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No. 65801-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

ELIZABETH AND JASON BROOKS,

APPELLANTS,

v.

BPM SENIOR LIVING COMPANY,

DEFENDANT.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

1. Elizabeth and Jason Brooks (hereinafter "The Brooks"), Appellants, assign error to Finding of Fact No. 38 that Elizabeth Brooks did not make a request for accommodation until February 9, 2010.

2. The Brooks assign error to assign error to Finding of Fact No. 43 that Elizabeth Brooks acquiesced to the travel schedule.

3. The Brooks assign error to Finding Fact No. 45 that the hiring of Kim Homer substantially reduced Ms. Brooks' travel obligations.

4. The Brooks assign error to Finding of Fact No. 51 that Ms. Brooks was "pleased and happy" to leave BPM for $55,000.

5. The Brooks assign error to Finding of Fact No. 52 that Elizabeth Brooks left her job voluntarily.

6. The Brooks assign error to the trial court's conclusion that Parfitt offered Elizabeth Brooks another job within the company. [Finding of Fact Nos. 28 & 49] This is a mixed error of law and fact.

7. The Brooks assign error to the trial court's conclusion that Elizabeth Brooks did not suffer an adverse employment action. This is a mixed error of law and fact.

8. The Brooks assign error to the trial court's failure to conclude that the travel schedule taking Elizabeth out of town three weeks out of every month was pretextual. This is a mixed error of law and fact.

9. The Brooks assign error to the trial court's conclusion that the harassment Elizabeth Brooks endured was not based on sex. This is a mixed error of law and fact.

10. The Brooks assign error to the trial court's conclusion that the harassment suffered by Elizabeth Brooks was not sufficiently pervasive to create a hostile work environment. This is a mixed error of law and fact.

11. The Brooks assign error to the trial court's conclusion that Elizabeth Brooks left her job pursuant to a negotiated severance package. This is a mixed error of law and fact.

12. The Brooks assign error to the trial court's conclusion that Elizabeth Brooks failed to establish a failure to accommodate. This is a mixed error of law and fact.

13. The Brooks assign error to the trial court's conclusion that Elizabeth Brooks was not able to perform the essential functions of her job. This is a mixed error of law and fact.

14. The Brooks assign error to the trial court's conclusion that Ms. Brooks was uninterested in pursuing other jobs at BPM and instead chose a "severance package" . This is a mixed error of law and fact.

15. The Brooks assign error to the trial court's conclusion that the retaliation claims of Elizabeth Brooks fail because she voluntarily resigned from her job. This is a mixed error of law and fact.

16. The Brooks assign error to the trial court's conclusion that BPM did not interfere with Elizabeth Brooks' legal right to maternity leave and did not fire her in December 2009. This is a mixed error of law and fact.

II. ISSUES PRESENTED

1. Whether it constitutes gender discrimination for an employer to require a mother, who must breastfeed her infant out of medical necessity, to travel 4 days a week, 3 weeks out of every month when that was not previously a requirement of her job.

2. Whether a nursing mother with a temporary medical disability can bring claims relating to both gender discrimination and disability discrimination or whether the claims are mutually exclusive.

3. Whether the company President stating to a temporarily disabled employee that he is "willing to take a look to see if there are any positions within the organization" constitutes a job offer.

4. Whether the employer's duty to accommodate a temporary medical disability and engage in meaningful dialogue about other jobs is nullified by firing the employee 6 days after she discloses the disability.

5. Whether pressuring an employee to resign during her maternity leave and terminating her on her first day back from leave constitutes harassment and interferes with the legal right to maternity leave.

6. Whether a forced termination becomes a voluntary quit because the employee discussed a severance amount with her employer after she had been terminated, but never signed the Separation and Release Agreement and never receives any money associated with the 'severance'.

7. Whether it is reasonable to sanction counsel for contact with a witness on the witness's status as a speaking agent when the witness met no criteria for a speaking agent as set forth in *Wright v. Group Health.*

III. OVERVIEW

Elizabeth Brooks had been an executive at BPM Senior Living for several years when she became pregnant. What should have been a joyous occasion ended with her termination due to the medical necessity that she breastfeed her baby. BPM operates assisted living communities for seniors throughout the western states. Walt Bowen owns the company and Dennis Parfitt is the President. Bowen, unbeknownst to Elizabeth, was exceedingly displeased to hear that she was pregnant. His displeasure escalated when she returned to work. Bowen and Parfitt began a campaign to force Elizabeth Brooks out of the company by constantly threatening her job and drastically increasing her travel schedule.

Ms. Brooks worked at BPM for a total of 6 years, the last three as Vice President of Sales. She was the only woman on the management team. Throughout her time at BPM Elizabeth Brooks had an unblemished

record. As VP of Sales, Elizabeth trained and coached all sales staff at the communities. The majority of her work was done by telephone from an office in her home. When specific issues arose, Elizabeth traveled to the properties. She also frequently drove to company headquarters in Portland. Ms. Brooks was always in charge of her own travel schedule.

In September 2009, Elizabeth Brooks gave birth to a baby who refused to eat any kind of formula and since formula was offered in bottles, she rejected all bottles. The only way that Elizabeth could nourish her infant was to breastfeed. Immediately after the birth, Parfitt warned Elizabeth her job was in jeopardy. He constantly pressured her to resign.

On December 21, 2009 Elizabeth returned from maternity leave to full time status. That same day Parfitt fired her, telling Elizabeth that her last day would be December 31st. On December 30, 2009 Elizabeth's termination was rescinded. No one explained either of these actions.

Ms. Brooks continued working. In late January BPM imposed a travel schedule requiring Elizabeth to travel 4 days a week, for 3 weeks every month. Elizabeth spent most of February 2010 suggesting accommodations; she could not travel weekly with a breastfeeding infant.

During this time, Elizabeth's milk production began to diminish and on February 23, 2010 she went to her doctor. Elizabeth's physician wrote a note that Ms. Brooks should not travel until she was done

breastfeeding. On March 10, 2010 she gave Parfitt the note. He did not discuss the parameters of the note with either Elizabeth or her doctor. Six days later Parfitt again fired Elizabeth Brooks.

IV. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

A. Elizabeth Brooks Had An Unblemished Work History At BPM

Elizabeth Brooks went to work at BPM Senior Living (hereinafter "BPM") in 2005 and was promoted to Vice President of Sales in 2007. RP (6/14/12) P 64-67] Walt Bowen (hereinafter "Bowen") owns BPM which operates 17 senior living facilities throughout the western states. Dennis Parfitt (hereinafter "Parfitt") is President of the company. Part of his job was to maintain a buffer between Bowen and BPM employees because Bowen was so unpredictable. [RP (6/19/12) P 97] On a day to day basis, Elizabeth's primary contact was with Parfitt who reported directly to Bowen. Ms. Brooks had worked at BPM on two previous occasions. She provided the company 30 days' notice and letters of resignation both times when she left. [RP (6/18/12) P 40 –41] Altogether Ms. Brooks worked for BPM a total of six years, during which she was never disciplined, never written up and never had a negative review. [FOF No. 13] BPM praised and promoted Elizabeth. "Never ever, ever had Dennis ever mentioned a problem with my job." [RP (6/14/12) P 96 –97]

Elizabeth Brooks was the only woman on the executive team. As Vice President of Sales it was her job to coach and train the sales staff at all of BPM's facilities. [RP 6/14/12) P 67-68] The majority of this work was done by telephone from an office Ms. Brooks maintained in her home. [FOF No. 6] [RP 6/13/12) P 176] In fact, during 2009[1] the company retained a consultant, Traci Bild, who taught a system of coaching implemented exclusively by phone which substantially reduced the need for travel. [RP (6/14/12) P 121-123] When specific issues arose at a BPM community, Ms. Brooks personally drove or flew to that property. She drove to company headquarters in Portland twice a month. Elizabeth Brooks had always been in charge of her own travel schedule. [RP (6/14/12) P 80]

B. <u>Elizabeth Brooks Announces Pregnancy, BPM's Owner Displeased</u>

Elizabeth Brooks was thrilled to be pregnant. She announced her pregnancy to her fellow employees at the annual company meeting which took place the last week in February, 2009. [RP (6/14/12) P 92- 93] Bowen's reaction was swift. He sent an e-mail on March 6th with what became his long range plan: "Elizabeth will be asked to resign...." [Ex.2] The following day he wrote an e-mail to Dennis Parfitt his right hand man:

[1] The trial court incorrectly stated that Bild had worked as a consultant for BPM from 2007-2009

> I would suggest that given her situation as it now stands and the care the [sic] will be needed with her child that we approach her with the idea of being "the marketing and sales team leader" at Overlake...this is better than the alternative. [Ex.3]

Bowen admitted at trial that the "alternative" he referenced was termination. [RP 6/20/12 P42 - 43] No one ever discussed any of these concerns with Elizabeth Brooks. Months passed without Bowen raising any further issues, but a month before her due date, Bowen unleashed a scathing email reiterating he wanted Elizabeth out of the company.

> ...we just need to move on immediately with a search for a replacement. We should search out the best recruitment agency to handle the assignment and take the necessary step to move Elizabeth out, I just do not see a role for her in the company." [Ex. 4]

C. <u>Maternity Leave, Threats to Elizabeth's Job and A Baby Who Will Only Drink Mother's Milk From the Breast</u>

Elizabeth Brooks worked through Friday, September 18th and gave birth to a baby girl on Sunday September 20, 2009. [Ex. 6] Elizabeth had vacillated about how much maternity leave she intended to take but once the infant was in her arms she wanted the entire 12 weeks allowed by law. [RP (6/14/12) P 95] Both Elizabeth and her husband Jason were thrilled to be Grace's parents. However, the joyous occasion quickly took a sobering turn. Four days after the birth, Parfitt sent Elizabeth an email

warning that her job was in jeopardy. [Ex. 7] [2] "...my stomach just flipped upside down...I read this and thought I'm going to lose my job." RP 6/14/12 P 98] In fact, Elizabeth discovered that BPM had hired a recruiter and was interviewing candidates for her position. [Ex. 12]; [RP (6/14/12) P 102] Fear of losing her job and the resultant emotional stress haunted Elizabeth. [RP (6/18/12) P 54-55] Throughout her maternity leave Parfitt constantly pressured Ms. Brooks to resign, impacting her time with her new baby. [RP (6/14/12) P 19-21; (6/14/12 P 36] His continual intrusions into Elizabeth's maternity leave and threats to her job left Elizabeth distraught. [RP (6/13/12) P 124; RP (6/14/12) P 19-21] In phone calls with Elizabeth, Parfitt repeatedly told her that the company was looking to replace her. Witness Lynley Callaway testified that she was in Elizabeth's home office in December 2009 and heard a conversation via speakerphone (later confirmed to be with Dennis Parfitt [RP (6/14/12) P 124-125]). "By the end she was extremely emotional, crying, which I have never seen Elizabeth cry before." [RP (6/14/12) P107-108] Although she was alarmed, Elizabeth did not resign.

Elizabeth's mother-in-law testified about Parfitt's intrusive behavior which caused "turmoil" right after the baby's birth. [RP (6/13/12) P 84 -85] Maggi Broggel, saw Elizabeth Brooks "2-3 times a

[2] "We both know that Walt can be rather unpredictable when it comes to his business strategies and personal relationships."

week" in the first months after the baby was born. [RP (6/13/12) P 156]. She described Elizabeth as "...consistently --and I have to say almost immediately after Grace's birth—consistently concerned with and preoccupied with keeping her job." [RP (6/13/12) 158 -159] Elizabeth Brooks worried that if she took the entire 12 week maternity leave she would not have a job to return to so she came back sooner and worked part time for six weeks. [RP (6/14/12) P 104] [Ex. 10] However, Parfitt continued his campaign to get Elizabeth to resign.

Parfitt even drove to Seattle on December 10, 2009 and spent a three hour luncheon pressuring Elizabeth Brooks to resign. [RP (6/14/12) P 113; FOF No. 29; Ex 11] He tried to entice Elizabeth to leave BPM and start her own consulting company. Parfitt, told Elizabeth she would not have a job very much longer because, "Walt wants you off payroll by the end of the year". [RP (6/14/12) P 117] According to Parfitt's own testimony he did not offer Elizabeth a job a different job at that luncheon. "We discussed the possibility of her going to our property in Redmond, Washington at Overlake Terrace." [RP (6/18/12) P 173] Elizabeth Brooks returned from the luncheon agitated and crying. [RP (6/14/12) P 23]. Although she did not resign Elizabeth was emotionally drained and felt acutely vulnerable. [RP (6/14/12) P 114] The following day Parfitt

reported to Bowen: "the conversation I had with Elizabeth did not go as well as I had hoped." [Ex. 12]

Elizabeth and Jason attended a holiday party at the home of Soher Bishai that evening for BPM employees. Guests confirmed that Elizabeth was emotional and increasingly alarmed about losing her job. [RP (6/18/12) P 13] Bishai confided to witness Maggie Broggel that Parfitt told her Bowen wanted Elizabeth out of the company because she had had a baby. [RP (6/19/12) P 55-59]

Elizabeth's baby had strong opinions also. Jason and Elizabeth tried to shift her to formula so that Elizabeth would not have to nurse. Grace rejected every type and mixture of formula offered to her. [RP (6/14/12) P 18-19] Since formula had been offered in a bottle the infant then rejected bottles. [RP 6/14/12 P 78-79] Therefore, in order to keep her alive, Elizabeth Brooks had to feed her daughter directly from her breast—it was the only way to nourish the child. [RP 6/14/12 P 78-79] Although this was not what she would have chosen, Elizabeth apprised her supervisors of the situation and figured breastfeeding would not create a problem. After all, she worked from home.

D. <u>Preparations To Breastfeed and Perform Job Responsibilities</u>

Elizabeth Brooks was determined to return to the job that she loved. She carefully laid plans to address any work contingency that

might occur. Ms. Brooks drove to BPM's Portland headquarters once or twice a month. Her mother-in-law agreed to accompany her and act as a nanny. [RP (6/13/12) P 125-128] This would allow Elizabeth to nurse Grace in the car going back and forth as well as nurse her between meetings. BPM had three facilities in around Portland so Elizabeth could visit those properties by car. BPM also owned three properties in Las Vegas meaning trips there typically lasted 3 days. [RP (6/20/12) P 85]

Being in one place would minimize the disruption for Grace. If she needed to fly to any properties Elizabeth planned to take her mother-in-law as a nanny and pay for her airfare. [RP (6/14/12) P 91- 92; RP (6/13/12) P 126-128] Her mother-in-law was ready and willing to help Ms. Brooks maintain her travel schedule. By the third week in March Elizabeth could introduce Grace to solid food and wean her entirely by June. [RP (6/14/12) P 130] Ms. Brooks had everything in place to meet her work responsibilities, travel when needed and breastfeed Grace.

E. <u>First Termination: Back To Work And Fired The Same Day</u>

On December 21, 2009 Elizabeth Brooks returned to work full time. Parfitt fired her that same day, telling Elizabeth that "Walt wanted me gone" by the end of the month. [FOF No. 30] [RP (6/14/12) P 116-117; RP (6/18/12) P 30-31] Elizabeth was stunned. She wrote Parfitt an email protesting this decision which appeared to be solely in response to

taking maternity leave. "I never dreamed that the perfectly normal act of having a child would result in threats to terminate my employment..." [Ex. 15] Parfitt had been so confident that he could pressure Elizabeth Brooks to leave BPM and start her own consulting firm that he had written a memo enumerating what responsibilities she would have as a consultant even though Elizabeth never agreed to be a consultant. [Ex.13]

Fired on December 21st, Elizabeth spent the next nine days of knowing that she had no job after the end of the month. Parfitt then reversed course. On December 30th he sent a memo stating, "Walt wants EB back involved." [Ex 18] Elizabeth was told to be at Portland headquarters in early January for meetings. She took her mother-in-law with her to Portland and nursed Grace between meetings as planned. [RP (6/13/12 P] The atmosphere was stilted but she was back at work.

F. The Travel Schedule: 4 Days A Week, 3 Weeks Every Month

In January BPM devised a different harassment tactic. Elizabeth would no longer be in charge of her own travel.[3] The schedule designed for Elizabeth drastically expanded her travel responsibilities. [Ex. 32] It was presented to her by Chief Operating Officer, Dan Lamey. Contrary to the finding of the trial court that Ms. Brooks "acquiesced to the schedule",

[3] Q. Had BPM laid out your travel schedule before?
A. Never. Not once. Ever.
[RP 6/14/12 P 80; FOF No. 9]

[FOF No. 38] Elizabeth responded promptly four days later stating that the schedule was extremely problematic. [Ex 33] She explained precisely why. "You do know that I'm breast feeding." [RP 6/14/12 P 79-83] [Ex. 37] Ms. Brooks was so stunned that it took time to let it sink in; She went back to Parfitt explaining that there was no way to breastfeed Grace and be on the road constantly. [RP 6/14/12 86-88] The schedule was altered slightly [Ex. 39]. From the outset Parfitt was opposed to having any meaningful dialogue about the schedule. He became adamant there would be no further changes. [Ex 33, 36]

The schedule, to which Parfitt refused to make any additional changes, required Elizabeth Brooks to travel 4 days a week for 3 weeks out of every month. This increase made it impossible for Elizabeth's mother-in-law to accompany her. [RP (6/13/12) P 128 -129] There had never before been a requirement that Ms. Brooks visit all 17 properties. [RP 6/14/12 P 88-89] The new schedule required her to visit all 17 properties every quarter. [RP 6/18/12 P 56] This schedule nearly doubled Elizabeth's travel from the previous year and was significantly more than her travel in 2008. It quadrupled Ms. Brooks' travel from 2007. [Finding of Fact 35] [Exhibits 73 and 74] [See Appendices A and B][4]

[4] Appendix A is the schedule designated for Ms. Brooks' post-maternity leave. Days blocked out in red represent days required to travel to the destination or to return home. [RP (6/14/12) P 71; RP (6/14/12) P 90]

Further complicating matters the schedule demanded that Elizabeth change location nearly every day. [Appendix A] Daily disruption would not be healthy for either mother or child. She made the situation clear to Parfitt, "I am her [Grace's] only source of nourishment." [Ex. 37] Meanwhile, Bowen made no attempt to hide his deep animosity toward Elizabeth for having a baby in the first place:

> Are we to expect that because Elizabeth has a baby that the needs of the company become secondary to the needs of Elizabeth. Having a baby is not a disability and millions of women are working after childbirth. Maybe if she thought it was going to change her career options she should have taken a different approach to her career. [Ex. 37]

Elizabeth Brooks spent most of February pleading with Parfitt to exercise some reason regarding her travel schedule. [RP (6/14/12) P 86-88][Ex. 37] Ms. Brooks proposed multiple accommodations to make the schedule workable until she could wean Grace. [RP (6/14/12) P 130 - 133] Among those suggestions, all of which Parfitt rejected, was splitting travel and having her new assistant visit the southern properties. [RP (6/20/12) P 75-76]. That meant she could drive to several locations. [RP (6/14/12) P 132 -133]. Elizabeth proposed suggested the Traci Bild system allowing her to accomplish all of work from her home office. [RP (6/14/12) P 130] Ms. Brooks also reminded Parfitt that she would soon introduce solid food to her baby's diet freeing her up to travel more. [RP (6/14/12) P 134]

Appendix B charts Elizabeth's travel schedule from 2007-2009.

Parfitt remained inflexible telling her "Walt [Bowen] will not allow any more changes." [Ex. 33] [RP 6/14/12 P 138] Simultaneous with insisting that she personally visit each of the 17 senior living facilities Bowen put all travel "on hold" for Elizabeth Brooks so that she could create "Action Plans" for each community. [RP (6/14/12) P 84] [Exs 31, 45] Because she was training new staff and preparing for the upcoming annual meeting, Elizabeth was not scheduled to travel to any communities in March 2010. However, travel remained an unresolved issue with Elizabeth requesting flexibility and Parfitt rejecting all suggestions to make the situation feasible.

G. <u>Medical Disability: Diminishing Milk Production</u>

During January 2010 Elizabeth Brooks first noticed that her milk production was diminishing. RP (6/14/12) P 144 - 145] She became increasingly alarmed about producing enough milk for her baby. On February 23, 2010 Ms. Brooks went to her physician, Dr. Bonnie Gong, M.D., to discuss milk production and also reported that she was "exceedingly stressed" due to pressure created by the new travel expectations. RP (6/13/2012) P 98 - 99] Dr. Gong wrote:

> Feeling very stressed, not sleeping, eating a lot. Job is traveling weekly. Unable to sleep. Stress eating. Still breastfeeding baby won't take bottle. Bosses are trying to make her job miserable and they tried to fire her on her maternity leave. Would like meds for depression/anxiety.

> Begin Zoloft 25-50mg. Note written for no travel until she is done breastfeeding. [Ex. 102]

Elizabeth feared her reduced milk production would eventually impact the only source of nourishment for her baby. Dr. Gong testified at trial, on a more probable than not basis, that the employer's insistence that Elizabeth travel three weeks of every month was the source of her stress which in turn caused diminishing milk production. [RP (6/13/12) P 99, P 122] This medical testimony is unrefuted.

Dr. Gong wrote a note stating, "Ms. Brooks may not travel as long as she is breastfeeding". [Ex.61] She intended this as a way that Elizabeth "could try and work something out with her employer". [RP (6/13/12) P 105] Dr. Gong testified that it was detrimental to the infant and unreasonable to expect a mother to travel weekly with an infant. RP (6/13/12) P 105-106] Fearing for her job, Elizabeth did not immediately provide the note to BPM, still hoping the situation would resolve. RP (6/14/12) P 146-147]

H. <u>Second Termination: BPM Ignores Suggestions For Accommodation, Fails To Interact With Either Ms. Brooks Or Her Doctor About the Extent of Her Disability and Fires Elizabeth</u>

On March 10, 2010 with the threat of the travel schedule hanging over her, Elizabeth Brooks could wait no longer. She provided Parfitt the doctor's note. No one from BPM contacted Elizabeth Brooks to talk to her about the note or her accompanying e-mail requesting accommodation.

"This travel schedule has seriously impacted my ability to produce milk and feed my daughter. [Ex. 49; RP 6/18/12 P36-37] No one from BPM sought permission to speak to Elizabeth's doctor who would have explained that her note did not prohibit travel but the schedule needed to be reasonable and allow Ms. Brooks some discretion. [RP (6/13/12) P 105-106; (6/18/12) P 36-37]

Elizabeth heard nothing for 6 days. Then on March 16th Parfitt e-mailed Elizabeth insisting that she cancel plans to come to Portland due to the doctor's note. [Ex. 50] He also called her, saying "we had to separate immediately." [RP (6/18/12) P 37] Elizabeth Brooks implored Parfitt to return her travel schedule to pre-maternity levels until she could wean Grace. Parfitt continued to reject all suggestions for accommodation. The e-mail reflects Elizabeth's strong desire to remain in her job:

> Dennis, please know that I REALLY love what I do and know that I do a tremendous job....I understand that we are expected to travel in case of an emergency situation at a community and I am sure that I could make those situations happen. I can maintain the travel schedule I had prior to maternity leave with the help of my mother-in-law who can accompany me to care for Gracie.....I would be happy to discuss a travel itinerary that would be acceptable to Walt and healthy for both myself and Gracie as mentioned in my last e-mail to you. [Ex. 50][5]

[5] At no time did the defense provide any evidence that Elizabeth Brooks wanted to leave her job. As Maggi Broggel testified: ""...certainly she never wanted to lose her job. She didn't want to leave BPM. She wanted to come back after time off from having a baby and be welcomed back and she thought she would be." [RP (6/13/12) P158-159]

On March 16th Parfitt fired Elizabeth Brooks for her inability to travel 4 days a week 3 weeks out of every month. "If you can't fulfill the requirements of this position, then we need to come to a quick resolution of this situation." [Ex 51] [RP (6/18/12) P 38]

Contrary to the findings of the trial judge, Parfitt never offered Elizabeth Brooks a different job. [RP (6/14/12) P 52] The following email excerpt from March 16th is the only time the subject came up:

> I am also willing to take a look to see if there are any positions within the organization that do not require travel. But if you take one of those, it most likely would require you to work at Overlake Terrace, and the only positions I can think of off hand, pay a lot less than what you currently make, so I do not know whether that is an option you wish to discuss. [Ex. 51]

The only "alternative" that Parfitt offered regarding the travel schedule was untenable:

> ...if you wish to bring your child along on your business trips, as I understand you have been doing, I am more than happy to permit that if it is something you are interested in.
>
> [Ex. 51]

After telling Ms. Brooks she was terminated, Parfitt offered a payment of $55,000 in exchange for signing a Separation and Release Agreement. (hereinafter "Separation Agreement") Elizabeth briefly considered the amount but ended up refusing the offer; she believed BPM's treatment of her was fundamentally wrong and "I wanted to be

".....I plan to request your final check this afternoon...." [Ex. 53] Although Parfitt and Brooks had discussed severance they had reached no agreement. On March 18th Elizabeth inquired about a goodbye e-mail to the staff, asking Parfitt, "this won't go out until I agree on the severance agreement, right?????" [Ex. 54] Parfitt admitted he had not even seen the agreement, "I haven't received the release document as yet but forward it to you as soon as I get it." [Ex. 53]

Parfitt filed a "Personnel Action Notice" on March 18th. He marked "Termination" and then, even though no agreement had been reached, wrote "Negotiated separation by mutual agreement and subject to separate severance agreement". [Ex. 57] The line for the employee's signature is blank. On March 18th Elizabeth sent an email to Parfitt saying, she did not want to send out a goodbye email "without my attorney reviewing the severance document." [Ex. 56] Later that same day Elizabeth Brooks wrote to Parfitt:

> ...I am having a very hard time with this and do not think I can put together something....I really tried to make everything sound overly good in that email I sent to you earlier and unfortunately I just don't feel that way....I have been struggling with this all day and would greatly appreciate it if you would send something out. I trust you will convey my sorrow in having to leave the team.[Ex. 55]

Furthermore, Ms. Brooks never received any 'severance' money.

I. The Trial Court Imposed Sanctions With No Legal Basis

Plaintiff's counsel subpoenaed Soher Bishai as a witness to attend trial. Pursuant to Plaintiffs' Witness Disclosure defense counsel had been put on notice six months earlier that plaintiffs intended to call this witness. [Ex. 77 & 78] Furthermore, the defense had also named this witness. [RP 6/19/12 P 6] At no time did the defense designate Bishai as a "speaking agent". Both parties knew that Bishai was the Executive Director of the Overlake Terrace facility, one of 17 such facilities owned by BPM. After receiving the subpoena to trial, Bishai called plaintiffs' counsel to inquire what questions she could expect to be asked.

The morning Bishai was to testify the defense claimed for the first time that she was a speaking agent. [RP (6/18/12) P 7] The following day an examination of Parfitt, who was a speaking agent for the defendant, demonstrated that Bishai did not have the authority conferred on a speaking agent. RP (6/19/12) P13][9] The Hon. Bruce Heller sanctioned plaintiffs' counsel $250, finding "that there is a burden on somebody who

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[9] Q. ....would Ms. Bishai have the authority to settle this matter?
A. No, she would not.
Q. Would Ms. Bishai have the authority on behalf of BPM to bind the company to any agreement with the plaintiff?
A. No, she would not.
Q. To your knowledge, did Ms. Bishai supervise, direct, or consult with counsel with regard to how this matter has been handled?
A. Not to my knowledge.
Q. ...Would Ms. Bishai have the authority from BPM to resolve any matters with regard to this lawsuit on behalf of BPM.
A. She would not. [RP (6/19/12) P 13]

is making contact with someone who could be a speaking agent to make—to make an attempt to ascertain what that person's status is and then to act accordingly." [RP (6/19/12) P31] Counsel objected. [RP (6/19/12) P 34] At entry of judgment the trial court "suspended" the sanctions. [CP 100]

2. PROCEDURAL FACTS

Elizabeth and Jason Brooks filed this lawsuit in King County Superior Court on December 2, 2010. On June 13, 2012 this case was heard by the Honorable Bruce Heller. Trial concluded on June 25, 2012. Findings of Fact and Conclusions of Law were entered on August 2, 2012. Judgment in favor of the defendants and "suspending" sanctions against plaintiffs' counsel was entered on August 23, 2012. [CP 100]

V. ARGUMENT

A. Based Upon The Standard of Review, The Trial Court Erred In Failing to Find Sex Discrimination, Failing To Find That Elizabeth Brooks Was Entitled To Reasonable Accommodation And Failing To Find That BPM's Actions Were Unlawful and Retaliatory

1. Standard of Review

Review of a trial court's decision following a bench trial requires determining whether the findings are supported by substantial evidence and whether those findings support the conclusions of law. *Endicott v. Saul*, 142 Wash. App. 899, 909, 176 P.3d 560, 566 (2008). Findings of fact must be supported by substantial evidence, which is the quantum of

evidence sufficient to persuade a rational fair-minded person the premise is true. *Id.* The Court reviews questions of law de novo. *Id.*, *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-880, 73 P.3d 369 (2003).

The standard of review for mixed questions of law and fact and the appropriate analysis are discussed in *Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 688, 167 P.3d 1112, 1118 (2007). The threshold issue in that case was whether Erwin acted as a real estate broker in providing the services for which he claimed a fee under the Agreement. Determining whether a person acted as a real estate broker through a particular course of conduct is a mixed question of law and fact, in that it requires applying legal precepts (the definition of "real estate broker") to factual circumstances (the details of the person's conduct). *See Tapper v. Employment Sec. Dep't*, 122 Wash.2d 397, 402, 858 P.2d 494 (1993). "Analytically, resolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law, and then applying that law to the facts." *Id.* at 403.

B. The Trial Court Compartmentalized The Actions BPM Took Against Elizabeth Brooks As If Each Stood Alone. The Appropriate Legal Standard is To Examine the Totality of the Circumstances

The trial court failed to analyze the *totality* of the circumstances, the applicable legal standard in cases of discrimination and harassment.

> The harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. Whether the harassment at the work place is sufficiently severe and persistent to seriously affect the emotional or psychological well being of an employee is a question to be determined with regard to the *totality of the circumstances.*

Glasgow v. Georgia-Pacific Corp. 103 Wash.2d 401, 406-407, 693 P.2d 708 (1985) [emphasis added]; *Schonauer v. DCR Entertainment, Inc.* 79 Wash.App. 808, 905 P.2d 392 (1995).

Rather than examine the multiple adverse actions against Elizabeth Brooks the trial court parsed the individual actions BPM took against her as if each stood on its own. However, the legal standard is well established: the trier of fact must analyze the various actions in concert. BPM took the following adverse actions against Elizabeth Brooks: interfering with her maternity leave by threatening her job and pressuring her to resign, termination the first day back from maternity leave, imposing a pretextual and retaliatory travel schedule, failing to clarify her doctor's note, ignoring any attempt at reasonable accommodation and culminating in her second and final termination. Examining all of BPM's actions toward Elizabeth Brooks a clear line can be traced from the

announcement of her pregnancy to her final termination. Taken together, these actions created a pervasive and hostile work environment sufficient to alter the terms and conditions of employment.

C. Elizabeth Brooks Had A Temporary Disability. A Nursing Mother Is Not Precluded From Availing Herself of the Protections Afforded Other Citizens With Disabilities

Elizabeth Brooks had a medically cognizable disability when her breast milk production began to diminish. She put BPM on notice of her disability at the time she provided her doctor's note to Parfitt. There is substantial evidence the trial erred regarding whether Ms. Brooks established failure to accommodate as well as Elizabeth's ability to perform essential job functions. The trial court findings regarding failure to accommodate [Assignment of Error No. 12] and inability to perform essential job functions [Assignment of Error No. 13] are questions of mixed law and facts. The Washington Law Against Discrimination (WLAD) reflects legislative intent that citizens of this state be free of discrimination by construing such laws "liberally".[7] Protection on the job for a disability is a legal right granted to citizens pursuant to statute.[8]

A prima facie case of disability discrimination was enunciated in *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 94 P.3d 930 (2004).

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[7] The provisions of this chapter *shall* be construed liberally for the accomplishment of the purposes thereof. RCW 49.60.020. (Emphasis added)

[8] RCW 49.60.180 (2) and (3).

> (1) the employee had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job; (2) the employee was qualified to perform the essential functions of the job in question; (3) the employee gave the employer notice of the abnormality and its accompanying substantial limitations; and (4) upon notice, the employer failed to affirmatively adopt measures that were available to the employer and medically necessary to accommodate the abnormality. *Hill II*, 144 Wash.2d at 192-93, 23 P.3d 440; *Davis v. Microsoft Corp.*, 149 Wash.2d 521, 532, 70 P.3d 126 (2003).

Id. at 145.

Feeding an infant for whom one has responsibility is a major life activity and in this case the impairment of that activity was, literally, a matter of life and death.

> A physical or mental impairment that is substantially limiting impairs a person's ability to perform tasks that are central to a person's everyday activities, thus are "major life activities." *Toyota Motor Mfg., Ky., Inc. v. Williams,* 534 U.S. 184, 195, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002). The United States Supreme Court has held that substantially limited means " '[u]nable to perform a major life activity that the average person in the general population can perform' " *id.* at 195, 122 S.Ct. 681 (quoting 29 C.F.R. § 1630.2(j) (2001)) and defined major life activities as "those activities that are of central importance to daily life." *Id.* at 197, 122 S.Ct. 681.

McClarty v. Totem Lake Elec., 157 Wash.2d 214, 229, 137 P.3d 844 (2006). For nursing mothers breastfeeding is a major life activity. Therefore, the medically documented condition of diminished milk production impacts a major life activity. Medically, Elizabeth Brooks had no choice—it was the only way to feed her infant child.

In *Pulcino v. Federal Express*, 141 Wn.2d 629, 9 P. 3d 787 (2000), our supreme court concluded that an employee with a temporary disability is protected by WLAD. "[T]he Act is not limited to permanent disabilities and thus requires employers to reasonably accommodate temporary disabilities." *Pulcino v. Federal Express*, at 643.

Dr. Bonnie Gong's trial testimony regarding diminished milk production is unrefuted—and it established that Elizabeth Brooks had a temporary disability. On March 10th Elizabeth provided Dr. Gong's note to Parfitt. Six days elapsed with only silence from BPM. On March 16th Parfitt told Ms. Brooks she had to maintain the travel schedule or come to a "quick resolution". The quick resolution was terminating Ms. Brooks.

1. BPM Had An Obligation To Engage In An Interactive Process With Elizabeth Brooks And Determine If There Was Another Suitable Position For Her Within the Company. The Trial Court Erred When It Concluded That Parfitt Offered Ms. Brooks Another Job In March 2010. The Record Does Not Support That Conclusion

Under disability law in this state, the employer is required to be proactive in exploring ways to accommodate the employee so that employee can continue to work.

> A reasonable accommodation requires an employer to take 'positive steps' to accommodate an employee's disability. *Goodman v. The Boeing Co.*, 127 Wash.2d 401, 408, 899 P.2d 1265 (1995) (quoting *Holland v. The Boeing Co.*, 90 Wash.2d 384, 389, 583 P.2d 621 (1978)). To reach a reasonable accommodation, employers and employees

> should seek and share information with each other "to achieve the best match between the employee's capabilities and available positions." *Goodman,* 127 Wash.2d at 409, 899 P.2d 1265.

Harrell v. Washington State ex rel. Dept. of Social Health Services, 170 Wash.App. 386, 285 P.3d 159 (2012).

Even in cases where the employer concludes that the employee has difficulty performing essential job functions there must still be a good faith effort to find a position for that employee where she can successfully function.

> If an employee is not able to perform the essential functions of his job, the agency's responsibility to accommodate the employee is limited to making a "good faith" effort to locate a job opening for which the employee is qualified. *See Dedman,* 98 Wash.App. at 486, 989 P.2d 1214; *see also Clarke v. Shoreline Sch. Dist. No. 412,* 106 Wash.2d 102, 121, 720 P.2d 793 (1986);

Havlina v. Washington State Dept. of Transp. 142 Wash.App. 510, 178 P.3d 354 (2007). BPM made absolutely no effort to either accommodate Elizabeth Brooks or to help her seek another job in the company at the time of her termination. [Assignment of Error No. 6] There is no documentation that Parfitt ever offered Ms. Brooks another job. The trial court based its conclusion on Parfitt opining, "I am willing to take a look to see if there are any positions within the organization that do not require travel". [Ex. 51] That is not a job offer. There was no discussion of wage, responsibilities, title or a start date – issues typically included in a

job offer. Pursuant to reasonable accommodation law, a job offer requires an interactive search process and knowledge of the extent of the disability and its medical parameters. "Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employee's capabilities and available positions." *Goodman v. Boeing*, 127 Wn. 2d 401, 408-409, 899 P.2d 1265 (1995). Notice then "triggers the employer's burden to take 'positive steps' to determine the extent of the disability" and accommodate the employee's limitations. *Goodman v. Boeing*, at 407.

Parfitt made no attempt to have such an exchange with Elizabeth Brooks. Parfitt made no attempt to speak to Ms. Brooks or her doctor about the doctor's note. Parfitt made no attempt clarify the parameters of Ms. Brooks' limitation. BPM's failure to interact with Ms. Brooks, seek more information and attempt to work with Elizabeth to find a reasonable accommodation contravenes well established Washington law.

2. The Trial Court Erred When It Found That Elizabeth Brooks Could Not Perform the Essential Functions of Her Job. There Is Substantial Evidence That Ms. Brooks Could Travel

The trial court erred when it found that Elizabeth Brooks could not perform the essential functions of her job "with or without accommodation". [Assignment of Error No. 13] One of the requirements

of a disability claim is that the employee must demonstrate that she can still perform the job's "essential functions". The essential function at issue in this case is the ability to travel. Elizabeth Brooks demonstrated that she could travel. She travelled to Portland in early January and again in February. On March 16th she stated that she planned on travelling to Portland and intended to go to Las Vegas at the end of March. There is substantial evidence that Ms. Brooks was capable of performing the essential job function of travel. The court misapplied the facts to the law.

The court cannot ignore that with reasonable accommodation the person asserting a disability could do their job. *Johnson v. Chevron U.S.A., Inc.*, 159 Wash.App. 18, 244 P.3d 438 (2010). What the employee cannot do is ask the employer to alter the "fundamental nature of the job". *Harrell v. Washington State ex rel. Dept. of Social Health Services*, 170 Wash.App. 386, 285 P.3d 159 (2012). Essential job functions can be accommodated in multiple ways.

> In six separate instructions, the court explained reasonable accommodation. Together, these instructions told the jury that Ms. MacSuga had the burden of proving that she could perform the essential functions of the job with or without reasonable accommodation; that reasonable accommodation could include a reasonable adjustment in job duties, work schedules, scope of work, job setting or conditions of employment; that the employer had the duty to inquire into the nature and extent of her disability and to take positive steps to accommodate the limitations; and the

> factors the employer may consider in determining whether a given accommodation is reasonable.

MacSuga v. County of Spokane, 97 Wash.App. 435, 440, 983 P.2d 1167 (1999).

The issue in this case is not the ability to travel but the *frequency* of travel. Ms. Brooks was ready and willing to travel to all properties reachable by car. Her limitation was a need to temporarily limit the frequency that she traveled by plane due to the fact that she had to take her baby with her. She had her mother-in-law standing by to act as a nanny whether travelling by car or plane. There is substantial evidence that Elizabeth Brooks could perform the essential function of travel and the trial court erred in finding she could not.

3. Disability Claims and A Claim for Sex Discrimination Due To Pregnancy and Childbirth Are Not Mutually Exclusive

The case of *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 172 P.3d 688 (2007), established that discrimination based upon pregnancy is sex discrimination. While the instant matter may be a case of first impression in Washington, courts in other states have ruled that pregnancy- based sex discrimination claims and disability discrimination claims are not mutually exclusive.[9] Nothing in *Hegwine* stands for the proposition that a sex discrimination claim based upon pregnancy or

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[9] *Cerrato v. Durham*, 941 F.Supp. 388 (S.D.N.Y. 1996); *Patterson v. Xerox Corp.*, 901 F Supp. 274 (N.D. Ill. 1995); *Garrett v. Chicago School Reform Board of Trustees*, WL 411319 (N.D.Ill. July, 1996).

childbirth precludes a disability claim. What *Hegwine* defines is the limits of pregnancy-based sex discrimination claims. These claims are limited to discrimination based upon "pregnancy and childbirth." Hegwine relies on WAC 162-30-020 which defines "Pregnancy, childbirth, and pregnancy related conditions."

> (a) "Pregnancy" includes, but is not limited to, pregnancy, the potential to become pregnant, and pregnancy related conditions.
> (b) "Pregnancy related conditions" include, but are not limited to, related medical conditions, miscarriage, pregnancy termination, and the complications of pregnancy.

Elizabeth Brooks asserts that whether breastfeeding is a pregnancy related condition is fact specific and should be evaluated on a case by case basis. While nursing is certainly related to childbearing and childbearing begins with childbirth there is no unbroken nexus in every case between childbirth and breastfeeding. The issue before this court is that Ms. Brooks developed a *medical condition* that diminished her milk production. That *medical condition* is the basis of her disability claim.

In contrast to the plaintiff in *Hegwine*, Elizabeth Brooks is not limiting her claims only to a pregnancy-related condition. She is also asserting a wholly separate disability claim regarding diminished milk production. Therefore, Ms. Brooks is asserting a separate and distinct claim that a bodily function (production of breast milk) was impaired.

This medically-documented condition falls under the protections established by the Washington Law Against Discrimination because it is a temporary disability. Furthermore, the employer had notice of this disability and made no effort at accommodation.

D. The Defendant's Treatment of Elizabeth Brooks Is Sex Discrimination. Elizabeth Brooks Suffered Adverse Employment Actions Triggered By Taking Maternity Leave and Needing To Breastfeed Her Child. She Continued To Suffer Adverse Employment Actions Because of Pregnancy Related Conditions Until Her Second Termination

There was no criticism of Elizabeth Brooks' job performance until she announced her pregnancy and took maternity leave. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 172 P.3d 688 (2007), established that discrimination based upon pregnancy or pregnancy related conditions violates WLAD's provisions prohibiting discrimination based on sex. RCW 49.60.180 (2) and (3).

The harassment of Elizabeth Brooks began 4 days into her maternity leave when Parfitt sent her an e-mail warning Elizabeth that her job was on the line. The temporal proximity evidenced in these facts is inarguable. The defendant cannot substantiate any reason outside of Elizabeth's pregnancy to explain the harassing treatment that began so soon after she gave birth. A bias against pregnancy is considered discriminatory and is unlawful. *Nguyen v. Matsushita Avionics Systems*

Corp. 131 Wash. App. 1064 (2006). It is also unlawful to interfere with maternity leave. RCW 49.78.300.[10]

Hegwine v. Longview Fibre Co. enumerated the elements of this type of discrimination: "(1) [Plaintiff] belongs to a protected class, (2) she suffered an adverse employment action, and (3) the adverse employment action was due to her pregnancy." *Hegwine* at 355. The trial court erred when it concluded that Elizabeth Brooks had not suffered any bias because she had not suffered "an adverse employment action". [Assignment of Error No. 7] Ms. Brooks suffered multiple adverse employment actions.

First, Parfitt harassed Elizabeth Brooks throughout her maternity leave, threatening her job and pressuring her to resign. Second, in December 2009, BPM fired Ms. Brooks on the same day she returned from maternity leave. Although it later rescinded the termination, Ms. Brooks spent 9 days believing she no longer had a job at the end of the month. The trial court cited *Kirby v. City of Tacoma,* 124 Wn. App. 454, 98 P.3d 827 (2004), for that states "threatening to fire an employee is not an adverse employment action." However, in this instance the employer did not merely threaten to fire Ms. Brooks—it *did* fire Ms. Brooks.

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[10] (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.

Third, adverse employment actions are not limited to termination. Witnesses established Parfitt's relentless harassment of Elizabeth in pressuring her to resign. The e-mail Ms. Brooks wrote to Parfitt on December 23, 2009 demonstrates the hostile work environment she faced on her return from maternity leave. [Ex. 15] *Hegwine* cites WAC 162-30-020(1)[11] and establishes that discrimination based on pregnancy is sex discrimination. This includes time taken for recovery from childbirth. There is substantial evidence in the record that Elizabeth Brooks suffered sex discrimination as a result of childbirth and maternity leave. Thus the court erred when it concluded that the harassment of Elizabeth Brooks was not based on sex. [Assignment of Error No. 9]

Furthermore, adverse employment actions can include *changes in scheduling*, responsibilities and a hostile work environment. *Kirby v. City of Tacoma*, 124 Wash. App. At 465. [Emphasis added] The travel

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[11] **WAC 162-30-020**
Pregnancy, childbirth, and pregnancy related conditions.

(1) **Purposes.** The overall purpose of the law against discrimination in employment because of sex is to equalize employment opportunity for men and women. This regulation explains how the law applies to employment practices that disadvantage women because of pregnancy or childbirth.

(2) **Findings and definitions.** Pregnancy is an expectable incident in the life of a woman. Discrimination against women because of pregnancy or childbirth lessens the employment opportunities of women.

(a) "Pregnancy" includes, but is not limited to, pregnancy, the potential to become pregnant, and pregnancy related conditions.

(b) "Pregnancy related conditions" include, but are not limited to, related medical conditions, miscarriage, pregnancy termination, and the complications of pregnancy.

schedule designed for Ms. Brooks is another example of harassment and multiple factors support that it was pretextual in nature. In analyzing hostile work environment claims, the court must examine the cumulative effect of the employer's actions. *Antonius v. King County*, 153 Wn.2d 256, 103 P.3d 729 (2004) *quoting National Railroad Passenger Corporation v. Morgan*, 536 U.S. at 101, 122 S.Ct. 2061 (2002).

The enormity of insisting that a nursing mother choose between an artificially imposed travel schedule and feeding her baby is harassment. The travel schedule is proof "that discriminatory animus was a substantial factor motivating [the employer] in its employment actions". *Hegwine v. Longview Fibre*, 162 Wn.2d at 361. Just as the defendant in *Hegwine* kept increasing the lifting requirements of the job in order to avoid hiring the plaintiff, BPM increased the travel requirements for Elizabeth Brooks. These actions were discriminatory as the defendant knew full well that Ms. Brooks had a pregnancy-related condition—the necessity to breastfeed her baby which limited her ability to travel.

E. The Defendant's Actions And Animosity, Culminating In The Termination of Elizabeth Brooks, Constitute Retaliation For Asserting Her Legal Right To Maternity Leave, Her Legal Right To Breastfeed As Well As Her Legal Right to Reasonable Accommodation

Elizabeth Brooks exercised her right to take maternity leave and that right is guaranteed by law. RCW 49.78.220[12] In response to exercising that right, Elizabeth was immediately subjected to unwarranted criticism, harassing, demeaning behavior, attempts to replace her, pressure to resign, termination and an unreasonable travel schedule all culminating in a second termination. When Elizabeth presented her doctor's note demonstrating that she had a disability and attempted to engage her employer in reasonable accommodation discussions she was fired a second time. Retaliation is unlawful pursuant to RCW 49.60.210:

> **Unfair practices--Discrimination against person opposing unfair practice--Retaliation against whistleblower**
>
> (1) It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

It is well established that RCW 49.60.180(1) applies to claims such as the one before this court. *Griffith v. Boise Cascade, Inc.*, 111 Wash.

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[12] (1)...an employee is entitled 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;

App. 436, 45 P.3d 589 (2002). [Court found no violation of discrimination law, not that the statute is inapplicable in discrimination and disability claims.] In *Davis v. West One Automotive Group,* 140 Wash.App. 449. 460, 166 P.3d 807 (2007) an employee claimed retaliatory discharge. The opinion reiterates the threshold issues:

> In order to establish a prima facie case of retaliatory discharge, [the plaintiff] must show (1) she engaged in a statutorily protected activity; (2) she was discharged or had some adverse employment action taken against her; and (3) retaliation was a substantial motive behind the adverse employment action. *Campbell,* 129 Wash.App. at 22–23, 118 P.3d 888.

The employer can have more than one reason for terminating an employee, but the action is unlawful if "engaging in protected activity" plays a role in the discharge. *Kahn v. Salerno,* 90 Wash.App. 110, 128, 951 P.2d 321 (quoting RCW 49.60.210(1)), *review denied,* 136 Wn.2d 1016, 966 P.2d 1277 (1998). Here the protected activities are maternity leave, necessity to breastfeed and request for reasonable accommodation.

Notably the harassment Elizabeth experienced was triggered by her pregnancy and maternity leave. "Evidence of retaliation may be circumstantial. Proximity in time between the protected activity and the employment action suggests retaliation." *Wilmot v. Kaiser Aluminum & Chem. Corp.,* 118 Wn.2d 46, 69, 821 P.2d 18 (1991). The harassment

escalated with Elizabeth Brooks' medical necessity to breastfeed. Bowen made no attempt to disguise his hostility when he wrote in February 2010:

> Having a baby is not a disability and millions of women are working after childbirth. Maybe if she thought it was going to change her career options she should have taken a different approach to her career. [Ex. 37]

One month later Parfitt fired Elizabeth Brooks. The maternity leave that Elizabeth Brooks took in September 2009 echoed through her relationship with her employer until her termination in March 2010.

1. Retaliation For Maternity Leave

Under RCW 49.78. 220 and 49.78.300(1)(a),[13] it is unlawful for an employer to interfere with the right to maternity leave. The trial court found that Parfitt had indeed pressured Elizabeth Brooks to resign. Therefore, the trial court erred when it also concluded that BPM did not interfere with Elizabeth Brooks' maternity leave. [Assignment of Error No. 16] On December 21, 2009—Elizabeth's first day back from maternity leave—the defendant fired her. This is a stark example of the trial court's failure to view the totality of the circumstances. It found that because the termination was rescinded 9 days later that it was of no

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[13] (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.

consequence. Furthermore, the trial court failed to take into account that adverse employment actions take many forms.

> Washington courts have defined "adverse employment action." According to our Supreme Court, discrimination requires ***"an actual adverse employment action, such as a demotion or adverse transfer, or a hostile work environment*** that amounts to an adverse employment action.

Robel v. Roundup Corp., 148 Wash.2d 35, 74 n. 24, 59 P.3d 611 (2002).

The constant pressure to resign—which began during her maternity leave—as well as Elizabeth's initial termination created "a hostile work environment that was an adverse employment action." *Kirby v. City of Tacoma,* 124 Wash.App. 454, 465, 98 P.3d 827 (2004). Our law guaranteeing the right to maternity leave is meaningless if it results in pressure to resign during leave and termination upon resuming work.

2. Retaliation for Pregnancy Related Condition: Breastfeeding

Elizabeth Brooks has a separate retaliation claim pursuant to *Hegwine v. Longview Fibre Co., Inc.* 162 Wash.2d 340, 172 P.3d 688 (2007). Repeatedly Elizabeth Brooks protested her travel schedule explaining that she was breast feeding and "I am still her food source". [Ex. 37] The defendant was acutely aware that Ms. Brooks had to have her baby with her in order to nourish the infant. This should not have been a problem—after all Elizabeth Brooks worked out of an office in her home.

Yet in January, after terminating Ms. Brooks and then bringing her back, BPM began a relentless campaign to force Elizabeth to travel constantly. The travel edict was pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Again, BPM's actions are intertwined and demonstrate the defendant was retaliating against Elizabeth Brooks for having a baby. Such behavior violates WLAD because it is sex discrimination. Under the law, Elizabeth Brooks had every right to return to work and continue to nourish her baby—breastfeeding an infant is a pregnancy related condition. Elizabeth Brooks asserted this right and the defendant retaliated with a pretextual schedule, forming a second retaliation action based on sex discrimination.

In this instance, separation of mother and child was a question of nourishing the infant. If allowed, the pretextual behavior of BPM could preclude every nursing mother from the workforce—all any employer would have to do is devise an unreasonable travel schedule. Even mothers who can pump breast milk to feed their babies cannot be separated from that infant four days a week.

3. Retaliation for Asserting Right to Accommodation

After apprising Parfitt of her medical condition, Elizabeth Brooks requested accommodation with regard to her travel schedule due to diminished milk production. [Ex. 49] Ms. Brooks had a medically

cognizable disability. On March 10, 2010 Ms. Brooks provided Parfitt a doctor's note addressing her breastfeeding issues and travel. After 6 days of silence BPM summarily fired Elizabeth Brooks. Thus Ms. Brooks asserted her statutorily protected activity to reasonable accommodation and her employer retaliated by terminating her employment.

F. BPM Violated the Law By Interfering With Maternity Leave Which Is The Legal Right of Ms. Brooks

Elizabeth Brooks exercised her right to take maternity leave. That is a right to which she is entitled under the law. RCW 49.78.220. For exercising that right, she was immediately subjected to harassing, demeaning behavior, attempts to replace her, and pressure to resign. The defendant constantly interfered with her maternity leave, bombarding Ms. Brooks with reasons she should leave the company, relentlessly pushing her to resign. [RP (6/14/12) P 100-101] Such behavior is unlawful because it interferes with maternity leave. RCW 49.78.300(1)(a).

G. The Trial Court Wrongly Concluded That Elizabeth Brooks Voluntarily Resigned From Her Job

Elizabeth Brooks did not resign from her position at BPM. [Assignment of Error No. 5] As the Court wrote in Finding of Fact No. 50: "***After terminating*** her, Mr. Parfitt offered her $55,000 in return for her signing a separation agreement and release." [Emphasis added]. BPM seeks a rule that if an employee discusses "severance" then a termination

becomes a resignation. There is no law to support such a conclusion. Whether Ms. Brooks' departure from BPM was voluntary or forced is a mixed question of law and fact. This court must examine the facts pertaining to Elizabeth Brooks' separation from BPM and apply the law. [Assignments of Error 11, 14 and 15]

An employer in an at-will employment arrangement may decide unilaterally to terminate an employee. An employer does not require an employee's agreement to terminate the employee when the employee is at will. An employer does not ordinarily pay severance to an employee who it decides to terminate.[14] Employers do, on the other hand, pay employees to execute releases from liability. The negotiations between Brooks and BPM were for Brooks' agreement to waive liability; not for Brooks to quit voluntarily. The employer attempted to entice Ms. Brooks to accept $55,000 on condition of a release of claims set forth in the Separation Agreement which Elizabeth never signed.

Sex discrimination, disability discrimination and sexual harassment do not have "involuntary termination" as elements. The legal

[14] The trial court based Finding of Fact No. 52, that Ms. Brooks voluntarily left the company, on how employees behave when terminated despite the absence of any evidence or legal authority on that subject. The trial court did not base its Finding on witness credibility but on documents that this Court may itself review. evidence or legal authority on that subject. The trial court did not base its Finding on witness credibility but on documents that this Court may itself review.

elements make the question of whether an employee is terminated or resigns in response to the employer's acts irrelevant. For example:

> To establish work environment sexual harassment an employee must prove the existence of the following elements:
>
> (1) The harassment was unwelcome.
> (2) The harassment was because of sex.
> (3) The harassment affected the terms or conditions of employment.
> (4) The harassment is imputed to the employer.

Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 408, 693 P.2d 708 (1985).

First, the employee must prove the conduct was unwelcome. Conduct is unwelcome if the employee does not solicit or incite it, and regards it as undesirable or offensive. *Glasgow*, *fn* 22 103 Wn.2d at 406. *Glasgow* sets forth considerations in analyzing whether the harassment affected the conditions of employment:

> Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law. The harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. Whether the harassment at the work place is sufficiently severe and persistent to seriously affect the emotional or psychological well being of an employee is a question to be determined with regard to the totality of the circumstances.

Id. at 406-07.

Harassment which affects terms and conditions of employment does not require involuntary termination. In fact, employees are often compelled to resign in order to escape harassment. Ms. Brooks tried so hard to stay in her job, that she reacted to the harassment with grace and good humor trying to convince her employer to temporarily accommodate her. The harassment was severe and persistant enough to cause the physiological condition of diminished milk production.

The instant matter can be analogized to another setting governed by statute and that is whether to award unemployment benefits. An award of benefits often hinges on the question of whether an employee "quit" or was terminated. How our courts have addressed the issue is instructive.

> [W]hether the job separation is a discharge or is voluntary, in order for a claimant to be eligible for benefits, the act requires that the reason for the unemployment be external and apart from the claimant. *Cowles Pub'g Co. v. Department of Empl. Sec.*, 15 Wash.App. 590, 593, 550 P.2d 712 (1976).

Safeco Ins. Companies v. Meyering, 102 Wash.2d 385, 392, 687 P.2d 195 (1984).

The *Safeco* case also reiterates that whether an employee's separation from the employer is a discharge or voluntary is a 'conclusion of law'. *Id.* at 390. *quoting Leschi Imp. Coun. v. State Hwy. Comm'n,* 84 Wash.2d 271, 285, 525 P.2d 774 (1974). In the employment security setting, the facts of each case are analyzed to determine what actually

caused the employee's separation. *Safeco* at 392-93. "A voluntary termination requires a showing that an employee intentionally terminated her own employment or committed an act that the employee knew would result in discharge." *Courtney v. State Employment Sec. Dept.*, 171 Wash.App. 655, 287 P.3d 596 (2012).

The record establishes that Elizabeth Brooks protested the travel schedule that BPM devised. That travel schedule substantially altered the terms and conditions of Ms. Brooks' employment. Forcing the continued employment of Ms. Brooks to hinge on a travel schedule which BPM knew she could not adhere to because of medical necessity is harassment. And that harassment forced Elizabeth Brooks from her job.

Furthermore, in Finding of Fact No. 51 [Assignment of Error No. 4] the trial court wrongly concluded that Elizabeth Brooks was "pleased and happy" to exchange a payment of $55,000 for her job. If that were the case, it stands to reason that she would have accepted $55,000 which she did not. At trial, the defendant could not produce any documentation of mutual agreement. [RP (6/18/12) P 121] The negotiations between Elizabeth and BPM were for Ms. Brooks' agreement to waive liability; not for her to quit voluntarily. The employer attempted to entice Ms. Brooks to accept $55,000 for a release of claims as set forth in the Separation Agreement that Elizabeth never signed. The defendant cannot change the

facts by asserting Elizabeth Brooks quit her job. Substantial evidence exists contradicting the Finding that Ms. Brooks left her job voluntarily.

H. The Trial Court's Imposition of Sanctions Was Improper

At trial, the court sanctioned plaintiffs' counsel for deminimus contact with witness Soher Bishai on the grounds that she was a speaking agent. However, Bishai did not meet the criteria for a speaking agent established in *Wright v. Group Health Hosp.*, 103 Wn. 2d 192, 691 P.2d 564 (1984). Plaintiffs' counsel subpoenaed Bishai to trial and the witness called her requesting information on what she would be asked. While the trial court made no evidentiary finding regarding the status of Bishai, the Findings of Fact state the witness was a "speaking agent". However, the testimony of the actual speaking agent who attended trial, Dennis Parfitt, demonstrated that Bishai did not meet the criteria for a speaking agent.

1. A Party Should Not Be Allowed To Ambush Opposing Counsel At Trial By Asserting For The First Time That A Witness Is A Speaking Agent, Particularly When Plaintiffs' Counsel Listed the Witness Six Months Before Trial And Again At The Beginning Of Trial

The plaintiffs listed Bishai as a witness six months prior to trial repeated their intention to call her at the start of the trial; at no time did BPM assert that Bishai was a speaking agent until she arrived in court to testify. In *Wright v. Group Health Hosp., supra.*, the defendant claimed that all of its witnesses were managing agents which the court found

Exs 77, 78, 900

improper. In that case plaintiffs' counsel sought "...to interview...employees to discover *facts*...not privileged corporate confidences." *Id.* at 195. In the instant matter there was no "interview" of Bishai. The Washington supreme court has ruled that "the crucial issue is: Which of the corporate party's employees should be protected from approaches by adverse counsel?" *Id.* at 197. Pursuant to *Wright*, BPM must show that Bishai had the authority to 'bind' the corporate defendant.

The court adopted a two pronged analysis in *Wright* to determine whether a witness has the status of 'speaking agent': is the witness a party and does the witness have the "right to speak for, and bind, the corporation." *Id.* at 201. Thus the term 'speaking agent' is used when the witness is not a named party.

> ...the purpose of the managing-speaking agent test is to determine who has the authority to bind the corporation. Those who are ultimately responsible for managing the entity's operations have the strongest interest in the outcome of any dispute involving the entity...These officials are the multi-person entity's alter ego—they can speak and act for the entity and can settle controversies on its behalf.

Wright at 202.

Witness Bishai did not meet the criteria set forth in *Wright*. Furthermore, it violates the spirit of the civil rules for a party to ambush opposing counsel by claiming a witness is a "speaking agent" the morning she arrives to testify. The burden is on the defense to affirmatively

demonstrate that Bishai was vested by BPM with the authority to bind the company, interact with the defendant's attorneys or was designated as a spokesperson to issue statements on its behalf. BPM failed to establish any of these elements. The court's ruling is not supported by law or facts.

2. A Trial Court Imposing 'Suspended' Sanctions Is Improper

First, there is no sanctionable conduct in the instant matter. Secondly, the trial court "suspended" sanctions during the entry of judgment. Suspending a penalty requires that specific conditions be set forth which trigger the imposition of the penalty. The trial judge failed to enumerate any such conditions. Here, counsel is left with no direction as to when or what will trigger the trial court to reinstate its original penalty or even decide that an increased penalty is warranted.

I. Consortium Claim, Remand And Attorneys Fees

This court has the authority to remand a case to a different trial judge when it is clear that the original trial judge has pre-determined the outcome. *See State v. Sledge*, 133 Wn.2d 828, 846 n.9, 947 P.2d 1199 (1997); *Sherman v. State*, 128 Wn.2d 164, 205-06, 905 P.2d 355 (1995). Substantial evidence outweighs the trial court's decision in this matter and it should be reassigned on remand. This case was filed pursuant to RCW 49.60 which provides for attorneys fees and appellants' counsel requests attorneys fees and costs pursuant to RAP 18.1.

VI. CONCLUSION

We are long past the time when a woman should be forced to choose between her job and having a baby or force a woman to choose between her job and feeding her baby. Elizabeth Brooks has the right to be free of sex discrimination based upon her pregnancy and childbirth. She has the right to be free of harassment for taking maternity leave and having a child. She has the right to maternity leave free from interference. She has the right to reasonable accommodation for a temporary disability. Finally, the law entitles Elizabeth Brooks to assert these rights free from retaliation. This case should be remanded for a new trial.

Respectfully submitted this 5th day of June, 2013.

Lori S. Haskell WSBA #15779
Attorney for Appellants

APPENDIX A

March 2010

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
	[redacted]	2 PORTLAND	3 PORTLAND	4 PORTLAND	5	6
7	[redacted]	9 LAS VEGAS	10 LAS VEGAS	11 LAS VEGAS	12	13
14	[redacted]	16 PORTLAND	17 EUGENE	18 CORVALIS	[redacted]	20
21	[redacted]	23 BOISE	24 SLC	25 SEATTLE	26	27
28	29	30	31			

April 2010

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
				1	2	3
4	[redacted]	6 PORTLAND	7 PORTLAND	8	9	10
11	[redacted]	13 SCOTTSDALE	14 LOS ANGELES	15 RIVERSIDE	[redacted]	17
18	[redacted]	20 PORTLAND	21 PORTLAND	22	23	24
25	26	27	28	29	30	

May 2010

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
						1
2	[redacted]	4 PORTLAND	5 PORTLAND	6	7	8
9	[redacted]	11 SANTA CRUZ	12 FRESNO	13 SACRAMENTO	[redacted]	15
16	[redacted]	18 PORTLAND	19 PORTLAND	20	21	22
23	24	25	26	27	28	29
30	[redacted]					

June 2010

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
		1 PORTLAND	2 PORTLAND	3 PORTLAND	4	5
6	[redacted]	8 LAS VEGAS	9 LAS VEGAS	10 LAS VEGAS	11	12
13	[redacted]	15 PORTLAND	16 EUGENE	17 CORVALIS	18	19
20	[redacted]	22 BOISE	23 SLC	24 SEATTLE	25	26
27	28	29	30			

July 2010

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
				1	2	3
4	[redacted]	6 PORTLAND	7 PORTLAND	8	9	10
11	[redacted]	13 SCOTTSDALE	14 LOS ANGELES	15 RIVERSIDE	16	17
18	[redacted]	20 PORTLAND	21 PORTLAND	22	23	24
25	26	27	28	29	30	31

August 2010

INDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
	[redacted]	3 PORTLAND	4 PORTLAND	5	6	7
	[redacted]	10 SANTA CRUZ	11 FRESNO	12 SACRAMENTO	13	14
	[redacted]	17 PORTLAND	18 PORTLAND	19	20	21
	23	24	25	26	27	28
	[redacted]	31 PORTLAND				

September 2010

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
			1 PORTLAND	2 PORTLAND	3	4
5	[redacted]	7 LAS VEGAS	8 LAS VEGAS	9 LAS VEGAS	10	11
12	[redacted]	14 PORTLAND	15 EUGENE	16 CORVALIS	17	18
19	[redacted]	21 BOISE	22 SLC	23 SEATTLE	24	25
26	27	28	29	30		

October 2010

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
					1	2
	[redacted]	5 PORTLAND	6 PORTLAND	7	8	9
	[redacted]	12 SCOTTSDALE	13 LOS ANGELES	14 RIVERSIDE	15	16
	[redacted]	19 PORTLAND	20 PORTLAND	21	22	23
25	26	27	28	29		30

November 2010

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
	[redacted]	2 PORTLAND	3 PORTLAND	4	5	6
	[redacted]	9 SANTA CRUZ	10 FRESNO	11 SACRAMENTO	12	13
	[redacted]	16 PORTLAND	17 PORTLAND	18	19	20
22	23	24	25	26	27	
	[redacted]	30 PORTLAND				

December 2010

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
			1 PORTLAND	2 PORTLAND	3	4
5	[redacted]	7 LAS VEGAS	8 LAS VEGAS	9 LAS VEGAS	10	11
12	[redacted]	14 PORTLAND	15 EUGENE	16 CORVALIS	17	18
19	[redacted]	21 BOISE	22 SLC	23 SEATTLE	24	25
26	27	28	29	30	31	

APPENDIX B

May 2007

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

June 2007

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
[redacted]	18 PORTLAND	19	20	21	22	23
24	[redacted]	26 LAS VEGAS	27	28	29	30

July 2007

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
1	2	3	4	5	6	7
8	[redacted]	10 LAS VEGAS	11	12	13	14
15	16	17	18	19	20	21
[redacted]	23 LAS VEGAS	24	25	26	27	28
29	30	31				

August 2007

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	[redacted]	16 LAS VEGAS	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

September 2007

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30						

November 2007

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
				1	2	3
4	5 PORTLAND	[redacted]	7	8	9	10
11	12 LAS VEGAS	[redacted]	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

December 2007

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
						1
2	3	4	5 ROSEVILLE	[redacted]	7	8
9	10 LAS VEGAS	11 LAS VEGAS	12 LAS VEGAS	[redacted]	14	15
16	17	18	19 PORTLAND	[redacted]	21	22
23	24	25	26	27 PORTLAND	[redacted]	29
30	31					

January 2008

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
		1	2	3	4	5
6	7	8 LAS VEGAS	[redacted]	10	11	12
13 *PHOENIX*	14	15	16 PORTLAND	[redacted]	18	19
20	21	22 LAS VEGAS	23 LAS VEGAS	24 LAS VEGAS	25 LAS VEGAS	26
27	28 LAS VEGAS	29 LAS VEGAS	30 LAS VEGAS	31		

February 2008

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
					1	2
3	4	5 PORTLAND	[redacted]	7	8	9
10	11	12 PORTLAND	[redacted]	14	15	16
17	18	19 PORTLAND	20 CORVALIS	21	22	23
24	25	26	27	28	29	

March 2008

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
						1
2	3 *FRESNO*	4	5 PORTLAND	[redacted]	7	8
9	10 PORTLAND	11	12	13	14	15 ***PORTLAND***
16	17	18	19	20	21	22
23	24 FRESNO	25 *PORTLAND* W. COVINA	26 W. COVINA	[redacted]	28	29
30	31					

April 2008

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
		1 *PORTLAND*	2 *PORTLAND*	3	4	5
6 *CORVALIS*	7	8 LAS VEGAS	9 LAS VEGAS	[redacted]	11	12
13	14	15	16	17	18	19
20	21 PORTLAND	22 PORTLAND	[redacted]	24	25	26
27	28	29 PORTLAND	30 PORTLAND			

May 2008

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
				1	2	3
4	5	6	7	8	9	10
11	12 *PORTLAND* BOISE	13 BOISE	[redacted]	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

June 2008

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
1	2	3	4	5	6	7
8 *SANTA ANNA*	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

July 2008

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
		1	2	3	4	5
6	7 PORTLAND	8 PORTLAND	9 CORVALIS	10 CORVALIS	11	12 *TIGARD*
13	14	15	16	17	18 *CORVALIS*	19
20	21	22 *LAS VEGAS*	23	24	25	26
27	28 PORTLAND	29 PORTLAND	30 PORTLAND	[redacted]		

August 2008

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
					1	2
3	4 *LAS VEGAS*	5 PORTLAND	6 PORTLAND	[redacted]	8	9
10	11	12 LAS VEGAS	13 LAS VEGAS	[redacted]	15	16
17	18	19	20	21	22	23
24	25	26 PORTLAND	27 PORTLAND	28 *TIGARD*	29	30
31						

September 2008

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15 PORTLAND	16 PORTLAND	17 PORTLAND	18 PORTLAND *TIGARD*	19	20
21	22	23	24	25	26	27
28	29	30 LAS VEGAS				

October 2008

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
			1 LAS VEGAS	2 LAS VEGAS	[redacted]	4
5	6	7	8	9	10	11
12 *S.F.*	13	14	15	16	17	18
19	20 LAS VEGAS	21 LAS VEGAS	[redacted]	23	24	25
26	27	28	29	30	31	

November 2008

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17 LAS VEGAS	18 LAS VEGAS	19 LAS VEGAS	[redacted]	21	22
[redacted] 30	24 PORTLAND	25 PORTLAND	26	27	28	29

December 2008

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
	1	2	3 PORTLAND *TIGARD*	4 PORTLAND	[redacted]	6
7	8	9	10	11	12	13
14	15	16 PORTLAND	17 PORTLAND	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

January 2009

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17 PORTLAND	18 PORTLAND
19 PORTLAND	[redacted]	21	22	23 *PORTLAND*	24 *PORTLAND*	25
26	27 LAS VEGAS	28 LAS VEGAS	29 LAS VEGAS	[redacted]	31	

February 2009

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
						1
2	3 PORTLAND	4	5	6	7	8
9	10	11 SEATTLE	12	13	14	15
16	17	18	19 *CORVALIS*	20	21	22
23	24	25 PORTLAND *(TIGARD)*	[redacted]	27	28	

March 2009

NDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
						1
	3	4	5	6	7	8
	10 LAS VEGAS	11 LAS VEGAS	[redacted]	13	14 PORTLAND	15 PORTLAN
	17	18	19	20	21	22
LAND						
	24 *ROSEVILLE*	25 SACRAMENTO	26 SACRAMENTO	[redacted]	28	29
	31					

April 2009

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
		1 CORVALIS	2 CORVALIS	3 CORVALIS	4	5
6 *CORVALIS*	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

May 2009

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
				1	2	3
4	5	6	7	8	9	10
11	12 LAS VEGAS	13 LAS VEGAS	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

June 2009

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
1	2	3	4	5	6	7 SANTA CRUZ
8 SANTA CRUZ	[redacted]	10	11	12	13	14
15 PORTLAND	16 PORTLAND	17 PORTLAND	18	19	20	21
22	23	24	25	26	27	28
29	30					

June 2009

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
1	2	3	4	5	6	7 SANTA CRUZ
8 SANTA CRUZ	[redacted]	10	11	12	13	14
15 PORTLAND	16 PORTLAND	17 PORTLAND	18	19	20	21
22	23	24	25	26	27	28
29	30					

June 2009

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
1	2	3	4	5	6	7 SANTA CRUZ
8 SANTA CRUZ	[redacted]	10	11	12	13	14
15 PORTLAND	16 PORTLAND	17 PORTLAND	18	19	20	21
22	23	24	25	26	27	28
29	30					

June 2009

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
1	2	3	4	5	6	7 SANTA CRUZ
8 SANTA CRUZ	[redacted]	10	11	12	13	14
15 PORTLAND	16 PORTLAND	17 PORTLAND	18	19	20	21
22	23	24	25	26	27	28
29	30					

July 2009

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
		1	2	3	4	5
6	7	8	9	10	11	12
13 CORVALIS	14 CORVALIS	15 PORTLAND	16 PORTLAND	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

January 2009

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17 PORTLAND	18 PORTLAND
19 PORTLAND	[redacted]	21	22	23 *PORTLAND*	24 *PORTLAND*	25
26	27 LAS VEGAS	28 LAS VEGAS	29 LAS VEGAS	[redacted]	31	

February 2009

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
						1
2	3 PORTLAND	4	5	6	7	8
9	10	11 SEATTLE	12	13	14	15
16	17	18	19 *CORVALIS*	20	21	22
23	24	25 PORTLAND *(TIGARD)*	[redacted]	27	28	

March 2009

NDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
						1
	3	4	5	6	7	8
	10 LAS VEGAS	11 LAS VEGAS	[redacted]	13	14 PORTLAND	15 PORTLANI
	17	18	19	20	21	22
LAND						
	24 *ROSEVILLE*	25 SACRAMENTO	26 SACRAMENTO	[redacted]	28	29
	31					

April 2009

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
		1 CORVALIS	2 CORVALIS	3 CORVALIS	4	5
6 *CORVALIS*	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

May 2009

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
				1	2	3
4	5	6	7	8	9	10
11	12 LAS VEGAS	13 LAS VEGAS	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

June 2009

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
1	2	3	4	5	6	7 SANTA CRUZ
8 SANTA CRUZ	[redacted]	10	11	12	13	14
15 PORTLAND	16 PORTLAND	17 PORTLAND	18	19	20	21
22	23	24	25	26	27	28
29	30					

July 2009

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
CORVALIS	CORVALIS	PORTLAND	PORTLAND			
20	21	22	23	24	25	26
27	28	29	30	31		

DATED this 5th of June 2013.

Lori S. Haskell, WSBA #15779
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of June, 2013, I caused a true and correct copy of the Appellant's Opening Brief be served in the manner indicated below.

Averil B. Rothrock	[ ] U.S. Mail
Schwabe Williamson & Wyatt PC	[X] Hand Delivery
1420 5th Ave Ste 3400	[ ] emailed arothrock@schwabe.com
Seattle, WA 98101-4010	[ ] And Supplemental Fax 206.292.0460

I declare under penalty of perjury that the foregoing is true and correct. EXECUTED on this 5th day of June, 2013, at Seattle, Washington.

Lori S. Haskell WSBA #15779
Attorney for Appellants

Lori S. Haskell
Attorney at Law
936 N. 34th St. #400
Seattle , WA 98103
206. 816-6603