Supreme Court No. _____ 90048-5

**IN THE WASHINGTON STATE SUPREME COURT**

**CYNTHIA LUSEBRINK**

Petitioner,

vs.

**KENT SCHOOL DISTRICT, a municipal corporation and a subdivision of the State of Washington**

Respondent,

APPEAL FROM KING COUNTY SUPERIOR COURT
No. 10-2-10370-8- KNT
Court of Appeals, Division I
No. 69348-4-I

# RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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## I. INTRODUCTION

Petitioner Cynthia Lusebrink (Ms. Lusebrink) disagrees with the jury's verdict that Respondent Kent School District (the District) did not fail to accommodate her disability pursuant to RCW 49.60.180. The jury's verdict is supported by substantial evidence and should be honored by this Court.

## II. COUNTER STATEMENT OF THE CASE

**Factual Background.**

In 2005, Ms. Lusebrink was diagnosed with a tumor on her liver, which required surgery. (July 16, 2012 VRP at 20.) Ms. Lusebrink requested and was given a leave of absence from October of 2005 through February of 2006. (*Id.*) When she returned, she sought an accommodation of starting back at only half-time, which the District allowed. (*Id.* at 20-21.) She also sought and obtained other accommodations, including having an aide and not having to lift anything heavier than 10 pounds. (*Id.* at 23.) On April 1, 2006, she went back to work full-time in her special education position. (Id. at 20-21.)

Ms. Lusebrink did not request any accommodations at the start of the 2006-07 school year. (VRP July 16, 2013 at 25.) Ms. Lusebrink later learned that her incision site had herniated. (July 16, 2012 VRP at 28.) She had another surgery on July 31, 2007 to repair the hernia. (*Id.* at 29.)

She had additional restrictions with the new surgery that prevented her from lifting anything heavy. (*Id.* at 30.) Given her new injury, she and her physicians felt that she needed a more extensive recovery period before returning to work. (*Id.* at 30.) She requested and was given another leave of absence initially for the first half of the 2007-08 school year, and then ultimately for the entire school year. (*Id.* at 30-31.) Ms. Lusebrink applied for the District's long-term disability benefits for the 2007-08 school year. (*Id.* at 31-32.)

As of May 2008, Ms. Lusebrink and her doctors believed it was still too risky for her to return to a classroom teaching job. (*Id.* at 156-57, 159-61.) The District supported Ms. Lusebrink's application for continued Long Term Disability payments when Standard Insurance threatened to stop them. (July 16, 2012 VRP at 62; 168.) The District met with Ms. Lusebrink on June 9, 2008, to discuss helping her reinstate her long term disability benefits and her placement for the 2008-09 school year. (Id. at 61-62; 166-68.)

At the meeting, Ms. Lusebrink made it clear to the District that being a special education teacher was no longer an option for her, as it would be unsafe, and was not in line with what the doctors were allowing her to do. (July 16, 2012 VRP at 65; CP 59 bates stamp 994-95.) The June 9, 2008 meeting was part of the interactive process for

accommodation. (July 19, 2012 VRP at 9; July 23, 2012 VRP at 25-26.) Ms. Lusebrink is required to inform the District what her disability is and what restrictions she had. (July 19, 2012 VRP at 9.)

Contrary to her position at trial, Ms. Lusebrink never asked for an accommodation to a regular classroom job during this meeting. (July 23, 2012 VRP at 29.) The District asked Ms. Lusebrink what she was interested in and she stated she did not know. (*Id.*) She had been looking online and at the weekly postings. (*Id.*) She had not noticed anything that she felt was appropriate for her at that point. (*Id.*) The District asked her what job classifications she was interested in, including food service, bus driving and maintenance. (*Id.*) She refused all of those suggestions. (*Id.*)

Ms. Lusebrink was advised to check the District website and weekly postings for job openings she believed she would be qualified for, and to provide additional medical information. (July 16, 2012 VRP at 169; July 17, 2012 VRP at 108.) The District told Ms. Lusebrink that if she found a job that she thought she could do, she should let report such to the District. (July 17, 2012 VRP at 58.)

The District received a dated June 25, 2008 from Ms. Lusebrink's physician, Kimberly Herner, M.D. (July 23, 2012 VRP at 36-37; July 17, 2012 VRP at 135; CP 56 Bates stamp 910.) Dr. Herner stated that Ms.

Lusebrink was currently disabled from teaching. (July 17, 2012 VRP at 135.)

All job openings at the District are posted online. (July 19, 2012 VRP at 22.) The District has an online application for employees. (*Id.* at 26.) The District sent Ms. Lusebrink weekly emails providing information about all job postings. (*Id.* at 30-31.) Teacher on Special Assignment (TOSA) jobs and curriculum jobs are rare and highly sought after. (July 23, 2012 VRP at 41.) Highly qualified people apply for those jobs. (July 23, 2012 VRP at 42) The District made clear to Ms. Lusebrink that it could not just place her in one of the TOSA jobs; she would have to apply. (*Id.*) The District asked Ms. Lusebrink to contact it if she found a job she was interested in, so he could facilitate her getting into the interview process. (*Id.* at 42-43) Immediately after the June meeting, the District verified Ms. Lusebrink was still on the District's email list to make sure she was getting all the job postings sent to her. (*Id.*) The Human Resources Department was also informed to keep an eye out for a job that met Ms. Lusebrink's restrictions. (*Id.* at 43.) Ms. Lusebrink had access and notice of internal and external postings. (*Id.* at 44.) Ms. Lusebrink told the District that she would apply for jobs she felt were appropriate for her and she would contact Keith Klug of the District so that he could facilitate it. (*Id.*)

Ms. Lusebrink did not inform the District that she had applied for the TOSA position. (July 19, 2012 VRP at 28.) (*Id* at 62.) The TOSA positions would have required Ms. Lusebrink to go into the special education classroom like the IP job that she said she could not perform. (July 19, 2012 VRP at 61-62.) The District made sure that Ms. Lusebrink got an interview for the TOSA positions. (*Id.* at 62.) There were eight candidates for two TOSA positions. (*Id.*) Ms. Lusebrink was considered for the positions. (July 19, 2012 VRP at 62.)

On December 8, 2008, Ms. Lusebrink received a notice of termination that stated she was being terminated for administrative reasons. (July 16, 2012 VRP at 87; July 17, 2012 VRP at 25.) The letter specifically stated that the termination was necessary because she was not an active employee and was not on an authorized leave of absence. (July 17, 2012 VRP at 26.) After Ms. Lusebrink's leave of absence for the 2007-08 year expired, she did not reapply for another leave of absence. (July 17, 2012 VRP at 27.) The letter specifically stated that she was eligible for reemployment with the District. (Id. at 28-29.) The District's policy requires an employee who is unable to work due to health related concerns or other reasons to apply for a leave of absence. (July 19, 2012 VRP at 120.) If the employee wants the leave to be extended then she or he must reapply every year. (Id. at 124.) Although Ms. Lusebrink knew

the policy, and had applied for two leaves of absence previously, she did not apply for leave following the 2007-08 school year. (July 19, 2012 VRP at 123; July 16, 2012 VRP at 20, 30-31; July 17, 2012 VRP at 27.)

Ms. Lusebrink did check the website and the postings for a period of time to look for jobs that she thought she could do. (July 17, 2012 VRP at 58.) After 2009, she no longer checked the website to look for jobs at the District that she might be able to do. (*Id.* at 59-60.) Ms. Lusebrink did not apply for a single classroom teaching position from May of 2007 through July 4, 2012. (July 16, 2012 VRP at 120; July 23, 2012 VRP at 82.) The reason she did not was because she was not physically able to perform teaching jobs due to her potential for injury. (July 16, 2012 VRP at 121.)

The District has a very simple online application process for jobs. (July 19, 2012 VRP at 87.) The process involves an applicant filling out an online application and simply clicking a button to submit the application. (*Id.*)

The District was well aware of the accommodation process and requirements. (July 19, 2012 VRP at 130.) Part of the accommodation decision is dependent upon what the employee tells the District about jobs she can or cannot do. (*Id.*) Dr. Herner's June 25, 2008 letter specifically stated that Ms. Lusebrink was disabled from any teaching job was a

critical factor in the District's decision regarding accommodations for Ms. Lusebrink. (*Id.* at 146-47.)

## III. REASONS WHY REVIEW SHOULD BE DENIED

### A. Ms. Lusebrink's Petition for Review should be denied because the Appellate Court's decision to uphold the Jury's Verdict follows all controlling precedent.

As her basis for seeking review under RAP 13.4(b)(2), Ms. Lusebrink contends the Court of Appeals "parsed and ignored relevant Supreme Court precedent." However, it is clear that Division I followed all applicable precedent. It is Ms. Lusebrink's view of the precedent that is erroneous. As Division I noted:

> The jury answered "no" to two questions on the special verdict form: (1) "Did Kent School District fail to reasonably accommodate a disability of Cynthia Lusebrink?" and (2) "Did Kent School District fail to take affirmative steps to reasonably accommodate a disability of Cynthia Lusebrink?"

*Lusebrink v. Kent School Dist.*, 2014 WL 645364, *3 (Wn.App. 2014).

While these two questions represented both of her disability discrimination theories, Ms. "Lusebrink's appeal is focused on the second theory: that the district failed to take affirmative steps to help her stay employed with the district in a position other than classroom teaching." *Id.*

#### 1. Ms. Lusebrink's misstates the actual holding in the appellate court's decision to uphold the Jury's Verdict.

Ms. Lusebrink claims the appellate court "*held that the employer has no duty to reassign even when the employee is qualified to fill a vacant position.*" (Pet. Rev. at 9.) Ms. Lusebrink's interpretation of the opinion of Division I in this case was not the court's holding. Nonetheless, this purported holding is what Ms. Lusebrink contends is a "conflict with another decision of the Court of Appeals" under RAP 13.4(b)(2).

Ms. Lusebrink centered her disability accommodation theory on the failure to be reassigned to an open position:

> Lusebrink argues that an employer's duty to take affirmative measures includes an "affirmative requirement" to reassign the employee to an open position for which she is qualified, even if there are more qualified applicants.

*Lusebrink,* 2014 WL 645364 at *4.

Division I agreed that reassignment was a method of reasonable accommodation for a disabled employee but disagreed that reassignment to an open position was *mandatory as a matter of law*. *Id.* Thus, a more precise description of the holding by Division I is an employer may reassign a disabled employee -- who can no longer perform the essential functions of her job -- to a new job but that the employer does not have a *mandatory legal duty* to reassign the disabled employee to a new, open position when there are other more qualified candidates for that position.

**2. The appellate court followed *Davis*.**

Ms. Lusebrink argued that Division I relied on the case of *Davis v. Microsoft Corp.*, 109 Wn.App. 884, 37 P.3d 333 (2002), *aff'd* 149 Wn.2d 521, 70 P.3d 126 (2003), for the proposition that passive conduct is an accommodation.

Initially, in Ms. Lusebrink petition for review she cited to the Division I opinion in *Davis* – not to this Court's opinion that affirmed Division I. It was Ms. Lusebrink who relied on the language in the court of appeals' *Davis* decision. As Division I in this case pointed out:

> Lusebrink relies on the Court of Appeals opinion. She does not cite the Supreme Court opinion in *Davis* and does not address the above passage deferring to the fact finder to determine whether the employer's efforts are reasonably calculated to help the employee find an alternative position.

*Lusebrink,* 2014 WL 645364 at *5. The passage from this Court's opinion in *Davis* referred to in the preceding quote was:

> [W]e decline to conclude, as the Court of Appeals appears to have done, that [Microsoft's] strategy amounted to a failure to accommodate Davis in the reassignment process. To take either position as a matter of law—i.e., to say that access to all company job listings was enough or to say that Microsoft was obligated to find an exact match before Davis had any duty to follow up—would be unwise. The reasonableness of any employer's approach will depend on a number of factors, such as the size of the employer and its database of open jobs, the nature of the job descriptions themselves (whether highly detailed or sketchy), the level of the involvement of the company's job counselor, and the advisability of disclosing the disability to the hiring supervisors prior to (or after) an initial interview. In sum, the fact-finder must determine whether

> Microsoft's efforts were reasonably calculated to assist Davis in finding an alternative position within the company.

*Davis v. Microsoft Corp.*, 149 Wn.2d 521, 538, 70 P.3d 126 (2003). The quote from *Davis* demonstrates Ms. Lusebrink's err in continuing to argue that reassignment to an open position is required as a matter of law. This Court's opinion in *Davis* made it clear that the determination of whether an employer took affirmative steps to accommodate a disabled employee is a question for the jury and not the court to answer. As pointed out in Judge Becker's opinion in this case, Ms. Lusebrink advanced an erroneous position that she should have been reassigned to an open position as a matter of law.

Second, Ms. Lusebrink's representation that Division I relied on *Davis* "for the proposition that passive conduct is an accommodation" is simply wrong. As noted, Division I in this case relied on this Court's decision in *Davis* to show that it is for the jury to decide whether an employer took reasonable steps to accommodate a disabled employee. As Division I put it: "Under *Davis,* 149 Wn.2d at 538, [the jury instruction] was correct because it allowed the jury to decide whether or not the district took 'affirmative steps' that amounted to a reasonable accommodation." *Lusebrink*, 2014 WL 645364 at *5.

Third, Ms. Lusebrink's attempt to distinguish *Davis* is confusing and illogical. Ms. Lusebrink argues that *Davis* should be ignored because it "examines a different temporal issue in the accommodation process" as the employee in *Davis* never applied for a job. (Pet. Rev. at 9.) Whether an employee applies for an open position or does not apply for an open position has no bearing on the issue of who is to decide whether the district took affirmative steps that amounted to a reasonable accommodation. *Davis* clearly states it is for the jury to decide. The fact that a disabled employee was or was not interviewed for an open position may weigh on jury's decision of whether reasonable accommodation was achieved. However, it does not prevent the jury as the fact finder from deciding the issue. In this case, Ms. Lusebrink was interviewed for an open position. This fact likely helped the jury decided that the District's efforts were reasonable.

**3. The appellate court followed *Dean.***

Ms. Lusebrink stated in her petition for review: "Division I dismisses *Dean v. Metropolitan Seattle-Metro*, 104 Wn.2d 627, 708 P.2d 393 (1985) as irrelevant." (Pet. Rev. at 10.) In reality, Division I dismissed Ms. Lusebrink's "implicit" reading of *Dean.* Because there is no precedent in Washington to support her erroneous statement that the law *requires* employers to assign disabled employees to open positions

above more qualified applicants, Ms. Lusebrink argued on appeal that this non-existent mandatory legal duty was "implicit" in *Dean*. *Lusebrink*, 2014 WL 645364 at *4. As pointed at *3 of the opinion of Division I, the actual and explicit holding in *Dean* is:

> We hold that to make a prima facie case of handicap discrimination an employee plaintiff must prove that he or she is handicapped, that he or she had the qualification required to fill vacant positions and that the employer failed to take affirmative measures to make known such job opportunities to the employee and to determine whether the employee was in fact qualified for those positions.

*Dean*, 104 Wn.2d at 639. As part of the holding, this Court explained that the employee "need only prove . . .that he was qualified for available positions for which he applied. [The employer] could in its turn prove [the employee] was less qualified than those hired to fill . . . existing vacancies." In *Dean,* this Court agreed that the employer "had no duty to create a job for Dean or to hire him in preference to a more qualified employee." *Dean*, 104 Wn.2d at 634. Ms. Lusebrink argued her theory of the case at trial but the jury sided with the District. Division I upheld the jury's verdict when it decided, in line with *Dean,* that there was substantial evidence to support the District's affirmative steps to accommodate Ms. Lusebrink.

**4. The appellate court followed *Clarke.***

Ms. Lusebrink asserted: "Division I dismisses as irrelevant this Court's holding in *Clarke v. Shoreline School Dist. No. 412*, 106 Wn.2d 102, 720 P.3d 793 (1986)." However, *Clarke's* holding expressly rejected

the theory of mandatory reassignment that Ms. Lusebrink's claims to be implicit in *Dean*. This Court stated in *Clarke*:

> [I]t is clear that RCW 49.60.180 and WAC 162–22 do not necessarily prohibit the School District from discharging Clarke from his teaching position simply because he is handicapped, unless he is otherwise qualified to perform the essential functions of the job. *Furthermore, Dean does not require the School District to create a position for Clarke for which he is not qualified, or to hire Clarke over a more qualified person.* However, *Dean* does require the School District to take affirmative steps to help Clarke fill a position within the School District, if such a position exists and Clarke is qualified to fill it.

106 Wn.2d at 120-21. (Emphasis added.) In fact, *Clarke* reinforces the requirement expressed above in *Dean* that affirmative steps require an employer "to make known such job opportunities to the employee and to determine whether the employee was in fact qualified for those positions." *Dean*, 104 Wn.2d at 639.

Ms. Lusebrink misinterprets *Clarke* to make her erroneous argument that the law requires the District to reassign her, as a matter of law, above other qualified candidates.

**B. Ms. Lusebrink's Petition for Review should be denied because there is no issue of substantial public interest.**

The second basis for Ms. Lusebrink petition is the claim of "substantial public interest" consideration under RAP 13.4(b)(4).[1] Ms. Lusebrink argued that this Court must reverse its previous precedent under

the WLAD to provide her a new trial. Ms. Lusebrink wants employers to be required, as a matter of law, to reassign a disabled employee to open positions over more qualified applicants. Ms. Lusebrink apparently concedes that the opinion by Division I in this case -- rejecting of her appeal -- was a correct application of the law as it currently exists in Washington. Ms. Lusebrink stated that "[t]he real question that was presented in this case is whether the [District] must actually transfer or assign the employee to a vacant position, or simply 'make positions known' and the let disabled employee compete with all other job applicants."

Ms. Lusebrink now wants this Court to legislate from the bench and overturn years of precedent interpreting the WLAD to hold that employers have a mandatory duty to reassign a disabled employee to an open position over more qualified candidates.

1. **Ms. Lusebrink's reliance on dicta from a federal decision interpreting the American with Disabilities Act is not a basis for this Court to legislate from the bench, violate the Separation of Powers Doctrine and overturn years of precedent interpreting this state's disability law.**

Ms. Lusebrink primary argument for a drastic change to Washington's disability law is based upon a single federal decision, *Aka v. Washington Hosp. Center*, 156 F.3d 1284 (D.C. Cir. 1998), which

[1] Ms. Lusebrink incorrectly cited to RAP 13.4(b)(3). (Pet. Rev. at 8.)

interpreted federal disability law under the ADA. Moreover, because the *Aka* decision was a reversal of the trial court's granting of the employer's motion for summary judgment, the language Ms. Lusebrink relies upon is at most dicta. In *Aka*, a disabled employee could no longer perform the essential functions of his job as a hospital orderly and asked for reassignment. After not receiving another job within the hospital, the employee sued asserting a claim for failure to accommodate under the ADA. The district court denied the employee's motion and granted dismissal of the claim for the hospital. 1996 WL 435026, *1 (D.D.C. 1996). The circuit court reversed the district court and remanded the accommodation claim for trial.

In overturning the district court's summary judgment in favor of the employer, the *Aka* court singularly relied upon the definition of "qualified individual" under the ADA. Responding to the employer's argument that reassignment is not mandatory under the ADA, the *Aka* court countered that the definition of "qualified individual" under the ADA included a provision for the reassignment of a disabled employee who can no longer perform the essential functions of his original job:

> [The employer's] argument misreads the statute. Section 12111(8) [of the ADA] defines an "otherwise qualified individual with a disability" to mean someone who "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds *or desires*." An

> employee seeking reassignment to a vacant position is thus within the definition if, with or without reasonable accommodation, she can perform the essential functions of the employment position to which she seeks reassignment.

*Aka v. Washington Hosp. Center*, 156 F.3d 1284, 1300-01 (D.C. Cir., 1998). (Emphasis in the original.) The *Aka* court's decision was based on the ADA's definition of a qualified individual, which provides:

> The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12111(8). This definition distinguishes *Aka* from the WLAD.

The WLAD, RCW Ch. 49.60, does not include the phrase "qualified individual with a disability" or any definition similar to the one listed above. Under Washington disability law, the WLAD provides a definition for "disabled." Included in this definition are portions related to when a person seeks a reasonable accommodation from an employer. RCW 49.60.040(7)(d) and (e). As noted by Division I in this case, the Washington Administrative Code further defines what can be a reasonable accommodation under WLAD for an employer. WAC 162–22–065(2)(c).

Because the *Aka* decision is rooted within the language of federal ADA legislation that is not present in Washington's disability laws, Ms. Lusebrink asks this Court to legislate from the bench by adding language to the WLAD. Such action is loathed under the separation of powers doctrine essential to Washington's democracy. *Public Utility Dist. No. 2 of Grant County v. North American Foreign Trade Zone Industries, LLC*, 159 Wn.2d 555, 579, 151 P.3d 176 (2007) ("It is the duty of this court to uphold and enforce the constitution, not to legislate from the bench."); *Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009)("The judicial branch violates the doctrine when it assumes tasks that are more properly accomplished by other branches").

Ms. Lusebrink invites this Court to legislate from the bench and overturn the line of cases expressly holding that an employer does not have a mandatory legal duty to reassign a disabled employee to an open position over hiring a more qualified applicant.

**2. Ms. Lusebrink's reliance on a federal decision interpreting the ADA should not be allowed because it was not part of her appeal.**

Apart from Ms. Lusebrink's desire for this Court to to write new law into WLAD, this Court should bar Ms. Lusebrink from obtaining discretionary review on a theory not argued until oral argument.

> [I]t would be unfair to the district to consider the federal cases as instructive authority. Lusebrink did not cite the federal cases in her briefing, nor did she argue that Washington law should be changed to become consistent with federal case law.

*Lusebrink*, 2014 WL 645364 at *7.

The circuit court decision in *Aka* was decided in 1998. If Ms. Lusebrink intended to argue for alignment between the WLAD and the ADA then such a position was available to her during trial and in her appeal. However, Ms. Lusebrink did not cite this federal law at trial or on appeal from the unfavorable jury verdict.

In fact, Ms. Lusebrink did not assign error to the issue of alignment between ADA and the WLAD. She should be precluded from doing so now. *Rutter v. Rutter's Estate*, 59 Wn.2d 781, 787-88 (1962) ("argument unsupported by an assignment of error does not present an issue for review").

### C. Ms. Lusebrink's Petition for Review should be denied because there is no legal error in Jury Instruction No. 11.

Ms. Lusebrink continues to condemn Instruction No. 11. Division I spent most of its analysis approving this instruction, which stated that it was Mr. Lusebrink's burden to prove:

> (3) That the Kent School District failed to take affirmative measures to help her find and apply for another position, *such as making known such job opportunities to her, and determining whether she was in fact qualified for those positions.*

*Lusebrink*, 2014 WL 645364 at *4. (Emphasis in original.) The debate is centered upon the italicized language above. This Court should reject Ms. Lusebrink's claims that this instruction is "erroneous."

Ms. Lusebrink asserted that "the trial court instructed the jury that the District had a duty to take affirmative steps instruction requires affirmative steps to accommodate . . . but then listed passive conduct as examples." (Pet. Rev. at 16.)[2] The instruction itself does not list "passive conduct." Rather, it stated the law set forth in *Dean, supra*. *Lusebrink*, 2014 645364 at *4. The decision by Division I made this fact abundantly clear.

Ms. Lusebrink continues to rehash her argument that employers in Washington have a mandatory legal duty to reassign a disabled employee to an open position over more qualified applicants. Division I and the District have fully addressed this argument.

Ms. Lusebrink does not appear to acknowledge that law requires the jury to decide whether the District took affirmative measures to accommodate her. As pointed out below, Instruction No. 11 allowed Ms. Lusebrink to argue her accommodation theories and the jury decided she could not meet her burden of proof. *Lusebrink*, 2014 WL 645364 at *7.

The jury's verdict should not be overturned just because Ms. Lusebrink does not like the result. *Washburn v. Beatt Equip. Co.,* 120 Wn.2d 246, 268–69 (1992) (An appellate court may not overturn a jury verdict unless the verdict is outside the range of substantial evidence in the record, shocks the conscience of the court, or seems to result from passion or prejudice).

**D. Ms. Lusebrink's Petition for Review should be denied because there was no error in the trial court's denial of her JNOV.**

Despite the jury's verdict otherwise, Ms. Lusebrink argues the District did not take any affirmative measures to accommodate her disability. Division I succinctly addressed Ms. Lusebrink's argument against the evidence:

> Lusebrink also argues the district "took no affirmative measures whatsoever" to accommodate her disability. Substantial evidence permitted the jury to find otherwise. . . . We conclude there was sufficient evidence supporting the jury's determination that the district did not fail to take affirmative steps to reasonably accommodate Lusebrink's disability.

*Lusebrink*, 2014 WL 645364 at *7.

Ms. Lusebrink now argues that *Frisino v. Seattle School Dist. No. 1*, 160 Wn.App. 765, 249 P.3d 1044 (2011), *rev. denied* 172 Wn.2d 1013,

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[2] Ms. Lusebrink cites to CP 1348 to support her claim; however, according to the undersigned's records, CP 1348 is Jury Instruction No. 14 explaining what present value means.

259 P.3d 1109 (2011), gives the District a mandatory legal duty to reassign her to an open position. (Pet. Rev. at 19.) In *Frisino* there was no issue of reassignment to a different job.

> *It is not disputed* that, with an accommodation to remove those environmental triggers, Frisino was qualified to perform the essential functions of her job [as a teacher]. *Reassignment to a different type of job was not at issue.*

160 Wn.App. at 778. (Emphasis added.)

## IV. CONCLUSION

The jury rejected Ms. Lusebrink's argument that the District failed to reasonably accommodate her disability as required by the WLAD. Ms. Lusebrink had her day in court to attempt to convince a jury that the District took no affirmative measures whatsoever to accommodate her disability. Because there was substantial evidence for the jury to decide otherwise, Ms. Lusebrink's petition for review should be denied.

RESPECTFULLY SUBMITTED this 17th day of April, 2014.

JERRY MOBERG & ASSOCIATES, P.S.

JERRY J. MOBERG, WSBA No. 5282
PATRICK R. MOBERG, WSBA No. 41323
Attorneys for Respondent Kent School District

## CERTIFICATE OF SERVICE

I certify that on this date, a copy of the document to which is affixed was caused to be served and delivered upon the following:

**Filed with the Supreme Court Clerk's office via email to:**

Supreme@courts.wa.gov

**Provided to Plaintiff/Appellant's attorneys, email & Federal Express to:**

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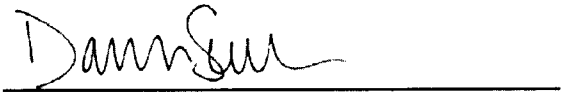
DATED this 17th day of April, 2014.



DAWN SEVERIN, Paralegal

## OFFICE RECEPTIONIST, CLERK

**From:** OFFICE RECEPTIONIST, CLERK
**Sent:** Thursday, April 17, 2014 4:29 PM
**To:** 'Dawn Severin'
**Cc:** tfirkins@vansiclen.com; diana@vansiclen.com
**Subject:** RE: Lusebrink v. Kent School District - Answer to Petition for Review

Rec'd 4-17-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Dawn Severin [mailto:dseverin@jmlawps.com]
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**To:** OFFICE RECEPTIONIST, CLERK
**Cc:** tfirkins@vansiclen.com; diana@vansiclen.com
**Subject:** Lusebrink v. Kent School District - Answer to Petition for Review

Greetings,

Attached for filing, please find the Answer to the Petition for Review in the matter of *Lusebrink v. Kent School District,* Appeal from King County Superior Court No. 10-2-10370-8-KNT, Court of Appeals Division I 69348-4-I

Submitted by:
Jerry Moberg, WSBA #5282, jmoberg@jmlawps.com
Patrick Moberg, WSBA#41323, pmoberg@jmlawps.com

Should you have questions or concerns regarding the attached, please feel free to contact our office.

Sincerely,

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