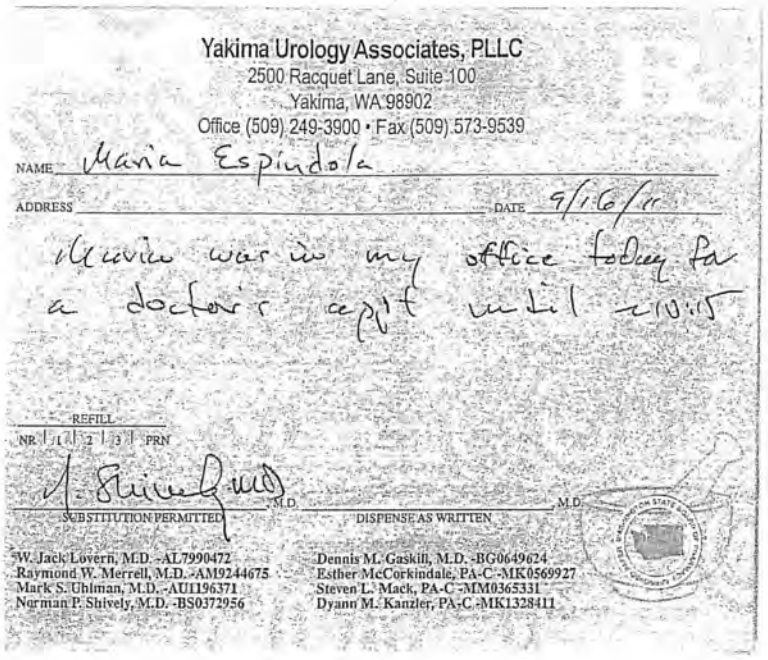
314 South 11th Avenue, Suite B
Yakima, Washington 98902

Scheduling Department (509) 248-9592
Main Office Telephone (509) 248-7380



www.memorialsvip.org

Employer #27



Yakima Urology Associates, PLLC
2500 Racquet Lane, Suite 100
Yakima, WA 98902
Office (509) 249-3900 • Fax (509) 573-9539

NAME María Espindola

ADDRESS _____ DATE 9/16/11

María was in my office today for a doctor's appt until 2:00

REFILL
NR | 1 | 2 | 3 | PRN

M.D.

SUBSTITUTION PERMITTED

M.D.

DISPENSE AS WRITTEN

W. Jack Lovern, M.D. -AL7990472
Raymond W. Merrell, M.D. -AM9244675
Mark S. Uhlman, M.D. -AU1196371
Norman P. Shively, M.D. -BS0372956

Dennis M. Gaskill, M.D. -BG0649624
Esther McCorkindale, PA-C -MK0569927
Steven L. Mack, PA-C -MM0365331
Dyann M. Kanzler, PA-C -MK1328411

Employer #29

Yakima Valley
Farm Workers Clinic
602 E. Nob Hill Blvd.
Yakima, WA 98901
(509) 248-3334

Date: 10/11/2011

To Whom It May Concern:

This letter is to confirm that

Name: Maria Espindola

DOB: DOB 4/14/78

had an appointment today. Please excuse from work/class for this time 2:30 pm / ___ days.

Signature

Employer #31

PAML
PATHOLOGY ASSOCIATES
MEDICAL LABORATORIES
602 E. Nob Hill Blvd.
Yakima, WA 98901
(509) 248-3334 ext: 3180

10/12/11

To Whom It May Concern: DOB- 4/14/78

Maria Espindola was seen for lab work today. If you have any further questions please do not hesitate to call us at (509) 248-3334 ext: 3180. Thank you for your cooperation.

Sincerely,

CMA

PAML- Nob Hill Branch

Employer #32

33 Maria Espindola
ESPI 001

1

DATE	DAY	SHIFT	IN	CODE	OUT	CODE	HOURS WORKED	ACCUMULATED HOURS	ACCUMULATED OVERTIME
27	TU		6:37		7:57		1:00	1:00	
27	TU		9:55		3:26		6:30	6:30	
28	WE		6:51		3:30		8:00	14:30	
29	TH		6:51		3:25		8:00	22:30	
30	FR		6:54		1:30		5:30	~~28:00~~ 27½	
AP / NO PTS. TUE. 12-27-11									
LE / -2 PTS. FRI. 12-30-11									
							+	8	
							1000	27½	Ø
							total	35½	Ø

A1181

025

TUE. 12-27-11

* FRI. 12-30-11

Yakima Valley Farm Workers Clinic
902 EAST NOB HILL BLVD. - YAKIMA, WA 98901

DR. TACH

S Maria Espindola

TIENE UNA CITA EL
DLUNES ☒MARTES DMIERCOLES DJUEVES DVIERNES DSABADO

FECHA 12/27/11 A LAS 2:30 P.M.

SI NO PUEDE ASISTIR A SU CITA, POR FAVOR LLAME 24 HORAS ANTES DE LA CITA.
TELEFONO 248-3334
VENGA AL LABORATORIO UNA SEMANA ANTES DE SU CITA

Employer #34

Yakima Valley
Farm Workers Clinic
602 E. Nob Hill Blvd.
Yakima, WA 98901
(509) 248-3334

Date: 3/6/12

To Whom It May Concern:

This letter is to confirm that

Name: Morin Espinoza

DOB: 4/14/78

brought her baby for
~~had an~~ appointment today. Please excuse her
from work/class for this time
1 ½ **days.**

Signature

Employer #36

Ma. Espindola.

Yakima Valley
Farm Workers Clinic
602 E. Nob Hill Blvd.
Yakima, WA 98901
(509) 248-3334

Date: 04/04/2012

To Whom It May Concern:

This letter is to confirm that

LAST:MENDOZA FIRST:BALERIA
DOB:01/12/2012 GENDER: F FC:08
PID #: 4545-71-1
GID #: 14-80888 PCP:FORSTER, CHARLES
DOS:04/04/12
ORD:M. SCOTVOLD, MD
AR#:0000018 MSR:00076723758

had an appointment today. Please excuse Mother. from work/class for this time
1 1 days.

Scotvold MD
Signature

Employer #38

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MARIA ESPINDOLA, Petitioner, v. APPLE KING, LLC, Respondent.	)	No. 35262-5-III ORDER DENYING MOTION TO MODIFY COMMISSIONER'S RULING

Having considered Petitioner's motion to modify the commissioner's ruling of August 4, 2017, and the record and file herein;

IT IS ORDERED the motion to modify the commissioner's ruling is denied.

PANEL: Judges Korsmo, Siddoway, Fearing

FOR THE COURT:

George Fearing

GEORGE FEARING
Chief Judge

(a) Restoration to position

(1) In general
Except as provided in subsection (b), any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave--

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits
The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations
Nothing in this section shall be construed to entitle any restored employee to--

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification
As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(D) of this title, the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction
Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 2612 of this title to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees

(1) Denial of restoration
An employer may deny restoration under subsection (a) to any eligible employee described in paragraph (2) if--

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on

29 U.S.C. § 2601(b)

...

(b) Purposes

It is the purpose of this Act--

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

WA. Const. Art. IV, § 30(3)

SECTION 30 COURT OF APPEALS. (1) *Authorization.* In addition to the courts authorized in section 1 of this article, judicial power is vested in a court of appeals, which shall be established by statute.

(2) *Jurisdiction.* The jurisdiction of the court of appeals shall be as provided by statute or by rules authorized by statute.

(3) *Review of Superior Court.* Superior court actions may be reviewed by the court of appeals or by the supreme court as provided by statute or by rule authorized by statute.

(4) *Judges.* The number, manner of election, compensation, terms of office, removal and retirement of judges of the court of appeals shall be as provided by statute.

(5) *Administration and Procedure.* The administration and procedures of the court of appeals shall be as provided by rules issued by the supreme court.

(6) *Conflicts.* The provisions of this section shall supersede any conflicting provisions in prior sections of this article.

(6) *Statement of the Case*. A statement of the facts and procedures relevant to the issues presented for review, with appropriate references to the record.

(7) *Argument*. A direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument.

(8) *Conclusion*. A short conclusion stating the precise relief sought.

(9) *Appendix*. An appendix containing a copy of the Court of Appeals decision, any order granting or denying a motion for reconsideration of the decision, and copies of statutes and constitutional provisions relevant to the issues presented for review.

(d) Answer and Reply. A party may file an answer to a petition for review. A party filing an answer to a petition for review must serve the answer on all other parties. If the party wants to seek review of any issue that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, the party must raise those new issues in an answer. Any answer should be filed within 30 days after the service on the party of the petition. A party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer. A party filing any reply to an answer must serve the reply to the answer on all other parties. A reply to an answer should be filed within 15 days after the service on the party of the answer. An answer or reply should be filed in the Supreme Court. The Supreme Court may call for an answer or a reply to an answer.

(e) Form of Petition, Answer, and Reply. The petition, answer, and reply should comply with the requirements as to form for a brief as provided in rules 10.3 and 10.4, except as otherwise provided in this rule.

(f) Length. The petition for review, answer, or reply should not exceed 20 pages double spaced, excluding appendices, title sheet, table of contents, and table of authorities.

(g) Reproduction of Petition, Answer, and Reply. The clerk will arrange for the reproduction of copies of a petition for review, an answer, or a reply, and bill the appropriate party for the copies as provided in rule 10.5.

(h) Amicus Curiae Memoranda. The Supreme Court may grant permission to file an amicus curiae memorandum in support of or opposition to a pending petition for review. Absent a showing of particular justification, an amicus curiae memorandum should be received by the court and counsel of record for the parties and other amicus curiae not later than 60 days from the date the petition for review is filed. Rules 10.4 and 10.6 should govern generally disposition of a motion to file an amicus curiae memorandum. An amicus curiae memorandum or answer thereto should not exceed 10 pages.

(i) No Oral Argument. The Supreme Court will decide the petition without oral argument.

(a) How to Seek Review. A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must serve on all other parties and file a petition for review or an answer to the petition that raises new issues. A petition for review should be filed in the Court of Appeals. If no motion to publish or motion to reconsider all or part of the Court of Appeals decision is timely made, a petition for review must be filed within 30 days after the decision is filed. If such a motion is made, the petition for review must be filed within 30 days after an order is filed denying a timely motion for reconsideration or determining a timely motion to publish. If the petition for review is filed prior to the Court of Appeals determination on the motion to reconsider or on a motion to publish, the petition will not be forwarded to the Supreme Court until the Court of Appeals files an order on all such motions. The first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals in which the petition is filed. Failure to serve a party with the petition for review or file proof of service does not prejudice the rights of the party seeking review, but may subject the party to a motion by the Clerk of the Supreme Court to dismiss the petition for review if not cured in a timely manner. A party prejudiced by the failure to serve the petition for review or to file proof of service may move in the Supreme Court for appropriate relief.

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(c) Content and Style of Petition. The petition for review should contain under appropriate headings and in the order here indicated:

(1) *Cover.* A title page, which is the cover.

(2) *Tables.* A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with reference to the pages of the brief where cited.

(3) *Identity of Petitioner.* A statement of the name and designation of the person filing the petition.

(4) *Citation to Court of Appeals Decision.* A reference to the Court of Appeals decision which petitioner wants reviewed, the date of filing the decision, and the date of any order granting or denying a motion for reconsideration.

(5) *Issues Presented for Review.* A concise statement of the issues presented for review.

setting aside, quashing, or dismissing an indictment or information, or a decision granting a motion to dismiss under CrR 8.3(c).

(2) *Pretrial Order Suppressing Evidence.* A pretrial order suppressing evidence, if the trial court expressly finds that the practical effect of the order is to terminate the case.

(3) *Arrest or Vacation of Judgment.* An order arresting or vacating a judgment.

(4) *New Trial.* An order granting a new trial.

(5) *Disposition in Juvenile Offense Proceeding.* A disposition in a juvenile offense proceeding that (A) is below the standard range of disposition for the offense, (B) the state or local government believes involves a miscalculation of the standard range, (C) includes provisions that are unauthorized by law, or (D) omits a provision that is required by law.

(6) *Sentence in Criminal Case.* A sentence in a criminal case that (A) is outside the standard range for the offense, (B) the state or local government believes involves a miscalculation of the standard range, (C) includes provisions that are unauthorized by law, or (D) omits a provision that is required by law.

(c) Superior Court Decision on Review of Decision of Court of Limited Jurisdiction. If the superior court decision has been entered after a proceeding to review a decision of a court of limited jurisdiction, a party may appeal only if the review proceeding was a trial de novo. Appeal is not available if: (1) the final judgment is a finding that a traffic infraction has been committed, or (2) the claim originated in a small claims court operating under RCW 12.40.

(d) Multiple Parties or Multiple Claims or Counts. In any case with multiple parties or multiple claims for relief, or in a criminal case with multiple counts, an appeal may be taken from a final judgment that does not dispose of all the claims or counts as to all the parties, but only after an express direction by the trial court for entry of judgment and an express determination in the judgment, supported by written findings, that there is no just reason for delay. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. The time for filing notice of appeal begins to run from the entry of the required findings. In the absence of the required findings, determination and direction, a judgment that adjudicates less than all the claims or counts, or adjudicates the rights and liabilities of less than all the parties, is subject only to discretionary review until the entry of a final judgment adjudicating all the claims, counts, rights, and liabilities of all the parties.

RAP 2.2

(a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

(1) *Final Judgment.* The final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs.

(2) [Reserved.]

(3) *Decision Determining Action.* Any written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action.

(4) *Order of Public Use and Necessity.* An order of public use and necessity in a condemnation case.

(5) *Juvenile Court Disposition.* The disposition decision following a finding of dependency by a juvenile court, or a disposition decision following a finding of guilt in a juvenile offense proceeding.

(6) *Termination of All Parental Rights.* A decision terminating all of a person's parental rights with respect to a child.

(7) *Order of Incompetency.* A decision declaring an adult legally incompetent, or an order establishing a conservatorship or guardianship for an adult.

(8) *Order of Commitment.* A decision ordering commitment, entered after a sanity hearing or after a sexual predator hearing.

(9) *Order on Motion for New Trial or Amendment of Judgment.* An order granting or denying a motion for new trial or amendment of judgment.

(10) *Order on Motion for Vacation of Judgment.* An order granting or denying a motion to vacate a judgment.

(11) *Order on Motion for Arrest of Judgment.* An order arresting or denying arrest of a judgment in a criminal case.

(12) *Order Denying Motion to Vacate Order of Arrest of a Person.* An order denying a motion to vacate an order of arrest of a person in a civil case.

(13) *Final Order After Judgment.* Any final order made after judgment that affects a substantial right.

(b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

(1) *Final Decision, Except Not Guilty.* A decision that in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision

(a) Proper notice required. In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed and the employer's provision of the required notice in either an employee handbook or employee distribution, as required by § 825.300.

(b) Foreseeable leave—30 days. When the need for FMLA leave is foreseeable at least 30 days in advance and an employee fails to give timely advance notice with no reasonable excuse, the employer may delay FMLA coverage until 30 days after the date the employee provides notice. The need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient to establish the leave was clearly foreseeable 30 days in advance.

(c) Foreseeable leave—less than 30 days. When the need for FMLA leave is foreseeable fewer than 30 days in advance and an employee fails to give notice as soon as practicable under the particular facts and circumstances, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if an employee reasonably should have given the employer two weeks notice but instead only provided one week notice, then the employer may delay FMLA–protected leave for one week (thus, if the employer elects to delay FMLA coverage and the employee nonetheless takes leave one week after providing the notice (i.e., a week before the two week notice period has been met) the leave will not be FMLA–protected).

(d) Unforeseeable leave. When the need for FMLA leave is unforeseeable and an employee fails to give notice in accordance with § 825.303, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if it would have been practicable for an employee to have given the employer notice of the need for leave very soon after the need arises consistent with the employer's policy, but instead the employee provided notice two days after the leave began, then the employer may delay FMLA coverage of the leave by two days.

(e) Waiver of notice. An employer may waive employees' FMLA notice obligations or the employer's own internal rules on leave notice requirements. If an employer does not waive the employee's obligations under its internal leave rules, the employer may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances, as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave and the rules are not inconsistent with § 825.303(a).

29 C.F.R. § 825.303(b); (c)

...

(b) Content of notice. An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), that the requested leave is for one of the reasons listed in § 825.126(b), and the anticipated duration of the absence; or if the leave is for a family member that the condition renders the family member unable to perform daily activities or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA–qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave due to a qualifying reason, for which the employer has previously provided the employee FMLA–protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. Calling in "sick" without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act. The employer will be expected to obtain any additional required information through informal means. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA–qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA–qualifying.

(c) Complying with employer policy. When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone. Similarly, in the case of an emergency requiring leave because of a FMLA–qualifying reason, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved. If an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA–protected leave may be delayed or denied.

...

29 C.F.R. § 825.304

29 C.F.R. § 825.302(d)

...

(d) Complying with employer policy. An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. An employee also may be required by an employer's policy to contact a specific individual. Unusual circumstances would include situations such as when an employee is unable to comply with the employer's policy that requests for leave should be made by contacting a specific number because on the day the employee needs to provide notice of his or her need for FMLA leave there is no one to answer the call-in number and the voice mail box is full. Where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA–protected leave may be delayed or denied. However, FMLA–protected leave may not be delayed or denied where the employer's policy requires notice to be given sooner than set forth in paragraph (a) of this section and the employee provides timely notice as set forth in paragraph (a) of this section.

...

29 C.F.R. § 825.301(b)

...

(b) Employee responsibilities. An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements set forth in § 825.302 or § 825.303 depending on whether the need for leave is foreseeable or unforeseeable. An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine whether the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the leave as FMLA leave. An employee using accrued paid leave may in some cases not spontaneously explain the reasons or their plans for using their accrued leave. However, if an employee requesting to use paid leave for a FMLA–qualifying reason does not explain the reason for the leave and the employer denies the employee's request, the employee will need to provide sufficient information to establish a FMLA–qualifying reason for the needed leave so that the employer is aware that the leave may not be denied and may designate that the paid leave be appropriately counted against (substituted for) the employee's FMLA leave entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for a FMLA–qualifying reason will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA–qualifying reason against the employee's FMLA leave entitlement.

...

(d) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. For example, employees (or their collective bargaining representatives) cannot trade off the right to take FMLA leave against some other benefit offered by the employer. This does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition. See § 825.702(d). An employee's acceptance of such light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12–month FMLA leave year.

(e) Individuals, and not merely employees, are protected from retaliation for opposing (e.g., filing a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

29 C.F.R. § 825.220

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has—

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. See § 825.400(c). Interfering with the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50–employee threshold for employee eligibility under the Act;

(2) Changing the essential functions of the job in order to preclude the taking of leave;

(3) Reducing hours available to work in order to avoid employee eligibility.

(c) The Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies. See § 825.215.

RCW 49.78.410

This chapter must be construed to the extent possible in a manner that is consistent with similar provisions, if any, of the federal family and medical leave act of 1993 (Act Feb. 5, 1993, P.L. 103-3, 107 Stat. 6), and that gives consideration to the rules, precedents, and practices of the federal department of labor relevant to the federal act.

RCW 49.78.300

(1) It is unlawful for any employer to:

(a) Interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this chapter; or

(b) Discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this chapter.

(2) It is unlawful for any person to discharge or in any other manner discriminate against any individual because the individual has:

(a) Filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this chapter;

(b) Given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this chapter; or

(c) Testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this chapter.

RCW 49.78.010

The legislature finds that the demands of the workplace and of families need to be balanced to promote family stability and economic security. Workplace leave policies are desirable to accommodate changes in the workforce such as rising numbers of dual-career couples, working single parents, and an aging population. In addition, given the mobility of American society, many people no longer have available community or family support networks and therefore need additional flexibility in the workplace. The legislature declares it to be in the public interest to provide reasonable leave for medical reasons, for the birth or placement of a child, and for the care of a family member who has a serious health condition.

2.06.030. General powers and authority--Transfers of cases--Appellate jurisdiction, exceptions—Appeals

The administration and procedures of the court shall be as provided by rules of the supreme court. The court shall be vested with all power and authority, not inconsistent with said rules, necessary to carry into complete execution all of its judgments, decrees and determinations in all matters within its jurisdiction, according to the rules and principles of the common law and the Constitution and laws of this state.

For the prompt and orderly administration of justice, the supreme court may (1) transfer to the appropriate division of the court for decision a case or appeal pending before the supreme court; or (2) transfer to the supreme court for decision a case or appeal pending in a division of the court.

Subject to the provisions of this section, the court shall have exclusive appellate jurisdiction in all cases except:

(a) cases of quo warranto, prohibition, injunction or mandamus directed to state officials;
(b) criminal cases where the death penalty has been decreed;
(c) cases where the validity of all or any portion of a statute, ordinance, tax, impost, assessment or toll is drawn into question on the grounds of repugnancy to the Constitution of the United States or of the state of Washington, or to a statute or treaty of the United States, and the superior court has held against its validity;
(d) cases involving fundamental and urgent issues of broad public import requiring prompt and ultimate determination; and
(e) cases involving substantive issues on which there is a direct conflict among prevailing decisions of panels of the court or between decisions of the supreme court;

all of which shall be appealed directly to the supreme court: PROVIDED, That whenever a majority of the court before which an appeal is pending, but before a hearing thereon, is in doubt as to whether such appeal is within the categories set forth in subsection (d) or (e) of this section, the cause shall be certified to the supreme court for such determination.

The appellate jurisdiction of the court of appeals does not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars.

The court shall have appellate jurisdiction over review of final decisions of administrative agencies certified by the superior court pursuant to RCW 34.05.518.

Appeals from the court to the supreme court shall be only at the discretion of the supreme court upon the filing of a petition for review. No case, appeal or petition for a writ filed in the supreme court or the court shall be dismissed for the reason that it was not filed in the proper court, but it shall be transferred to the proper court.

29 U.S.C. § 2615

(a) Interference with rights

(1) Exercise of rights
It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination
It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries
It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual--

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

(iii) a certification issued by the health care provider of the servicemember being cared for by the employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(3) of this title.

(B) Copy

The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification

(i) Leave due to serious health condition of employee

The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave due to serious health condition of family member

The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees
An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits

(1) Coverage
Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 2612 of this title, the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of Title 26) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

(2) Failure to return from leave
The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 2612 of this title if--

(A) the employee fails to return from leave under section 2612 of this title after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than--

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 2612(a)(1) of this title or under section 2612(a)(3) of this title; or

(ii) other circumstances beyond the control of the employee.

(3) Certification

(A) Issuance
An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by--

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(C) of this title;

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(D) of this title; or

MEYER, FLUEGGE & TENNEY

December 31, 2018 - 2:41 PM

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Appellate Court Case Title:	Maria Espindola v. Apple King, a Limited Liability Company
Superior Court Case Number:	16-2-02725-2

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