

The Honorable Ricardo S. Martinez

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
Seattle Division

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| CHERYL ENSTAD et al., |) | |
| |) | |
| Plaintiffs, |) | No. 2:17-cv-01496-RSM |
| |) | |
| v. |) | |
| |) | PLAINTIFFS' REPLY TO |
| PEACEHEALTH, |) | DEFENDANT'S OPPOSITION TO |
| |) | PLAINTIFFS' MOTION TO CERTIFY |
| Defendant. |) | QUESTIONS TO THE WASHINGTON |
| |) | SUPREME COURT |
| |) | |
| |) | Noted on Motion Calendar: February 23 rd , |
| |) | 2018 |
| |) | |
| |) | |

PLAINTIFFS' REPLY ISO MOT. TO CERTIFY
QUESTIONS TO THE WASHINGTON SUPREME
COURT
No. 2:17-cv-01496-RSM

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INTRODUCTION

As explained in Plaintiffs' Opposition to Defendant's Motion to Dismiss Complaint, Dkt. #27 at 3, 20 ("Pls.' Opp."), this Court can and should deny Defendant's motion to dismiss the state-law claims without certifying questions to the Washington Supreme Court. But if the Court has any doubts about the clarity of Plaintiffs' claims under Washington law, the Court should exercise its discretion to certify Plaintiffs' questions to the Washington Supreme Court.

Certification is particularly appropriate "where the issues of law are complex and have significant policy implications." *McKown v. Simon Prop. Grp. Inc.*, 689 F.3d 1086, 1091 (9th Cir. 2012) (internal quotation marks and citation omitted). As of 2016, more than forty percent of hospital beds in Washington were in Catholic Hospitals.¹ Those hospitals employ thousands of people and provide employment benefits, including health care coverage, to many more thousands of those employees' family members. Accepting Defendant's arguments would mean effectively stripping civil rights protections from thousands of health care employees and their families across Washington State. The "federal character of our judicial system recognizes that [these] matters of state law should first be decided by state courts when possible, not federal courts." *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co., Inc.*, 834 F.3d 998, 1003 (9th Cir. 2016) (internal quotation marks and citations omitted).

I. Any Doubts About Whether the WLAD's Religious Exemption Violates the Washington Constitution as Applied to Non-Ministerial Employees Should Be Resolved By the Washington Supreme Court.

¹ See Julia Kaye et al., HEALTH CARE DENIED 26 (2016), available at https://www.aclu.org/sites/default/files/field_document/healthcaredenied.pdf.

1 Plaintiffs' first question for certification is whether, under *Ockletree v. Franciscan*
 2 *Health Sys.*, 179 Wn.2d 769 (2014), the WLAD's exemption for religious employers applies to
 3 employees in non-ministerial positions. Defendant argues certification is unnecessary because
 4 this Court "has heard dozens of WLAD cases" without needing to certify questions to the
 5 Washington Supreme Court. Dkt. #32 at 3 ("Def.'s Opp."). But the question under *Ockletree* is
 6 not how to interpret the statutory text of the WLAD. The question is whether the statutory text of
 7 the WLAD violates the Washington State Constitution's Privileges and Immunities Clause,
 8 WASH. CONST. art. I, § 12. *See Ockletree*, 179 Wn.2d at 790-97 (Stephens, J., dissenting). The
 9 Washington Supreme Court is uniquely positioned to interpret the constitutionality of
 10 Washington State statutes under the Washington State Constitution.²

12 In arguing against certification, PeaceHealth distorts the *Ockletree* opinions and the well-
 13 pled allegations in the Complaint. Despite PeaceHealth's argument to the contrary, Justice
 14 Wiggins' opinion would clearly prohibit PeaceHealth from invoking the religious-employer
 15 exemption to discriminate against Cheryl Enstad because her "job qualifications and
 16 responsibilities are unrelated to religion." *Id.* at 806 (Wiggins, J., concurring in part and
 17 dissenting in part). The Complaint explicitly alleges that "[a]s a medical social worker, Ms.
 18 Enstad's job duties were non-ministerial. She did not conduct worship services, religious
 19 ceremonies, or rituals for PeaceHealth, and she did not serve as a messenger or teacher of its
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23 ² The cases cited by PeaceHealth all predate *Ockletree* and are, therefore, inapposite. *See* Def.'s
 24 Opp. at 4 (citing *Farnam v. CHRISTA Ministries*, 116 Wn.2d 659 (1991); *Salina v. Providence*
 25 *Hospice of Seattle*, No. 02-2559, 2005 WL 5912105, at *4 (W.D. Wash. Apr. 11, 2005), *aff'd*,
 26 226 F. App'x 653 (9th Cir. 2007)).

1 faith.” Dkt. #1 at ¶ 38 (“Compl.”). PeaceHealth impermissibly attempts to reach beyond the four
2 corners of the Complaint by citing to its “Statement of Common Values,” which states
3 “PeaceHealth believes that life and death are part of a sacred journey.” Dkt. #31 at 9 (“Def.’s
4 Reply ISO MTD”); Def.’s Opp. at 4. But even if that information could be considered on a
5 motion to dismiss, it would be irrelevant. Under Justice Wiggins’ concurrence, the
6 constitutionality of the WLAD’s religious-employer exception is not determined by whether the
7 employer had subjective religious motivations, but rather on “an objective examination of an
8 employee’s job description and responsibilities in the organization.” *Ockletree*, 179 Wn.2d at
9 806. PeaceHealth’s own subjective religious motivations are irrelevant to that objective inquiry.

11 PeaceHealth similarly misinterprets Justice Stephens’ opinion—which held that the
12 religious-employer exemption is unconstitutional “as applied to WLAD claims based on
13 discrimination that is unrelated to an employer’s religious purpose, practice, or activity,”
14 *Ockletree*, 179 Wn.2d at 789 (Stephens, J., dissenting)—as upholding the constitutionality of the
15 religious-employer exception to discriminate against all employees, regardless of whether they
16 perform a religious function, so long as the discrimination has some connection to the
17 employer’s religious beliefs. But that interpretation ignores the substance of Justice Stephens’
18 opinion, which explained that the WLAD exemption violates the Washington Constitution
19 because it sweeps more broadly than any analogous exemption upheld by courts. As Justice
20 Stephens noted, the religious exemption for employers under Title VII—unlike the WLAD—
21 protects religious employers from claims of religious discrimination but does not allow those
22 employers to use religion to discriminate based on race, sex, or other protected characteristics.
23 *See Ockletree*, 179 Wn.2d at 802-03. “Thus, church organizations have been held liable under
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1 Title VII for benefit and employment decisions which they contended were based upon religious
 2 grounds but which also discriminated against women based upon sex.” *Vigars v. Valley*
 3 *Christian Ctr. of Dublin, Cal.*, 805 F. Supp. 802, 807 (N.D. Cal. 1992). Justice Stephens also
 4 noted that, despite the plurality’s assertion to the contrary, no court has upheld an exception that
 5 extends (a) beyond claims for religious discrimination *and* (b) beyond non-ministerial
 6 employees. *See Ockletree*, 179 Wn.2d at 803 & n.5. Yet, under PeaceHealth’s interpretation, the
 7 WLAD would retain all the same constitutional defects highlighted in Justice Stephens’ opinion.³

9 At a minimum, the Washington Supreme Court should be given an opportunity to clarify
 10 any uncertainty over the scope of its own decision. In the four years since *Ockletree*, no court has
 11 had the opportunity to apply the opinions from Justice Stephens and Justice Wiggins to non-
 12 ministerial employees. Indeed, no reported case—State or federal—has had an opportunity to
 13 apply *Ockletree* to the WLAD religious exemption at all. If there are any doubts about the scope
 14 of *Ockletree*, it is appropriate for this Court to provide the Washington Supreme Court the
 15 opportunity to decide these questions in the first instance.
 16

18 ³ PeaceHealth’s argument is also procedurally improper. Despite PeaceHealth’s assertions to the
 19 contrary, Def.’s Opp. at 1, 5, there are no allegations in the Complaint regarding PeaceHealth’s
 20 religious beliefs as it relates to providing insurance that covers transition-related care. The
 21 Complaint alleges discrimination was based on “moral disapproval,” Compl. at ¶ 70, a term that
 22 is not limited to religious tenets. *See Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir.
 23 2015) (describing “religious objections” as only a “subset” of the broader category of “moral
 24 objections”). Indeed, many Catholic hospitals already provide insurance coverage for transition-
 25 related care without any religious objections. *See Palermo Decl.* at ¶ 2, *Robinson v. Dignity*
Health, No. 16-3035 (N.D. Cal. Aug. 29, 2016), ECF No. 46-1 (“[M]ore than half of the health
 26 plans offered by Dignity Health, including health plans for California employees, cover
 27 treatment and services related to gender dysphoria.”). Notably, PeaceHealth has not claimed that
 28 the lack of coverage for transition-related care is related to any religious purpose or activity.

1 **II. Any Doubts About Whether Discrimination “On the Basis of” Gender Identity**
 2 **Exclusively Means Discrimination On the Basis of an Individual’s Own Gender**
 3 **Identity Should Be Resolved By the Washington Supreme Court.**

4 A statute that is clear on its face is not subject to judicial construction. *Marquis v. City of*
 5 *Spokane*, 130 Wn.2d 97, 107 (1996). Here, the WLAD plainly prohibits discrimination against
 6 “any person in compensation or in other terms or conditions of employment *because of ... sexual*
 7 *orientation*,” which is defined to include gender identity. RCW 49.60.180(3) (emphasis added).
 8 Interpreting similar language in Title IX, the United States Supreme Court held that
 9 discrimination against a person “on the basis of” sex includes discrimination based on the sex of
 10 a third party. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005). If given the
 11 opportunity, the Washington Supreme Court would reach the same conclusion.

12 Despite that plain language, Defendant directs the Court to a portion of the Washington
 13 Administrative Code (“WAC”) stating employee benefits must be provided equally, regardless of
 14 “the employee’s . . . gender identity.” Def.’s Opp. at 7 (citing WAC 162-32-030). The language
 15 of the WAC is clear that it addresses only “certain specific forms of . . . gender identity
 16 discrimination” – it does not purport to represent all possible instances of discrimination. WAC
 17 162-32-010. Defendant’s interpretation of the regulation as an exclusive list of all types of
 18 employment discrimination would bring the regulation into conflict with the statute’s plain text
 19 and the “statutory mandate of liberal construction requires that [courts] view with caution any
 20 construction that would narrow the coverage of the law.” *Marquis*, 130 Wn.2d at 108.⁴

21 _____
 22 ⁴ Defendant’s reliance on *Sedlacek* is unavailing. Def.’s Opp. at 8. The *Sedlacek* court did not
 23 hold that plaintiffs lacked a WLAD claim, but only that the plaintiff could not establish a
 24 sufficiently specific public policy for purposes of a claim for wrongful discharge in violation of
 25 public policy. In any event, Cheryl Enstad is not bringing a claim for ‘associational’
 26 discrimination on the basis of gender identity, just as the plaintiff in *Jackson*, 544 U.S. 167, was
 27 not bringing a claim for ‘associational’ discrimination on the basis of sex—she is simply alleging

1 **III. Any Doubts About Whether Pax Has Standing Under Marquis Should Be Resolved**
2 **By the Washington Supreme Court.**

3 PeaceHealth’s health benefit plan is a contract to provide healthcare to its employees and
4 their beneficiaries in exchange for the employee’s labor. *See* Pls.’ Opp. at 23. Indeed, all the
5 essential elements of a contract are present. *See Family Med. Bldg., Inc. v. DSHS*, 104 Wash. 2d
6 105, 109 (1985) (discussing elements of a contract). Similar policies have been held to constitute
7 enforceable unilateral contracts even when the document purports to disclaim the existence of a
8 contractual relationship. *See Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 519 (1992).

9
10 But even if the health plan did not constitute a formal “contract,” the WLAD’s
11 nonexclusive list of rights prohibits Defendant from discriminating against Pax as a beneficiary.
12 *Marquis* held that independent contractors could assert a cause of action under the WLAD—not
13 because the WLAD provides special protection for the formation of contracts, but because it
14 contains a nonexclusive list of rights, “is broadly stated, is to be liberally construed, and...meant
15 to prevent and eliminate discrimination.” *Marquis*, 130 Wn.2d at 112. If the Court finds
16 *Marquis* and other cases cited by the parties to offer insufficient clarity, the Court should provide
17 the Washington Supreme Court an opportunity to clarify the scope of *Marquis* in this context.

18
19 **CONCLUSION**

20 For these reasons, Plaintiffs respectfully request that the Court certify the foregoing
21 questions to the Washington Supreme Court.
22

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24 _____
25 that she was provided unequal compensation pursuant to a policy that facially discriminates on
26 the basis of gender identity. That discriminatory treatment violates the statute’s plain text.

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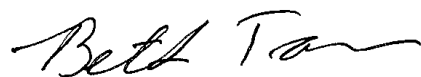
CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2018, I caused to be electronically filed the foregoing PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY QUESTIONS TO THE WASHINGTON SUPREME COURT with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the Defendants through the following attorneys of record:

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