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NO. 93620-0

SUPREME COURT
OF THE STATE OF WASHINGTON

STACIA HARTLEBEN,

Appellant,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

Court of Appeals Case No. 73758-9-I

REPLY TO ANSWER TO
PETITION FOR REVIEW

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1. Introduction

In its Answer the University raises an issue not mentioned by the Court of Appeals. App. A. The University claims WLAD requires prospective accommodation of disabilities. The University contended for the first time on appeal that Stacia Hartleben's request for disability accommodations was retroactive. The University claims this means it has no duty to provide her with an accommodation for her memory loss. Ms. Hartleben sought an accommodation that would allow her to relearn the material in five key courses in order that she could continue with advanced courses and complete her degree without being at such a severe disadvantage compared to students without memory loss.

2. Argument

Under WLAD the issue is the reasonableness of Ms. Hartleben's request for a disability accommodation, not whether it is prospective or retroactive.

For the first time on appeal, the University claimed that WLAD requires prospective accommodation. The University has coupled this claim with statements that it is not required to insure against the financial loss resulting from disabilities or relieve the financial stress of the disabled. It should be noted that the Court of Appeals did not indicate in its Opinion that Ms. Hartleben's disability accommodations request is "retroactive" or that a prospective accommodation is required. App. A. Also, the University's

Office of Disability Resources for Students (DRS) was explicit that they did not consider Ms. Hartleben's accommodations request to be "retroactive". CP 254:23-25, 255:1, 313:14-19.

It is the nature of Ms. Hartleben's disability, retrograde amnesia, that has forced her to request to relearn the content of certain classes. Her retrograde amnesia or memory loss is very much a present disability affecting her now and in the future. See WAC 162-26-060(2). The University's case, *Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102 (Fed. Cir. 1996) is not to the contrary. In that case an employee's disability, alcoholism, interfered with his ability to call his employer as required when he was not able to work. The employer took disciplinary action as a result of the employee's failure to call as required. The employee also suffered from depression. It was recommended that the employer provide the employee with an accommodation that allowed him to choose to undergo treatment in which case all discipline imposed would be rescinded and he would be made whole for any wages and benefits lost as a result. The employer did not object to the treatment for alcoholism and depression but claimed the "fresh start" by rescinding the record of discipline and restoring lost wages and benefits was retroactive and not required. The Court agreed relying on the provision particular to alcoholism that states an employer "may hold an employee...who is an

alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use of alcoholism of such employee”. *Id.* 1106, 1107. See 42 U.S.C. §12114(c)(4). The Court also noted that the employer was unaware of the disability at the time the discipline was imposed, and a retroactive accommodation such as this “fresh start” would require employers to provide accommodations before they had knowledge of the disability. *Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, supra*, 95 F.3d at 1107-1108.

Stacia Hartleben does not seek a retroactive accommodation. And the University never treated her disability accommodations request as such. CP 254:23-25, 255:1, 313:14-19. Her disability is not alcoholism for which there are statutory exemptions from certain accommodations. See 42 U.S.C. §12114(c)(4). She has not been disciplined; she does not seek to have past misconduct removed from her record. She does not request changes to her past grades. Nor does she seek to have her previous school record altered in any way. She does not seek an accommodation for actions taken by the University during a period when it was unaware of her disability.

Instead, Ms. Hartleben seeks a reasonable accommodation for her disability’s impact on her now and in the future. To get the full benefit of her

Program and complete her degree, Ms. Hartleben must know the content of certain classes wiped from her memory by her disability. Otherwise, she will be at a severe disadvantage compared to students in the Program who do not have her disability and will likely not be able to finish her degree. There is no way for her to move forward except by relearning the content of five of her classes.

The issue is not retroactivity but rather whether a jury should be able to decide if the disability accommodation is reasonable. Ms. Hartleben's situation highlights the importance of determining disability accommodations on a case by case basis. It is important in making this determination to bear in mind her particular disability and the accommodations that might allow her to enjoy full access to the Program. See *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002). Ms. Hartleben's disability is unusual. She lost her memory of some of her past, but it is the impact on her present ability to complete advanced courses and her degree that requires accommodation. There is nothing in WLAD or any disability law that relieves the University of its obligation to provide her with a reasonable accommodation, however unusual her disability may be.

The University contends that Ms. Hartleben should have requested an accommodation at the time she took the five classes and not now as a result of a "new disability". Answer, p. 18. But Ms. Hartleben did not have

retrograde amnesia or memory loss until after she completed the five courses. She requires an accommodation for her present disability, not because of any impairment in the past. Because of her memory loss, she cannot continue in her degree program with advanced classes until she relearns the material from those classes. She requires as a disability accommodation some means to relearn the material in order to complete her degree. She requires interaction and feedback to relearn this complex course material.

The University points out it is not responsible for Ms. Hartleben's memory loss. No one is suggesting otherwise. But that is not the basis for determining its obligation to provide a reasonable disability accommodation.

The University claims that many students have disabilities that prevent them from completing classes and implies they are refused tuition waivers as well in retaking classes. But no student has ever made the same request for a disability accommodation as Ms. Hartleben. CP 251:19-24, 301:10-11, 13-16, 18-23. Just because no one has requested a particular disability accommodation does not mean it is unreasonable. CP 303:10-16.

Also, there is nothing in the record, no evidence offered at all, about any other students with disabilities and how they have fared in their classes. There is certainly no evidence about the circumstances under which such students may retake classes. Perhaps any such students did not complete the

classes and need the college credit and grade; perhaps they simply seek a better grade. Also, simply because there may have been students who did not receive a tuition waiver as a reasonable accommodation does not mean one is not appropriate, even necessary, in a particular situation such as Ms. Hartleben's, to provide comparable service.

The University then wildly predicts should a jury be allowed to decide whether Ms. Hartleben's disability accommodation request is reasonable, hospitals will be required to treat patients free of charge "if a subsequent disability impairs the 'benefit' of previous treatment". Answer, p. 19. In this case, though, Ms. Hartleben was enrolled in a degree Program where the classes at issue are either required before taking advanced classes or build on a required course. CP 272:18-25 Ms. Hartleben did not enroll in particular classes but instead in the Program. She paid tuition for and took those core classes in order to be able to succeed in advanced classes and obtain her degree. She seeks the accommodation of relearning the contents of those classes in order to be able to enjoy meaningful access, a comparable opportunity, to her Program as students without retrograde amnesia or memory loss.

Medical treatment, on the other hand, is typically fee per service. Additional medical treatment for a particular condition could mean more costs such as for the physician, labs, imaging, medication and other hospital

services. There is no cost to the University in having a student sit in and participate again in five classes without receiving a grade or college credit. The University has said there would be no additional work for its staff other than from having one more student in these classes. CP 285:13-16, 19-25; 286:1-7.

A hospital may well claim having to provide free services is a hardship. The University in this case has said there is no hardship. CP 301:24-302:1-3, 6-8, 12. And there is evidence from which a jury could find the disability accommodation requested by Ms. Hartleben is reasonable. This attempt at analogy underscores the importance of determining any disability accommodation on a case by case basis.

Without the accommodation she requests or something similar, Ms. Hartleben will be required to pay twice for the information from those core classes because of her particular disability. Yet she does not seek a different grade or additional college credit, important reasons for paying tuition in the first place. Another important reason for paying tuition to take those core classes was to be able to take the advanced courses and complete her degree. Unless she pays full tuition again for these classes, she will not have the information from those core classes needed to take advanced classes and complete her degree Program. She will be at a severe disadvantage compared to students who do not have her disability. Because of her

disability she will not receive the full benefits of having paid tuition to take those classes.

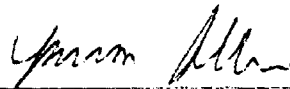
Providing the same service to Ms. Hartleben means she is denied comparable service provided to those students without her disability. Without this or a similar accommodation, because of her particular disability, she does not have comparable access to her Program as other students who do not have memory loss. At least a jury should be able to decide as much.

3. Conclusion

In view of the foregoing, Stacia Hartleben respectfully requests this Court grant her Petition for Review of the Court of Appeals Opinion in this case and reverse the judgment of the trial court and remand this case for a jury trial.

DATED this __5th__ day of October, 2016.

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PROOF OF SERVICE

I, Laura Allen, attorney for Petitioner, certify under penalty of perjury that a copy of the foregoing Petition for Review was sent this __5th__ day of October, 2016 by email and sent by U.S. mail, first class, postage prepaid, to Skylar A. Sherwood ssherwood@Riddellwilliams.com and Kristina Markosova, kmarkosova@Riddellwilliams.com, Riddell Williams P.S., 1001 Fourth Avenue, Suite 4500, Seattle, WA 98154-1192; and to Howard Mark Goodfriend, Smith Goodfriend, P.S., 1619 8th Ave. N., Seattle, WA 98109-3007, attorneys for Respondent University of Washington.

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Please find attached for filing the Petitioner's Reply to the Answer to the Petition for Review in *Stacia Hartleben v. University of Washington*, Case No. 93620-0, Court of Appeals Div. I Case No. 73758-9-I. The attorney filing this document is Laura Allen WSBA #19805, lauraallen@allenmead.com

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