IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ANGELA HARRIS, Appellant, v. PROVIDENCE EVERETT MEDICAL CENTER, Respondent.	)	No. 65167-6-I DIVISION ONE UNPUBLISHED OPINION FILED: May 16, 2011

Appelwick, J. — The trial court granted summary judgment in favor of employer Providence, dismissing employee Harris's claim for pregnancy discrimination. Harris appeals, arguing that Providence is not a religious organization exempt from the Washington Law Against Discrimination, chapter 49.60 RCW, and that Providence is equitably estopped from claiming the exemption. The statutory exemption challenge was not raised below. We decline to reach the merits of that issue here. Harris fails to present sufficient facts to support estoppel. We affirm.

FACTS

Angela Harris filed suit against her employer, Providence Everett Medical Center (Providence), alleging a single claim of sex discrimination under the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW. Providence filed an answer and a motion to dismiss under CR 12(b)(6) and CR 12(c), noted without oral argument. Providence moved for dismissal on the grounds of immunity from liability under WLAD because it was a nonprofit religious organization exempt from liability. In support of its motion, Providence submitted a declaration by its human resources director and several exhibits.

Harris responded. In support of her response, she also included a declaration. Harris argued that Providence was estopped from claiming the religious exemption by assertions made in its employee policy relating to discrimination. Providence replied, including another declaration and additional exhibits. Harris also moved to strike Providence's reply in support of its motion to dismiss for inappropriately asserting facts and relying on evidence outside of the pleadings to support a CR 12(b)(6) motion. The trial court denied Harris's motion to strike. It determined that, because Providence had met the requirements of CR 56 and referenced facts outside the pleadings in its motion to dismiss, the motion to dismiss could appropriately be treated as a motion for summary judgment, in accordance with CR 12(b)(6) and CR 12(c). The trial court also permitted Harris to file a surreply in response to the new arguments made in Providence's reply. She did not file a surreply. The parties did not conduct discovery.

The trial court granted summary judgment in favor of Providence. The trial court declined to reconsider. Harris appeals.

DISCUSSION

Harris contends that the trial court improperly granted summary judgment. A motion for summary judgment presents a question of law reviewed de novo. Osborn v. Mason County, 157 Wn.2d 18, 22, 134 P.3d 197 (2006). A trial court grants summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). We construe the evidence in the light most favorable to the nonmoving party. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). We review a ruling on a motion for summary judgment based solely on the record before the trial court at the time of the motion for summary judgment. RAP 9.12; Wash. Fed'n of State Emps., Council 28 v. Office of Fin. Mgmt., 121 Wn.2d 152, 163, 849 P.2d 1201 (1993). An adverse party may not rest upon mere allegations or denials, but must instead set forth specific facts showing the existence of a genuine issue for trial. CR 56(e); McBride v. Walla Walla County, 95 Wn. App. 33, 36, 975 P.2d 1029, 990 P.2d 967 (1999).

I. Religious Employer Exemption

Harris first argues that Providence failed to show that it was a religious organization under WLAD.[1] Providence contends that it is exempt from WLAD

[1] Harris argues that the question of whether Providence is a religious organization must be resolved at trial. But, in both Farnam and Hazen, the appellate courts resolved this issue as a matter of law. See Farnam v CRISTA Ministries, 116 Wn.2d 659, 678, 807 P.2d 830 (1991); Hazen v. Catholic Credit Union, 37 Wn. App. 502, 503, 681 P.2d 856 (1984). In doing so, the court may

as a matter of law.

RCW 49.60.040(11) exempts from the discrimination statute "any religious or sectarian organization not organized for private profit."[2] The WLAD does not define religious or sectarian organization. It is undisputed that Providence is a nonprofit organization. The parties only dispute whether Providence is a religious organization.

Two key cases have interpreted the meaning of the religious employer exemption and provide guidance here. In the first, Division Three held that a Catholic credit union was not a religious or sectarian organization and was subject to chapter 49.60 RCW as a matter of law. Hazen v. Catholic Credit Union, 37 Wn. App. 502, 503, 681 P.2d 856 (1984). In Farnam v. CRISTA Ministries, our Supreme Court held that the employer, CRISTA Ministries, was a religious organization exempt from WLAD. 116 Wn.2d 659, 678, 807 P.2d 830 (1991); see also Erdman v. Chapel Hill Presbyterian Church, 156 Wn. App. 827, 850, 234 P.3d 299 (holding that the plain language of RCW 49.60.040(11) barred Erdman's harassment and wrongful discharge claims under the WLAD), review granted, 170 Wn.2d 1010, 245 P.3d 772 (2010).

Relying on Farnam, Providence argues that this court need only look to the status of its corporate parent, Providence Health and Services, to review

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not weigh facts, but may consider whether an issue of material fact remains as to whether the organization meets the exemption. See CR 56(c); Osborn, 157 Wn.2d at 22.

[2] Under RCW 49.60.040(11), "employer" is defined as "any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit."

whether the religious exemption applies here. In Farnam, CRISTA was a single corporate entity encompassing seven divisions, including schools, counseling services, radio stations, and health care facilities. Farnam, 116 Wn.2d at 662. The nursing home employing Farnam was just one of several facilities operated by CRISTA. Id. The court limited its inquiry to the parent company CRISTA's status as a religious organization, rather than the status of the facility directly employing Farnam. Id. at 677.

Providence argues that it is exempt from WLAD because its parent organization is a religious organization. Harris did not respond in the briefing to Providence's argument that this court should look to the status of its parent organization. Harris asserted at oral argument that the Farnam exception does not apply here, because this case did not involve a parent organization acting through subdivisions. But, Providence provided evidence that it is a wholly owned subsidiary of Providence Health and Services, a nonprofit corporation that owns and oversees several health care entities. Providence Health and Services is sponsored by the Sisters of Providence. The members of the corporation holding Providence are the members of the Provincial Council of the Sisters of Providence-Mother Joseph Province. Upon dissolution of the corporation, all assets shall go to the Sisters of Providence-Mother Joseph Province.

Harris agreed at oral argument that the Sisters of Providence is a religious organization, but argues that Providence appears to operate as any other hospital in Washington. Harris also notes that Providence submitted no

evidence of the type submitted in Farnam, such as evidence related to the religious status of its employees or patients, evidence of religious activities at Providence, or evidence that Providence is run by religious people, driven by religious objectives, or actively engaged in the spreading of a religious message.

It appears that Providence and its parent organization are wholly owned by the Sisters of Providence. It is undisputed that Sisters of Providence is a religious organization. It appears that under Farnam, that alone would render Providence exempt from the statute. However, Harris did not contest whether Providence met the statutory exemption at the trial court level. She argued only that Providence was estopped from claiming the exemption.

RAP 2.5 permits the appellate court to refuse to review any claim of error which was not raised in the trial court. RAP 2.5's prohibition is discretionary. Roberson v. Perez, 156 Wn.3d 33, 39, 123 P.3d 844 (2005). After the trial court agreed to treat the motion as a motion for summary judgment, it invited Harris to provide a surreply. Harris failed to provide a surreply or to seek additional discovery on the issue of Providence's status as an exempt religious organization. She presented no facts at the trial court level regarding the status of Providence or its parent. Given the poorly developed facts on this issue, as well as the failure to brief the applicability of Farnam's rule regarding parent status, in this case, we decline to address this issue here.

II. Equitable Estoppel

Harris contends that even if Providence qualifies for the religious exemption, the trial court erred in granting summary judgment because

Providence was estopped from seeking the exemption. Harris argues that Providence is estopped because Providence made promises in its handbook and Harris relied upon, and was damaged by, those promises.[3,4]

The elements of equitable estoppel are (1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or admission. Bd. of Regents v. City of Seattle, 108 Wn.2d 545, 551, 741 P.2d 11 (1987). Equitable estoppel is not favored and therefore requires a showing of clear, cogent, and convincing evidence by the asserting party. Colonial Imps., Inc. v. Carlton Nw., 121 Wn.2d 726, 734-36, 853 P.2d 913 (1993).

Harris must set forth specific facts relating to any statements made to her by Providence upon which she relied. In her declaration, Harris stated:

> During my employment with Providence Medical Center, I was aware of and relied upon [Providence's] employee policies concerning anti-discrimination. [Providence] assured all employees through its policy handbook that it would comply with

[3] Harris cites to the Order Granting in Part and Denying in Part Cross Motions for Summary Judgment, French v. Providence Everett Medical Center, No. C07-0217RSL, 2008 WL 4186538 (W.D. Wash. Sept. 8, 2008). In French, the district court found that Providence held itself out as an employer that agreed to be subject to the WLAD. Id. at *8. Providence did not challenge the other elements of the estoppel claim, so the district court denied summary judgment on the basis that Providence was estopped from claiming the exemption. Id. French does not control the outcome here. In that case, the plaintiff presented sufficient evidence to meet her burden to overcome summary judgment. Id. Harris must do the same.

[4] Although she raised a collateral estoppel argument based on French at the trial court level, Harris is asserting on appeal an argument based only on equitable estoppel. Therefore, we do not address Providence's arguments relating to collateral estoppel.

> local, state, and federal discrimination laws and that it would not discriminate against me on the basis of sex or pregnancy or any other basis prohibited by law.
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> . . . When taking medical leave due to my pregnancy and after returning from my leave, I was aware of and relied upon [Providence's] policy of complying with all discrimination laws.
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> [Providence's] strong stated commitment and assurance of not discriminating against me due to discrimination prohibited by law is one of the reasons I chose to continue to work for [Providence]. I believe [sic] at all times that [Providence] would comply with all local, state, and federal discrimination laws.

Harris asserted in her response to the motion to dismiss that she relied on the equal employment opportunity policy contained in the employee handbook.[5] She submitted as support the text of the policy relied on by the plaintiff in the Order Granting in Part and Denying in Part Cross Motions for Summary Judgment, French v. Providence Everett Medical Center, No. C07-0217RSL, noted at 2008 WL 4186538 (W.D. Wash. Sept. 8, 2008). Harris does not assert that she received a handbook, that any handbook she received contained an identical statement, or explain why the policy considered in French is otherwise applicable to her. Her reliance on the policy in French is insufficient to prevent summary judgment. We agree with Providence that Harris fails to assert that Providence actually provided her with the same policy.

Even if Harris submitted sufficient evidence to support the existence and language of the policy, Harris has not set forth sufficient facts to show that the

[5] In her original response to the motion to dismiss, Harris did not attach a copy of the policy. She submitted only the district court's order in French. She provided the policy in the form of a pleading in the French case with the policy attached only in her motion for reconsideration. She did not state in her declaration that the statement in French was the same statement that she relied on.

policy applied to her. Providence argues that the anti-discrimination policy offered in French did not apply to Harris because Harris was a union employee, subject to a union contract that contained specific anti-discrimination protections:

> The Employer and the Union agree not to discriminate or condone harassment in any manner, in conformance with applicable federal and state laws, against any employee by reason of race, color, religion, creed, sex, national origin, age, marital status, sexual orientation, or sensory, mental or physical handicap, subject to occupational requirements and ability to perform within those requirements. The matters set forth herein shall be interpreted consistent with the requirements of the Employer under state and federal law.

Harris does not dispute that she was a union employee or covered by the collective bargaining agreement offered into evidence. Providence contends that it agreed in the collective bargaining agreement only to comply with "applicable" state laws. Harris responds that she relied on the handbook policy, not the collective bargaining agreement policy and that her reliance on that policy was reasonable regardless of whether the collective bargaining agreement actually contradicted the handbook.[6] As addressed above, Harris failed to raise a question of fact that she was provided with the policy and that it applied to her. Without such evidence, Harris cannot show that she was entitled to rely on the policy.

[6] Harris contends that Providence admitted that reliance on the anti-harassment policy was reasonable when it so admitted in depositions taken in the French case. Providence responds that Harris should not be permitted to rely on evidence admitted in the French case. Providence argues that the French case involved a non-union employee not subject to the collective bargaining agreement. Harris did not contradict this assertion. The contested deposition testimony does not address whether it would be reasonable to rely on the handbook policy when it was contradicted by the collective bargaining agreement, so it is not useful here.

Harris additionally disputes Providence's interpretation of the language in the collective bargaining agreement. Harris asserts that a question of fact as to the intent of the language of the collective bargaining agreement should prevent summary judgment. But, interpretation of a contract is a question of law reviewed de novo. Berg v. Hudesman, 115 Wn.2d 657, 668, 801 P.2d 222 (1990); Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Even if Harris believed the collective bargaining agreement meant something different, her subjective belief would not be clear, cogent, and convincing evidence of a statement made by Providence that it would not assert the WLAD exemption. Carlton Nw., 121 Wn.2d at 736. Under the plain language of the collective bargaining agreement, Providence only agreed to subject itself to applicable discrimination laws. As a matter of law, the collective bargaining agreement does not support Harris's claim of estoppel.

We hold that Harris fails to establish an issue of material fact relating to the first element of estoppel. The trial court did not err in finding that Providence was not estopped from asserting the exemption.

III. Constitutional Claims

Harris next asserts that the religious exemption violates the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Harris's constitutional arguments were not raised before the trial court. We decline to reach Harris's new constitutional arguments.

IV. Amendment

Harris next contends that the trial court should have permitted her to amend her complaint to pursue alternative causes of action.[7] The decision to grant leave to amend the pleadings is within the discretion of the trial court and reviewed for manifest abuse of discretion. Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). But, here, Harris acknowledged that she did not formally move to amend. Harris raised her desire to amend in her response to Providence's motion to dismiss. But, Harris failed to comply with CR 15(a), which requires a party to attach a copy of the proposed amended pleading to a motion to amend. Without a formal motion to amend the proposed pleading the trial court had nothing to grant. No error occurred here.

V. Summary Judgment Without Oral Argument

Harris finally argues that the trial court erred in granting summary judgment without oral argument.[8] Oral argument is a matter of discretion, so long as the movant is given the opportunity to argue in writing his or her version of the facts. State v. Bandura, 85 Wn. App. 87, 92-93, 931 P.2d 174 (1997). Harris did not request oral argument. The trial court did not abuse its discretion by not offering oral argument sua sponte.

We affirm.

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[7] CR 15(a) provides that leave to amend "shall be freely given when justice so requires."

[8] King County Local Civil Rule (KCLCR) 56(c)(1) states, "All summary judgment motions shall be decided after oral argument, unless waived by the parties." KCLCR 7(b)(4)(C) states that any party may request oral argument in its motion or opposition.

Appelwick, J.

WE CONCUR:

Dwyer, J.

Cox, J.